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By Karimah J. Lamar

Introduction

An arbitration agreement is a contract in which parties agree to bring any legal claims they may have to arbitration, rather than filing a lawsuit in court. Instead of having these claims resolved by a judge, the parties agree to have the matter heard before an arbitrator who is chosen by the parties. In employment settings, arbitration agreements can be particularly useful to reduce costs, minimize exposure to risky litigation, keep the proceedings private, and expedite resolution to a pending matter. However, within the last few years, the National Labor Relations Board (NLRB) has consistently undermined these advantages.

In *D.R. Horton, Inc.*,[1] the Board concluded that Horton violated sections 7 and 8(a)(1) of the National Labor Relations Act[2] (NLRA) by requiring its employees to sign a mutual arbitration agreement that "precludes them from filing joint, class, or collective claims addressing their wages, hours or other working conditions against the employer in any forum, arbitral or judicial."[3] In reaching this conclusion, the Board first determined that the agreement interfered with the exercise of employees' substantive rights under Section 7 of the NLRA, which allows employees to act in concert with each other:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, *and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or*

1 2012 NLRB LEXIS 11, 357 NLRB No. 184 (2012).

2 29 U.S.C. § 151 et seq.

3 *D.R. Horton*, 2012 NLRB LEXIS 11, at *1.

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> *protection*, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.[4]

The Board also found that that the mutual arbitration agreement violated section 8(a)(1) of the NLRA by concluding that Horton had committed an unfair labor practice under Section 8 by requiring employees to agree not to act in concert in administrative and judicial proceedings. Section 8(a) states, in relevant part: "It shall be an unfair labor practice for an employer (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title. . . ."[5]

Since its ruling in *D.R. Horton*, the NLRB has invalidated similar agreements, disregarding state and federal law, and relying on its rationale in *D.R. Horton* and other similar cases.[6]

NLRB Continues to Reaffirm Prior Rationale

Yet again, in *Samsung Electronics America, Inc.*,[7] the NLRB invalidated Samsung's arbitration agreement requiring newly-hired employees to agree to restrict their rights to pursue joint, class, or collective actions. The Administrative Law Judge (ALJ) in *Samsung* conceded that state and federal courts have rejected the Board's reasoning in *D.R. Horton* and later cases.[8] However, the ALJ said that he is compelled to follow "Board Law unless, and until, reversed by the Supreme Court."[9]

The Board's decision in *D.R. Horton* applied the test set forth in *Lutheran Heritage Village-Livonia*[10]:

> [The] inquiry begins with whether the rule explicitly restricts activities protected by Section 7. If so, the rule is unlawful. If the rule does not explicitly restrict protected activity, the finding of a violation is dependent upon a showing of one of the following: (1) employees would reasonably construe the rule to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights.[11]

Applying this test and the reasoning in *D.R. Horton*, the Board in *Samsung* interpreted class-action waivers in arbitration agreements as violating Section 7. Despite the fact that the agreement in *D.R. Horton* specifically excluded from coverage claims brought before the Board and the Equal Employment Opportunity Commission (EEOC), the Board found the agreement unlawful because the employees were limited to individual arbitrations, rather than collective actions.

To add insult to injury, the Board stated that enforcing an unlawful rule, here the mandatory arbitration provision that is at issue, independently violates Section 8(a)(1) of the NLRA. Accordingly, when Samsung wrote to the plaintiffs' counsel demanding that the plaintiffs withdraw their lawsuit based on the arbitration agreement signed by the parties, that action violated Section 8. Samsung further violated the law by filing a motion to dismiss.

Notwithstanding the fact that reliance on *D.F. Horton* is now blatantly mistaken in light of recent state and federal court rulings, the Board and ALJ continue to rely on this misguided "law." In *Samsung*, the ALJ opined that if there was any doubt about this issue,

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4 29 U.S.C. § 157 (emphasis added).

5 29 U.S.C. § 158(a).

6 *See, e.g.*, Murphy Oil, USA, Inc., 361 NLRB No. 72 (2014); Cellular Sales of Missouri, LLC, 362 NLRB No. 27 (2015).

7 2016 NLRB LEXIS 70, 363 NLRB No. 105 (2016).

8 2016 NLRB LEXIS 70, at *31.

9 2016 NLRB LEXIS 70, at *31.

10 343 N.L.R.B. 646 (2004).

11 *D.R. Horton*, 2012 NLRB LEXIS 11, at *16 (citing Lutheran Heritage Village, 343 N.L.R.B. at 646-647).

there could be none after the Board's decisions in *Murphy Oil, USA, Inc.*[12] and *Cellular Sales of Missouri, LLC*.[13] However, both relied on *D.R. Horton*, which has been invalidated by the Fifth Circuit Court of Appeals.[14] It is unclear why the Board in both *Murphy Oil* and *Cellular Sales* were not persuaded by *D.R. Horton's* ultimate reversal by the Fifth Circuit.

The Fifth Circuit in *D.R. Horton* held that the NLRA is not the only relevant authority, and that the Federal Arbitration Act[15] (FAA) is of equal importance.[16] It also found that (1) there is no substantive right to class action procedures,[17] (2) the savings clauses is not a basis for invalidating class action waivers,[18] (3) there is no basis for concluding that the NLRA overrides the FAA,[19] and (4) there is no congressional disavowal of arbitration.[20]

Future Showdown

Interestingly, the Board does not even address the ALJ's reliance on *D.R. Horton* and subsequent decisions that rely on *D.R. Horton*. The AJL dangled the carrot out there for the Board to bite, and it failed to even address the issue of the arbitration agreement. Instead, the Board focused its opinion on analyzing whether or not Samsung engaged in coercive questioning designed to restrict employees from engaging in protected concerted activities.[21] The ALJ conceded that federal and state courts have repeatedly rejected the Board's reasoning but that he is "required" to follow "Board law, unless, and until reversed by the Supreme Court." It is unclear why the NLRB remained silent, but one can only speculate that it could not defend its unyielding position that class actions waivers are unenforceable in light is recent federal and state law. The Board could have used *Samsung* as an opportunity to correct bad law but, instead, remained silent on reconciling "Board Law" with state and federal case law.

The FAA was intended to get the parties out of court and into arbitration as quickly as possible.[22] However, the Board disregards the public policy supporting the FAA and continues to allow this conflict to remain unresolved. The NLRB could easily put this issue to rest by seeking review with the U.S. Supreme Court on any one of these cases that have been invalidated by state and federal courts. Instead, it chooses to continue to circumvent Circuits and publish decisions that find arbitration agreements like Samsung's unlawful. In 2015 alone there were 35 published decisions that found similar arbitration agreements unlawful based on *D.R. Horton* and *Murphy Oil*. If this issue ever reaches the United States Supreme Court, the Supreme Court will likely uphold the finding that class action waivers are enforceable.

Bottom Line for Employers

Employers seeking to implement class or collective action waivers in their arbitration agreements should consult counsel and discuss the cost-benefit analysis of adopting such agreements. While these agreements have significant advantages, given this unresolved issue, employers should carefully consider whether such waivers make sense for their business.

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12 361 NLRB No. 72 (2014).

13 362 NLRB No. 27 (2015).

14 *See* D.R. Horton, Inc. v. NLRB, 737 F.3d 344 (5th Cir. 2013).

15 9 U.S.C. § 1 et seq.

16 *D.R. Horton*, 737 F.3d at 357.

17 737 F.3d at 357.

18 737 F.3d at 360.

19 737 F.3d at 361.

20 737 F.3d at 361.

21 *Samsung*, 2016 NLRB LEXIS 70, at *8-13.

22 Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 22 (1983).