

To: Our Clients and Friends

July 27, 2012

California Court of Appeal Rejects NLRB Decision Barring Class Action Waivers in Arbitration Agreements

On January 6, 2012, the National Labor Relations Board in *D.R. Horton, Inc.* (2012) 357 NLRB No. 184 (*D.R. Horton*) ruled that agreements requiring employees to arbitrate their employment disputes on an individual basis and preventing them from pursuing such claims on a classwide basis in any forum, whether in arbitration or in court, violated Section 7 of the National Labor Relations Act (NLRA).

On July 18, 2012, the California Court of Appeal in **Lorena Nelsen v. Legacy Partners Residential, Inc.**, rejected the Board's decision in *D.R. Horton*. The Court of Appeal's ruling is favorable for employers as it allows enforcement of class action waivers in arbitration agreements. Such waivers have the effect of requiring employees to submit their individual claims to arbitration, precluding them from pursuing such claims in expensive class action arbitrations or lawsuits.

What Is This Case About?

Plaintiff Lorena Nelsen was employed as a property manager for Legacy Partners Residential, Inc. (LPR). She filed a putative class action lawsuit on behalf of all current and former California-based property managers against LPR alleging multiple violations of the California Labor Code. Nelsen signed an arbitration agreement when LPR hired her in which she agreed to arbitrate any claim, dispute and controversy between herself and LPR. LPR moved to compel arbitration, but Nelsen raised the Board's decision in *D.R. Horton* arguing that she could not be barred from pursuing class action litigation. The trial court granted LPR's motion. The California Appellate Court affirmed, criticizing the Board for pushing well beyond the boundaries of its authority and concluding that it was under no obligation to follow the Board's decision.

The Appellate Court's Reasons for Declining to Follow the Board's decision:

- 1) Appellate courts are not "bound by the decisions of lower federal courts on questions of federal law," and "are also not bound by federal administrative interpretations."
- 2) "The subject matter of the decision—the interplay of class action litigation, the FAA, and section 7 of the NLRA—falls well outside the Board's core expertise in collective bargaining."

This Client Bulletin is published for the clients and friends of Bryan Cave LLP. Information contained herein is not to be considered as legal advice. This Client Bulletin may be construed as an advertisement or solicitation. © 2012 Bryan Cave LLP. All Rights Reserved.

- 3) There is no prior legislative or judicial precedent suggesting class action litigation constitutes “concerted activity.”
- 4) “The decision goes well beyond the scope of the NLRB’s administrative expertise by interpreting a statute — the FAA — that the agency is not charged with enforcing.”

Lessons for Employers

California courts have historically been hostile to enforcing class action waivers in arbitration agreements. In *Gentry v. Superior Court* (2007) 42 Cal. 4th 443 (*Gentry*), the California Supreme Court held that trial courts could refuse to enforce such class action waivers if they would have the effect of undermining the ability of employees to vindicate non-waivable statutory rights. *Gentry* established a number of factors that courts should consider in deciding whether class action waivers are unenforceable. In *Gentry*, the California Supreme Court relied on its earlier decision in *Discover Bank v. Superior Court* (2005) 36 Cal. 4th 148 (*Discover Bank*), which allowed plaintiffs in certain consumer class actions to demand class action arbitrations even if their arbitration agreements contained express class action waivers.

But in *AT&T Mobility LLC v. Concepcion* (2011) 131 S. Ct. 1740 (*Concepcion*), the United States Supreme Court overruled *Discover Bank*. *Concepcion* held that the Federal Arbitration Act preempted California law, and that classwide arbitration could not be imposed on a party who never agreed to it. After *Concepcion*, the continued vitality of *Gentry* has been called into serious question. Several lower courts have since held that employers cannot be compelled to arbitrate wage and hour cases on a classwide basis unless the parties agreed to such arbitration. These rulings have forced employees to arbitrate their claims on an individual basis.

Employers who previously chose not to use arbitration agreements because of doubts over their enforceability should revisit whether an arbitration agreement might provide an effective tool in managing employment disputes.

Employers using arbitration agreements should have them reviewed periodically to make sure they take into consideration current court decisions regarding unconscionability and enforceability. Employers using such agreements should also consider including a clause barring class action arbitrations. Such waivers can force employees to submit their individual claims to an arbitrator and bar arbitrators from making class certification decisions that will be subject to very limited judicial review.

Bryan Cave LLP has substantial experience advising employers regarding compliance with California law on enforceability of arbitration agreements.

Please contact any member of Bryan Cave’s [Labor and Employment Client Service Group](#) with any questions or if you need assistance.

Julie E. Patterson [Labor and Employment]

Irvine; 949-223-7144

jepatterson@bryancave.com

Leslie Hecht Helmer [Labor and Employment]

Los Angeles; 310-576-2218

lhelmer@bryancave.com

Pamela Carroll Calvet [Labor and Employment]

Los Angeles; 310-576-2390

pcalvet@bryancave.com

Kaye E. Steinsapir [Labor and Employment]

Los Angeles; 310-576-2293

kaye.steinsapir@bryancave.com