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NLRB Decision Limiting Class Action Waivers Based on Longstanding Precedent

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In the past 20 years the Supreme Court has interpreted the **Federal Arbitration Act** broadly, allowing businesses to require consumers and employees to arbitrate, rather than litigate, many legal claims. Businesses frequently use arbitration agreements to bar class actions, which can be costly and time-consuming. Just last term, in ***AT&T v. Concepcion***, the Court enhanced this business tool, striking down a California law that prevented businesses from barring class actions in cases involving small claims brought by less powerful parties bound to arbitrate by contracts of adhesion. Although the case involved consumers, it offered employers a vehicle to restrict employee class actions.

The NLRB's decision in ***D.R. Horton***, issued in early January, significantly limited the effectiveness of this tool for employers by invalidating an arbitration agreement that banned class actions. This case is likely to generate significant controversy, provoking even more attacks on the agency by its vocal critics, but experienced labor lawyers will recognize the case as an **unremarkable application of long-settled legal principles**.

Class claims frequently offer the only vehicle for consumers or employees to challenge unlawful actions that cause limited damages to each individual while often reaping millions for the business. For each person injured, the cost of litigating a claim outweighs the potential benefit. Without class actions, these claims often go unremedied. In the workplace, Fair Labor Standards Act cases seeking minimum wage or overtime payments are most likely to be abandoned on this basis and *Horton* involved such a claim, alleging that the nonunion employer misclassified employees as exempt from overtime pay.

The decision in *Horton* arises from the fact that class actions implicate core rights under the National Labor Relations Act. **Section 7** protects the right to engage in concerted activities for "mutual aid and protection." A class or collective action constitutes concerted activity, i.e., employees joining together, for purposes of mutual aid and protection, i.e., to bring a legal claim challenging unlawful working conditions. Accordingly, the Supreme Court has recognized that concerted pursuit of administrative and judicial actions by employees is protected by Section 7. The law similarly protects concerted claims in the arbitral forum.

The contract invalidated in *Horton* conditioned employment on the employees' waiver of their statutory right to bring a class action in any forum. By prohibiting the employees from bringing their Fair Labor Standards Act claim collectively in arbitration, while also precluding access to the courts, the arbitration agreement interfered with the employees' Section 7 right to jointly bring their legal claim against their employer, thereby violating the NLRA. Proponents of arbitration suggest that such action constitutes a permissible contractual waiver of Section 7 rights or alternatively, that the Federal Arbitration Act precludes this interpretation of the statute. Both of these contentions are contradicted by existing law.

Even before the passage of the NLRA, the law barred enforcement of contracts that required employees to give up their right to engage in protected concerted activities, including "yellow-dog contracts" agreeing not to join a labor union. Since the enactment of the statute, the NLRB and the Supreme Court have continued to invalidate employer-imposed contracts that force employees to give up their statutory rights to engage in protected activities.

While the Federal Arbitration Act, along with the National Labor Relations Act, encourages and validates arbitration agreements, it does not conflict with the result reached by the NLRB in *D.R. Horton*. The FAA makes arbitration agreements enforceable, except on "such grounds as exist at law or in equity for the revocation of any contract." As noted, contracts that force employees to give up their rights to engage in union and protected concerted activity have long been unenforceable. Thus, refusing to enforce arbitration agreements that require such waivers is consistent with the FAA. Additionally, the Court has stated that arbitration agreements involve nothing more than a choice of forum and cannot be used to deprive employees of substantive statutory rights, which would certainly include the right to engage in concerted activity.

While the decision bars enforcement of some arbitration agreements, there are limits to the impact of*Horton*. It applies only to employees covered by the National Labor Relations Act, nonsupervisory, non-managerial employees of private employers. It does not cover railroads, airlines or agricultural employees, many of whom are already exempt from the FAA as transportation employees. Further, the decision only invalidates agreements that bar both arbitral and judicial class actions. Accordingly, there remain large numbers of employees unaffected by *Horton* that may still be precluded from bringing class claims against their employers. While NLRB opponents may seize on the decision to add fuel to the fire they have ignited, in actuality it is in accord with longstanding and well-settled precedent.