

# “What keeps you up at night?”

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## Arbitration agreement requiring employee’s complete waiver of all rights to bring class actions found to be unlawful

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### SUMMARY

**A recent decision by the National Labor Relations Board held that it is unlawful to force employees to completely waive their right to bring class or collective claims in all forums. A mandatory arbitration agreement must leave either the court or arbitration door open through which employees can pursue class or collective claims against their employer.**

On January 3, 2012, the National Labor Relations Board (the “Board”) ruled that an employer violates federal labor law by requiring its employees to sign an arbitration agreement that waives their right to pursue all employment-related class or collective arbitration and court actions. This decision, which applies to both non-union and union employers, is expected to have a significant impact on employer-mandated arbitration agreements.

The facts giving rise to this decision are as follows. D.R. Horton (the “Company”), a homebuilder with nationwide operations, required its employees to sign a “Mutual Arbitration Agreement” (“MAA”) as a condition of their employment and continued employment with the Company. Under the MAA, employees waived their right to sue the Company in court for any matters relating to their employment, and, in its place, agreed to resolve all such disputes through binding arbitration on an individual, non-class basis. The MAA limited the arbitrator’s jurisdiction to individual employee claims, and specifically prohibited employees from bringing group or class actions in arbitration.

Michael Cuda, a Company superintendent, signed the MAA as a condition of his continued employment with the Company. In 2008, Cuda’s attorney notified the Company that he intended to commence arbitration on behalf of Cuda and a nationwide class of similarly situated employ-

## “What keeps you up at night?”

ees challenging the Company’s classification of the superintendent position as exempt under the Fair Labor Standards Act (“FLSA”). Cuda and members of the prospective class were not represented by any labor union. The Company responded that the MAA barred arbitration of collective and class claims, and, therefore, the notice of intent to commence arbitration was invalid. Cuda answered by filing an unfair labor practice charge with the Board, in which he contended that the MAA’s prohibition against class and collective actions unlawfully restricted and interfered with the employees’ right to engage in protected concerted activity under the National Labor Relations Act (“NLRA”)—specifically, he argued that the class ban restrained the ability of employees to associate and collectively resolve grievances.

The Board agreed. Under Section 7 of the NLRA, employees have a right to engage in protected concerted activity concerning wages, hours and terms and conditions of their employment without interference or fear of retaliation by their employers. Both seeking to resolve disputes through arbitration and collectively pursuing workplace grievances are protected activities under the NLRA, regardless of whether or not employees are represented by a union. Accordingly, the Board reasoned that “employees who join together to bring employment-related claims on a class-wide or collective basis in court or before an arbitrator are exercising rights protected by Section 7 of the NLRA.” Because the MAA: (1) was a condition of employees’ employment; (2) prohibited employees from seeking resolution of employment-related disputes in court, leaving them only with arbitration as a means for resolving disputes; and (3) provided that an arbitrator could not consolidate claims or afford collective relief, the Board concluded that the MAA improperly barred employees from exercising substantive rights afforded to them under the NLRA.

The Board next considered and rejected the Company’s argument that outlawing the MAA’s ban on class and collective actions under the NLRA would conflict with the Federal Arbitration Act (“FAA”). Noting that the purpose of the FAA was to prevent courts from treating arbitration agreements less favorably than other private contracts, the Board reasoned that “[t]o find that an arbitration agreement must yield to the NLRA is to treat it no worse than any

other private contract that conflicts with Federal labor law. The MAA would equally violate the NLRA if it said nothing about arbitration, but merely required employees, as a condition of employment, to agree to pursue any claims in court against the [Company] solely on an individual basis.”

Significantly, the Board dismissed contentions that its holding conflicted with recent U.S. Supreme Court decisions, most notably, the 2011 case of *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740 (2011). In *AT&T Mobility*, the Court had upheld an arbitration agreement’s waiver of class action claims by consumers against a service provider. The Board distinguished this Supreme Court precedent on the basis that employee rights under the NLRA were not at issue in *AT&T Mobility*. The Board also rejected the argument that its decision was inconsistent with Supreme Court rulings that a party cannot be required to submit to arbitration on a class-wide basis without his consent. See *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 130 S. Ct. 1758, 1775-76 (2010) and *AT&T Mobility*, 131 S. Ct. at 1746. Emphasizing that its holding was limited to an arbitration agreement that completely banned employee class or collective actions *in all forums*, which the employees were required to sign as a condition of their employment with the Company, the Board explained as follows: “We need not and do not mandate class arbitration in order to protect employees’ rights under the NLRA. Rather, we hold only that employers may not compel employees to waive their NLRA rights to collectively pursue litigation of employment claims in *all* forums, arbitral and judicial. So long as the employer leaves open a judicial forum for class and collective claims, employees’ NLRA rights are preserved without requiring the availability of classwide arbitration. Employers remain free to insist that *arbitral* proceedings be conducted on an individual basis.” (emphasis in original).

The bottom line for employers is that it is unlawful to force employees to completely waive their right to bring class or collective claims in all forums. A mandatory arbitration agreement must leave either the court or arbitration door open through which employees can pursue class or collective claims against their employer. Employers that require or may be considering requiring their employees to sign a compulsory arbitration agreement as a condi-

## “What keeps you up at night?”

tion of employment, should take note of this ruling and should carefully review their agreement to ascertain whether it contains a complete ban prohibiting employees from pursuing class and collective claims in both arbitration and court. If so, the employer will need to consider whether to amend the agreement to either: (1) carve out an exception to the ban against the filing of court claims to allow employees to pursue joint, class or collective claims in court, or, in the alternative, (2) permit employees to arbitrate employment-related joint, class and collective claims.

It is anticipated that this decision will not be the last word on the issue, and that an appeal to the federal circuit court will be filed.

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