

January 11, 2012

## **NLRB Rejects Class Action Waivers and Postpones Workplace Posting Requirement**

The National Labor Relations Board (“NLRB”) has issued a Decision and Order holding that employers cannot force employees to sign arbitration agreements that include class and collective action waivers as a condition of employment (*D.R. Horton, Inc.*, Case No. 12-CA-25764 (Jan. 3, 2012)). The case, which is the latest in many developments regarding class action waivers, signals that this area of law is far from settled.

The decision stands in stark contrast to last year’s U.S. Supreme Court decision in *AT&T Mobility LLC v. Concepcion*, which held that the Federal Arbitration Act (“FAA”) preempted a California rule that invalidated class action arbitration waivers in consumer contracts. (For more on the *AT&T* decision, see our May 11, 2011 [Employment Law Alert](#).) Despite the high court’s position, the NLRB has now ruled that class action arbitration waivers violated employees’ substantive Section 7 rights under the National Labor Relations Act (“NLRA”) to engage in concerted activity for mutual aid or protection. Further, the NLRB held that its ruling did not conflict with the FAA, which generally makes employment-related arbitration agreements enforceable. In attempting to narrow its ruling, the NLRB stated that it was not banning all agreements to arbitrate nor was it requiring class arbitration; rather, it was holding only that employers must leave open a judicial forum for employees to pursue class or collective claims. We expect the decision to be appealed.

In other news, the NLRB has announced that it is, once again, postponing the effective date of its recent rule requiring employers to post a notice of employee rights under the NLRA. The new posting deadline is April 30, 2012.

The rule originally was slated to take effect on November 14, 2011, and then was pushed out to January 31, 2012, after a federal judge who is presiding over two lawsuits challenging the agency’s authority to require the workplace posting asked that the rule be delayed to give her time to fully consider the litigation. The NLRB says the latest postponement is to “facilitate the resolution of the legal challenges that have been filed with respect to the rule.”

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We will monitor the status of the posting requirement and keep you up to date. In the meantime, for more information about the poster, see our September 9, 2011 [Employment Law Alert](#).

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