BARNES & THORNBURG LLP

NLRB Decides Not To Risk Its D.R. Horton Decision

July 22, 2014 | | National Labor Relations Board, Labor Relations

Gerald F. Lutkus
Of Counsel
(Retired)

My colleague Holt Hedrick has posted some interesting thoughts on the B&T Currents blog about the NLRB's decision not to appeal to the Supreme Court, its decision in *D.R. Horton*. If you remember, in *D.R. Horton*, the NLRB ruled that companies violated the NLRA if they required employees to sign a mandatory arbitration provision that contained a class action waiver. Holt suggested that Board declined to appeal the 5th Circuit's decision because without a Supreme Court decision on the subject, the Board could continue enforcing *D.R. Horton*. It gets even better than that, though. Four Circuit Courts of Appeal have refused to apply the Board's position in *D.R. Horton* and one of those Circuits, the Fifth, expressly overturned the Board's decision in *D.R. Horton.* But, without a Supreme Court decision overturning *D.R. Horton*, not only can the Board continue to enforce its own decision, Administrative Law Judges that hear cases on class action waivers are required under Board procedure to enforce and apply current Board authority. So, that means that any employer litigating with the Board over the use of mandatory arbitration provisions including class action waivers faces the prospect of having to appeal those cases at least to the Circuit Court of Appeals level to win. Given the unanimous weight of authority outside the Board, employers should be able to win these cases at that level – but it will be a long and winding road to get there.

RELATED PRACTICE AREAS

Labor and Employment
Labor Relations
National Labor Relations Board (NLRB)

RELATED TOPICS

nlra
NLRB