

Board Finds Certain Arbitration Agreements Violate NLRA

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Keith J. Brodie
Partner

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Although his term is over, the reverberations of Member Becker's recess appointment term continue.

In another seemingly novel decision, if not one at odds with recent U.S. Supreme court precedent, a NLRB majority comprised of Members Pearce and Becker reversed an ALJ's decision and ruled that an arbitration agreement containing a class action waiver violated the NLRA because it infringed on the right employees have to "engage in concerted action for mutual aid or protection." The case is [D.R. Horton Inc.](#), handed down yesterday.

At this point, employers would be well advised to review their current arbitration agreements to ensure compliance. Looking forward, it appears this decision will be appealed, primarily because it seems to run counter to the 2010 decision of the U.S. Supreme Court in [Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.](#) 559 U.S. ____ (2010) and the Supreme Court's 2011 decision in [AT&T Mobility LLC v. Concepcion](#), 563 U.S. ____ (2011). The later of these two cases held that arbitration clauses that contained express class action waivers had to be enforced under the Federal Arbitration Act ("FAA"). The Board appears to have sidestepped this holding by relying on Section 2 of the FAA which provides that arbitration agreements may be invalidated in whole or in part upon "grounds as exist at law or in equity for the revocation of any contract."

This decision is a further indication of NLRB's willingness to extend regulation further into all employers' affairs, whether unionized or not. As a result, all employers would be well advised to pay close attention to developments at the Board, especially in light of President Obama's recent [recess appointments](#) which appear likely to continue the current regulatory approach of the Board. (See recent BT Alert on this issue [here](#)).

Update: For more analysis of the [D.R. Horton](#) decision, download the Barnes & Thornburg Labor & Employment legal Alert, "Two Member Majority of NLRB Clouds Viability of Employment Arbitration Agreements" by [clicking here](#).