

NLRB Continues To Invalidate Class Action Waivers In Mandatory Arbitration Programs

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While federal courts around the country – including the U.S. Supreme Court – continue to generally uphold “class action waivers” in mandatory arbitration programs, the NLRB continues to go the other way and find that such provisions violate the NLRA. Employers who have arbitration programs that require employees to have claims against companies heard in front of arbitrators rather than courts often include “class action waivers” in their programs. The waivers prohibit employees from forming class actions against the companies by requiring claims to be brought only an individual basis. In 2012, the NLRB issued its infamous decision in *D.R. Horton Inc.*, 357 N.L.R.B. No. 184, (2012) that ruled class action waivers violate the NLRA because they impede “concerted activity.” That is, the NLRB views the potential formation of class actions contesting alleged unlawful practices as “group activity” protected by the NLRA. The Fifth Circuit subsequently denied enforcement of *DR Horton* and held the NLRA does not work to invalidate class action waivers. Not to be deterred, the NLRB issued a decision on October 28, 2014, in *Murphy Oil USA, Inc.*, 361 N.L.R.B. No. 72 (2014) in which it found an employer violated the NLRA by having an arbitration program that contains a class action waiver. The Board noted it disagreed with the Fifth Circuit’s analysis and reaffirmed its commitment to invalidating class action waivers. The US Supreme Court is likely to weigh in at some point, as it has issued a series of rulings in recent years generally upholding various aspects of mandatory arbitration programs – including class action waivers (although it has not yet tackled the analysis under the framework of the NLRA). Until then the NLRB will seemingly continue to find class action waivers to be unlawful even if federal courts of appeal disagree. Accordingly, companies with class action waivers should take this into consideration when evaluating the “pros and cons” of maintaining them. A copy of the decision can be found [here](#).

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