

Fifth Circuit Denies NLRB's Rehearing Request On Class Action Waivers; NLRB Likely To Continue Ignoring Fifth (And Other) Circuit Court Rulings

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In an April 16, 2014 one-paragraph opinion, the Fifth Circuit rejected the NLRB's rehearing petition in *D.R. Horton v. NLRB*, which sought reconsideration of the Court's December 2013 decision upholding class action waivers in mandatory arbitration agreements under the Federal Arbitration Act. Stating that no one on the original three-member panel that decided the case, nor any judge in active service on the Circuit bench requested that the case be reheard en banc, the Fifth Circuit closed the door to any further circuit-level proceedings, leaving only the Supreme Court as the final appeal possibility. While this is a clear victory for employers, companies shouldn't start popping the champagne corks just yet. The key question is whether the Board will appeal this decision to the Supreme Court so that employers and employees can get a final answer on this issue once and for all. As far as I can tell, the NLRB is still weighing its options. The importance of getting a Supreme Court ruling is that the Board, which has by my count now lost the class action waiver issue in the Fifth, Second, Eighth, and Eleventh Circuits (and won in zero circuits), is not compelled to abide by the decision of any court except the Supreme Court. This ability (and willingness) to ignore lower federal court rulings is often referred to as the doctrine of non-acquiescence. While most federal agencies in practice do follow the decisions of federal courts (after all, spending millions upon millions of taxpayer dollars only to lose time and again is generally not looked upon very favorably), the NLRB's dogged pursuit of its initiative to invalidate class action waivers in arbitration agreements shows no sign of abating.

Accordingly, the NLRB must decide whether it wants to appeal the decision now or keep fighting in lower federal courts in the hopes that the arbitration tide starts to turn (or at least until the Board believes it stands a better chance of winning in the Supreme Court). It would seem that the NLRB's current litigation strategy on this issue will eventually become untenable (i.e., the Board invalidating and the courts endorsing the same arbitration provisions, all at great cost to everyone involved). Whatever the NLRB decides, you can be sure this won't be the last blog post on this hot button topic.

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