

Class Action Waivers: Are They Enforceable?

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Class action waivers in arbitration agreements continue to occupy the attention of the National Labor Relations Board (NLRB), and uncertainty in this area of law raises ongoing concerns for employers. In *D.R. Horton, Inc.*, 357 NLRB 184 (2012), the NLRB held that requiring employees to sign an arbitration agreement waiving the right to pursue class and collective actions violates the National Labor Relations Act (NLRA). The NLRB took the position that joining together to pursue class relief is protected concerted activity under Section 8(a)(1) of the NLRA. The U.S. Court of Appeals for the Fifth Circuit in *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344 (5th Cir. 2013), denied enforcement of the NLRB's ruling, finding that use of collective action procedures is not protected concerted activity. Yet, the NLRB has stood by its earlier position, holding again in *Murphy Oil USA, Inc.*, 361 NLRB No. 72 (2014), that the inclusion of class action waivers in arbitration agreements constitutes an unfair labor practice. Most recently, the Fifth Circuit in *Murphy Oil USA v. NLRB*, No. 14-60800 (5th Cir. Oct. 26, 2015), once again ruled that such waivers are enforceable and not unlawful.

The law in this area is unsettled, and it remains to be seen whether the issue will be taken up and resolved by the U.S. Supreme Court, which has traditionally favored arbitration and has held that the Federal Arbitration Act provides broad authority to enter into and enforce arbitration agreements.

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