

# Significant Court Win for Employers

By Hope Eastman

**Key practice point 1.** Employers can now require employees to resolve employment-related disputes individually, waiving any right to pursue class action or collective action claims through arbitration or in court. Employers who use mandatory arbitration agreements with their employees should be sure that they contain clear prohibitions on employees pursuing class and collective claims. The Fifth Circuit Court of Appeals has overturned a controversial National Labor Relations Board (NLRB) ruling that such provisions violate the National Labor Relations Act (NLRA). *D.R. Horton, Inc. v. National Labor Relations Board*.

The Fifth Circuit joins the Second, Eighth, and Ninth Circuits in finding that individual-only arbitration agreements are enforceable. Combined, those courts set the applicable federal law for employers in Alaska, Arizona, Arkansas, California, Connecticut, Hawaii, Idaho, Iowa, Louisiana, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New York, North Dakota, Oregon, South Dakota, Texas, Vermont, and Washington.

While there are many factors to consider in deciding whether to use arbitration agreements at all, these rulings allow the employer to avoid the significant costs of defending class and collective actions and to focus the parties on the merits of the individual employee's claims.

**Key practice point 2 and warning.** The Fifth Circuit's decision in *D.R. Horton, Inc.* made it clear that arbitration agreements must expressly state that the class action waiver does not preclude employees from filing a charge with the NLRB.

*D.R. Horton*, a building contractor, had a mutual mandatory arbitration agreement that prevented employees from pursuing class actions, requiring instead that any disputes be determined on an individual basis in arbitration. Its agreement provided that both *D.R. Horton* and its employees:

- agreed to waive "all rights to trial in court before a judge or jury on all claims between them";
- agreed that "all disputes and claims between them would "be determined by final and binding arbitration," including claims for "wages, benefits, or other compensation"; and
- agreed that the arbitrator would "not have the authority to consolidate the claims of other employees" and would "not have the authority to fashion a proceeding as a class or collective action or to award relief to a group or class of employees in one arbitration proceedings".

These provisions meant that employees could not pursue class or collective claims in an arbitral or judicial forum. Instead, all employment-related disputes were to be resolved through individual arbitration. Despite these provisions, a *D.R. Horton* former employee sought to initiate arbitration on a nationwide collective basis for violations of the Fair Labor Standards Act (FLSA). When *D.R. Horton* responded that the arbitration agreement barred such claims and refused to participate in the arbitration, the employee filed an unfair labor practice charge with the NLRB.

In January 2012, the NLRB ruled that *D.R. Horton* could not enforce its agreement despite several major Supreme Court decisions upholding class action waivers in arbitration. This was the first time the NLRB had ever taken this position.

*D.R. Horton* appealed and more than 40 amicus briefs from pro-employer and pro-employee organizations were filed in the case.

The NLRB argued that class and collective action waivers interfered with employees' rights to engage in concerted activity and that the National Labor Relations Act should override the Federal Arbitration Act (FAA). The Court of Appeals rejected several NLRB arguments and, over the dissent of one of the judges, ruled the NLRB's position violated the FAA which favored arbitration. It held that Congress had not exempted the NLRA from the FAA requirement that arbitration agreements be enforced "according to their terms" unless Congress has specified otherwise. Essentially telling the NLRB that its position comes way too late in the history of federal endorsement of arbitration as a problem-solving method, the Court upheld

the use of these arbitration provisions which require employees to give up their rights to pursue class or collective actions whether in court or in arbitration.