

PUBLICATION

Clash Over Class/Collective Action Waivers in Arbitration Agreements

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If persistence is what you want from the NLRB, then you are probably happy with the Board's recent ruling on Murphy Oil USA's class and collective action waivers. In case you missed it, the NLRB held that employment arbitration provisions that contain class and collective waivers are unlawful. The NLRB's decision came in direct conflict with a recent decision from the Fifth Circuit Court of Appeals. Indeed, just two years ago the Fifth Circuit reversed a virtually identical NLRB decision, which seemed to decide the issue for good. The NLRB, however, took another bite at the apple and reignited the controversy in *Murphy Oil USA v. NLRB*.

The facts of *Murphy Oil USA v. NLRB* are simple. Sheila Hobson, a Murphy Oil USA employee signed a "Binding Arbitration Agreement and Waiver of Jury Trial" (the "Arbitration Agreement"). The provision set forth that "[e]xcluding claims which must, by . . . law, be resolved in other forums, [Murphy Oil] and Individual agree to resolve any and all disputes or claims . . . which relate . . . to Individual's employment . . . by binding arbitration." The provision also requires employees to waive the right to pursue class or collective claims in arbitration or court.

Despite this provision, Hobson and three other employees filed a collective action against Murphy Oil in the United States District Court for the Northern District of Alabama alleging violations of the Fair Labor Standards Act ("FLSA"). Not surprisingly, Murphy Oil moved to dismiss the collective action and to compel individual arbitration, citing the Arbitration Agreement. In response, Hobson filed an unfair labor charge with the NLRB, asserting that the Arbitration Agreement violates Section 8(a)(1) of the National Labor Relations Act ("NLRA"), which provides that an employer commits an unfair labor practice by "interfer[ing] with, restrain[ing], or coerc[ing] employees in the exercise" of their rights to engage in protected concerted activity. The NLRB ultimately held that Murphy Oil's Arbitration Agreement violated Section 8(a)(1) of the NLRA because it "requir[es] its employees to agree to resolve all employment-related claims through individual arbitration, and by taking steps to enforce the unlawful agreement in [f]ederal district court."

This was not the first time the NLRB held that such an arbitration provision was unlawful. Nor was the Fifth Circuit's subsequent ruling the first time it reviewed the NLRB's position. Indeed, *Murphy Oil USA v. NLRB* marks the second occasion in recent years that the Fifth Circuit disagreed with the NLRB on this point.

The first occasion came in 2013 when the Fifth Circuit decided *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344 (5th Cir. 2013). In that case, the NLRB held that a similar arbitration agreement was unlawful for the same reasons offered in *Murphy Oil USA*. The Fifth Circuit, however, rejected the NLRB's analysis and reversed the NLRB's *D.R. Horton's* decision.

The NLRB issued its *Murphy Oil USA* opinion only ten months *after* the Fifth Circuit's ruling in *D.R. Horton*. The Board thus disregarded the Fifth Circuit's ruling in *D.R. Horton* and chose instead to reaffirm its previous ruling. It thus came as no surprise when the Fifth Circuit recently reaffirmed its decision in *D.R. Horton*.

While the continuing battle between the NLRB and Fifth Circuit provides little in the form of clarity, at least one thing is clear: the NLRB appears resolute in its position that arbitration provisions with class and collective action waivers are unlawful. But the Fifth Circuit does not show any signs of wavering.

In the Fifth Circuit, employers seem to have some certainty, at least for now. Nationwide employers, however, will continue to face a dilemma unless the United States Supreme Court weighs in.