Nearly two years after Waffle House Inc. employee Carrie Harris filed an unfair labor practices charge, the Georgia-based breakfast chain was unable to butter up the National Labor Relations Board (NLRB). Harris’ complaint alleged that Waffle House’s arbitration agreement that employees were required to execute as a condition of their employment violated the National Labor Relations Act (NLRA) because the agreement contained a “no consolidated, collective, or class action arbitrations” provision. On Monday, February 1, 2016, a split three-member panel of the NLRB agreed with Harris that Waffle House’s mandatory, pre-employment waiver violated the NLRA because it precluded employees from pursuing class or collective actions. The NLRB ordered Waffle House to cut the class-action waiver from the mandatory arbitration agreement.

Since the NLRB’s 2012 decision in D.R. Horton and 2014 decision in Murphy Oil, the NLRB has staunchly defended its position that mandatory arbitration agreements that bar class or collective action claims are unlawful. So why, in the face of such steadfast opposition, would Waffle House attempt to enforce a mandatory waiver? Simple: the Fifth Circuit has expressly rejected the NLRB’s position – not once but
twice – and consistently ruled that waivers, such as the one Waffle House used, are lawful and enforceable.

The Fifth Circuit’s reversals of the Board’s D.R. Horton and Murphy Oil decisions has national implications. Employers have the option to appeal an NLRB decision with the D.C. Circuit or any circuit in which it has sufficient business operations. Therefore, employers with sufficient contacts in Fifth Circuit states may appeal an NLRB decision invalidating their arbitration agreements even where an unfair labor practices charge has been filed against the employer outside the Fifth Circuit. Unfortunately, however, this leaves Waffle House and other employers caught in the middle of the ongoing song and dance performed by the NLRB and the Fifth Circuit.

Because the NLRB is not bound by federal court decisions except those rendered by the U.S. Supreme Court, the difference of opinion between the Fifth Circuit and the NLRB is likely to continue simmering until the nation’s high court weighs in on the issue. Some employers have attempted to avoid costly battles with the NLRB by cooking up arbitration agreements with opt-out provisions for class-action waivers. However, this approach was recently rejected by another split NLRB panel with its recent December 22, 2015 RPM Pizza, LLC decision. The RPM Pizza decision was immediately submitted for appeal to the Fifth Circuit.

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