

## The DOJ's Evolving View of the Interplay Between the Federal Arbitration Act and the National Labor Relations Act

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Employers in the gaming and hospitality arena are eagerly awaiting the results of the upcoming changes to the legal landscape that are expected to emerge from a business-oriented administration. These employers have long tried to reduce the costs and length of litigation, particularly in the context of wage and hour claims, by requiring employees to arbitrate work-related disputes on a bilateral, rather than collective or class-wide, basis.

The Trump administration has already begun to change course regarding the legality of class action waivers, which is affecting employers in dozens of cases. In a rather expected move, the Department of Justice now says it no longer believes that class action waivers in arbitration agreements infringe upon workers' Section 7 rights under the National Labor Relations Act (NLRA). On June 16, the Department of Justice filed an amicus brief with the Supreme Court in *NLRB v. Murphy Oil USA, Inc.*, which oral arguments on this issue are scheduled for October. The DOJ's brief argues that, "Nothing in the NLRA's legislative history indicates that Congress intended to bar enforcement of arbitration agreements like those at issue here...And while the National Labor Relations Board's ("NLRB" or "Board") reading of ambiguous NLRA language is entitled to judicial deference, the Board's analysis of the interplay between the NLRA and the FAA is not." The DOJ acknowledges that it previously filed a petition for a writ of certiorari on behalf of the NLRB, but that after the change in administration, it reconsidered the issue and has reached the opposite conclusion.

The saga started in January 2012 with the controversial ruling in *D.R. Horton, Inc.*, in which the Board ruled that agreements between an employer and its individual employees interfere with the employees' right to engage in concerted activities if the agreements require arbitration of work-related disputes on a bilateral rather than collective or class wide basis. This issue has created a split among the circuit courts. On review, the Fifth Circuit rejected the Board's *D.R. Horton* analysis and held that enforcement of the challenged arbitration agreement would not deny a party any statutory right because the use of class action procedures is not a substantive right under the NLRA. The Seventh and Ninth Circuits have disagreed. In *Epic Systems Corporations v. Jacob Lewis*, the Seventh Circuit affirmed a district court's ruling that an arbitration agreement requiring employees to waive the right to participate in a class proceeding was invalid and unenforceable under the NLRA. In a similar case, the Ninth Circuit reversed a district court's order granting an employer's motion to compel bilateral arbitration. The Ninth Circuit held that the NLRA gives employees a "right to pursue work-related legal claims together" and that the employer had violated that right by requiring employees to resolve their legal claims in separate arbitration proceedings. Most recently, the NLRB's General Counsel reaffirmed the Board's prior decision in *D.R. Horton, Inc.*, notwithstanding the Fifth Circuit's ruling rejecting that decision, by issuing a complaint against Murphy Oil USA, Inc. for requiring its employees to waive their rights to commence or participate in a class action.

In October, the Supreme Court will address this split among the circuits and hear *Murphy Oil*, *Epic Systems*, and the Ninth Circuit case. Notably, on June 16, the NLRB announced that the Acting Solicitor General of the United States has authorized the NLRB to represent itself at the hearing. The General Counsel's office, headed up by Richard F. Griffin, Jr. until his term ends in November, will represent the Board. It is unclear whether the DOJ will face off with the General Counsel, given its new take on this issue.



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It is currently unclear how the U.S. Supreme Court will decide this issue in October, or what effect the Department of Justice's new position will have on its ultimate ruling. Either way, it is likely that employers will soon have new guidance on whether class waivers in arbitration agreements infringe upon workers' Section 7 rights. Shortly after the hearing, President Trump is expected to nominate a new General Counsel whose views will certainly align with the business-friendly Trump administration. While we wait for the Supreme Court's ruling and at least until Griffin's term ends, employers should continue to consult counsel when considering including class waivers in their arbitration agreements.

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