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Employees' New Tactic to Challenge Arbitration Agreements: A Trip to the NLRB

Employer Strategies to Defeat Challenges Amid Conflicting Court and NLRB Approaches

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Today's faculty features:

Lonnie D. Giamela, Partner, **Fisher & Phillips**, Los Angeles

Teresa R. Tracy, Partner, **Freeman Freeman & Smiley**, Los Angeles

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EMPLOYEES' NEW TACTIC TO CHALLENGE ARBITRATION AGREEMENTS:

A TRIP TO THE NLRB

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Teresa R. Tracy, Esq.
Freeman, Freeman & Smiley, LLP
1888 Century Park East, Suite 1900
Los Angeles, CA 90067
Tel: (310) 255-6100
Email: Teresa.Tracy@ffslaw.com

I. THE NLRB AND THE COURTS CLASH OVER CLASS ACTION ARBITRATION WAIVERS

As anyone who has been watching the fate of class action waivers in arbitration agreements knows, the National Labor Relations Board ("NLRB") has become very active in invalidating them. Yet they run into a real roadblock when their decisions are then challenged in court.

A. The Basis of the NLRB Decisions

Section 7 of the Act guarantees employees "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection" as well as the right "to refrain from any or all such activities." That phrase has been interpreted to include a right to proceed collectively in litigation or arbitration. See *Eastex, Inc. v. NLRB*, 437 U.S. 556, 566, 98 S.Ct. 2505, 57 L.Ed.2d 428 (1978) (recognizing that employees engage in concerted activity "when they seek to improve working conditions through resort to administrative and judicial forums.").

Section 8(a)(1) of the Act makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7" of the Act. According to the NLRB, this prohibits employers from, among other things, promulgating, maintaining, or enforcing rules that reasonably tend to inhibit employees from exercising their rights under the Act.

The Federal Arbitration Act ("FAA") governs the enforceability and scope of an arbitration agreement. 9 U.S.C. § 1 et seq. Under the FAA, a party seeking to invoke an arbitration agreement may petition the district court "which, save for such agreement, would have jurisdiction [to hear the case], for an order directing that such arbitration proceed in the manner provided for in such agreement." 9 U.S.C. § 4; see also *Trompeter v. Ally Financial, Inc.*, 914 F.Supp.2d 1067, 1071 (ND Cal 2012).

The FAA, at 9 USC § 2, applies to a "written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . ." Specifically excluded, however, are "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 USC § 1. The Supreme Court in *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001), interpreted this exclusionary provision, "any other class of workers engaged in foreign or interstate commerce," narrowly, and held it applied only to workers actually working in commercial industries similar to seamen and railroad employees. Relying on *Allied-Bruce Terminix Companies, Inc. v. Dobson*, 513 U.S. 265 (1995), the Court in *Circuit City* interpreted Section 2's inclusion provision, a "contract evidencing a transaction involving commerce," broadly, finding it was not limited to transactions similar to maritime transactions. In line with these interpretations, most contracts of employment fall within the FAA's reach, regardless of whether the employees themselves are involved in any traditionally-defined commercial transactions as part of their work.

In *Allied-Bruce Terminix, supra*, the Supreme Court examined the phrase ""evidencing a transaction" involving commerce and determined that "the transaction (that the contract 'evidences')

must turn out, in fact . . . [to] have involved interstate commerce[.]" (emphasis in original). A prior Supreme Court case, *Bernhardt v. Polygraphic Co. of America*, 350 U.S. 198 (1956), that like *Circuit City* and *Allied-Bruce Terminix* interpreted the words ""involving commerce" as broadly as the words "affecting commerce," involved an employment contract between Polygraphic Co., an employer engaged in interstate commerce, and Norman Bernhardt, the superintendent of Polygraphic Co.'s Vermont plant. The employment contract at issue contained a provision that in case of any dispute, the parties would submit the matter to arbitration by the American Arbitration Association.

The Supreme Court found the FAA did not apply because the company did not show that the employee, "while performing his duties under the employment contract was working 'in' commerce, was producing goods for commerce, or was engaging in activity that affected commerce, within the meaning of our decisions."

The FAA dictates that arbitration agreements are "a matter of contract," and "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Such generally applicable contract defenses include "fraud, duress, or unconscionability, but not [ ] defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." *AT & T Mobility LLC v. Concepcion*, 563 U.S. 333, 131 S.Ct. 1740, 1746, 179 L.Ed.2d 742 (2011). Consistent with the text of the FAA, "courts must 'rigorously enforce' arbitration agreements according to their terms." *Am. Exp. Co. v. Italian Colors Rest.*, —— U.S. ——, 133 S.Ct. 2304, 2309, 186 L.Ed.2d 417 (2013) (quoting *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 221, 105 S.Ct. 1238, 84 L.Ed.2d 158 (1985)).

These two laws have come into direct conflict with respect to class and collective action waivers in arbitration agreements between employers and employees.

A district court faced with a petition to enforce an arbitration clause engages in a limited two-part inquiry: first, it determines whether the arbitration agreement is valid, and second, it determines whether the agreement encompasses the claims at issue. See, e.g., *Mitsubishi Motors Co. v. Soler Chrysler–Plymouth*, 473 U.S. 614, 627–28, 105 S.Ct. 3346, 87 L.Ed.2d 444 (1985); see also *Trompeter*, 914 F.Supp.2d at 1071.

B. Pre-2015 NLRB and Judicial Precedent

The NLRB set the stage for the current spate of lawsuits challenging class action waivers in employment agreements in *In re D.R. Horton, Inc.*, 357 NLRB No. 184, 2012 WL 36274, (Jan. 3, 2012)(*Horton I*), enforcement denied in part by *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344 (5th Cir. 2013), the NLRB held that it is unlawful under Section 8 of the NLRA for employers to require that employees agree to arbitrate all employment-related claims on an individual basis, thereby giving up their right under Section 7 to access class or collective procedures in judicial or arbitral forums for their "mutual aid or protection."

The employer filed a petition for review of the NLRB's decision, and the NLRB cross-applied for enforcement of its order. On review, the Fifth Circuit disagreed with the NLRB and overruled *Horton I* to the extent it invalidated the class arbitration waiver as illegal. *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344, 359–61 (5th Cir. 2013)(*Horton II*). Relying on *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 131 S.Ct. 1740, 179 L.Ed.2d 742 (2011), the Fifth Circuit concluded that

the NLRB's decision in *Horton I* effectively prohibits class action waivers, whether in an arbitral or judicial forum, and therefore constitutes "an actual impediment to arbitration [that] violates the FAA." *Horton II,* 737 F.3d at 359–60. The Fifth Circuit then considered whether "the FAA's mandate" to enforce arbitration agreements as written "has been 'overridden by a contrary congressional command,'" quoting *CompuCredit Corp. v. Greenwood*, 565 U.S. ——, 132 S.Ct. 665, 669 (2012). It and concluded that "[n]either the NLRA's statutory text nor its legislative history contains a congressional command against application of the FAA." *Id*., at 361. Finally, the Fifth Circuit concluded that there is no inherent conflict between the FAA and the NLRA and that, indeed, the "courts repeatedly have understood the NLRA to permit and require arbitration." *Id*.

In *Sutherland v. Ernst & Young LLP*, 726 F.3d 290, 296 (2nd Cir. 2013), the Second Circuit held that the FLSA, which has a grant of authority for collective action that is much more specific than that provided by the NRLA, see 29 USC § 216(b), did not prevent enforcement of a class action waiver included in an arbitration agreement. In a footnote, the Court declined to follow the NLRB's views as articulated in *Horton I. v. Sutherland*, 726 F.3d at 297 n. 8. See also, *Litvinov v. UnitedHealth Grp. Inc.*, 2014 WL 1054394 (SDNY, 3/10/14), at *3 n. 11; *Lloyd v. J.P. Morgan Chase & Co.*, 2013 WL 4828588 (SDNY, 9/9/13), at *6 n. 7; *LaVoice v. UBS Fin. Serv., Inc*., 2012 WL 124590 (SDNY, 1/1312), at *6.

Iskanian v. CLS Transportation Los Angeles, LLC, 59 Cal.4th 348 (2014), considered *Horton I* and *Horton II* in detail and concluded that *Horton I*'s invalidation of class arbitration waivers could not be reconciled with the FAA as authoritatively interpreted by the Supreme Court in *Concepcion* and *Italian Colors.*

Other courts jumped into the fray, generally finding that the FAA took precedence and upholding the validity of class action waivers in employment arbitration agreements. See, e.g., *Owen v. Bristol Care, Inc.*, 702 F.3d 1050, 1053–55 (8th Cir. 2013), and *Delock v. Securitas Sec. Servs. USA, Inc.*, 883 F.Supp.2d 784, 789–90 (E.D. Ark. 2012); *Richards v. Ernst & Young, LLP*, 744 F.3d 1072, 1075 n. 3 (9th Cir. 2013)(similarly collecting cases that have determined that they should not defer to *Horton I* on the ground that it conflicts with the explicit pronouncements of the Supreme Court concerning the policies undergirding the FAA). But see, *Brady v. Nat'l Football League*, 644 F.3d 661 (8th Cir. 2011). However, a close reading of that case shows that it did not adopt the entire rationale of *Horton I*, but only reasoned that the filing of a good faith class action lawsuit could be concerted activity within the meaning of Section 7. Furthermore, *Brady* preceded *Horton I* and did not concern the intersection between the NLRA and the FAA. See, *Horton II*, 737 F.3d at 356-62.

The NLRB did not back down. It reiterated its position in *Murphy Oil USA, Inc*., 361 NLRB No. 72, 2014 WL 5465454 (Oct. 28, 2014). In the NLRB's view, this rule does not conflict with the FAA because the FAA does not require enforcement of illegal contracts and because Section 7 amounts to a "contrary congressional command" overriding the FAA. *Id.*, at *12 (quoting *CompuCredit Corp. v. Greenwood*, 565 U.S. ——, 132 S.Ct. 665, 668–69, 181 L.Ed.2d 586 (2012)).

II. IN 2015, THE NLRB HAS CONTINUED TO PUSH ITS ANTI-CLASS ACTION ARBITRATION WAIVER AGENDA

During 2015, there have been at least 33 NLRB decisions across the country addressing the interplay of the NLRA and the FAA, each reaching the conclusion that class and collective action waivers in employment agreements run afoul of the NRLA and are therefore unenforceable. It appears that the NLRB is forum-shopping in the hope that it will find a sympathetic court that will give its position credence.

- ***Alternative Entertainment, Inc. and James Decommer,* 2015 WL 4237726 (NLRB Div. of Judges) (7/9/15)**

Michigan field technicians challenged the employer's policies, including its arbitration agreement that waived group, class or collective actions in judicial forums. It included a provision that claims with administrative agencies, such as workers' compensation claims, would not be subject to the agreement. With respect to its mandatory arbitration rule, the employer asserted that, although the NLRB was likely to view the collective action waiver as unlawful, such a position has not been supported by any decision from the Courts of Appeals. The ALJ rejected the employer's argument. According to the ALJ, the employer's mandatory arbitration policy explicitly restricted activities protected by Section 7 by prohibiting employees from bringing class or other collective actions relating to Section 7 type claims: employment-related discrimination, compensation, promotion, demotion and disciplinary action. The ALJ did not address the arguments regarding the reaction of any of the Courts of Appeals.

- ***The Neiman Marcus Group, Inc. and Sheila Monjazeb,* 362 NLRB No. 157, 2015 WL 4647966 (8/4/15)**

Applying *Murphy Oil*, a unanimous Board panel held that the employer violated Section 8(a)(1) by maintaining a mandatory arbitration program that employees would reasonably construe to prohibit the filing of unfair labor practice charges with the Board. A panel majority consisting of Members Hirozawa and McFerran found that the maintenance and enforcement of the arbitration program also violated Section 8(a)(1) because it requires employees, as a condition of employment, to waive their rights to pursue class or collective actions on employment-related claims in all forums, whether arbitral or judicial. Member Johnson dissented from this 8(a)(1) finding, citing his dissent in *Murphy Oil*. The Board also rejected the employer's argument that the complaint should be dismissed as time-barred by Section 10(b), assertedly because the initial unfair labor practice charge was filed and served more than 6 months after the employee signed the arbitration program documents and more than 6 months after her employment with the employer ended. The Board panel majority stated that what matters is that the employer maintained and enforced the arbitration program with respect to the employee during the Section 10(b) period, and that this time span included the relevant 6-month period that preceded the filing of the charge. The Board declined to consider its earlier order denying the employer's motion to dismiss the complaint due to settlement bar and estoppel (an earlier settlement agreement had revised several portions of the program; the employer, however, continued to assert that the pre-settlement version of the program applied to the employee because it was the one she had agreed to, and she left the employer prior to the settlement revision). The Board also rejected the employer's contention that the Board, the General Counsel,

the Regional Director, and the ALJ were not authorized to bring or hear the complaint because the Board lacked a quorum at the relevant times.

- ***Grill Concepts, Inc. d/b/a/ The Daily Grill and Unite HERE, Local 11,* 2015 WL 4709435 (NLRB Div. of Judges) (8/4/15)**

The employer was embroiled in an organizing campaign by the union, which filed charges with the NLRB alleging numerous violations revolving around organizing activities and the employer's policies. With respect to the dispute resolution policy that included mandatory arbitration with a waiver of class or collective arbitration, the ALJ found it was unlawful. This was despite the fact that the policy provided employees with the opportunity to opt out within 30 days after signing for receipt of the policy.

This case differed from *Murphy Oil* and *Horton I* because the agreement permitted employees to opt out of arbitration and pursue claims in court on a collective or class basis. The employer argued that this case presented the "more difficult question" of whether an employer could enter into an agreement that was not a condition of employment with an individual employee to resolve either a particular dispute or all potential employment disputes through nonclass arbitration rather than litigation in court. The ALJ framed the issue as whether employees may be forced to choose whether or not to prospectively and irrevocably waive their substantive right to band together and bring a class or collective lawsuit against their employer in an attempt to better their wages, hours, or other working conditions.

The NLRB's General Counsel and the union asserted that the agreement was unlawful because it was not truly voluntary, it constituted an irrevocable waiver of prospective Section 7 rights, it required employees to self-identify as choosing to preserve their Section 7 rights, it was inconsistent with Board precedent finding unlawful and unenforceable employee separation agreements that waive or "trade away" the employee's right to engage in future concerted activity, it interfered with the rights of individuals who had opted out to act concertedly with employees who have not, and it permitted employers to obviate employees' rights under the Act through private contracts. The union further asserted that the agreement was not voluntary for employees with pending claims.

The ALJ started with the threshold issue of whether the agreement was a condition of employment. With regard to new employees with any claim pending during the of the opt-out period, the ALJ found the agreement was a condition of employment. The agreement stated, "I also understand that I may not opt out of my Dispute Resolution Arbitration Agreement while I have any legal claim pending which arose prior to my execution of this form or which has been or could have been submitted to arbitration at the time the claim arose." For these individuals, the ALJ found that the agreement was "consideration for [their] employment and the continuation of [their] employment with Grill Concepts" and therefore a condition of employment.

For employees without pending claims, the ALJ found that the agreement was not a condition of employment. The opt-out provision was mentioned in the first sentence of the agreement. Toward the end of the agreement it stated, "If I decide to opt out of the Dispute Resolution Arbitration Agreement, I understand that I will be able to continue my employment." The acknowledgment and receipt again mention the opt-out provision. The union asserted that the opt-

out provision was not attached to the agreement and was buried deep within the handbook. While the opt-out provision ideally would be attached to the agreement, the ALJ found it was sufficiently referenced with the agreement and it is contained within the same appendix to the handbook. While ideally it would be attached to the agreement, if the employer was attempting to conceal the existence of the opt-out provision, "it did a poor job of it."

In addition, the evidence showed that current employees were not required to sign the agreement or sign for receipt of the handbook and thus be bound by the agreement. The evidence showed that at least two employees did not sign the agreement or the acknowledgment and receipt of the employee handbook, and no negative consequences ensued. Moreover, the employer provided unrefuted testimony that employees could decline to sign, and when this occurred, it was just noted the employee declined to sign. These facts led to the conclusion that continued employment with the employer was not conditioned upon signing the agreement.

The ALJ noted that the NLRB had not decided whether an employer can enter into an agreement that is not a condition of employment with an individual employee to resolve either a particular dispute or all potential employment disputes through non-class arbitration rather than litigation in court. *Murphy Oil* and *Horton I* made it clear that the NLRB would find unlawful any policy that "extinguishes" an employee's right to engage in such litigation. This left open the question of whether an opt-out provision like the current one, which did not eradicate the employees' rights, nonetheless interferes with or coerces employees in this right.

The ALJ noted that the right to forego collective or class action litigation belongs to the employee, so long as such right is voluntary and free of coercion. Clearly, an employee cannot be forced to engage in any particular concerted activity, including being party to a collective lawsuit.

The more difficult question was under what conditions, if any, an employee could prospectively and irrevocably waive his or her statutory right to engage in protected concerted activity. Abundant case law had already established that a union may, through collective bargaining, waive employees' statutory rights as long as there was a clear and unmistakable relinquishment of that right. *Gem City Ready Mix Co*., 270 NLRB 1260, 1260-1261 (1984); see also *In re Tide Water Assoc. Oil Co.*, 85 NLRB 1096, 1098 (1949) (establishing the "clear and unmistakable" standard for waivers of statutorily protected rights); *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983) ("we will not infer from a general contractual provision that the parties intended to waive a statutorily protected right unless the undertaking is 'explicitly stated'. More succinctly, the waiver must be clear and unmistakable"); *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 257 (2009).

With regard to individual employees who are not party to a collective-bargaining agreement, the NLRB in *Murphy Oil* shed some light on this question. Though the arbitration agreement at issue in *Murphy Oil* was mandatory, to support its decision, the Board relied on *National Licorice Co. v. NLRB*, 309 U.S. 350, 364 (1940), where the Supreme Court found the employer could not contract with individual employees to relinquish their rights under the Act. In *National Licorice*, a committee of three employees negotiated a contract with the employer providing for a wage increase, overtime, holiday pay, and vacation time. The contracts as executed were between the employer and the individual employees who signed them. Employees who signed the contract relinquished their rights to strike, demand a closed shop, or sign an agreement with any union. Employees who did not sign the contract did not reap its benefits.

The focus in *National Licorice* was the employment contracts themselves, not whether they were conditions of continued employment; they were not. (The contracts were found to be unlawful because they discouraged union membership.) However, the ALJ observed that the right to engage in concerted activity is just as protected as the right to engage in union activity. The agreement, whether it is a condition of employment or not, extracted a promise to refrain from activity protected by Section 7, and was therefore invalid under the reasoning set forth in *National Licorice* and like cases.

The ALJ did not believe the fact that collective or class litigation is but one category of protected activity under the Act mattered. By analogy, the ALJ observed it was difficult to imagine that an employment contract requiring employees to agree they will not seek religious accommodation, with a 30-day opt-out provision would pass muster. An agreement to forego the protected concerted activity of class or collective litigation, with a 30-day opt out provision, was a similar prospective waiver of substantive rights that should be accorded no less protection. An obvious distinction is that the Title VII example does not implicate the FAA because the right to engage in collective or class litigation has nothing to do with the substance of the right to be free from discrimination based on religion. However, the ALJ found that it was a distinction without a difference, since the NLRB had already determined that substantive rights under the NLRA are protected, in no relative sense, despite the strong federal policy in favor of arbitration.

The ALJ also rejected the employer's argument based on *Johnmohammadi*. In that case, the employer's arbitration agreement had a 30-day opt-out provision similar to the one in the instant case. The court held that to prevail on a claim under *National Licorice* and its progeny, the plaintiff employee was required to show that the arbitration agreement was "conduct immediately favorable to employees," which the employer undertook with the express purpose of impinging upon its employees' freedom of choice in deciding whether to waive or retain their right to participate in class litigation. The Supreme Court has found that "the informality of arbitral proceedings is itself desirable, reducing the cost and increasing the speed of dispute resolution." It therefore confers a benefit upon employees. Moreover, the employer's intent to impinge on employee rights is not a required element of a Section 8(a)(1) violation, so the employer's purpose is not material.

The ALJ also considered the *Johnmohammadi* argument that regardless of inducement, an employee may never waive the right to participate in class or collective litigation by negotiating an individual contract with her employer. Since the court determined the agreement was not an unfair labor practice, it found the arbitration agreement was valid. The ALJ's different conclusion about the applicability of *National Licorice*, in line with the Board's reasoning in *Murphy Oil*, led to the opposite conclusion.

The ALJ believed that the Supreme Court's decision in *American Express Co. v. Italian Colors Restaurant*, ___ U.S. ___, 133 S.Ct. 2304 (2013), issued after *Horton I*, the Board in *Murphy Oil* also indicated that a contract prospectively waiving substantive rights under the Act is unlawful in and of itself, regardless of how it is applied. The Board noted that the Supreme Court, in *Italian Colors*, explained that the federal policy favoring arbitration, however liberal, does have limits. It does not permit a "prospective waiver of a party's right to pursue statutory remedies,' such as a 'provision in an arbitration agreement forbidding the assertion of certain statutory rights."

The ALJ found that the *Italian Colors* case and its reasoning did not provide a reason for the Supreme Court to discuss whether the FAA must yield to another federal statute that was substantively implicated by the statute giving rise to the underlying cause of action.

The ALJ stated it was "axiomatic" that many of the NLRA's protections necessarily implicate other federal employment statutes, and specifically the right to pursue claims under them. The ALJ found that the question not raised by prior judicial decisions was whether the rationale underlying the effective vindication exception changed if the vindication is through the act of litigating itself, not from the remedy resulting from such litigation? The Board's reasoning rationally extended to the circumstance here, according to the ALJ, where the question was whether to "permit" employees to prospectively waive their rights, not whether a waiver may be required as a condition of employment.

The employer argued that the strong federal policy in favor of arbitration, as affirmed by the Supreme Court in *Concepcion*, *supra*, and *CompuCredit Corp. v. Greenwood*, 132 S.Ct. 665, 672 fn. 4 (2012), compelled a finding that the agreement here was lawful. The ALJ simply stated that in reaching its decisions in *Murphy Oil* and *Horton I*, the Board recognized the strong federal policy in favor of arbitration and discussed it at length, distinguishing the above Supreme Court precedents. The employer also notes that numerous decisions have permitted parties to agree to this type of contract. The ALJ, however, felt bound by the Board precedent, which was found to be contrary to permitting an agreement like the one at issue here.

The ALJ also considered the argument that the agreement violated Section 8(a)(1) because it interfered with employees' access to the Board's procedures. The agreement stated that "employment-related disputes" were subject to arbitration. This was broadly defined to include "disputes between me and the [employer] in connection with or concerning or arising out of my employment, or the administration or termination of my employment." It also explicitly included claims based on "alleged violations of federal and/or state laws, including, but not limited to Title VII of the Civil Rights Act of 1964, as amended, the Americans with Disabilities Act, the Age Discrimination in Employment Act, [and] the Fair Labor Standards Act." It specifically excluded "workers' compensation benefits, unemployment compensation benefits, claims under any of the [employer's] employee welfare benefit and pension plans, and any other claims prohibited by law from being resolved by arbitration."

The ALJ opined that many of the included claims could also describe unfair labor practice claims. In addition, claims under the Act were not specified in the excluded claims section. A reasonable employee reading this in the context of the rest of the document was not going to know that the phrase "any other claims prohibited by law" would excuse disputes resulting in NLRB charges from arbitration, according to the ALJ. Furthermore, since ambiguities must be construed against the employer, the ALJ found that the agreement violated Section 8(a)(1) because employees would reasonably believe it encompassed Board charges.

- ***Countrywide Financial Corporation, Countrywide Home Loans, Inc., and Bank of America Corporation, and Joshua D. Buck and Mark Thierman, Thierman Law Firm and Paul Cullen, The Cullen Law Firm,* 362 NLRB No. 165 (8/14/15)**

Applying *Horton I* and *U-Haul Co. of California*, 347 NLRB 375 (2006), enfd. 255 Fed. Appx. 527 (D.C. Cir. 2007), a Board panel majority consisting of Chairman Pearce and Member Hirozawa found that the employers violated Section 8(a)(1) by maintaining a mandatory arbitration agreement that employees would reasonably construe to prohibit the filing of unfair labor practice charges with the Board. The panel majority rejected the employers' argument that a savings clause in the agreement stating "nothing in this Agreement shall be construed to require arbitration of any claim if an agreement to arbitrate such a claim is prohibited by law" was a valid defense to the alleged violation. The agreement also required applicants to select whether they agreed or disagreed to be bound by its terms; if the applicant selected the "disagree" option, the agreement stated that the applicant would not be able to move forward in the application process. The agreement did not address whether arbitration could be conducted individually or collectively as a class. Member Johnson dissented and would have dismissed the Section 8(a)(1) allegation based on the savings clause. In his view, employees would not reasonably conclude, after reading the clause, that the arbitration agreement restricted their access to the Board's processes.

Applying *Murphy Oil*, the panel majority further found that although the agreement was not unlawful on its face by compelling employees to waive their Section 7 right to collectively pursue litigation of employment claims in all forums, the employers enforced the agreement in violation of 8(a)(1) by filing a motion in federal district court to compel individual arbitration in response to a collective lawsuit filed by former employees alleging wage and hour violations under the FLSA and California Labor Code (the court had granted the motion to compel in part and stayed the lawsuit, but left it to the arbitrator to decide whether the wage claims should be arbitrated individually or collectively and that decision was pending at the time of the Board proceeding). The panel majority found that the court motion had an "illegal objective" within the meaning of footnote 5 of the Supreme Court's decision in *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731 (1983), and thus was not protected by the First Amendment. Member Johnson, in dissent, stated that he would dismiss the 8(a)(1) enforcement violation for the reasons set forth in his dissent in *Murphy Oil*, and also because the agreement is not, as in *Murphy Oil*, unlawful on its face with respect to waiver of class or collective litigation of employment claims. In Member Johnson's view, because the Board had not previously ruled on whether enforcement of a facially lawful arbitration agreement is unlawful, the illegal objective exception of *Bill Johnson's* did not apply and the enforcement violation could not be found.

- ***PJ Cheese, Inc. and James Sullivan,* 362 NLRB No. 177, WL 5001023 (8/20/15)**

Applying *Horton I* and *Murphy Oil*, a majority panel of the NLRB, consisting of Chairman Pearce and Member McFerran, affirmed the ALJ's finding that the employer violated 8(a)(1) by: (1) maintaining a mandatory arbitration agreement that employees would reasonably construe to prohibit the filing of unfair labor practice charges with the Board and; (2) maintaining and enforcing the arbitration agreement that required employees to waive their rights to pursue class or collective employment claims in all forums, arbitral and judicial. Although the employee had acknowledged in writing that he voluntarily agreed to the arbitration agreement, the agreement itself stated that it was a condition of employment and that arbitration was the exclusive means to resolve employment

problems. Therefore, it was explicit that arbitration was a condition of employment and that employees were bound to it regardless of whether the signed the agreement. The named entity also argued that it could not be found to have committed the enforcement action because its subsidiary alone had filed the district court motion. However, the NLRB found that the agreement defined the employer to include both the parent and the subsidiary. With respect to the violations in (2), Member Johnson dissented for the reasons set forth in his dissent in *Murphy Oil*. As to the violation in (1), Member Johnson found it unnecessary to pass on the merits of the violation because the employer failed to raise any possible exception to it.

- ***Leslie's PoolMart, Inc. and Keith Cunningham*, 362 NLRB No. 184, WL 5027605 (8/25/15)**

Applying *Murphy Oil*, the Board ruled that the employer violated Section 8(a)(1) by maintaining and enforcing an arbitration agreement that required employees, as a condition of employment, to agree to resolve certain employment-related disputes exclusively through individual arbitration and to relinquish any right to resolve such disputes through collective or class action. The Board rejected the employer's arguments that the complaint was time-barred under Section 10(b), that the charging party did not have standing to assert his unfair labor practice charge because he was no longer employed by the employer, and that the charging party did not engage in protected concerted activity by filing, as an individual, a class action suit. The Board ordered the employer to rescind or revise its unlawful policy, to notify the court in which it had opposed the charging party's class action that it had done so and would no longer oppose the action on the basis of the policy, and to reimburse the charging party for reasonable expenses and legal fees incurred in opposing the employer's motion to compel individual arbitration.

Member Johnson, dissenting, would not have found the employer's maintenance or enforcement of the agreement unlawful. Because he would find no violation, he found it unnecessary to consider the propriety of the remedies ordered for the enforcement violation. He similarly found it unnecessary to pass on the employer's argument that the charging party did not engage in concerted activity by individually filing a class claim, but observed that he did not agree with his colleagues that the mere filing of an opt-out class action fell within the framework created by *Meyers Industries, Inc*., 281 NLRB No. 118 (1986)("Meyers II"), enfd. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied, 487 U.S. 1205 (1988), for determining protected, concerted activity.

- ***On Assignment Staffing Services, Inc. and Arnella M. Freeman*, 362 NLRB No. 189 (8/27/15)**

Applying *Murphy Oil* and *Horton, I*, a Board panel majority consisting of Chairman Pearce and Member McFerran granted the General Counsel's motion for summary judgment and found that the employer violated Section 8(a)(1) by promulgating and maintaining a mandatory arbitration agreement under which employees were compelled, as a condition of employment, to waive the right to maintain class or collective actions in all forums, whether arbitral or judicial, unless employees individually opted out of the waiver within 10 days of receiving a copy of the agreement. The panel majority concluded that the employer's opt-out procedure was itself a condition of employment that significantly burdened employees' exercise of their Section 7 right to pursue collective or class litigation. Further, in deciding an issue left open by the Board's decision in *Horton I*, the panel majority concluded that, even assuming that the opt-out provision rendered the employer's

arbitration agreement not a condition of employment, it was still unlawful because it required employees to prospectively waive their Section 7 right to engage in concerted activity.

Member Johnson dissented, observing that he would dismiss the complaint for the reasons set forth in his dissent in *Murphy Oil* alone. Further, Member Johnson concluded that the opt-out provision in this case rendered the individual arbitration agreement voluntary and therefore not a mandatory condition of employment. Finally, he concluded that such voluntary individual arbitration agreements do not require employees to prospectively waive any substantive statutory right or otherwise violate the Act.

- ***Hoot Winc, LLC and Ontario Wings, LLC d/b/a Hooters of Ontario Mills and Alexis Hanson, etc. et al.,* 363 NLRB No. 2, WL 5143098 (9/1/15)**

Three different cases brought by three different employees, were decided in this consolidated decision. Citing *Murphy Oil, Horton I* and *U-Haul Co. of California*, 347 NLRB 375 (2006), a unanimous Board panel found, *inter alia*, that the employers, alleged and found to be joint employers, violated Section 8(a)(1) by maintaining a mandatory arbitration agreement that would reasonably be read by employees to prohibit the filing of unfair labor practice charges with the Board. In finding the violation, the Board acknowledged that the agreement did not explicitly prohibit employees from filing charges with the Board, but rejected the employers' argument that an exemption in the agreement for "any dispute that cannot be arbitrated as a matter of law" saved the agreement from being unlawful. In addition, a panel majority consisting of Chairman Pearce and Member Hirozawa held that the agreement violated Section 8(a)(1) because it required employees to waive their right to engage in class or collective action in all forums, whether arbitral or judicial. Member Miscimarra dissented from this finding, citing his partial dissent in *Murphy Oil*.

- ***Hobby Lobby Stores, Inc. and the Committee to Preserve the Religious Right to Organize,* 2015 WL 5241738 (NLRB Div. of Judges)(9/8/15)**

The charge in this case was filed by the Committee to Preserve the Religious Right to Organize. The issues were (1) whether the employer's mandatory arbitration agreement and related policies in the handbook, as part of the employment application, and in each new hire packet, which required employees, as a condition of employment, to waive their right to resolution of employment-related disputes by collective or class action violated Section 8(1)(1); (2) whether they would be reasonably read by employees to prohibit them from filing unfair labor practices with the NLRB in violation of Section 8(a)(1); and (3) whether the employer's enforcement through its motions to compel arbitration in two federal cases pending in California federal district courts violated Section 8(a)(1). The federal district courts had each granted the motions and rejected the NLRB's arguments under *Horton I.*

The ALJ felt obliged to follow NLRB precedent and answered "yes" to each of the above issues. However, she went on to address additional arguments made by the employer that had not been as fully covered in previous decisions, rejecting each of them in turn. It also held that the FAA did not apply to a group of team drivers who transported the employer's products across state line, since the FAA exempts from its coverage contracts of employment of transportation workers.

- ***Amex Card Services Company, a Subsidiary of American Express Travel Related Services Company, Inc., a Subsidiary of American Express Company and Erandi Acevedo, Jennifer Flynn, and Jonathan Longnecker,* 363 NLRB No. 40, 2015 WL 6957289 (11/10/15)**

The charges were filed by call center employees in Phoenix, Arizona. The employer had won its motion to compel individual arbitration in an FLSA collective action case brought by five former employees in federal district court. Applying *Murphy Oil*, *Horton I,* and *U-Haul Co. of California*, 347 NLRB 375 (2006), enfd. 255 Fed. Appx. 527 (D.C. Cir. 2007), a unanimous NLRB panel found that the employer violated Section 8(a)(1) by maintaining a mandatory arbitration agreement that employees reasonably would believe barred or restricted them from filing charges with the NLRB or to access the NLRB's processes, and by maintaining and enforcing a mandatory arbitration agreement under which employees were compelled, as a condition of employment, to waive the right to maintain class or collective actions in all forums, whether arbitral or judicial. The NLRB rejected the employer's arguments that the maintenance allegation is barred by Section 10(b) and that the employer's arbitration policy was distinguishable from the policies in *Horton I* and *Murphy Oil*.

The employer had both a form and policy. New hires had to sign both. By signing the form, each employee acknowledged receipt of the policy and agreement to its terms. In its opening paragraph, the form stated, "I understand that arbitration is the final and exclusive forum for the resolution of all employment-related disputes between American Express and me that are based on a legal claim." The final paragraph before the employee's signature reads in its entirety: "I agree to submit any and all employment [-]related disputes based on a legal claim to arbitration, and agree to waive my right to trial before a judge or jury in federal or state court in favor of arbitration under the Policy." The 14-page policy applied to employees hired prior to June 1, 2003 who did not opt out of coverage, and to all employees hired after since June 1, 2003. The policy contained the following exclusions:

> "Any claim under the National Labor Relations Act" is not covered."
>
> The Policy "does not preclude an individual from filing a claim or charge with a governmental administrative agency with independent statutory authority to pursue an enforcement action, such as the National Labor Relations Board . . . ."

The NLRB believed that the policy and form, when read together, were "at best" ambiguous, since while the policy carved out NLRB proceedings, the form did not. Furthermore, the form was drafted as a complete agreement to be signed by the employee; in it, the employee acknowledged receipt of the policy, but it did not incorporate the policy in its operative language, which covered "all employment-related disputes" without limitation.

The NLRB issued its typical cease and desist, rescission, notification, and posting requirements, including notification to the federal district court that it had rescinded or revised the policy and that it no longer opposed the collective action on the basis of the unlawful arbitration policy.

- ***Nijjar Realty, Inc., d/b/a/ Pama Management and Gerardo Haro,* 363 NLRB No. 38, 2015 WL 7444737 (11/20/15)**

The three-member panel of the NLRB ruled: (a) the complaint was not time-barred although the initial charge was filed and served more than 6 months after the employee signed the arbitration/class action waiver agreement because the employer continued to maintain the unlawful agreement during the 6 months preceding the filing of the charge; (b) although the allegation that the employer's attempt to enforce its policy was not part of the charge, it was of the same class of violations as the allegation that was in the charge that the employer maintained an unlawful arbitration policy and therefore it was sufficiently related to a timely charge; (c) the employee was engaged in concerted activity when he filed an employment-related class/collective action alleging violations of state wage and hour law in the state court of California; (d) the opt-out provision of the arbitration agreement did not save it. The panel also denied the employer's motion to dismiss the complaint or, alternatively, stay the proceedings. In addition to the order to rescind or revise the agreement and notify its employees who were required to sign it of these actions and, if revised, provide them with a copy of the revision, the employer was ordered to notify the superior court in the underlying case that it has rescinded or revised the agreement upon which the petition to compel and stay the action was based, and to inform the court that it no longer opposed the action on the basis of those agreements.

- ***Professional Janitorial Service of Houston, Inc., and Service Employees International Union,* 363 NLRB No. 35, 2015 WL 7568340 (11/24/15)**

The NLRB held that the maintenance of an arbitration policy that required Texas employees, as a condition of employment, to waive their rights to pursue class or collective actions involving employment-related claims in all forums, whether judicial or arbitral, violated Section 8(a)(1) – this is despite language in the policy that exempted "non-waivable statutory claims, which may include. . . charges before. . . the National Labor Relations Board." The NLRB thought that the language was ambiguous, particularly because the policy went on to state: "if such an agency completes its processing of your action against the Company, you must use arbitration if you wish to pursue further your legal rights, rather than filing a lawsuit on the action." It also found that the confidentiality provision of the policy independently violated Section 8(a)(1) by prohibiting employees from discussing terms and conditions of employment. Finally, the NLRB found that employees would reasonably interpret the policy to limit or restrict access to the NLRB and its processes, and therefore constituted a violation. The NLRB cited its *Horton I* and *Murphy Oil* decisions. It issued the typical cease and desist order, including the maintenance of the policy or similar policies, and requiring affirmative action to rescind the policy, notify employees of the rescission, and posting. However, there was a separate concurring and dissenting opinion by Member Miscimarra, who argued that Section 8(a)(1) does not vest authority in the NLRB to dictate any particular procedures pertaining to the litigation of non-NLRA claims, nor does the NRLA render unlawful agreements in which employees waive class-type treatment of non-NLRA claims.

- ***Bristol Farms and Konny Renteria,* 363 NLRB No. 45, 2015 WL 7568339 (11/25/15)**

In this *Murphy Oil/Horton I* case, a Board panel majority consisting of Chairman Pearce and Member McFerran denied the employer's motion seeking an order approving its proposed unilateral

Settlement Agreement, Notice, and revised Arbitration Agreement because approval would not effectuate the purposes of the NLRA. In response to the initial charges and ALJ's findings against it, the employer and the Region of the NLRB participated in the NLRB's alternative dispute resolution program. The employer proposed the settlement agreement at issue; the employer moved for approval after the Region rejected the proposed agreement. The majority of the NLRB rejected the employer's argument that its revised arbitration agreement did not fall within the proscriptions of *Murphy Oil* and *Horton I* because it was truly "optional." In so doing, the majority cited *On Assignment Staffing Services*, 62 NLRB No. 189 (2015), where, deciding an issue left open by *Horton I*, the NLRB held that an arbitration agreement that precludes collective action in all forums is unlawful even if entered into voluntarily, because it requires employees to prospectively waive their Section 7 right to engage in concerted activity. The majority disagreed with the dissent's view that Section 9(a) of the Act requires the NLRB to permit individual employees to prospectively waive their Section 7 right to engage in concerted legal activity.

Member Miscimarra, dissenting, would have granted the employer's motion. Adhering to his partial dissent in *Murphy Oil*, Member Miscimarra reiterated his view that Section 8(a)(1) does not vest the NLRB with authority to dictate any particular procedures pertaining to the litigation of non-NLRA claims, nor does the Act entitle employees to class-type treatment of such claims. Moreover, in his view, not only does the NLRB lack jurisdiction over procedural issues pertaining to non-NLRA claims, but several other considerations made it particularly inappropriate for the Board to declare unlawful the employer's revised arbitration agreement in this case. He stated that, even if employees were deemed to have an NLRA-protected right to insist on the class-type treatment of non-NLRA claims, the employer's revised agreement is lawful because (1) Section 7 gives every employee the right "to refrain" from NLRA-protected activity; (2) Section 9(a) gives every employee the right "at any time" to adjust his or her non-NLRA disputes on an individual basis and thus the right to agree to waive class-type dispute-adjustment procedures; and (3) the employer's revised agreement had no effect unless an employee voluntarily chooses to sign it.

- ***Convergys Corporation and Hope Grant*, 363 NLRB No. 51, 2015 WL 7750753 (11/30/15)**

The employee filed a class and collective action in federal district court alleging FLSA violations. The employer filed a motion to strike the class and collective claims, citing the agreement that all job applicants were required to sign, agreeing to pursue any claim or lawsuit relating to their employment only on an individual basis. The federal district court in Missouri denied the motion on the basis that the waiver violated the NLRA. Although this was not an arbitration agreement, the NLRB found that (a) the agreement was a unilaterally-implemented rule that restricted Section 7 activities; (b) the employer violated Section 8(a)(1) by enforcing the agreement through its motion to strike.

- ***Price-Simms, Inc. d/b/a/ Toyota Sunnyvale and Richard Vogel*, 363 NLRB No. 52, 2015 WL 7750756 (11/30/15)**

The employee filed a charge in October 2014, and the General Counsel issued a complaint in January 2015. The charge focused on the employer's binding arbitration agreement and handbook that required its Sunnyvale, California employees to execute the agreement as a condition of employment. The agreement prohibited the arbitrator from consolidating claims of more than one

employee or fashioning a proceeding as a class or collective action and limited the arbitrator to hear only the employee's individual claims. The complaint alleged that by promulgating and maintaining this agreement, the employer interfered with Section 7 rights. It also alleged that the employer violated the Act when it tried to enforce this agreement by filing a motion to compel arbitration in a wage and hour class action filed by employee/charging party Vogel in a state trial court.

The employer contended that the allegations of the complaint were barred by the 6-month statute of limitations set forth in Section 10(b) of the Act. The NLRB rejected this argument as to the "maintained and enforced" allegations. It did reject the "promulgated" allegations since it was clear that the agreement was promulgated well outside the 6-month period. However, having found a basis for allowing two of the allegations to proceed, the NLRB applied its decisions in *Horton I* and *Murphy Oil* both as to the "maintaining" and "enforcing through a motion to compel arbitration" allegations.

- ***U.S. Xpress Enterprises, Inc., and U.S. Xpress, Inc., and Justin L. Swidler,* 363 NLRB No. 46, 2015 WL 7750745 (11/30/15)**

The NLRB ALJ found that the Tennessee employers violated Section 8(a)(1) by maintaining and enforcing an arbitration agreement that required employees, as a condition of employment, to waive their rights to pursue class or collective actions involving employment-related claims in all forums, whether arbitral or judicial. The three-member panel of the NLRB rejected the employers' argument that the complaint was time-barred because the initial unfair labor practice charge was filed and served more than 6 months after the employee/charging party learned of the arbitration agreement, since the employers had continued to maintain it within the period. By asserting the arbitration agreement as an affirmative defense in a class action lawsuit alleging FLSA violations, the employers violated the NLRA, and that this violation had occurred within the limitations period. It also rejected the employers' contention that the opt-out provision placed it outside the scope of the prohibition against mandatory individual arbitration agreements.

- ***Brinker International Payroll Company L.P. and the Sawaya & Miller Law Firm,* 363 NLRB No. 54, 2015 WL 7769420 (12/1/15)**

An employee filed an FLSA and Colorado Wage Act collective and class action in federal court against the partnership that operated restaurants; the court granted the employer's motion to dismiss and compel arbitration. The law firm representing the employees filed the NLRB charge. In a brief opinion, the NLRB found that the employer violated Section 8(a)(1) by maintaining and enforcing an arbitration agreement that required employees, as a condition of employment, to waive their rights to pursue class of collective actions involving employment-related claims. It further found that maintaining this agreement violated Section 8(a)(1) because employees reasonably would believe that it barred or restricted their right to file unfair labor practices with the NLRB. It issued the typical cease and desist, policy rescission and posting orders, and further ordered the employer to notify the federal district court and relevant circuit court that it had rescinded the agreement, and that it no longer opposed the lawsuit on the basis of the arbitration agreement.

Member Miscimarra concurred in part and dissented in part. His dissent was based on his view that Section 8(a)(1) does not vest authority in the Board to dictate any particular procedures pertaining to the litigation of non-NLRA claims, nor does the Act render unlawful agreements in

which employees waive class-type treatment of non-NLRA claims. To the contrary, he opined that Section 9(a) protects the right of every employee as an "individual" to "present" and "adjust" grievances "at any time." This aspect of Section 9(a) is reinforced by Section 7 of the Act, which protects each employee's right to "refrain from" exercising the collective rights enumerated in Section 7. Thus, he believed that (i) the NLRA creates no substantive right for employees to insist on class-type treatment of non-NLRA claims; (ii) a class-waiver agreement pertaining to non-NLRA claims does not infringe on any NLRA rights or obligations, which has prompted the overwhelming majority of courts to reject the Board's position regarding class waiver agreements; and (iii) enforcement of a class-action waiver as part of an arbitration agreement is also warranted by the FAA. Although questions may arise regarding the enforceability of particular agreements that waive class or collective litigation of non-NLRA claims, he believes these questions are exclusively within the province of the court or other tribunal that, unlike the NLRB, has jurisdiction over such claims.

- ***Citigroup Technology, Inc. and Citicorp Banking Corporation (Parent), a Subsidiary of Citigroup, Inc. and Andrea Smith*, 363 NLRB No. 55, 2015 WL 7769422 (12/1/15)**

There were two issues in this case: (1) whether the employer violated Section 8(a)(1) by maintaining its employment arbitration policy, which required employees, as a condition of employment, to agree to resolve certain employment-related disputes exclusively through individual arbitration; and (2) whether the employer violated Section 8(a)(1) by enforcing the policy by opposing class treatment of the arbitration demand filed with the American Arbitration Association (AAA) by a former employee for claims brought under the FLSA. The NLRB had no problem answering the first question in the affirmative. However, because the employee in the underlying lawsuit had initiated the arbitration proceeding, and "considering the provisions and policies of the Federal Arbitration Act," the NLRB found that the employer did not unlawfully enforce the agreement in violation of Section 8(a)(1).

Member Miscimarra concurred in part and dissented in part, disagreeing with the NLRB's ruling on the first issue but agreeing with it on the second issue.

- ***Jack in the Box, Inc. and Dana Ocampo*, 2015 WL 7755555 (NLRB Div. of Judges) (12/1/15)**

The issues presented were whether the employer violated Section 8(a)(1) by soliciting employees to sign its arbitration agreement and by maintaining and/or enforcing the arbitration agreement (1) because it interfered with employees' Section 7 rights to engage in collective legal activity such as participating in collective and class litigation; (2) because it interfered with employees' access to the Board and its processes; and (3) because the confidentiality provision interfered with employees' Section 7 rights to discuss their wages, hours, and other terms and conditions of employment with others by restricting employees from publicly disclosing the terms of arbitration awards. The arbitration agreement contained the following provisions:

> This Agreement also applies to claims brought under state or federal laws including, but not limited to [specifically enumerated bases not including NLRA] or any other present or future laws; any claims for retaliatory discharge . . . and any other statutory and common law

> claims under any law of the United States or State or local agency are also covered by this Agreement. . . .
>
> Nothing in this Agreement precludes Employee from filing a charge or from participating in an administrative investigation of a charge before an appropriate government agency, including the Equal Employment Opportunity Commission or similar state Agency.
>
> The following claims or disputes are not covered by this Agreement: claims for unemployment insurance benefits; claims for workman's compensation benefits; claims seeking only monetary recovery where the total amount of the claim does not exceed $15,000; claims that in the absence of This Agreement have no basis in law or could not be filed in court; or claims both Employee and Company agree are not covered by this Agreement.

The ALJ did not believe the carve-out language was sufficiently broad to save the agreement. She followed NLRB precedent in finding that the agreement was not lawful.

III. HOW THE NLRB HAS FARED RECENTLY IN THE COURTS

- ***Fowler v. CarMax, Inc.*, 2015 WL 352045 (California appellate decision, 1/28/15, unpublished)**

Among the many issues addressed by the court was the interplay of the FAA and the NLRA. It relied on state precedent, *Iskanian v. CLS Transportation Los Angeles, LLC,* 59 Cal.4th 348 (2014), which had considered *Horton I* and *Horton II,* and concluded that in light of the FAA's liberal federal policy favoring arbitration, the NLRA did not represent a contrary congressional command overriding the FAA's mandate. Therefore, the NLRA did not bar enforcement of the arbitration agreement and which prohibited class arbitration.

- ***Brown v. Citicorp Credit Services, Inc.*, WL 1401604 (D Idaho, 3/25/15)**

The employer asked the court to reconsider its earlier denial of the motion to compel individual arbitration of FLSA claims. The employer had appealed the court's decision to the Ninth Circuit. While the appeal was being briefed, the Ninth Circuit issued its opinion in *Richards v. Ernst & Young*, 744 F.3d 1072 (9th Cir. 2013). The employer then filed a motion to reconsider and asked the Ninth Circuit to remand the appeal for the limited purpose of resolving its motion to reconsider. The Ninth Circuit did so, for the limited purpose of resolving the employer's motion for reconsideration. On remand, the district court granted the employer's motion.

The district court observed that about ten months after it issued its earlier decision, the Ninth Circuit issued *Richards*, discussed above. In that case, the Ninth Circuit expressly declined to evaluate *Horton I* because the appellant had failed to properly raise the issue on appeal. But in dicta, contained in a footnote, the Ninth Circuit signaled that this district court's opinion was wrongly decided. The Ninth Circuit began by noting that "the two courts of appeals, and the overwhelming majority of the district courts to have considered the issue have determined that they should not defer to the NLRB's decision in *Horton I* on the ground that it conflicts with the explicit pronouncements of the Supreme Court concerning the policies undergirding the Federal Arbitration Act ("FAA")." *Id.*

at n. 3. The Ninth Circuit went on to cite this district court's opinion and to comment that it "fail[ed] to consider countervailing policies or deference with respect to the FAA [Federal Arbitration Act]." *Id.*

Moreover, just a few days before the Ninth Circuit issued *Richards*, the Fifth Circuit reversed *Horton I* and rejected its analysis. See *Horton II*. The Fifth Circuit thus joined the Second and Eighth Circuits in rejecting the NLRB's reasoning in *Horton I*. See *Sutherland v. Ernst & Young LLP*, 726 F.3d 290, 297 n. 8 (2nd Cir. 2013*); Owen v. Bristol Care, Inc.*, 702 F.3d 1050, 1053–54 (8th Cir. 2013). According to the district court in *Brown*, "There are no Circuit decisions supporting the NLRB." Given these circumstances, the district court granted the employer's motion to reconsider and granted its motion to compel arbitration.

- ***Patterson v. Raymours Furniture Co., Inc.*, 96 F.Supp.3d 71 (SD NY, 3/27/15)**

A former employee brought this putative collective and class action against her former employer for alleged violations of the FLSA and the New York Labor Law. The employer moved to compel arbitration. The court held that the arbitration provision, which was in a revised employee handbook, was enforceable. It went on to find that the claims were within the scope of the arbitration agreement, and that the class action waiver was enforceable.

The arbitration provision carved out the employee's rights under the NLRA ("This Program also does not: ... waive any rights you might have under the National Labor Relations Act ("NLRA") nor does it exclude the National Labor Relations Board from jurisdiction over disputes covered by the NLRA. Thus, the Program does not prevent you from filing an unfair labor practice charge under the NLRA....").

Further, the arbitration provision stated that "notwithstanding any other provision of this Program, if you ... elect to arbitrate a Claim, ... you ... will [not] have the right ... to ... obtain relief from a class action...." Thus, to the extent the arbitration provision could be read to include the right to collective activity outside of the context of filing an unfair labor practice claim with the NLRB, its class action waiver overrode the language on which the employee was relying.

Lastly, the court rejected the employee's argument that the class action waiver violated her Section 7 rights, citing the NLRB's decisions in *Horton I* and *Murphy Oil*. In turn, the court pointed to *Horton II* and the Second Circuit's decision in *Sutherland*. The court found no reason to not apply circuit precedent. Therefore, it granted the employer's motion to compel arbitration on an individual basis only.

- ***Holden v. Raleigh Restaurant Concepts, Inc.*, 2015 WL 6672423 (ED NC, 4/3/15)**

The exotic dancer plaintiff filed this putative collective and class action against the defendant alleging violations of the FLSA and state wage and hour law. The court had previously granted the defendant's motion to stay and compel arbitration, rejecting the plaintiff's argument that the arbitration in the "entertainment lease" she signed was unenforceable because it was unconscionable, tripped her of substantive FLSA rights, and that the defendant had breached its covenant of good faith. The court, at the same time, denied the defendant's motion to dismiss the class and collective action allegations, based on its conclusion that since class and collective action waivers were in the

arbitration agreement, it was an issue to be decided by the arbitrator. The court also ordered the parties to submit status reports about the arbitration proceedings.

The plaintiff's status report stated she had not filed an arbitration demand but rather filed an NLRB charge, and that she would file her arbitration demand once the NLRB had completed its proceedings. The court found that she was ignoring its earlier ruling and ordered her to show cause why she should not be found in civil contempt. In response, the plaintiff stated that she had filed a demand with the American Arbitration Association ("AAA"), but that the filing fee was $3,350 for a class and collective action so she had paid $200 toward it and had asked the defendant to pay the balance (without response). The defendant replied that her filing a demand for arbitration without conferring to attempt to select a neutral arbitrator violated the arbitration agreement, and that is should not have to pay the balance of the fee because the plaintiff had failed to first confer with it. Thus, the defendant asked the court to order the plaintiff to withdraw her AAA proceeding and confer with the defendant to select a single neutral arbitrator. The court found that the plaintiff had satisfied her burden to show why she should not be held in civil contempt, but agreed with the defendant that the plaintiff should have abided by the arbitration agreement. It therefore ordered her to withdraw her demand for arbitration and confer with the defendant to try to select a single neutral arbitrator.

The plaintiff then asked the court to reconsider its order based upon further briefing of the procedural details of the arbitration agreement. The court allowed the motion and construed the arbitration agreement to be ambiguous. Thus, the court held that the parties should first attempt to mutually agree on the selection of an AAA arbitrator. Failing that, the parties could apply to the AAA to select an arbitrator for them. The defendant was required to pay for any fees charged by the AAA and the arbitrator that the plaintiff would not have had to pay in a court proceeding.

- ***Marenco v. DirecTV, LLC*, 233 Cal.App.4th 1409 (2/5/15, review denied 5/13/15)**

An employee brought a putative class action against the employer for failure to pay full wages in violation of the state Unfair Competition Law (UCL) and the state's Labor Code. The employer petitioned to compel arbitration as the successor to an arbitration agreement between the employee and his previous employer. DirectTV submitted evidence that during its acquisition of the previous employer, it had assumed all of the assets, debts, rights, responsibilities, liabilities and obligations, including "all the rights and obligations arising from [the previous employer's] employee relationships."

After initially granting the employer's motion to compel, the trial court granted the employee's request for a rehearing. Before the rehearing date, the United States Supreme Court issued its decision in *Concepcion*, which held that the FAA preempted the California rule of unconscionability set forth in *Discover Bank v. Superior Court* (2005) 36 Cal.4th 148 (2005).

On rehearing the motion to compel, the trial court ordered arbitration of the employee's individual claims. The court found that (1) as a successor, DirecTV had standing to enforce the arbitration agreement; (2) the agreement's class action waiver is not unconscionable under state law because, according to *Concepcion*, the FAA preempts the *Discover Bank* rule of unconscionability; and (3) the agreement's prohibition of PAGA representative actions does not violate the NLRA. The employee appealed.

The court first addressed whether the order could be appealed, noting that under state law, an order granting a motion to compel arbitration is generally not appealable (although a denying a motion to compel is). The employee argued the "death knell" doctrine, which applies where an order effectively terminates class claims and preserves only the plaintiff's individual claims. Because that doctrine only applies if there is a final order dismissing the class claims with prejudice, and there was nothing before the appellate court that would show this was the case, the doctrine was not applicable. However, the appellate court exercised its discretion to treat the appeal as a petition for writ of mandate so that it could address the question of DirecTV's standing as a successor in interest, an issue of first impression that would otherwise evade appellate review.

The appellate court noted state precedent establishing that nonsignatory defendants could enforce arbitration agreements where there is sufficient identity of parties, e.g., where the nonsignatory is the agent for a party to the arbitration agreement, the nonsignatory is a third party beneficiary of the agreement, or equitable estoppel applies.

The employee argued that the declaration was insufficient; DirecTV argued that the requirements of a merger under state law were met. The court observed that by suing DirecTV for wages, the employee acknowledged the existence of an employment relationship with the entity that survived the merger, and that entity had assuming all of the disappearing corporation's rights and liabilities, including obligations owed to the disappearing corporation's employees. Thus, DirecTV was entitled to invoke the arbitration provision. The court commented that it would reach the same conclusion even if the predecessor corporation did not disappear on the date of the merger; the record supported a reasonable inference that the employees who continued to work after the merger with no change in the original terms of employment implicitly accepted DirecTV's decision to maintain their existing terms of employment, including the arbitration agreement.

The court followed the binding precedent established by *Iskanian*, and found that the FAA preempted prior state law regarding the enforceability of class action waivers. The complaint at that point did not indicate that the employee intended to bring a representative PAGA claim. The court noted that while *Iskanian* held that PAGA waivers are contrary to public policy and unenforceable, it had also held that the NLRA does not prohibit class action waivers in employment arbitration agreements.

The judgment staying the class claims and compelling arbitration of the employee's individual claims was affirmed.

- ***Nanavati v. Adecco USA, Inc.*, 99 F.Supp.3d 1072 (ND Cal, 4/13/15)**

This case involved alleged violations of California state laws including overtime, meal breaks, time records, and waiting time penalties. The employer filed a motion to compel arbitration that had been signed as part of the "on-boarding" of the plaintiff. The agreement provided that "the Company and Employee agree that any and all disputes, claims or controversies arising out of or relating to this Agreement, the employment relationship between the parties, or the termination of the employment relationship, shall be resolved by binding arbitration...." In bold and capitalized font, the first paragraph concluded: "By signing this agreement, the parties hereby waive their right to have any dispute, claim or controversy decided by a judge or jury in a court." Paragraphs 7 and 8 of the Agreement further provided (likewise in bold and capitalized font):

> "7. By signing this agreement, the parties agree that each may bring claims against the other only in their individual capacity, and not as a plaintiff or class member in any purported class and/or collective proceeding.
>
> 8. Furthermore, by signing this agreement, the parties agree that each may bring claims against the other only in their individual capacity and not in any representative proceeding under any private attorney general statute ("PAGA claim"), unless applicable law requires otherwise. If the preceding sentence is determined to be unenforceable, then the PAGA claim shall be litigated in a civil court of competent jurisdiction and all remaining claims will proceed in arbitration."

Employees could opt out within 30 days of signing the arbitration agreement. In order to do so, an employee had to first request a form from the human resources department via an email address that was provided in the agreement. The same paragraph clearly stated that "[a]n Employee who opts out as provided in this paragraph will not be subject to any adverse employment action as a consequence of that decision...." The agreement also stated that the failure to timely submit a completed opt out form constituted acceptance of the arbitration agreement.

The evidence showed that the plaintiff had reviewed and electronically signed the agreement, acknowledged agreement to the employer's electronic signature agreement, and acknowledged receipt and acceptance of the terms of the "on-boarding" forms. The employee did not send an email requesting the form that would have allowed him to opt out of the arbitration agreement, and the employer did not have a signed opt out form from him.

After the employer moved to compel arbitration, the plaintiff filed a complaint with the NLRB alleging unfair labor practices, including the promulgation of an allegedly unlawful arbitration agreement. At the hearing on the motion to compel, the plaintiff indicated that the NRLB had investigated the allegations and communicated its intent to file a complaint against the employer in the near future. The plaintiff orally requested the court to stay the action pending resolution of the NLRB's complaint.

Here, the employee did not challenge the authenticity of his signature or the prima facie validity of the arbitration agreement, so he had already conceded that he was bound by a valid agreement. Therefore, the detailed declaration submitted by the employer about the electronic agreement easily satisfied its "low burden" to authenticate the signature and establish the existence of a valid arbitration agreement.

Further, all of the plaintiff's claims fell within the scope of the agreement, since the arose out of the employment relationship and its termination.

The plaintiff relied on *Horton I* and *Murphy Oil* to advance his argument that the agreement was invalid and unenforceable under Section 7. The court, however, observed that the majority of federal courts that considered *Horton I* had rejected its reasoning, citing *Horton II*, *Richards*, and *Brown*, It noted that even the California Supreme Court rejected *Horton I* when faced with a class waiver provision in an arbitration agreement that was entered free of coercion. *Iskanian v. CLS Transp. Los Angeles, LLC*, 59 Cal.4th 348, 367–74, 173 Cal.Rptr.3d 289, 327 P.3d 129 (2014). The NLRB nevertheless reaffirmed *Horton I* in *Murphy Oil*.

The court noted that although the Ninth Circuit has never taken a concrete stance on *Horton I*, in *Johnmohammadi*, a unanimous panel of the Ninth Circuit rejected arguments against enforcing a class action waiver in an employment agreement similar to the ones plaintiff was advancing here. Without deciding whether the filing of a class action to enforce labor laws is "concerted activity" within the meaning of the NLRA, the Ninth Circuit had determined that the plaintiff failed to show that the arbitration agreement she signed with Bloomingdale's "interfered with, restrained, or coerced her in the exercise of her right to file a class action." Distinguishing *Horton I* on the ground that it concerned a mandatory agreement to arbitrate, the *Johnmohammadi* court found dispositive the fact that Bloomingdale's did not require the plaintiff to accept a class action waiver as a condition of employment, and that nothing had stopped her from opting out of the agreement. In the absence of any coercion influencing the decision, the Ninth Circuit had found no unlawful restraint or interference in merely presenting an employee with a choice to arbitrate on an individual basis or resolve future employment disputes in court.

The plaintiff tried to distinguish *Johnmohammadi* on two grounds: first, that it predated the NLRB's subsequent reaffirmation of *Horton I* in *Murphy Oil*, and second that unlike in *Johnmohammadi*, the employer here did exercise coercion to unlawfully influence plaintiff's decision to accede to the arbitration agreement. The court was not persuaded by either of these arguments. *Murphy Oil*, like *Horton I*, concerned a mandatory arbitration agreement with no opportunity to opt out. Therefore, to the extent *Murphy Oil* remained viable given "the round judicial rejection" of *Horton I*, it was inapplicable to the Ninth Circuit's reasoning in *Johnmohammadi*, which focused on a lack of coercion in the employee's agreement (through failure to opt out) to arbitrate. Indeed, as the employer in this case noted, the arbitration agreement and class action waiver in *Johnmohammadi* were upheld by an administrative law judge in collateral NLRB proceedings for precisely that reason.

The court went on to find that this case was not factually distinguishable from *Johnmohammadi*. The "on-boarding" process was no different from the process described in *Johnmohammadi*. While the plaintiff was not given the opt out form when he signed the agreement, merely being required to request the form by email did not force him to make the decision to opt out "while sitting in front of the computer and going through the entire packet of orientation materials," since nothing precluded him from copying the email address and requesting a form later. Nor did this court find persuasive the plaintiff's assertion that the need to request an opt out form from the human resources department operated as a deterrent to opting out. The plaintiff did not testify that he felt deterred by this process. Further, because the opt out provision specifically assured that opting out would not carry any adverse employment consequences, it would be unreasonable to simply presume that the plaintiff was coerced into not opting out. The more reasonable conclusion is that the plaintiff made a "fully informed and voluntary decision" to accede to the agreement.

In sum, the court believed that *Johnmohammadi* squarely controlled the outcome in this case. Therefore, the class action waiver is not an unlawful restraint of the plaintiff's right to engage in concerted activity and was enforceable according to the terms of the agreement.

- ***Sullivan v. PJ United, Inc.*, 2015 WL 6599698 (ND Ala, 6/29/15)**

The plaintiff originally filed this case on July 9, 2013 as a collective action under the FLSA against PJ United and an individual defendant. On July 17, 2013, the defendants moved to stay trial

of the action pending arbitration on a single-claimant basis, citing a collective action waiver provision in the arbitration agreement. The plaintiff agreed to arbitrate, but only on a collective action basis. The court ultimately determined that the interpretation of the collective action waiver provision is a question for the arbitrator. The court therefore granted the motion to stay the action, but denied the motion for an order directing arbitration to proceed on a single-claimant basis.

Defendants filed their arbitration demand with the American Arbitration Association (AAA). The parties selected an arbitrator and agreed that the arbitration proceeding would be held in abeyance pending a decision by the NLRB on the FLSA claims.

The employee filed his unfair labor practice charge with the NLRB on October 9, 2013, specifically alleging that defendants' collective action waiver violated the rights of employees conferred by Section 7 to engage in concerted activity to address the terms and conditions of employment. On June 6, 2014, the ALJ determined that the collective action waiver violated the NLRA. At the time the court made the June 2015 ruling, the ALJ's decision had not yet been accepted or rejected by the NLRB, and the defendants had appealed his decision with the NLRB.

Following the ALJ's decision, the arbitrator lifted the stay on arbitration. After briefing by both parties, the arbitrator issued the interim order at the heart of the current dispute on December 12, 2014. The arbitrator identified the relevant issue as whether the arbitration could proceed as a collective action or would be limited to consideration of the plaintiff's individual claim(s) only. The arbitrator found that, based on the prior ALJ decision in the case that enforcing a waiver of collective action on FLSA claims was a violation of law, that the prohibition in the arbitration agreement was illegal and must be excised. He also noted that the statement in the employer's Dispute Resolution Program Booklet, which stated that in arbitration an individual's "rights are protected," would be violated if the arbitrator enforced the collective action waiver provision, because the NLRB determined that employees had a right to collective action on FLSA claims. Therefore, the arbitrator determined that the arbitration would be allowed to proceed as a collective action.

Defendants then brought this action to vacate the arbitration award and to order arbitration on a single-claimant basis.

The court noted that the FAA has exceedingly narrow grounds upon which an award can be vacated, modified, or corrected. Section 11 of the AAA allows for modification or correction of arbitration awards where there has been miscalculation of figures or an award on a matter not submitted for arbitration. 9 U.S.C. § 11. Section 10 allows for vacatur of an arbitration award that has been "procured by corruption, fraud, or undue means;" involved partiality or corruption by arbitrators; involved arbitrator "misbehavior by which the rights of any party have been prejudiced;" or most relevantly "where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made." 9 U.S.C. § 10. Defendants argued that the arbitrator in this case exceeded his powers by ordering them to arbitrate on a class basis.

The arbitrator in this case had read the agreement, under his interpretation of the applicable law, as allowing for class arbitration, and cited specific language from the Dispute Resolution Program Booklet in doing so. The court rejected the defendants' argument that the court should consider whether the arbitrator improperly understood and applied the relevant law. The court

viewed the only question for it to decide was whether the arbitrator (even arguably) interpreted the parties' contract, not whether he got its meaning right or wrong, or whether his application of the relevant law was incorrect. The court found that the arbitrator was at the very least arguably interpreting the parties' contract when he determined that class arbitration was permitted.

Therefore, the defendants' motion to vacate the interim arbitration award was denied.

- ***Nanavati v. Adecco USA, Inc.*, 2015 WL 4035072 (ND Cal, 6/30/15)**

The court refused to certify for interlocutory appeal, pursuant to 28 USC 1292(b), its earlier order granting the employer's motion to compel arbitration. The employee was seeking to appeal the court's determination that provisions waiving class action and representation action procedures in the binding arbitration agreement were valid and enforceable.

The employee argued that the rejection of his argument that the NLRA precluded class action waivers in employment contracts implicates a controlling question of law upon which there is substantial ground for a difference of opinion, i.e., whether federal courts should adopt the NLRB's conclusions in *Horton* and *Murphy Oil*. While the court agreed that "in the abstract" it might be a controlling question of law since the Ninth Circuit had not directly addressed the applicability of these two cases, the lower court's order did not rest on the legal question of whether Section 7 of the NLRA limited the reach of the FAA, but rather on the factually indistinguishable holding of the Ninth Circuit's controlling opinion in *Johnmohammadi v. Bloomingdale's, Inc.*, 755 F.3d 1072 (9th Cir. 2014). The plaintiff speculated that the Ninth Circuit would find the facts of the case distinguishable and choose to confront the legal question of the limitations that the NLRA might impose on private arbitration agreements.

The court went on to note that "every court" to have considered *Horton* and *Murphy Oil* has rejected the reasoning in those opinions, particularly with respect to non-coercive arbitration and waiver provisions such as those at issue in this case.

- ***Hobson v. Murphy Oil USA, Inc.*, 2015 WL 4111661 (ND Ala, 7/8/15)(appeal filed by plaintiff to the 11th Circuit on 8/5/15)**

Plaintiffs had filed a collective action for unpaid overtime under the FLSA. The employer moved to compel arbitration and dismiss the collective action allegations. On September 18, 2012, the district court granted the motion, dismissed the collective action allegations with prejudice, ordered the plaintiffs to submit their individual claims to arbitration, and stayed the federal case pending resolution through arbitration. The court noted that the case could be reopened, on either party's motion, for an appropriate purpose such as dismissal following settlement, entry of judgment, vacatur, or modification of an arbitrator's award.

Almost two and a half years later, in February 2015, plaintiffs moved for reconsideration of the order. The court denied the motion. The employer noted that the plaintiffs had failed to submit their claims to arbitration as required by the earlier court's order. The employer thus asked the court to dismiss the plaintiffs' claims in their entirety, and the court directed the plaintiffs to show cause why it should not do so.

Plaintiffs argued that they behaved reasonably in waiting to arbitrate because one of the plaintiffs had filed an unfair labor practice with the NLRB during January 2011, while the motion to compel arbitration was pending before the court. In the charge, this plaintiff asserted that the arbitration agreement violated Section 8(a)(1) by maintaining and enforcing a mandatory arbitration agreement that prohibited employees from engaging in protected, concerted activities, and by leading employees to reasonably believe that they were prohibited from filing unfair labor practice charges with the NLRB. The NLRB ruled in her favor on October 28, 2014, finding that the employer violated Section 8(a)(1) "by requiring its employees to agree to resolve all employment-related claims through individual arbitration, and by taking steps to enforce the unlawful agreements in Federal district court when [Hobson] and three other employees filed a collective claim against [Murphy Oil] under the Fair Labor Standards Act." The NLRB ordered the employer to rescind its arbitration agreement,

> "or revise it in all of its forms to make clear to employees that the Agreement and Waiver does not constitute a waiver of their right to maintain employment-related joint, class, or collective actions in all forums, and that it does not restrict employees' rights to file charges with the National Labor Relations Board."

The employer was also ordered to notify all current and former employees, and all applicants for employment, who were required to sign the arbitration agreement, that the agreement had been rescinded. Further, the employer was ordered to

> [n]otify the United States District Court for the Northern District of Alabama that it has rescinded or revised the mandatory arbitration agreements upon which it based its motion to dismiss Sheila Hobson's and her co-plaintiffs' FLSA collective action and to compel arbitration of their claims, and inform the court that it no longer opposes the plaintiffs' FLSA action on the basis of those agreements.

The employer then filed a petition for review of the NLRB's decision with the Fifth Circuit on November 7, 2014; that review was still pending when the briefing was filed on the instant motion.

Plaintiffs argued that until the NLRB issued its decision in October 2014, the question of whether, and to what extent, the employer could enforce an individual arbitration agreement against its employees was litigated through two parallel but closely related proceedings: one before this court and one before the NLRB, and that had plaintiffs filed for individual arbitration during this period [between this court's September 18, 2012 order compelling arbitration and the NLRB's October 28, 2014 ruling], they would have effectively mooted their NLRB proceeding - at least with respect to their own claims - and deprived themselves of the ability to seek redress for the unfair labor practices they alleged.

The court observed that only one plaintiff had filed with the NLRB; thus, the others could not assert any prejudice from being unable to seek redress before the NLRB. The court then called their assertion that a federal court order is without effect if there is a related proceeding pending before the NLRB "outlandish." It noted that if they were really concerned that their rights would be irreparably harmed by the requirement to arbitrate their individual claims, they could have requested

either a stay of the arbitration order pending the outcome of the NLRB proceedings or permission to seek an interlocutory appeal. They had done neither and instead ignored the court's order.

The plaintiffs also argued that even if their decision to wait to initiate arbitration proceedings was not reasonable, dismissal of their claims with prejudice was too harsh. The court disagreed. Although there was no Eleventh Circuit decision that directly supported the outcome, other circuits had reached that conclusion. The court cited *James v. McDonald's Corp.*, 417 F.3d 672 (7th Cir. 2005)(court order to submit claim to arbitration; plaintiff failed to do so; plaintiff filed a request for reconsideration approximately one year later or, in the alternative, requested that her case be dismissed so she could appeal; the court denied the motion as untimely; the circuit court affirmed); *Renobato v. Compass Bank Corp.*, 480 F. App'x 764, 766–67 (5th Cir. 2012) (dismissal not an abuse of discretion when plaintiff did not initiate arbitration proceedings for three years, even after being given a second chance to do so by the district court); *Salt Lick Bancorp v. F.D.I.C.*, 187 F. App'x 428, 446–47 (6th Cir. 2006) (dismissal not an abuse of discretion when plaintiff did not initiate arbitration proceedings for two and a half years, despite plaintiff's alleged inability to retain counsel and obtain documents from a third party); *Windward Agency, Inc. v. Cologne Life Reinsurance Co.*, 123 F. App'x 481, 483–84 (3rd Cir. 2005) (dismissal not an abuse of discretion after a six-year delay in initiating arbitration).

The court also rejected plaintiffs' argument that the issue of delay was a matter for the arbitrator to decide rather than the court.

- ***Levison v. Mastec, Inc.*, 2015 WL 5021645 (MD Fla., 8/25/15)(appeal filed with the 11th Circuit on 8/26/15)**

This was a collective action under the FLSA. The amended complaint added allegations that DirecTV wrongfully established a "fissured employment scheme" by classifying the plaintiffs as employees of MasTec, and that MasTec wrongfully caused the employees to sign arbitration agreements containing collective and class action waivers. The arbitration agreement (and the employee handbook that preceded it and contained substantially the same provisions) allowed the employee to opt out of arbitration within 30 days after signing the agreement.

Citing its earlier decision in *De Oliveira v. Citicorp N. Amer., Inc.*, 2012 WL 1831230 (MD Fla., 5/18/12), and noting *Cordero*, discussed above, the court felt it was bound by Eleventh Circuit precedent in *Caley v. Gulfstream Aerospace Corp.*, 428 F.3d 1359 (11th Cir. 2005), which enforced a collective action waiver in compelling arbitration of an individual's FLSA overtime claim. It further noted that in *Walthour v. Chipio Windshield Repair, LLC*, 745 F.3d 1326 (11th Cir. 2014), the court concluded that enforcement of collective action waivers in arbitration agreements is not inconsistent with the FLSA and rejected the reasoning of *Horton I*.

The court therefore granted the motion to compel arbitration, stayed the federal case, and ordered the parties to arbitrate the case pursuant to the terms of the arbitration agreement.

- ***Lewis v. Epic Systems Corporation*, 2015 WL 5330300 (WD Wis., 9/11/15)**

The same court had considered a similar waiver in an arbitration agreement in *Herrington v. Waterstone Mortgage Corp.* In that case, the agreement stated that "[s]uch arbitration may not be

joined with or join or include any claims by any persons not party to this Agreement." In *Herrington*, this court had concluded that the waiver was inconsistent with *Horton I.* The court continued to believe that the NLRB's reasoning was straightforward and persuasive, and that it was "reasonably defensible" and therefore controlling. Indeed, the employer in *Herrington* had subsequently asked this court to reconsider its ruling in light of *Horton II*, and the court had declined to do so. The court didn't believe that the employer in *Lewis* had distinguished its collective action waiver from the waiver considered in *Herrington*. Therefore, while the court acknowledged that the weight of authority favored the employer's view, and while it might be that the ultimately the Supreme Court or the Seventh Circuit would agree with the employer, the court would continue to follow the NLRB's *Horton I* decision.

- ***Tallman v. Eighth Jud. Dist. Ct. (CPS Security (USA), Inc.),* 359 P.3d 113 (Supreme Court of Nevada, 9/24/15)**

Former employees brought separate actions against employer asserting violations of the FLSA and Nevada state law. The lower state court entered orders compelling arbitration and denying their motions for class certification. The plaintiffs then sought writs of mandamus. There was both a short-form agreement and long-form agreement, both of which plaintiffs signed. The long form agreement expressly stipulated that plaintiffs' employment involved commerce, and it contained an acknowledgement to consult an attorney and provided a 30-day opt-out period.

The state Supreme Court held that: (1) the employer's failure to sign its own long-form arbitration agreement did not invalidate the agreement; (2) the employer's individual agents were entitled to enforce the arbitration agreement; (3) the FAA prohibited a state court from invalidating a class action arbitration waiver; (4) the NLRA did not invalidate the agreement's class action waiver; and (5) the employer did not waive its right to arbitrate class claims under state law by removing a former employee's action to federal court based on claims brought under the FLSA.

- ***Murphy Oil USA, Inc. v. NLRB*, 2015 WL 6457613 (5th Cir., 10/26/15)**

Background: In June 2010, Hobson and three other employees filed a collective action against the employer in the United States District Court for the Northern District of Alabama alleging violations of the FLSA. The employer moved to dismiss the collective action and compel individual arbitration pursuant to the arbitration agreement. The employees opposed the motion, contending that the FLSA prevented enforcement of the arbitration agreement because that statute grants a substantive right to collective action that cannot be waived. The employees also argued that the arbitration agreement interfered with their Section 7 right to engage protected concerted activity.

While the employer's motion to dismiss was pending, Hobson filed an unfair labor charge with the NLRB in January 2011 based on the claim that the arbitration agreement interfered with her Section 7 rights. The General Counsel for the NLRB issued a complaint and notice of hearing to the employer in March 2011.

In a separate case of first impression, the NLRB issued *Horton I* in January 2012. Following the NLRB's decision in *Horton I*, the employer in this case implemented a revised arbitration agreement for all employees hired after March 2012. The revision provided that "[N]othing in this Agreement precludes [employees] ... from participating in proceedings to adjudicate unfair labor

practice[ ] charges before the [Board]." Because Hobson and the other employees involved in the Alabama lawsuit were hired before March 2012, the revision did not apply to them.

In September 2012, the Alabama district court stayed the FLSA collective action and compelled the employees to submit their claims to arbitration pursuant to the arbitration agreement. One month later, the NLRB General Counsel amended the complaint before the NLRB stemming from Hobson's charge to allege that the employer's motion to dismiss and compel arbitration in the Alabama lawsuit violated Section 8(a)(1) of the NLRA.

Meanwhile, the petition for review of the NLRB's *Horton I* decision in was making its way to this same court. In December 2013, the court rejected the NLRB's analysis of arbitration agreements in *Horton II*. While *Horton II* meant that an employer does not engage in unfair labor practices by maintaining and enforcing an arbitration agreement prohibiting employee class or collective actions and requiring employment-related claims to be resolved through individual arbitration, the court nevertheless enforced the NLRB's order requiring the employer to clarify the agreement, which the court thought might be "misconstrued" as prohibiting employees from filing an unfair labor practice charge, which would violate Section 8(a)(1). The NLRB petitioned for rehearing *en banc*, which was denied without a poll in April 2014.

The Board's decision as to Murphy Oil in the instant case was issued in October 2014, ten months after the *Horton II* decision and six months after rehearing was denied. 361 NLRB No. 72, 2014 WL 5465454 (10/28/14). The NLRB, unpersuaded by the court's analysis, reaffirmed its *Horton I* decision. It held that Murphy Oil violated Section 8(a)(1) by "requiring its employees to agree to resolve all employment-related claims through individual arbitration, and by taking steps to enforce the unlawful agreements in [f]ederal district court." The NLRB also held that both the original and the revised arbitration agreements were unlawful because employees would reasonably construe them to prohibit filing NLRB charges.

The decision: The employer, aware that the Fifth Circuit had already held to the contrary, used the broad venue rights governing the review of NLRB orders to file its petition for review with the Fifth Circuit. The NLRB, also aware, moved for *en banc* review in order to allow arguments that the prior decision should be overturned. Having failed in that motion and having the case instead heard by a three-judge panel, the court adhered to its prior ruling. It therefore granted the employer's petition, and held that the employer did not commit unfair labor practices by requiring employees to sign its arbitration agreement or seeking to enforce that agreement in federal district court.

The court denied the employer's petition insofar as the NLRB's order directed the employer to clarify language in its arbitration agreement applicable to employees hired prior to March 2012 to ensure they understand they are not barred from filing charges with the NLRB.

In greater detail, the Fifth Circuit's decision in this case held that:

(1) the employer waived its claims that the employee's unfair labor practice charge was untimely and that NLRB was collaterally estopped from considering whether it was lawful to enforce the arbitration agreement;

(2) the employer did not commit an unfair labor practice by requiring employees to sign arbitration agreements;

(3) the NLRB's refusal to follow the Court of Appeals' decision did not warrant a finding of contempt;

(4) the employer's earlier arbitration agreement *did* constitute an unfair labor practice;

(5) the employer's revised arbitration agreement did *not* constitute an unfair labor practice; and

(6) the employer did not engage in an unfair labor practice by filing a motion to dismiss and compel arbitration in the employees' collective action.

The court specifically stated that it did not hold that an express statement must be made that an employee's right to file NLRB charges remains intact before an employment arbitration agreement is lawful. Such a provision would assist, though, if incompatible or confusing language appears in the contract.

IV. EMPLOYERS WHO ARE COVERED BY THE NLRB'S RULINGS

The Board has statutory jurisdiction over private sector employers whose activity in interstate commerce exceeds a minimal level. As a practical matter, the Board's jurisdiction is very broad and covers the great majority of non-government employers with a workplace in the United States, including non-profits, employee-owned businesses, labor organizations, non-union businesses, and businesses in states with "Right to Work" laws.

Retailers

Employers in retail businesses fall under the Board's jurisdiction if they have a gross annual volume of business of $500,000 or more. This includes employers in the amusement industry, apartment houses and condominiums, cemeteries, casinos, home construction, hotels and motels, restaurants and private clubs, and taxi services. Shopping centers and office buildings have a lower threshold of $100,000 per year.

Non-retailers

For non-retailers, jurisdiction is based on the amount of goods sold or services provided by the employer out of state ("outflow") or purchased by the employer from out of state ("inflow"). Outflow or inflow can be direct or 'indirect', passing through a third company such as a supplier. The Board takes jurisdiction when annual inflow or outflow is at least $50,000.

Special categories

Channels of interstate commerce: For businesses providing essential links in the transportation of goods or passengers, including trucking and shipping companies, private

bus companies, warehouses and packing houses, the minimum is $50,000 in gross annual volume.

Health care and child care institutions: Hospitals, medical and dental offices, social services organizations, child care centers and residential care centers with a gross annual volume of at least $250,000 are under NLRB jurisdiction; for nursing homes and visiting nurses associations, the minimum is $100,000.

Law firms and legal service organizations: The minimum is $250,000 in gross annual volume.

Cultural and educational centers: For private and non-profit colleges, universities, and other schools, art museums and symphony orchestras, the annual minimum is $1 million.

Federal contractors: Private contractors who work for the federal government are under NLRB jurisdiction. In addition, all federal contractors are required by the Department of Labor to post a Notice of Employee Rights under the NLRA.

Religious organizations: The Board will not assert jurisdiction over employees of a religious organization who are involved in effectuating the religious purpose of the organization, such as teachers in church-operated schools. The Board has asserted jurisdiction over employees who work in the operations of a religious organization that did not have a religious character, such as a health care institution.

Indian tribes: The Board asserts jurisdiction over the commercial enterprises owned and operated by Indian tribes, even if they are located on a tribal reservation. But the Board does not assert jurisdiction over tribal enterprises that carry out traditional tribal or governmental functions.

The following employers are excluded from NLRB jurisdiction by statute or regulation:

- Federal, state and local governments, including public schools, libraries, and parks, Federal Reserve banks, and wholly-owned government corporations.

- Employers who employ only agricultural laborers, those engaged in farming operations that cultivate or harvest agricultural commodities or prepare commodities for delivery.

- Employers subject to the Railway Labor Act, such as interstate railroads and airlines.

The FAA requires involvement in commerce.

Bernhardt v. Polygraphic Co. of America, Inc., 350 U.S. 198 (1956), held that section 3 of the FAA, which concerns stays pending arbitration, applies only to arbitration agreements governed by section 2, agreements in maritime transactions, and transactions in interstate commerce. Since the contract before the Court did not involve a maritime transaction nor interstate commerce, the FAA was inapplicable by its own terms.

Section 1 of the FAA specifically excludes from the Act's coverage "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." The courts have consistently construed this provision to exclude from the FAA only employment contracts of workers engaged in the actual movement of goods across state lines or work closely related to that movement. *See, e.g., Dickstein v. duPont*, 443 F.2d 783, 785 (1st Cir. 1971)("Courts have generally limited this exception to employees . . . involved in, or closely related to, the actual movement of goods in interstate commerce."); *Signal-Stat Corp. v. United Elec. Radio & Mach. Workers Local 475*, 235 F.2d 298, 301-03 (2d Cir. 1956), *cert. denied*, 354 U.S. 911 (1957); *Tenney Eng'g, Inc. v. United Elec. Radio & Mach. Workers Local 437*, 207 F.2d 450, 452-53 (3d Cir. 1953)(holding that the exclusion applies only to those "classes of workers engaged directly in commerce, that is, only those other classes of workers who are actually engaged in the movement of interstate or foreign commerce or in work so closely related thereto as to be in practical effect part of it"); *Home v. New England Patriots Football Club, Inc.*, 489 F. Supp. 465, 469 *(D.* Mass. 1980); *Donmoor, Inc. v. Sturtevant*, 449 So. 2d 869, 870-72 (Fla. Dist. CL App. 1984).

Southland Corp. v. Keating, 465 U.S. 1 (1984), held that state courts must apply the central provisions of the FAA. If an arbitration agreement fall within the FAA's coverage, then the FAA preempts additional state law requirements and compels enforcement of the arbitration agreement. *See, e.g., Securities Indus. Ass'n v. Connolly*, 883 F.2d 1114 (1st Cir. 1989) (holding that the FAA preempts the state requirement that arbitration clauses in pre-dispute arbitration agreements between broker dealers and their customers be conspicuously brought to the attention of customers and explained in writing regarding their legal effect), *cert. denied*, 495 U.S. 956 (1990); *Webb v. R. Rowland & Co.*, 800 F.2d 803, 806 (8th Cir. 1986)(holding that the FAA preempts the state statutory requirement that all arbitration provisions be accompanied by a notice, in ten point capital letters and that the contract contains a binding arbitration provision); *Collins Radio Co. v. Ex-Cell-O Corp.*, 467 F.2d 995 (8th Cir.1972)(holding that the FAA preempts the state statutory requirement that an arbitration agreement be signed **by** the" parties' attorneys); *Bunge Corp. v. Perryville Feed & Produce,Inc.*, 685 S.W.2d 837 (Mo. 1985)(holding that when it applies, the FAA preempts a state statute requiring inclusion of a special notice that the contract contains an arbitration provision); *Godwin v. Stanley Smith & Sons*, 386 S.E.2d 464, 467 (S.C. CL App. 1989)(holding that the arbitration provision was enforceable under the FAA even though it was not printed in the type prescribed by S.C. CODE ANN. § 15-48-10(a) (Law. Co-op. 1976)); *Withers-Busby Group*, 538 S.W.2d 198 (holding that the arbitration provision was unenforceable because it was not signed by the parties' attorneys as required by TEX. REV. CIV. STAT. ANN. art. 224 (Vernon 1973)).