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DSSV LEGAL ALERT

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NLRB Administrative Law Judge Enforces Employee's Class Action Waiver In Mandatory Employment Arbitration Agreement

Earlier this year in *American Express Co. v. Italian Colors Restaurants*, 133 S. Ct. 2304 (2013) ("*Amex*"), the Supreme Court held that waivers of the right to class arbitration in contract provisions will be "rigorously enforced" under the Federal Arbitration Act ("FAA"), unless there is some flaw that invalidates the contract itself, such as fraud, duress or unconscionability. Following *Amex*, the judicial trend in the Second Circuit and elsewhere, has been to enforce arbitration agreements with class and collective action waivers in accordance with their terms. *See, e.g.*, *Raniere v. Citigroup Inc.*, No. 11-5213-cv (2d Cir. Aug. 12, 2013); *Sutherland v. Ernst & Young LLP,* No. 12-304-cv, 2013 WL 4033844 (2d Cir. Aug. 9, 2013).

Despite the judicial trend of enforcing such waivers, in *D.R. Horton v. NLRB*, 357 N.L.R.B. No. 184 (Jan. 6, 2012) (decided before *Amex*), the National Labor Relations Board ("NLRB") took the position that class waivers violate employees' rights under the National Labor Relations Act ("NLRA") to engage in protected concerted activity. *D.R. Horton* is currently pending before the Fifth Circuit.

Notably, on November 8, 2013, Judge Bruce D. Rosenstein, an NLRB judge, upheld a class action waiver in a mandatory employment arbitration agreement. *See Chesapeake Energy Corporation*, Case No. 14-CA-100530 (Nov. 8, 2013). Relying on the Supreme Court's decision in *Amex*, Judge Rosenstein recommended the dismissal of claims that the employer's mandatory arbitration policy's class waiver violated the NLRA. He held "that the Board's position that class and collective action waivers in arbitration agreements violate Section 8(a)(1) of the [NLRA] cannot be sustained." However, he did find that the employer's policy violated the law by including NLRA claims among the claims subject to binding arbitration, as that prohibited employees from exercising their statutory right to file unfair labor practice charges with the NLRB.

If Judge Rosenstein's recent decision -- with respect to the enforcement of class and collective action waivers in arbitration agreements -- is any indication, the NLRB may be changing its position on this issue pursuant to *Amex* and its progeny. Going forward, while *D.R. Horton* remains pending, it will be interesting to see how other NLRB judges handle this issue.

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