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THE HILLSBOROUGH COUNTY BAR ASSOCIATION

CLASS ARBITRATION UPDATE: NLRB RULES
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After the U.S. Supreme Court's decision in *AT&T Mobility v. Concepcion* that mandatory arbitration agreements precluding class arbitration are enforceable, there has been a growing trend of employers using such arbitration agreements to prevent class arbitration of employment-related disputes.

On January 6, 2012, the National Labor Relations Board ("Board") handed down a decision that effectively holds that *AT&T Mobility v. Concepcion* does not apply to certain rights in the employment context. The Board is the federal agency that enforces the National Labor Relations Act of 1935 ("NLRA"), which gives employees the right to self-organize, join and assist labor organizations, bargain collectively and engage in concerted activities for collective bargaining or for the mutual aid or protection of employees. The NLRA makes it an unfair labor practice for any employer, except federal, state governments and others subject to the Railway Act, to interfere with, restrain or coerce employees for exercising their rights under the NLRA.

Significantly, the Board's attack on mandatory arbitration agreements affords employees another legal theory for challenging such agreements that exclude class claims. The Board expressly held that mandatory arbitration agreements (other than those negotiated in collective bargaining agreements) requiring the waiver of class claims in any forum constitute an unfair labor practice and violate the NLRA. The Board said, "employers may not compel employees to waive their NLRA rights to collectively pursue litigation of employment claims in all forums, arbitral and judicial."

The ruling was the result of Michael Cuda filing an unfair labor practice against his employer, a home builder, who forced all employees to sign an arbitration agreement requiring that all employment-related disputes be resolved through individual arbitration and waiving the right to a judicial forum. Cuda attempted to bring a collective action under the Fair Labor Standards Act and the employer maintained that the arbitration agreement Cuda signed prohibited class claims in any forum. Cuda claimed that this practice violated the NLRA because it interfered with employees' rights to engage in concerted activities for the purpose of mutual aid or protection of all employees. In other words, the arbitration agreement interfered with the employees' rights to collectively join to bring class claims against their employer to improve the terms and conditions of their employment. In the Board's eyes, such a mandatory arbitration agreement unlawfully circumvented employees from exercising their rights to engage in concerted activities.

Notably, the Board's decision does not limit the forum in which class actions may be brought; it only seeks to preserve employees' inherent rights to collectively join litigation to improve the terms and conditions of employment, regardless of whether the action is filed in arbitration or in court.

[Footnotes omitted]

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