Labor and Employment Alert: NLRB Sticks To Its Guns On Arbitration Clauses and Class Action Waivers

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The National Labor Relations Board (NLRB) recently issued a decision reaffirming its much-maligned 2012 *D.R. Horton* opinion. In *D.R. Horton*, the NLRB held that an employer could not require employees to resolve employment-related claims through individual arbitrations, thereby waiving their right to proceed in a collective or class action.

State and federal courts nationwide, including three Federal Courts of Appeal, have uniformly criticized *D.R. Horton*. Despite this criticism, in its most recent decision addressing the issue—*Murphy Oil USA, Inc.*—the NLRB maintained that *D.R. Horton* was properly decided. The National Labor Relations Act's (NLRA) protection of employee concerted action is at the core of the *D.R. Horton* and *Murphy Oil* decisions. Stated simply, the NLRB's position is that the NLRA's protection of concerted action voids any agreement between an employer and employee that would waive the employee's right to participate in a collective or class action.

In its decision, the NLRB said: "We have no illusions that our decision...will be the last word on the subject." Employers should not have such an illusion, either. This issue is bound for future litigation, and many believe it is destined for the U.S. Supreme Court. Employers considering implementing or continuing to use such an arbitration class waiver should contact their Vorys labor professional to evaluate the risks inherent to this developing legal area.