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## CLASS ACTION WAIVER IN ARBITRATION AGREEMENT SURVIVES NLRA CHALLENGE

Finding the National Labor Relations Board failed to give appropriate weight to the Federal Arbitration Act, the federal Fifth Circuit Court of Appeals overturned a Board decision invalidating an arbitration agreement that prohibited employees from pursuing claims in a collective or class action. Nonetheless, the court upheld the portion of the Board's decision requiring the employer to clarify that the arbitration agreement did not preclude employees from filing unfair labor practice claims with the Board.

In *D.R. Horton, Inc. v. National Labor Relations Board,* D.R. Horton appealed an adverse Board decision holding that its mandatory employee arbitration agreement violated the National Labor Relations Act. By way of background, as more fully described in our February 2012 FEB, the Board held that the arbitration agreement's class and collective action waiver improperly restricted employee rights to engage in concerted activity for their mutual aid and protection and held the waiver to be unenforceable. The Board concluded that its decision did not offend the pro-arbitration policy of the Federal Arbitration Act and, in fact, accommodated the policies of both the NLRA and the FAA.

On appeal, the Fifth Circuit disagreed. While recognizing the judicial deference afforded to Board interpretations of ambiguous provisions it administers, the court observed that "the Board has not been commissioned to effectuate the policies of the [NLRA] so single-mindedly that it may wholly ignore other and equally important Congressional objectives." Thus, courts have "never deferred to the Board's remedial preferences where such preferences potentially trench upon federal statute and policies unrelated to the NLRA."

The Fifth Circuit started its analysis with the FAA mandate that arbitration agreements be enforced according to their terms. It noted two potentially applicable exceptions: (1) an arbitration agreement may be invalidated upon a ground that would invalidate any contract, and (2) application of the FAA may be precluded by another state's contrary congressional command. Citing by analogy to the California Supreme Court's decision in *AT&T Mobility LLC v. Concepcion* (Fenwick's April 28, 2011 Litigation Alert), the court found that "requiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." The court further found no express statutory or legislative congressional command to override the FAA or any other inherent conflict between the NLRA and the FAA. Because neither exception provided a basis to invalidate the class action waiver, the Fifth Circuit refused to enforce the Board's order requiring D.R. Horton to rescind the waiver.

However, the Fifth Circuit recognized that the Board reasonably concluded the arbitration agreement could lead employees to believe they were precluded from filing an unfair labor practices charge with the Board. It, thus, enforced the requirement that D.R. Horton revise its agreement on that point.

While this decision provides helpful support for employers that use class waivers in employee arbitration agreements, employers should understand that this area of the law continues to be in flux. Decisions to install such waivers should be informed by legal advice and a weighing of the benefits and risks of such a provision. Further, following this decision, employers should revisit their arbitration agreement forms to ensure they do not inadvertently overreach and preclude (or appear to preclude) employees from filing unfair labor practices claims with the Board. Specifically, arbitration agreements should be clear that employees are not waiving their right to file unfair labor charges with the Board.

### DISCRIMINATION CLAIM – BASED ON ASSOCIATION TO DISABLED RELATIVE – SURVIVES DISMISSAL REQUEST

In *Rope v. Auto-Chlor System of Washington, Inc.*, plaintiff Scott Rope, a former branch manager for Auto-Chlor, sued his employer for violation of the newly-enacted Michelle Maykin Memorial Donation Protection Act, discrimination for his association with a disabled person, and wrongful termination in violation of the public policy, among other claims. When hired in September 2010, Rope informed Auto-Chlor that he planned to take time off in February 2011 to donate a kidney to his physically disabled sister. He requested, and was granted, unpaid leave for this purpose. When California passed a new donation protection law that provided for paid leave to employees, Rope requested the leave be extended and paid.

Auto-Chlor granted Rope unspecified unpaid leave but, notwithstanding multiple follow-up inquiries, did not respond to his request for paid leave. After receiving satisfactory performance reviews from September to December 2010, Auto-Chlor fired Rope on December 30, 2010 – two days before the new donation protection law took effect. As planned, Rope donated a kidney to his sister in February 2011. Rope alleged that Auto-Chlor fired him to avoid providing him paid leave or accommodating his anticipated work restrictions, but the trial court dismissed Rope's action. Rope appealed.

The appellate court found in part for Rope and in part for Auto-Chlor. With regard to the donation protection law, the court agreed that the law applied prospectively only. Since the law was not yet effective on Rope's separation date, it did not apply and his claim failed. However, the court recognized that Rope could pursue a claim for associational discrimination, wrongful termination in violation of public policy, and failure to maintain an environment free from discrimination. "The reasonable inference is that Auto-Chlor acted preemptively to avoid an expense stemming from Rope's association with his physically-disabled sister," and such conduct was actionable under these alternative theories.

This decision provides a good example of a rare associational discrimination claim and the potential breadth of protections under federal and state anti-discrimination law.

### NEWSBITES

**No Duty to Explore Cause of Poor Performance Absent Notice of Correlation to Disability**

A federal district court in Washington refused to require an employer, absent some notice from an employee of the need to do so, to investigate the cause of the employee's poor performance to explore whether it might be caused by a known disability. In *Kelley v. Amazon.com*, a customer service representative sued her former employer for, among other things, failing to accommodate her disabilities and to engage in the interactive process. The employer knew the employee suffered from migraines and endometriosis, and granted several leave and schedule modification requests during her employment. Following a decline in her performance, as measured by the percentage of unresolved customer problems, the employer placed plaintiff on two consecutive performance improvement plans, followed by remedial training and a final performance improvement plan. During the process, the plaintiff's supervisor criticized the plaintiff's tone and approach with customers, observing that the plaintiff "came across as unapologetic, distracted, short, uninterested, uncaring and rushed." When her performance did not improve, the company terminated her employment.

In her lawsuit, the plaintiff claimed the employer had a duty to look into the reason for her poor performance to determine whether it was caused by her disabilities and to accommodate her disabilities. The court rejected both contentions. First, the law did not require the company to explore a causal connection between the termination and the plaintiff's disabilities absent some notice from the plaintiff to that effect. Second, the law did not require the employer to accommodate the plaintiff's disabilities by lowering its uniform performance standard, which was an essential function of the job.

**New Tax Law – Think Twice Before Agreeing Not to Contest UI Claim**

Under amendments to the Unemployment Insurance Integrity Act of 2011 that took effect in late October, employers must now timely and adequately respond to a state unemployment agency's information request about an employee's initial insurance claim. Consequences for violating the requirement vary from state to state, but, at a minimum, an employer will not be relieved of charges to its account that result from the employer's failure to timely or adequately respond to a request if the employer has established a pattern of untimely or inadequate responses. Fines and penalties can also apply. In California, for instance, fines against an employer can be up to ten times the weekly benefit amount (with a cap of $4,500) for willfully making a false statement or willfully failing to report a material fact about a termination.

Not only does the amendment underscore the importance of timely and accurate reporting to a state agency, it also calls into question an oft-used strategy for facilitating amicable employee departures: the employer's agreement not to contest an unemployment insurance claim. Such an agreement (whether verbal or written) could create conflicting obligations to the state agency and the departing employee. Thus, before entering into any such agreement, employers should consult legal counsel to assess risk and prepare appropriate wording that preserves the employer's ability to respond truthfully and completely to the state agency.

**$700K Attorneys' Fees Award Upheld for $27K Jury Verdict**

In *Muniz v. United Parcel Service, Inc.*, a federal district court in California awarded a plaintiff nearly $700K in attorneys' fees following a jury verdict of $27K on the plaintiff's claim of discriminatory demotion. The plaintiff had originally pursued a broader panoply of claims, including gender- and age- based discrimination, retaliation, negligent supervision and training, and a request for punitive damages. Many of her claims were dismissed or abandoned. Following the verdict, both the plaintiff and the employer requested attorneys' fees as the prevailing party in the action. The court granted the plaintiff's request and, after some reduction, granted her fees in excess of 25 times the amount of her recovery. The federal Ninth Circuit Court of Appeals (covering California, among other states) upheld the award. While recognizing the plaintiff's limited success as compared to her original claims, the appellate court found the trial court properly exercised its discretion in awarding the fees, especially given both parties' difficulty of segregating hours spent exclusively on the unsuccessful claims and the plaintiff's success in proving gender-related bias.

**New Lawsuit Provides Cautionary Tale on Use of Background Checks**

In November, a proposed class action lawsuit was filed against The Walt Disney Company alleging the company's candidate screening process violated state and federal law. The plaintiff alleges that Disney relied on a background check obtained through a third-party agency in deciding to rescind his offer of employment, but never provided him legally-required notice of adverse action or access to the report. The background report inaccurately reflected a criminal conviction in 2010; in fact, the conviction occurred in 1998 and was expunged in 2010. The plaintiff alleges that he attempted to explain the situation to Disney to no avail. After contacting the third-party agency, the plaintiff corrected the report, but was never hired by Disney. The plaintiff alleges that Disney's practice violated not only federal and state law governing background checks, but also state law prohibiting consideration of certain arrest records. Whether the plaintiff's claims will succeed – individually or on a class basis – remains to be seen, but the lawsuit serves as a cautionary example of the importance of complying with the technical legal requirements governing background checks.

**Retaliation Claim for Complaining of Sexually Suggestive Sniffing Revived**

In *Royal v. CCC&R Tres Arboles, LLC*, the federal Fifth Circuit Court of Appeals (covering Texas, among other states) revived an employee's retaliation claim where she was fired shortly after she complained about coworkers subjecting her to sexually suggestive sniffing. According to the employee, two coworkers would hover over her and sniff her – occurring twelve times per coworker over the course of her four-day tenure with the employer. The employee complained about the sniffing and other objectionable conduct,

to which the assistant manager advised her to "let it slide" and commented "you know how men are like when they get out of prison." At a staff meeting the next day, the employee stated that she did not like the sniffing; she also inquired about the coworker's conduct in a follow-on meeting with her manager and assistant manager. That afternoon, the employer fired the employee. The employer later justified its action, claiming the employee swatted a fly harder than necessary and slammed a door. The trial court dismissed the employee's claims. On appeal, the Fifth Circuit revived the employee's retaliation claim (the only subject of the appeal), finding she presented sufficient evidence for a jury to conclude the employer terminated her for complaints about sexual harassment.

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