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Challenging Pro-Business Decisions With Horton

Law360, New York (January 11, 2012, 1:42 PM ET) -- In a decision dramatically signed on Jan. 3, 2012 — the final day that the National Labor Relations Board had a quorum, due to the expiration of the terms of both a Democratic and Republican member that day — and made public by the NLRB on Jan. 6, 2012, two days after three recess appointments by President Barack Obama restored the NLRB to full strength, the board ruled in D.R. Horton Inc. and Michael Cuda that it constitutes an unfair labor practice for an employer to require as a condition of employment that employees arbitrate claims, including statutory claims, as individuals rather than a class, unless a union has agreed.

The 2-0 decision was only signed by Democratic NLRB Chairman Mark Pearce and departing Democratic member Craig Becker. The departing Republican member, Craig Hayes, refused to sign the opinion and recused himself without explanation.

The decision was a rather pointed rebuke by the Obama NLRB of the combined effect — at least in the employment arena — of two recent U.S. Supreme Court decisions: 14 Penn Plaza LLC v. Pyett and ATT Mobility v. Concepcion.

In both these cases, the Supreme Court had split 5-4 down conservative versus liberal "party" lines and decided, respectively, first to allow employers to require employees, as a condition of employment, to agree that an arbitrator, rather than judge or jury, will decide any statutory claims the employee ever brings in a private proceeding; and second, to allow employers to require employees to have such statutory claims heard individually rather than as part of an arbitral class action.

These decisions had been heralded as opening up a potential means to effectively eliminate one of the banes of the last decade of the employer community, namely, employment-related wage-and-hour and discrimination class action litigation.

If undisturbed, Horton could effectively reverse, or at least severely limit, the effect of these two very pro-business decisions. As a result, Horton will undoubtedly come under intense fire from commercial business interests. Almost equally certainly, it looks like Horton may well end up being decided in the Supreme Court.

Given Congress' clear awareness of the class action procedural tool both as embodied in the Federal Rules of Civil Procedure and addressed in a variety of other jurisdictional statutes, such as the Class Action Fairness Act, it is not entirely clear that Congress could have intended that the Federal Arbitration Act (FAA) could be interpreted in such a way as to eliminate in effect the class action as a tool to vindicate a wide variety of statutorily protected federal and state law rights.

One might think that if a co-equal federal law were intended to have such an effect, Congress might have made that intent quite explicit.

This may be a classic case of a situation that neither the executive nor the judicial branches were really created to resolve. Congressional attempts to date, however, to address whether and to what extent employers should be allowed to condition employment on their employees' agreeing to waive any right to bring statutory claims in public civil for a or as groups have so far fallen prey to the political gridlock of a divided Congress.

Though it will no doubt become a part of the upcoming political debate in this year's election cycle and seems likely that legislation both undermining and bolstering Horton will be introduced, the prospect of our divided Congress passing legislation that resolves the tension between the FAA and the NLRA during this election year seems remote, charitably speaking.

Assuming the decision is enforced by the United States Court of Appeal, a substantially more likely outcome may well be that a majority of the Supreme Court, viewing Horton as an executive-branch end-run around the effect of its recent decisions in Pyett and Concepcion, will simply vote to take the matter up on a petition for certiorari.

Given that Justice Anthony Kennedy, the "swing" vote on the court, voted with the four conservative members in both Pyett and Concepcion, it could well be that the Supreme Court ends up resolving the balance of power between these two federal laws — and the tension between the NLRA's protection of the rights of employees to join and act in "concert" and the FAA's policy requiring agreements to arbitrate be "voluntary" — in favor of the FAA.

In the end, the result could very well be that the Supreme Court answers the board's Jan. 6, 2012, Supreme Court smack-up with an even firmer smack-down of its own.

Who knows what will happen after that? Perhaps Obama will, like his Depression-era Democratic predecessor Franklin Roosevelt, begin threatening to "pack" the Supreme Court?

One thing is for certain, though: Who will hear again about Horton? All of us.

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