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NLRB Declares Arbitration Agreements Prohibiting Class Action Claims Unlawful

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The NLRB has decided to enter the fray in a big way as to the enforceability of arbitration agreements that do not allow for arbitration of class claims. On January 3, 2012, the NLRB ruled in *D.R. Horton, Inc. and Michael Cuda* (http://tinyurl.com/78xf9hs), that it constitutes an unfair labor practice for an employer to require, as a condition of employment, that employees arbitrate claims as individuals rather than a class, unless a union has agreed to such arbitration provision. The NLRB found that such an agreement interferes with employees' right to engage in protected concerted activity. This decision is a rebuke by the NLRB of two recent United States Supreme Court decisions: *14 Penn Plaza LLC v. Pyett* (http://tinyurl.com/7yntnhg) and *AT&T Mobility v. Concepcion* (http://tinyurl.com/6azuf4n). In these two cases, the Supreme Court decided, respectively, first to allow employers to require employees as a condition of employment to agree that an arbitrator (rather than a 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 a class action arbitration. These decisions have been welcomed by employers as a potential means to effectively eliminate employer-related wage and hour and discrimination class action litigation.

Horton could reverse (or at least severely limit) the effect of these two decisions. The *Horton* decision may well end up being reviewed by the Supreme Court, and Congress may get involved. Employers who currently have arbitration agreements (not agreed to by a union) requiring arbitration of statutory claims on an individual basis should monitor the progress of this case carefully. In addition, employers with such agreements will need to consider whether they will suspend the requirement of individual (as opposed to class) arbitration pending further developments with regard to the *Horton* decision.

Does Your New Year's Resolution Involve Purging Records? Before You Do So, You Should Ensure Compliance With Applicable Recordkeeping Laws

Written by: Kristy Kunisaki Marino

In the new year, you may be planning to purge records in an effort to create virtual or physical space and to save money on the cost of storing unnecessary records. However, before you do so, it is important to be familiar with federal and state document retention rules.

Below is a sample of some of the regulations that may apply to you and your company:

The Fair Labor Standards Act (FLSA) (http://tinyurl.com/78cyb85) requires that every covered employer keep certain records for each non-exempt employee (http://tinyurl.com/86quyfu), such as identifying information about the employee and data about the hours worked and the wages earned for at least three years. In addition to payroll records, collective bargaining agreements and sales and purchase records also should be maintained for three years. Records on which wage computations are based must be retained for two years.

Companies covered by the FMLA (http://tinyurl.com/czx3g9), must keep and preserve records pertaining to their obligations under the FMLA in accordance with the FMLA's recordkeeping requirements. Records (http://tinyurl.com/87o72me) must be maintained for no less than three years, including records detailing dates of FMLA leave taken by eligible employees and copies of all notices provided to the employer by the employee.

The IRS mandates that all employment tax records (http://tinyurl.com/6rydfe8) be kept for at least four years.

In addition to maintaining records to meet the requirements under the law, document retention policies also should address the various statute of limitations periods under which employees can bring claims. For example, the Lilly Ledbetter Fair Pay Act (http://tinyurl.com/b59b6q) extended the statute of limitations for an equal pay lawsuit. Thus, because pay records from years past may be needed to defend a pay discrimination claim, you may wish to consider retaining the records beyond the statutory requirements. You also should be aware of your state's laws concerning document retention. State laws governing workers' compensation or unemployment insurance may have separate recordkeeping requirements and/or an extended statute of limitations period under which claims can be

brought.

Finally, it should be noted that different standards for the preservation of documents apply when an employer receives notice of a possible claim from an employee. If you become aware that an employee may file a claim, your regular policies and procedures should not be not applied. Instead, any and all documents pertaining to the employee need to be preserved during the pendency of the claim and/or litigation. For additional information, see "Document Preservation Demand — Now What?" from our *Legal News: Employment Law Update* July 26, 2010 edition (http://tinyurl.com/7agmkre).

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