

WILL THE SUPREME COURT AGREE WITH THE NLRB THAT PRE-DISPUTE EMPLOYMENT ARBITRATION PROVISIONS CONTAINING CLASS AND COLLECTIVE ACTION WAIVERS IN BOTH JUDICIAL AND ARBITRAL FORUMS VIOLATE THE NATIONAL LABOR RELATIONS ACT - WHETHER THERE IS AN OPT-OUT OR NOT?

Christine Neylon O'Brien*

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INTRODUCTION

Should employers be able to require individual employees to sign away their rights to collective action as a condition of employment? Certainly, employees should wonder just what they are giving up when they sign dispute resolution “agreements”¹ in order to get a job. These employer-mandated contract provisions generally require the exclusive use of individual arbitration for future employment disputes, preventing access to group action in court or arbitration. In many instances, employees are also barred from seeking relief from administrative agencies that protect the rights of workers such as the National Labor Relations Board (NLRB). Does the National Labor Relations Act (NLRA)²—a federal labor law that guarantees the right of employees to act in concert for mutual aid or protection—permit such waivers, or must the Federal Arbitration Act

* Professor of Business Law, Carroll School of Management, Boston College. The author wishes to thank Professors Stephanie Greene and Margo E. K. Reder of Boston College for their helpful ideas on this paper.

1. Arguably the word “agreement” is a misnomer because the “agreement” to the provision is generally a requirement in order for the employee to obtain employment. Thus, it is an adhesive contract provision that is unfavorable to the employee and not made a subject for negotiation. Individual arbitration as the exclusive remedy is literally stuck onto the hiring deal, which the employee only “agrees” to in order to obtain employment. Thus, this “agreement” is a “take it or leave it” matter—although, in some instances, employers allow a brief period to opt out of the dispute resolution program (DRP) that is otherwise the default. The National Labor Relations Board (NLRB) has taken the position that an opportunity to opt out does not save individual DRPs from violating the National Labor Relations Act (NLRA), but some courts have been inclined to look more favorably at opt-out provisions. *Compare* *On Assignment Staffing Servs., Inc.*, 362 N.L.R.B. No. 189, at *4, 6 (Aug. 27, 2015) (finding the opt-out provisions interfere with Section 7 rights and are contrary to federal labor law policy), *rev'd summarily per curiam*, No. 15-60642, 2016 WL 3685206 (5th Cir. June 6, 2016) *with* *Johnmohammadi v. Bloomingdale's, Inc.*, 755 F.3d 1072, 1077 (9th Cir. 2014) (holding that the plaintiff's decision to enter into an arbitration agreement did not amount to an unfair labor practice). The Ninth Circuit upheld a DRP agreement requiring arbitration and prohibiting joinder of claims because an employee had the right to opt out of the DRP, which she did not exercise, and thereafter could not claim that enforcement of DRP violates Norris-LaGuardia or the NLRA. *Johnmohammadi*, 755 F.3d at 1077. Under the Federal Arbitration Act (FAA), the DRP must be enforced according to its terms. Thus, had she opted out, she would have been free to pursue this class action in court. *Id.* In *Morris v. Ernst & Young, LLP*, 834 F.3d 975, 982 n.4 (9th Cir. 2016), *cert. granted*, No. 16-300, 2017 WL 125665 (U.S. Jan. 13, 2017), the Ninth Circuit noted that pursuant to its ruling in *Johnmohammadi*, there would be no Section 8 violation if “the employee . . . could have opted out of the individual dispute resolution agreement and chose not to.”

2. 29 U.S.C. §§ 151-169 (2012). In particular, this paper and the courts look at 29 U.S.C. § 157.

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(FAA)³—a federal law that favors arbitration as a dispute resolution mechanism—take precedence over the NLRA? If an employer provides the option to “opt out” on the waiver of collective rights, will this option save such provisions from being a mandatory condition of employment and hence be unlawful under the NLRA?

The NLRB has answered the foregoing questions with a resounding “no.” The agency’s rulings on mandatory class or collective action⁴ waivers rely upon the fact that the right to collective action is protected concerted activity under Section 7 of the NLRA, a substantive right that cannot be individually and prospectively waived.⁵ In addition, it is clear that the freedom to file charges at the NLRB, either individually or collectively, and the right to sue in court are also protected activities under Section 7.⁶

In both *D. R. Horton* and *Murphy Oil*, the NLRB held that employers violate the NLRA when they require employees to waive their right to

3. 9 U.S.C. §§ 1-16 (2012).

4. See Nicole Wredberg, *Subverting Worker Rights: Class Action Waivers and the Arbitral Threat to the NLRA*, 67 HASTINGS L.J. 881, 884-85 (2016) (differentiating between collective actions where individuals must affirmatively give consent before becoming part of the class and class actions where all similarly situated employees are automatically included).

5. See *Murphy Oil USA, Inc.*, 361 N.L.R.B. No. 72, at *1-2, *8-10 (Oct. 28, 2014) (indicating that national labor policy supports a right to engage in collective action), *enforcement denied in relevant part*, 808 F.3d 1013 (5th Cir. 2015), *reh'g en banc denied*, No. 14-608000 (5th Cir. May 13, 2016), *cert. granted*, No. 16-307, 2017 WL 125666 (U.S. Jan. 13, 2017); *On Assignment Staffing Servs.*, 362 N.L.R.B. No. 189, at *5-8 (determining that opt-out does not save an otherwise invalid mandatory arbitration provision that requires individual employees to give up statutory right to act concertedly). The NLRB, in both *Murphy Oil* and *On Assignment*, cited this author’s co-authored article on the issue of collective action waivers in mandatory pre-dispute arbitration provisions in employment agreements. *Murphy Oil*, 361 N.L.R.B. No. 72, at *2 n.15 (citing Stephanie Greene & Christine Neylon O’Brien, *The NLRB v. The Courts: Showdown over the Right to Collective Action in Workplace Disputes*, 52 AM. BUS. L. J. 75 (2015)); *On Assignment*, 362 N.L.R.B. No. 189, at *8 n.28 & at *9 n.32 (citing Greene & O’Brien, *supra*, at 119-21). In *On Assignment*, the majority of the Board panel cited our discussion regarding opt-out provisions, particularly how they require affirmative action on the part of the employee in order to preserve statutory rights. *Id.* at *8 n.28. In addition, the Board quoted our analysis that the courts have not “given serious consideration to the merits of the Board’s analysis and the fact that the case raises issues that have not been addressed by the Supreme Court.” *Id.* at *9 n.32. Member Johnson’s dissent took issue with our interpretation of opt-outs, arguing that “a requirement of affirmative action to preserve rights is not alien to our system of law, including labor law.” *Id.* at *15 n.34 (Johnson, M., dissenting). It should be noted that, pursuant to a collective bargaining agreement, employees may collectively agree to dispute resolution agreements that waive collective and class actions.

6. See *Eastex, Inc. v. Nat’l Labor Relations Bd.*, 437 U.S. 556, 566 (1978) (holding that Section 7 of the NLRA protects employees’ efforts to improve working conditions through administrative and judicial forums).

“joint, class, or collective claims addressing wages, hours, or other working conditions against the employer in any forum, arbitral or judicial” as a condition of employment.⁷ The NLRB found that requiring individual employees to sign such agreements, as opposed to a union agreeing to resolve disputes through arbitration in a collective bargaining agreement, amounted to an unfair labor practice.⁸ The restraints on collective action work against the policies and purposes of the NLRA, which policies and purposes include fostering concerted activity in order to equalize the bargaining power of employees against the superior strength of the employer.⁹

As large, well-established corporate entities crafted increasingly expansive arbitration provisions foreclosing access to judicial tribunals and restricting joinder of claims, provisions that restrict individuals’ rights to engage in collective activity and class actions, the Supreme Court has reflexively upheld such provisions based upon its interpretation of the FAA’s supremacy.¹⁰ The Supreme Court has upheld arbitration clauses for consumer, merchant credit, and employment matters without concern for the Constitutional right to a judicial forum,¹¹ or for the deleterious effect on other federal laws regarding securities, antitrust, employment, and consumer protection.¹² To date, the NLRB has been, in a sense, like the canary in the coal mine on this mandatory arbitration issue, consistently messaging that individual arbitration, imposed as a condition of employment, violates employees’ federal statutory rights to engage in collective action.¹³

7. See *Murphy Oil*, 361 N.L.R.B. No. 72, at *1 (quoting *D. R. Horton, Inc.*, 357 N.L.R.B. 2277, 2277 (2012), *enf. denied in relevant part*, 737 F.3d 344 (5th Cir. 2013), *reh’g en banc denied*, No. 12-60031 (5th Cir. Apr. 16, 2014)).

8. See *D. R. Horton*, 357 N.L.R.B. at 2278-80 (holding that collective pursuit of a workplace grievance in arbitration is equally protected by the NLRA).

9. *Id.* at 2279.

10. See Greene & O’Brien, *supra* note 5, at 82-88 (analyzing Supreme Court decisions where the Court majority exhibited a preference for individual arbitration under the FAA).

11. See Interview by Dave Davies with Jessica Silver-Greenberg, “Have We Lost a Constitutional Right in the Fine Print,” NPR: FRESH AIR (Nov. 12, 2015), <http://www.npr.org/2015/11/12/455749456/have-we-lost-a-constitutional-right-in-the-fine-print> [<https://perma.cc/57QY-BD32>] (last visited Feb. 16, 2017) (elaborating upon the consequences of agreements that require arbitration and ban class actions lawsuits).

12. See Katherine V.W. Stone & Alexander J.S. Colvin, *The Arbitration Epidemic: Mandatory arbitration deprives workers and consumers of their rights*, ECON. POLICY INST., EPI BRIEFING PAPER NO. 414, 1, 10-14 (2015), <http://www.epi.org/files/2015/arbitration-epidemic.pdf> [<https://perma.cc/7QPG-LBD3>] (discussing these and other issues, including the effective vindication doctrine and California’s Private Attorney General Act).

13. See Jessical Silver-Greenberg & Michael Corkery, *Start-ups Embrace Arbitration to Settle Workplace Disputes*, N.Y. TIMES (May 15, 2016), <http://nyti.ms/20FZRzG> [<https://perma.cc/9WBB-K8VF>] (noting that arbitration clauses directly oppose workplace

The right to collective action is truly the centerpiece of the NLRA, recognized as such because without it, employees lack bargaining power, mass, organization, and expertise for managing employment matters with their employers. The right to engage in protected, concerted activity embodied in Section 7 of the NLRA created an employee bill of rights in the private sector workplace.¹⁴ Importantly, employees need not be in a union or forming a union in order to gain the protection of Section 7, rather, the right to engage in concerted activities for “mutual aid or protection” and the right to refrain from engaging in such activities are all clearly spelled out in the statute. Section 7, with its protective umbrella for collective action, is the heart of the NLRA, and the NLRB has held that employers may not require individual employees to sign away this right to act together in order to secure employment, even where such waivers are cast as voluntary or “optional.”¹⁵ Subordinating the foundation of this federal labor statute to the FAA, without statutory directive or even legislative history supporting this intent, would decimate the very purpose of the labor law without providing a corresponding benefit under the FAA. Limiting arbitration to individual claims is not a central concern of the FAA, rather, it is the strategy of big business to limit its exposure to workplace dispute claims by unilaterally imposing such restrictive pre-dispute contract terms as a condition of employment.¹⁶ Mandatory

transparency); *see also* Jeff Hirsch, *Silicon Valley Arbitration Clauses*, WORKPLACE PROF BLOG (May 14, 2016), http://lawprofessors.typepad.com/laborprof_blog/2016/05/silicon-valley-arbitration-clauses.html [<https://perma.cc/82GW-6PA6>] (noting that the NLRB is the only agency taking action on behalf of employees relating to this arbitration issue and that “[w]orkers represented by experienced unions tend to fare well under arbitration systems, while individual employees—or those trying to form class actions—are far less likely to see the benefits of one-sided arbitration agreements”).

14. Section 7 provides:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities

29 U.S.C. § 157 (2012).

15. *See* Bristol Farms, 363 N.L.R.B. No. 45, at *2 (Nov. 25, 2015) (“It is a bedrock principle of federal labor law and policy that agreements in which individual employees purport to give up the statutory right to act concertedly for their mutual aid or protection are void.”); *On Assignment Staffing Servs., Inc.*, 362 N.L.R.B. No. 189, at *1 (Aug. 27, 2015) (holding opt-out provision did not render arbitration agreement that waived collective action lawful because it required employees to prospectively waive their Section 7 right to engage in concerted activity), *rev’d summarily per curiam*, No. 15-60642, 2016 WL 3685206 (5th Cir. June 6, 2016).

16. *See* Jessica Silver-Greenberg & Robert Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice*, N.Y. TIMES (Oct. 31, 2015), <https://nyti.ms/1KMrvBJ>

arbitration agreements that deny the right to pursue claims collectively unfairly enhance employers' bargaining positions and accelerate the erosion of workers' rights and statutory protections.¹⁷ With the passing of Associate Justice Antonin Scalia, author of the majority's 5-4 opinion in *AT&T Mobility v. Concepcion*,¹⁸ the future is questionable regarding the Court's potential endorsement of employment agreements that require waivers of collective or class actions and mandate individual arbitration—a topic on which the Supreme Court has yet to rule - that could gut the substance of the NLRA to achieve a goal that the FAA does not require.¹⁹

This research paper analyzes five recent cases on the issue of mandatory arbitration clauses that prohibit joinder of individual employment claims. The first case, *On Assignment*, was one of first impression for the NLRB where the agency answered the question of whether providing an opportunity to opt out of a mandatory dispute resolution program with a class waiver saves the provision from violating the NLRA.²⁰ The NLRB ruled that opt-out provisions do not validate such class waivers.²¹ The Fifth Circuit granted the employer's motion for summary reversal of the Board's order in *On Assignment*.²² This follows the Fifth Circuit's pattern of refusing to enforce the NLRB's other related decisions on mandatory pre-dispute individual arbitration provisions with collective action waivers in both *D. R. Horton* and *Murphy Oil*.²³

The second case analyzed here, *Totten v. Kellogg Brown & Root*, is a

[<https://perma.cc/7SSH-AXD6>] (noting “[s]ome state judges have called the class-action bans a ‘get out of jail free’ card, because it is nearly impossible for one individual to take on a corporation with vast resources,” and recalling that federal judge William G. Young stated in an interview that “business has a good chance of opting out of the legal system altogether and misbehaving without reproach”).

17. See Stone & Colvin, *supra* note 12, at 21 (noting that plaintiff's access to attorneys was limited in individual arbitration where collective contingent fee arrangements are not available and the data shows large gap in economic outcomes favoring employers in arbitration as compared to litigation).

18. *AT&T Mobility v. Concepcion*, 563 U.S. 333 (2011).

19. See Gordon Renneisen, *The Post-Scalia Fate of Employment Class Waivers*, LAW360 (March 9, 2016), <https://www.law360.com/articles/768875/the-post-scalia-fate-of-employment-class-waivers> [<https://perma.cc/FZC9-PS74>] (offering perspective on how the new Court will be called upon to re-examine the holding of *Concepcion*).

20. *On Assignment Staffing Servs.*, 362 N.L.R.B. No. 189, at *1.

21. *Id.*

22. *On Assignment Staffing Servs., Inc. v. Nat'l Labor Relations Bd.*, No. 15-60642, 2016 WL 3685206, at *1 (5th Cir. June 6, 2016) (per curiam).

23. *D. R. Horton, Inc.*, 357 N.L.R.B. 2277, 2277 (2012), *enf. denied in relevant part*, 737 F.3d 344 (5th Cir. 2013), *reh'g en banc denied*, No. 12-60031 (5th Cir. Apr. 16, 2014); *Murphy Oil USA, Inc.*, 361 N.L.R.B. No. 72, at *1-2, *8-10 (Oct. 28, 2014), *enforcement denied in relevant part*, 808 F.3d 1013 (5th Cir. 2015), *reh'g en banc denied*, No. 14-608000 (5th Cir. May 13, 2016), *cert. granted*, No. 16-307, 2017 WL 125666 (U.S. Jan. 13, 2017).

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federal district court decision from California upholding the NLRB's position in a *D. R. Horton*-type²⁴ case where there was no opt-out provision.²⁵ The *Totten* case is presently on appeal to the Ninth Circuit where a potential affirmance would add to what has developed into a circuit split on this issue.²⁶

The third case discussed, *Lewis v. Epic Systems*, is initially analyzed in light of the federal district court's decision to follow the NLRB's *D. R. Horton* rationale, and its previous decision in *Herrington v. Waterstone Mortgage Corp.*²⁷ The *Lewis* case was appealed and argued before the Seventh Circuit where the court affirmed the district court's denial of the employer's motion to compel arbitration, creating a clear circuit split on the issue of pre-dispute arbitration provisions that waive the right to collective action.²⁸ In contrast to the district court decisions in *Totten* and *Lewis*, as well as the Seventh Circuit's affirmance in *Lewis*, cases from the Fifth Circuit have disagreed with the NLRB's position in *D. R. Horton* and *Murphy Oil*.²⁹ Nonetheless, in a closely related matter, the Fifth Circuit

24. See *D. R. Horton*, 357 N.L.R.B. at 2278-80 (announcing principle that mandatory pre-dispute individual arbitration with waiver of all collective action violates the NLRA); see also Greene & O'Brien, *supra* note 5, at 88-111 (outlining the NLRB's rationale in *D. R. Horton* and the deficiencies in cases where courts refused to enforce the NLRB on this issue); note, *Deference and the Federal Arbitration Act: The NLRB's Determination of Substantive Statutory Rights*, 128 HARV. L. REV. 907, 908 n.11 (2015) (suggesting that courts should defer to the NLRB's finding that concerted legal activity is a substantive right under Section 7 of the NLRA).

25. *Totten v. Kellogg Brown & Root, LLC*, 152 F. Supp. 3d 1243, 1258 (C.D. Cal. 2016), *appeal filed*, No. 16-55569 (9th Cir. Apr. 20, 2016).

26. See Lawrence E. Dubé, *Court Backs NLRB View on Class Action Waivers*, DAILY LAB. RPT. (BNA) No. 24, at A-10 (Feb. 5, 2016) (noting Ninth Circuit could create a circuit split if it affirmed the district court's decision in *Totten*).

27. *Lewis v. Epic Sys. Corp.*, No. 15-CV-82-BBC, 2015 WL 5330300, at *2-3 (W.D. Wis. Sept. 11, 2015) (citing *Herrington v. Waterstone Mortg. Corp.*, 993 F. Supp. 2d 940, 943-46 (W.D. Wis. 2014)), *aff'd*, 823 F.3d 1147 (7th Cir. 2016), *cert. granted*, No. 16-285, 2017 WL 125664 (U.S. Jan. 13, 2017).

28. *Lewis v. Epic Sys. Corp.*, 823 F.3d 1147 (7th Cir. 2016), *cert. granted*, No. 16-285, 2017 WL 125664 (U.S. Jan. 13, 2017); see also Vin Gurrieri, *7th Circ. Tees Up Class Waiver Battle for Supreme Court*, LAW360 (May 27, 2016), <https://www.law360.com/articles/801487/7th-circ-tees-up-class-waiver-battle-for-supreme-court> [<https://perma.cc/UVM2-FPQP>] (noting Seventh Circuit's decision to uphold the NLRB in *Lewis* may set the stage for a Supreme Court decision in light of Fifth Circuit's contrary position).

29. See *supra* text accompanying notes 23-28. The NLRB was unsuccessful in its request for an en banc rehearing and reversal of the Fifth Circuit's panel decision in *Murphy Oil*. See Lawrence E. Dubé, *NLRB Seeks 5th Cir. Rehearing on Class Waivers*, DAILY LAB. RPT. (BNA) No. 74, at A-8 (Apr. 18, 2016) (noting NLRB's argument that "just as an employer may not require that an employee waive her rights to earn a minimum wage or be free from age discrimination in the workplace, it may not require that she waive that core substantive NLRB right" embodied in Section 7, that is the right to engage in concerted

upheld the NLRB's finding that a mandatory individual arbitration provision that a reasonable person could construe as barring the filing of NLRB charges *was* an unfair labor practice.³⁰ This latter issue is one that the NLRB outlined as part of its holding in *D. R. Horton*,³¹ and it is an issue on which even the Fifth and Eighth Circuits agree.³² Thus, even though both of these courts have ruled against the NLRB on the primary collective action waiver issue, they deferred to the Board's test regarding arbitration provisions that would lead a reasonable person to believe that they were barred from filing a claim at the NLRB.

The fourth case analyzed in this paper was decided just a week after the Seventh Circuit's decision to uphold the NLRB in *Lewis* but had a very different outcome. The Eighth Circuit decided *Cellular Sales of Missouri, LLC v. National Labor Relations Bd.*, following the reasoning of the Fifth Circuit and finding that a mobile phone salesman was bound by his agreement to resolve disputes solely by individual arbitration.³³

activity for mutual aid or protection); Vin Gurrieri, *NLRB Asks 5th Circ. To Rethink Class Waiver Ruling*, LAW360 (April 19, 2016), <https://www.law360.com/articles/785580/nlr-asks-5th-circ-to-rethink-class-waiver-ruling> [<https://perma.cc/5Y57-EDDY>] (arguing for en banc review on basis the three-judge panel misread Supreme Court precedent which did not relate to the NLRA and the substantive rights embodied therein). The Fifth Circuit declined to reconsider its October 2015 decision to reverse the NLRB's ruling in *Murphy Oil*. See Y. Peter Kang, *5th Circ. Won't Rethink NLRB Reversal in Class Waiver Row*, LAW360 (May 13, 2016), <https://www.law360.com/articles/796378/5th-circ-won-t-rethink-nlr-reversal-in-class-waiver-row> [<https://perma.cc/5595-98ZF>] (stating that the Fifth Circuit declined to reconsider *Murphy Oil*); Lawrence E. Dubé, *5th Cir. Won't Rehear NLRB's Murphy Oil Case on Class Waivers*, DAILY LAB. RPT. (BNA) No. 94, at A-1 (May 16, 2016) (noting the justices denied the petition without comment and NLRB had until August 11, 2016, to petition the U.S. Supreme Court for review on ruling in *Murphy Oil*).

30. See *Chesapeake Energy Corp. v. Nat'l Labor Relations Bd.*, 663 F. App'x. 613, 615 (5th Cir. 2016) (per curiam) (enforcing the NLRB's order in part and noting that there was no opt-out option). The NLRB made clear that preserving employees' access to the NLRB for the purpose of filing unfair labor practice charges does not save an otherwise illegal mandatory individual arbitration provision that bars collective action in both arbitral and judicial forums because access to administrative agencies is not access to class or collective adjudication in a judicial forum. *Solar City Corp.*, 363 N.L.R.B. No. 83, at *1 (Dec. 22, 2015); Lawrence E. Dubé, *Agency Access Didn't Save Illegal Arbitration Policy*, DAILY LAB. RPT. (BNA) No. 246, at A-2 (Dec. 22, 2105) (finding that employer violated Section 8(a)(1) of the NLRA by maintaining and enforcing the agreement).

31. See *D. R. Horton, Inc.*, 357 N.L.R.B. 2277, 2280 (2012) (noting that arbitration agreements that employees could reasonably construe as restricting engagement in Section 7 protected concerted activity violate the NLRA), *enf. denied in relevant part*, 737 F.3d 344 (5th Cir. 2013), *reh'g en banc denied*, No. 12-60031 (5th Cir. Apr. 16, 2014).

32. *D. R. Horton v. Nat'l Labor Relations Bd.*, 737 F. 3d 344 (5th Cir. 2013); *Cellular Sales of Mo., LLC v. Nat'l Labor Relations Bd.*, 824 F.3d 772 (8th Cir. 2016).

33. *Cellular Sales*, 824 F.3d at 776. See Jon Steingart, *Solo Arbitration Doesn't Violate Right to Concerted Activity*, DAILY LAB. RPT. (BNA) No. 103, at A-13 (June 2, 2016), http://news.bna.com/dlln/display/batch_print_display.adp?searchid=29164715

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The fifth case discussed, *Morris v. Ernst & Young, LLP*, involved employees at an accounting firm who signed a dispute resolution agreement (DRA) as a condition of employment that included a concerted action waiver preventing employees from joining together to arbitrate or bring legal claims.³⁴ Employees Morris and McDaniel brought a class claim regarding their alleged misclassification to avoid overtime wages under the Fair Labor Standards Act.³⁵ The Ninth Circuit held that the individual arbitration provision was illegal under Section 7 of the NLRA because it waived the substantive federal right to act in concert with other employees when bringing legal claims, following the Seventh Circuit's ruling in *Lewis v. Epic Systems*.³⁶

The existing circuit split on class waivers developed as appeals trickled up in cases where several courts agreed with the Board's rulings that mandatory individual arbitration provisions violate the NLRA.³⁷ This paper examines the NLRB's position on these controversial class action waivers within mandatory dispute resolution programs and makes recommendations for the courts' treatment of mandatory individual arbitration provisions in employment disputes. This paper recommends that in the absence of congressional action on pre-dispute class action waivers, courts should respect the essence of the NLRA in the employment

[<https://perma.cc/ZWY9-9DRK>] (discussing *Cellular Sales* decision and developing circuit split on mandatory arbitration with collective action waiver with Fifth and Eighth now in agreement and Seventh siding with NLRB).

34. *Morris v. Ernst & Young, LLP*, 834 F.3d 975, 979 (9th Cir. 2016), *cert. granted*, No. 16-300, 2017 WL 125665 (U.S. Jan. 13, 2017).

35. *Id.* (citing 29 U.S.C.A. § 201 *et seq.* as well as California labor laws).

36. *Id.* at 983-84 (citing *Lewis v. Epic Sys. Corp.*, 823 F.3d 1147 (7th Cir. 2016), *cert. granted*, No. 16-285, 2017 WL 125664 (U.S. Jan. 13, 2017)).

37. See *Totten v. Kellogg Brown & Root, LLC*, 152 F. Supp. 3d 1243, 1260 (C.D. Cal. 2016) (agreeing with NLRB position on *D. R. Horton* and *Murphy Oil* in case involving employee suing regarding minimum wage and overtime violations where dispute resolution policy was condition of employment and limited disputes to individual arbitration), *appeal filed*, No. 16-55569 (9th Cir. Apr. 20, 2016). Kellogg Brown appealed the case to the Ninth Circuit. See Dubé, *supra* note 26. It should be noted that in *Johnmohammadi v. Bloomingdale's, Inc.*, 755 F.3d 1072 (9th Cir. 2014), there was an opt-out provision on the mandatory individual arbitration provision which the district court found made the agreement valid, and the Ninth Circuit upheld the district court's ruling. However, there was no opt-out provision in *Totten*. *Totten*, 152 F.Supp.3d at 1251. In *Morris*, the Ninth Circuit followed the Seventh Circuit's opinion in *Lewis*—holding that mandatory class waivers violate the NLRA—but mentioned its ruling in *Johnmohammadi v. Bloomingdale's Inc.*, holding that there would be no Section 8 violation if “the employee there could have opted out of the individual dispute resolution agreement and chose not to.” *Morris*, 834 F.3d at 995 n.4. In contrast to the Ninth Circuit's view on opt-outs, the NLRB has ruled that opt-out provisions do not save otherwise invalid class action waivers. *On Assignment Staffing Servs., Inc.*, 362 N.L.R.B. No. 189, at *4, *6 (Aug. 27, 2015), *rev'd summarily per curiam*, No. 15-60642, 2016 WL 3685206 (5th Cir. June 6, 2016).

sphere and follow the Board and the Seventh and Ninth Circuits.³⁸

Since its decision in *D. R. Horton*, the NLRB has decided a host of cases upholding the principles it announced in *D. R. Horton* and reaffirmed in *Murphy Oil*, a principle that the Board has refused to waive on despite the express refusal to enforce the agency's decisions in the Fifth Circuit and now also at the Eight Circuit.³⁹

I. AN OPT-OUT PROVISION DOES NOT SAVE A MANDATORY ARBITRATION CLAUSE PROHIBITING JOINDER OF INDIVIDUAL CLAIMS IN EMPLOYMENT DISPUTES - THE NLRB FURTHER DEFINES CLASS WAIVER DOCTRINE

In *On Assignment Staffing Services, Inc.*, the NLRB answered a question left unresolved in its earlier decisions in *D. R. Horton*⁴⁰ and *Murphy Oil*.⁴¹ In both of those opinions, the NLRB held that when employers require employees to waive their right to “joint, class, or collective claims addressing their wages, hours, or other working conditions against their employer in any forum, arbitral or judicial” as a

38. See Stone & Colvin, *supra* note 12, at 25 (noting the unlikelihood of passage of the proposed federal Arbitration Fairness Act, which would eliminate pre-dispute arbitration agreements in the employment sphere). There has been some action on the Arbitration Fairness Act which would amend the FAA to exclude consumer and employee disputes from mandatory pre-dispute arbitration. See Jessica Silver-Greenberg & Michael Corkery, *House Democrats Call for Curbs on Required Arbitration*, N.Y. TIMES (Apr. 14, 2016) <http://www.nytimes.com/2016/04/15/business/dealbook/house-democrats-call-for-curbs-on-required-arbitration.html> [https://perma.cc/PZ2W-UG9F]; Arbitration Fairness Act of 2015, H.R. 2087, 114th Cong. (1st Sess. 2015). The Arbitration Fairness Act of 2017 was reintroduced by Senator Al Franken on March 7, 2017.

39. See Daniel V. Kitzes & Shar Bahmani, *NLRB Not Waffling on Pre-employment Class-Action Waivers Despite Fifth Circuit Reversals*, SQUIRE PATTON BOGGS: EMPLOYMENT LAW WORLDVIEW (Feb. 4, 2016), <http://www.employmentlawworldview.com/nlr-not-waffling-on-pre-employment-class-action-waivers-despite-fifth-circuit-reversals/> [https://perma.cc/4X72-Y3J9] (noting the NLRB is not bending on its *D. R. Horton* line of decisions despite Fifth Circuit rejections).

40. *D. R. Horton, Inc.*, 357 N.L.R.B. 2277, 2277 (2012). The NLRB noted in its *D. R. Horton* opinion that it did not reach the question of whether “an employer can enter into an agreement that is not a condition of employment with an individual employee to resolve either a particular dispute or all potential employment disputes through non-class arbitration rather than litigation in court.” *Id.* at *13 n. 28.

41. *Murphy Oil USA, Inc.*, 361 N.L.R.B. No. 72 (Oct. 28, 2014), *enforcement denied in relevant part*, 808 F.3d 1013 (5th Cir. 2015), *reh'g en banc denied*, No. 14-608000 (5th Cir. May 13, 2016), *cert. granted*, No. 16-307, 2017 WL 125666 (U.S. Jan. 13, 2017). *On Assignment Staffing Servs., Inc.*, 362 N.L.R.B. No. 189, at *4, 6 (Aug. 27, 2015) (finding the opt-out provisions interfere with Section 7 rights and are contrary to federal labor law policy), *rev'd summarily per curiam*, No. 15-60642, 2016 WL 3685206 (5th Cir. June 6, 2016).

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condition of employment, they violate the NLRA.⁴² The NLRB stated that it is not an unfair labor practice if a union negotiates a collective bargaining agreement that provides for arbitration of employment and other disputes between an employer and employee(s) because, in that case, a union acts as a representative for the bargaining unit of employees, providing inherent access to employees' group strength.⁴³ The Board noted it is well settled that a properly certified or recognized union may waive certain rights under Section 7 in return for other concessions in the context of collective bargaining.⁴⁴ The Board also clarified that it is a different matter if the arbitration agreement allows the employee to retain the right to bring a class action in court, because an employer's requirement that an employee waive his or her right to collective or group arbitration would not present the same problem, as another avenue for collective action remains.⁴⁵ The NLRB was clear that it was not mandating class arbitration in such circumstances.⁴⁶

The NLRB in *D. R. Horton* and *Murphy Oil* did not address the question whether an employer could avoid violating the NLRA when requiring employees to agree to individually arbitrate all employment claims, if the employees were afforded an opportunity to opt-out of the provision.⁴⁷ Thus, the question was whether giving an employee an initial chance to opt-out of the arbitration provision rendered it acceptable since the mandatory aspect was ameliorated to a degree, making the arbitration alternative a choice, rather than a condition of, employment.

In *On Assignment*, employees were allowed ten days after receipt of the employer's dispute resolution agreement to opt-out of the individual arbitration procedure.⁴⁸ Absent opting out, the employee's signature acknowledging receipt of the agreement, along with the lapse of ten days, amounted to a waiver of the employee's statutory right to collective or class action.⁴⁹ The NLRB found that the possibility to opt-out did not make the agreement a choice rather than a condition of employment.⁵⁰ Instead,

42. *Id.* at *10. Section 8 of the NLRA is violated when Section 7 rights are infringed. 29 U.S.C. §§ 157-158.

43. *D. R. Horton*, 557 N.L.R.B. at 2286.

44. *Id.*

45. *Id.*

46. *See id.* at 2288 ("We need not and do not mandate class arbitration in order to protect employees' rights under the NLRA So long as the employer leaves open a judicial forum for class and collective claims, employees' NLRA rights are preserved without requiring the availability of classwide arbitration.")

47. *On Assignment Staffing Servs., Inc.*, 362 N.L.R.B. No. 189, at *1 (Aug. 27, 2015), *rev'd summarily per curiam*, No. 15-60642, 2016 WL 3685206 (5th Cir. June 6, 2016).

48. *Id.*

49. *Id.*

50. *Id.*

the opt-out procedure was viewed as a “second mandatory condition of employment” requiring affirmative action in order to retain the Section 7 right to collective action.⁵¹ The Board viewed the requirement to act as a significant burden interfering with employees’ exercise of Section 7 rights.⁵² The NLRB noted that the arbitration agreement, even assuming *arguendo* that the opt-out provision prevented it from being a condition of employment, nevertheless remained unlawful because it was a prospective waiver of the right to engage in concerted activity.⁵³ Such agreements conflict with the purpose and policy of the NLRA and Norris-LaGuardia Acts by restricting employees’ rights to engage in Section 7 protected activities.⁵⁴ This was so because of the prospective waiver of the right to engage in collective or class litigation in all forums in the absence of affirmatively opting out of the agreement within a very brief, specific time period.⁵⁵

In addition, the complaint alleged that the waiver was irrevocable.⁵⁶ The Dispute Resolution Agreement covered “any dispute arising out of or related to Employee’s employment with, or termination of employment . . .” including employment disputes regarding statutory claims, and made individual final and binding arbitration the exclusive forum, specifically preventing access to court and a jury trial.⁵⁷ An exception from coverage existed for private attorney general representative actions but nonetheless an employee was permitted to seek an individual remedy for such violations in arbitration.⁵⁸

The class action waiver in *On Assignment* provided that employees would not be discriminated against for exercising their rights under Section 7 of the NLRA but the company retained its right to enforce the waiver and seek dismissal of employees’ class, collective or representative claims, an arrangement that effectively undermined any exercise of class or collective rights.⁵⁹ If this provision was deemed to be unenforceable or unconscionable, void or voidable, challenges to the provision would be decided by a judicial rather than an arbitral forum.⁶⁰ The failure to opt out within ten days was deemed acceptance of the arbitration agreement.⁶¹

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.* at *2.

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.* at *2-3.

61. *Id.* at *3.

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The NLRB outlined two questions regarding *On Assignment's* arbitration agreement: (1) whether it was a mandatory condition of employment, and therefore controlled by the *D. R. Horton* and *Murphy Oil* decisions, and (2) whether the agreement was unlawful even if not mandatory.⁶² The NLRB quickly rejected the Employer's assertion that the agreement was not mandatory because of the ten-day opt-out period, finding the agreement, along with its opt-out clause, were conditions of employment.⁶³ The NLRB applied the test of whether an employer's conduct "reasonably tends to interfere" with the exercise of employees' Section 7 rights.⁶⁴ The NLRB found that the opt-out procedure did reasonably interfere because it required employees to take specific affirmative steps within a ten-day period, or risk losing their statutory rights.⁶⁵ Requiring employees to take such action in order to preserve rights is a burden on their exercise, just as a rule requiring permission or advance notice to an employer in order to engage in protected concerted activity would be unlawful.⁶⁶

One of the reasons why opt-out provisions do not heal the Section 7 problems inherent in imposing affirmative obligations on employees in order for them to preserve their statutory rights is that failure to act means employees lose their Section 7 rights. Thus, the default position brought on by failure to opt-out is individual arbitration which bars concerted activity. It would be slightly less egregious if a mandatory arbitration agreement was an option to opt-in to individual arbitration, and the default was one that allowed the employee to retain Section 7 rights, because then at least the presumption would be in favor of retaining the right to engage in protected concerted activities. But even with the latter opt-in option, the whole dynamic is creating a choice in a situation where the employer holds the power and the employee is forced to choose at her peril. If the employee chooses to opt-out of arbitration, it could result in loss of employment or some perceived lack of support for the employer's chosen system of dispute resolution. In *On Assignment*, the NLRB quoted language from the Norris-LaGuardia Act to support its position that whether such agreements were imposed as conditions of employment or characterized as voluntary undertakings, they violate federal labor policy because "the 'individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and

62. *Id.*

63. *Id.* at *4.

64. *Id.* (citing *American Freightways Co.*, 124 N.L.R.B. 146, 147 (1959)).

65. *Id.*

66. *Id.*

thereby to obtain acceptable terms and conditions of employment.”⁶⁷

In addition, the opt-out procedure interfered with Section 7 rights because it required employees to make an “observable choice” illustrating their position concerning concerted activity.⁶⁸ Free choice to exercise Section 7 rights includes freedom from employer knowledge of the employees’ views as well as freedom from fear of reprisal for pro-union views.⁶⁹ Requiring employees to choose options that are unlawful—unlawful because they require irrevocable waiver of Section 7 rights or else declare their election to opt-out—places employees in a position where they would reasonably believe that choosing the opt-out would be perceived negatively by the employer because of its “strong preference” for the waiver.⁷⁰ The opt-out procedure would result in an enduring record of the employee’s position on this issue and this too would tend to push employees in the opposite direction, defaulting to a permanent loss of Section 7 rights.⁷¹ The Board found that the arbitration agreement was unlawful, and the opt-out procedure itself was a burden on, and an interference with, exercise of Section 7 rights.⁷² The NLRB noted that the requirement of affirmative action to avoid the permanent waiver of substantive rights as well as the then diminished pool of those free to join in collective action underscored that even with an opt-out procedure, the dispute resolution agreement was a mandatory condition of employment.⁷³ But even if the DRA was not a mandatory condition, the Board made clear that it would reach the same result.⁷⁴

The NLRB went further in *On Assignment* than it did in *D. R. Horton*, holding that even non-mandatory agreements with individual employees “to resolve . . . all potential employment disputes through non-class arbitration rather than litigation in court” were “contrary to the National Labor Relations Act and to fundamental principles of federal labor policy.”⁷⁵ The Board held that the Federal Arbitration Act did not require the federal labor law to yield, reaffirming its consistent opposition to

67. *Id.* at *8 (quoting Section 2, 29 U.S.C. § 102).

68. *Id.* at *4 (citing *Allegheny Ludlum Corp.*, 333 N.L.R.B. 734, 740 (2001)).

69. *Id.* (citing *Quemetco, Inc.*, 223 N.L.R.B. 470, 470 (1976) and *Struksnes Construction Co.*, 165 N.L.R.B. 1062, 1062 (1967)).

70. *Id.* at *5.

71. *Id.*

72. *Id.*

73. *Id.* at *8 n.28 (citing Greene and O’Brien, *supra* note 5 at 119-20).

74. *Id.*

75. *Id.* at *6 (quoting, in part, *D. R. Horton, Inc.*, 357 N.L.R.B. 2277, 2289 n.28 (2012), *enf. denied in relevant part*, 737 F.3d 344 (5th Cir. 2013), *reh’g en banc denied*, No. 12-60031 (5th Cir. Apr. 16, 2014)).

prospective waivers of Section 7 rights.⁷⁶ Individual agreements that cede employees' future assertion of collective rights are contrary to the NLRA.⁷⁷ This is so even if the individual employment contracts are voluntary, and thus not a condition of employment.⁷⁸ The problem with foreclosing all potential for collective action is that it curtails the "full freedom of association" that is protected by the NLRA.⁷⁹ The NLRB refuted the existence of conflict with the Federal Arbitration Act, noting the Norris-LaGuardia Act provides the FAA must yield to the NLRA should any arbitration initiative conflict with the public policy goals supporting the NLRA.⁸⁰ The NLRB recognized the inequality of bargaining power between employers and individual employees such that the concept of voluntariness with respect to individual unorganized employees made little difference.⁸¹ Thus, whether considered voluntary or a condition of employment, prospective individual waivers of Section 7 collective action were both deemed illegal by the NLRB.⁸²

In rejecting the dissent's argument that employee acquiescence to a voluntary dispute resolution agreement with an opt-out provision is a 'de minimis' condition, the majority found that the right to engage in concerted legal activity is a fundamental substantive right.⁸³ *On Assignment* required employees to act within ten days to reject the waiver provision, thus obliging employees to act quickly in order to protect their Section 7 rights.⁸⁴ Absent employee action, the mandatory individual arbitration provision takes effect by default. In *On Assignment*, the NLRB granted the General Counsel's motion for summary judgment, finding the employer's mandatory arbitration agreement violated Section 8(a)(1) of the Act, and required the employer to discontinue the policy and notify employees of the discontinuation.⁸⁵

Member Johnson's dissent in *On Assignment* focused on contract law

76. *Id.*

77. *Id.*

78. *Id.* at *7.

79. *Id.* (citing *Nat'l Licorice Co. v. Nat'l Labor Relations Bd.*, 309 U.S. 350, 362 (1940)).

80. *Id.* at *7-8.

81. *Id.* at *8.

82. *Id.* (noting that the agreement in *On Assignment* was a condition of employment).

83. *Id.* at *9 (citing *Murphy Oil USA, Inc.*, 361 N.L.R.B. No. 72, at *8 (Oct. 28, 2014), *enf. denied in relevant part*, 808 F.3d 1013 (5th Cir. 2015), *reh'g en banc denied*, No. 14-608000 (5th Cir. May 13, 2016), *cert. granted*, No. 16-307, 2017 WL 125666 (U.S. Jan. 13, 2017)).

84. *Id.* at *8 (describing how the mandatory condition of employment puts an affirmative duty on employees to act if they wish not to be bound by the agreement).

85. *Id.* at *1, *10-11 (mandating that respondent rescind or revise the agreement as well as post a notice at all locations where the agreement was in effect).

rather than labor law, objecting to the preemption of the common law of contracts by the NLRA.⁸⁶ Yet that is the very thing that federal law is supposed to do, preempt state law when it is in direct conflict with it. Member Johnson also found that the opt-out opportunity made the arbitration agreement voluntary rather than mandatory, in contrast to the view of the majority.⁸⁷ Because of his view that an employee was free to enter into the dispute resolution agreement or not as “an equal bargaining partner,” Member Johnson found that the DRA did not violate the Act.⁸⁸ He dismissed the distinction between arbitration agreed to in collective bargaining agreements, as compared to arbitration agreements between an employer and an individual employee as making “no difference” since both consign dispute resolution to arbitration and waive Section 7 rights.⁸⁹ However, in the collective bargaining context, the Section 7 right to collective action is not waived since it is collectively bargained for and agreed to by the union as representative of the employees. This is in contrast to the individual employee context, where there is no collective strength when an employee must quickly decide whether to risk the displeasure of a brand new employer’s preference for arbitration. Member Johnson suggested that even if the individual arbitration agreement were “a prospective waiver of a substantive statutory right, a proper accommodation of the NLRA and the FAA would require finding that such a waiver does not violate the Act.”⁹⁰ Board Member Johnson found this to be so because one of the FAA’s fundamental statutory attributes of arbitration is the irrevocability of an agreement to settle disputes by arbitration.⁹¹ Member Johnson determined this despite the fact that it is the Board’s responsibility to interpret the NLRA in light of changing industrial trends,⁹² one of which is the increasing employer imposition of arbitration upon individual employee’s workplace disputes, in most cases where there is “no union present or waiting in the wings.”⁹³

86. *Id.* at *9, *11-12 (detailing how Member Johnson believes the majority has gone too far in rendering mandatory individual-specific arbitration contracts unlawful).

87. *Id.* at *12-13 (noting how the Board does not have any special expertise in determining contractual questions and should defer to the courts).

88. *Id.* at *14 (describing how employees who are free to accept or reject arbitration constitute equal bargaining partners).

89. *Id.* at *15 (explaining the lack of a meaningful distinction in terms of individuals in both cases having the freedom to arbitrate).

90. *Id.* at *16.

91. *Id.* (describing this as one of the three fundamental attributes of arbitration under the FAA).

92. *See Nat’l Labor Relations Bd. v. J. Weingarten, Inc.*, 420 U.S. 251, 266 (1975) (noting it is the Board’s responsibility to adapt the Act to changing industrial patterns and that courts must not “impermissibly encroach[] upon the Board’s function”).

93. *On Assignment Staffing Servs., Inc.*, 362 N.L.R.B. No. 189, at *16 (Aug. 27,

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The employer appealed the Board's *On Assignment* decision to the Fifth Circuit.⁹⁴ The Fifth Circuit refused to enforce the NLRB's decisions in *D. R. Horton*,⁹⁵ *Murphy Oil*,⁹⁶ and *On Assignment*.⁹⁷ The only prospect for support of the NLRB's position on mandatory individual arbitration agreements before the Fifth Circuit lies in its recent unpublished decision in which the panel found that such a provision violated the NLRA when it reasonably could be construed to bar access to filing unfair labor practice charges at the NLRB.⁹⁸ In that case, however, there was no opt-out provision, a factor that seems to matter more to some courts than to the NLRB.⁹⁹ The dissenter in *On Assignment* wrote that the majority could not find a single decision that supported the NLRB's view in *Murphy Oil*,¹⁰⁰ but there is growing evidence of judicial support for the NLRB's position in the several recent cases discussed next.

2015), *rev'd summarily per curiam*, No. 15-60642, 2016 WL 3685206 (5th Cir. June 6, 2016).

94. *On Assignment Staffing Servs., Inc. v. Nat'l Labor Relations Bd.*, No. 15-60642, 2016 WL 3685206 (5th Cir. June 6, 2016).

95. *D.R. Horton, Inc. v. Nat'l Labor Relations Bd.*, 737 F.3d 344, 364 (5th Cir. 2013) (holding that the NLRB did not give proper weight to the FAA, but also that the NLRB properly required Horton to make clear to its employees that the arbitration agreement did not preclude them from pursuing separate claims with the NLRB).

96. *Murphy Oil USA, Inc. v. Nat'l Labor Relations Bd.*, 808 F.3d 1013, 1021-22 (5th Cir. 2015) (holding that *Murphy Oil's* petition was granted in that the corporation did not commit unfair labor practices, but their petition was denied regarding the Board's desire for employers to clarify to employees that they could file separate claims), *reh'g en banc denied*, No. 14-608000 (5th Cir. May 13, 2016), *cert. granted*, No. 16-307, 2017 WL 125666 (U.S. Jan. 13, 2017).

97. *On Assignment Staffing Servs.*, 362 N.L.R.B. No. 189, at *5-8.

98. *Chesapeake Energy Corp., v. Nat'l Labor Relations Bd.*, 633 F. App'x 613, 614-15 (5th Cir. 2016) (*per curiam*) (holding that the petition for review is granted in part and the Board's order is enforced in part).

99. *Chesapeake Energy Corp.*, 362 N.L.R.B. No. 80, at *1 (April 30, 2015) (noting mandatory individual arbitration agreement was a condition of employment and no opt-out provision was mentioned). In *Johnmohammadi v. Bloomingdale's, Inc.*, the Ninth Circuit held that the availability of an opt-out made a class action waiver in an arbitration agreement legal under the NLRA. 755 F.3d 1072, 1077 (9th Cir. 2014) (holding that *Johnmohammadi* could not claim that the enforcement of the agreement violates the NLRA because she had selected to arbitrate employment-related disputes on an individual basis). See *Morris v. Ernst & Young, LLP*, 834 F.3d 975, 982 n.4 (9th Cir. 2016), *cert. granted*, No. 16-300, 2017 WL 125665 (U.S. Jan. 13, 2017).

100. See *On Assignment Staffing Servs.*, 362 N.L.R.B. No. 189, at *16 (Johnson, M., dissenting) (noting that the majority cannot point to a single decision that supports their view of the statutes, the NLRA and FAA).

II. MANDATORY ARBITRATION PROVISION PROHIBITING JOINDER OF CLAIMS WITHOUT AN OPT-OUT CLAUSE: A FEDERAL COURT IN CALIFORNIA FOLLOWS *D. R. HORTON* AND *MURPHY OIL*

A trial court responding to procedural motions may start the process in motion that ultimately leads to a division of opinion among the circuit courts as both levels of federal courts interpret federal statutes in the context of enforcing federal administrative agency decisions or not. Judge Gee's opinion in *Totten v. Kellogg Brown & Root, LLC*, triggered a belated groundswell of support for the NLRB's decision in *D. R. Horton*.¹⁰¹ This was so even though plaintiff David Totten filed claims regarding unpaid wages and meal breaks as well as premium overtime wages under California's state labor code and Private Attorneys General Act.¹⁰² The defendants moved the case to federal court where they were partially successful in getting a motion to compel individual arbitration.¹⁰³ Judge Gee upheld the Board's position in *D. R. Horton* and *Murphy Oil* in a case where a dispute resolution plan (DRP) was a condition of employment, and the DRP limited disputes to individual, rather than collective, arbitration.¹⁰⁴ The DRP had a savings clause providing that if the DRP was held unenforceable, then it would not apply to class or representative actions "which shall proceed instead before the court."¹⁰⁵

Employee Totten claimed that he did not receive a copy of the DRP, despite signing an agreement acknowledging he had received and reviewed it and that certain legal claims would be resolved through arbitration rather than in court.¹⁰⁶ Totten argued that the agreement was unconscionable and therefore void.¹⁰⁷ As to the first prong of an unconscionability theory, Totten asserted the DRP was procedurally unconscionable because he was not given an opportunity to negotiate terms.¹⁰⁸ The district court agreed, reasoning his argument was further supported by the employer's failure to

101. See *Totten v. Kellogg Brown & Root, LLC*, 152 F. Supp. 3d 1243, 1248 (C.D. Cal. 2016) (granting in part and denying in part defendant's motion to compel arbitration as well as dismiss class and representative claims), *appeal filed*, No. 16-55569 (9th Cir. Apr. 20, 2016); see also Dubé, *supra* note 26, at 1 ("[Totten] may set the stage for another major test of the National Labor Relations Board's view that arbitration agreements containing class action waivers interfere with the labor law rights of employees.").

102. *Totten*, 152 F. Supp. 3d at 1243.

103. *Id.* at 1248.

104. *Id.* at 1256-66.

105. *Id.* at 1248, 1267.

106. *Id.* at 1250.

107. *Id.*

108. *Id.* at 1250.

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give the employee a copy of the DRP or associated rules.¹⁰⁹ As to the second prong of the theory, substantive unconscionability, Totten asserted the following: a lack of mutuality; the ability of the employer to unilaterally modify the terms (which the court severed based upon a severability clause in the agreement); a requirement that the discovery costs be borne by the party taking the discovery, that attorneys' fees to be awarded by an arbitrator to either party including the company, and that the class and representative waivers violated the NLRA and California public policy.¹¹⁰

The court did not find a lack of mutuality, but did find the modification provision illusory and therefore unconscionable.¹¹¹ The discovery costs and attorneys' fee provisions were not substantively unconscionable in the court's view.¹¹² However, the court upheld the NLRB's assertion that class action waivers violated Section 7 substantive rights, finding the Supreme Court's precedents concerning arbitration inapplicable since they did not squarely address substantive federal statutory rights.¹¹³ The federal district court agreed with the dissent in *D. R. Horton II*, holding that the arbitration agreement's interference with a substantive statutory right made it unenforceable.¹¹⁴ In addition, the court noted that none of the cases cited by the defendants were controlling precedent, nor were these cases persuasive due to a lack of substantive analysis of what the court, as well as the NLRB for that matter, perceived to be the critical issue, namely, the class action waiver's interference with substantive statutory rights of the NLRA.¹¹⁵ Thus, the trial court refused to enforce the class action waiver in the arbitration agreement and held that the class could proceed to court.¹¹⁶

Just a few weeks later, Judge Wright from the same federal district court issued an opinion granting in part and denying in part defendant Kellogg Brown & Root's motion to compel arbitration against Totten on claims covered by the mandatory arbitration provision.¹¹⁷ The district court found that there was no evidence of substantive unconscionability and only

109. *Id.* at 1251.

110. *Id.* at 1252.

111. *Id.*

112. *Id.* at 1253-54.

113. *Id.* at 1260-61.

114. *Id.* at 1264-65 (explaining how Judge Graves agreed with the Board that the arbitration agreement interferes with substantive rights afforded to the employees (citing *D. R. Horton II*, 737 F.3d 344, 364-65 (5th Cir. 2013) (Graves, J., dissenting)).

115. *Id.* at 1265.

116. *Id.* at 1256.

117. *Totten v. Kellogg Brown & Root, LLC*, No. 5:15-cv-01876-ODW-KKx, 2016 U.S. Dist. LEXIS 18558 at *1 (C.D. Cal. Feb. 16, 2016).

minimal procedural unconscionability regarding the KBR arbitration program, and thus for claims that qualified under that program, the court granted KBR's motion to compel arbitration.¹¹⁸ However, because Totten's Section 7 claims were not subject to the arbitration program in light of a specific exemption regarding such claims, these were not submitted to arbitration.¹¹⁹ State law claims that Totten initially brought in state court were not specifically exempted from arbitration and thus "may be subject to arbitration" according to the court.¹²⁰ Totten claimed that the arbitration provision was an adhesion contract that was "implicitly procedurally unconscionable" and that KBR's failure to provide a copy of the program to him was similarly procedurally unconscionable.¹²¹ The court found that since Totten signed an acknowledgement that he had read and agreed to the DRP, he failed to prove that he did not agree to it and his procedural unconscionability argument failed.¹²²

With respect to Totten's substantive unconscionability arguments, the court found none persuasive.¹²³ This was so because the arbitrator-determined discovery was deemed adequate, mutuality was not lacking since both parties were bound by the DRP, the ability to unilaterally modify terms applied to prospective disputes only, and attorneys' fees were awardable by the arbitrator to the prevailing party based upon applicable law.¹²⁴ There was no mention of Section 7 of the NLRA, *D. R. Horton*, or *Murphy Oil* in the district court's order in February.

Thereafter, in April, an NLRB ALJ ruled on the legality of Kellogg Brown & Root's DRP.¹²⁵ The judge found that KBR engaged in unfair labor practices by maintaining a mandatory individual arbitration policy as a condition of employment that prohibited employees from pursuing claims in a class or representative capacity in both judicial and arbitral forums, and seeking to enforce the policy against the Charging Party, Totten.¹²⁶ The ALJ ordered the employer to rescind or revise the existing DRP, in accordance with the NLRB's requirements as stated in *D. R. Horton* and *Murphy Oil*, as well as ordered it to notify Totten and other employees of the changes.¹²⁷ The judge noted the federal district court's decision in

118. *Id.* at *14.

119. *Id.* at *5-7.

120. *Id.* at *6-7.

121. *Id.* at *7.

122. *Id.* at *10-11.

123. *Id.* at *11.

124. *Id.* at *10-14.

125. Kellogg Brown & Root LLC, 2016 NLRB LEXIS 257, at *1 (N.L.R.B. Apr. 4, 2016).

126. *Id.* at *12-14.

127. *Id.* at *13.

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Totten v. Kellogg Brown & Root and its pending appeal at the Ninth Circuit, indicating that KBR must notify the appellate court of the rescission and revision of its DRP, as well as withdraw objections to Totten's class claims.¹²⁸ The ALJ also ordered the employer to pay Totten for expenses resulting from its opposition to the class claims, and post a notice onsite as well as electronically regarding the ALJ's order.¹²⁹ The outcome of the *Totten* appeal at the Ninth Circuit may add to the circuit split begun by the Seventh Circuit, discussed next.

III. THE SEVENTH CIRCUIT AFFIRMS A FEDERAL DISTRICT
DECISION ENFORCING THE BOARD'S POSITION IN *D. R.*
HORTON AND MURPHY OIL

In another federal district court decision, *Lewis v. Epic Systems Corp.*,¹³⁰ the court once again agreed with the NLRB's position in *D. R. Horton*.¹³¹ District Court Judge Crabb cited her earlier decision in *Herrington v. Waterstone Mortgage Corp.*,¹³² a case that she noted involved a similar waiver in an arbitration clause to the instant case.¹³³ In *Waterstone*, Judge Crabb found the waiver inconsistent with the NLRB's *D. R. Horton* decision.¹³⁴ She noted that the Board's reasoning was straightforward and that both the Board and the courts have found that lawsuits for unpaid wages by multiple plaintiffs are one type of protected concerted activity under Section 7 of the Act.¹³⁵ Thus, according to the court, *Waterstone's* waiver on collective action in the arbitration agreement violated §8(a)(1) of the NLRA.¹³⁶

When *Waterstone* sought reconsideration of the district court's decision based upon the Fifth Circuit's refusal to enforce *D. R. Horton*, Judge Crabb once again found in favor of the NLRB because the Fifth

128. *Id.* at *14 (citing *Totten v. Kellogg Brown & Root, LLC*, 152 F. Supp. 3d 1243 (C.D. Cal. 2016), *appeal filed*, No. 16-55569 (9th Cir. Apr. 20, 2016)).

129. *Id.* at *14-15.

130. *Lewis v. Epic Systems Corp.*, No. 15-CV-82-BBC, 2015 WL 5330300, at *1 (W.D. Wis. Sept. 11, 2015), *aff'd*, 823 F.3d 1147 (7th Cir. 2016), *cert. granted*, No. 16-285, 2017 WL 125664 (U.S. Jan. 13, 2017).

131. *D. R. Horton, Inc.*, 357 N.L.R.B. 2277, 2278-80 (2012), *enf. denied in relevant part*, 737 F.3d 344 (5th Cir. 2013), *reh'g en banc denied*, No. 12-60031 (5th Cir. Apr. 16, 2014).

132. *Herrington v. Waterstone Mortgage Corp.*, 993 F. Supp. 2d 940 (W.D. Wisc. 2014).

133. *Lewis*, 2015 WL 5330300, at *1.

134. *Id.*

135. *Id.* (citations omitted).

136. *Id.* at *2 (citing *Herrington v. Waterstone Mortg. Corp.*, No. 11-CV-779-BBC, 2012 WL 1242318, at *3 (W.D. Wis. Mar. 16, 2012)).

Circuit's majority opinion did not persuade her otherwise.¹³⁷ The court found that no distinction was made by the respondent employer between the collective action waivers in *Waterstone* and *Epic Systems*.¹³⁸ Because the waiver at Epic had a savings clause—providing that if the class or collective claim waiver was found to be unenforceable, then any class, collective, or representative action must be filed in court as the exclusive forum—the court noted that its decision that the waiver was invalid made the rest of plaintiff's argument moot and resulted in a denial of the defendant's motion to dismiss.¹³⁹ It should be noted that this savings clause appears to cut off administrative agency claims, or a reasonable person would so conclude, something that the NLRB finds problematic.

The oral argument in the *Epic Systems* appeal took place on February 12, 2016, and the Seventh Circuit granted the NLRB's motion to participate in the oral argument, which it did towards the end of the session.¹⁴⁰ This was the first time that the NLRB participated in an oral argument as an amicus at the appellate level on the class waiver issue.¹⁴¹ During the

137. *Id.* (holding that the majority never persuasively challenged the Board's conclusion).

138. *Id.*

139. *Id.* at *1, *3.

140. See Albina Gasanbekova, *Building a Circuit Split: Updating Moves by the NLRB on Class Waivers*, 34 ALTERNATIVES TO THE HIGH COST OF LITIG., Issue 4, 60-64 (Apr. 2016). The oral argument in *Lewis v. Epic Systems* is available at http://media.ca7.uscourts.gov/sound/2016/sk.15-2997.15-2997_02_12_2016.mp3 [<https://perma.cc/6R2Y-WVTS>].

141. See Gasanbekova, *supra* note 140. The NLRB submitted an amicus brief in *Lewis v. Epic Systems Corp.*, Case No. 15-2997 (NLRB Amicus Brief filed Dec. 16, 2015) and in *Morris v. Ernst & Young*, Case No. 13-16599 (9th Cir. NLRB Amicus Brief filed Nov. 6, 2015) but the Board did not participate in the oral argument of the *Morris* case. The NLRB also filed an amicus brief regarding *Patterson v. Raymours Furniture Co.*, Case No. 15-2820, (2nd Cir. NLRB Amicus Brief filed Dec. 23, 2015) in an appeal from *Patterson v. Raymours Furniture Co.*, 96 F. Supp. 3d 71 (S.D.N.Y. 2015). In *Patterson*, the federal district court held that an employment arbitration provision was enforceable, rejecting plaintiff's argument that the employee arbitration program (EAP) carved out rights under the NLRA. The district court noted that the EAP stated that the right to file an unfair labor practice charge under the NLRA was not prevented, and the court found that the class action waiver overrode the EAP's language that might be read to include collective activity outside of filing an unfair labor practice claim at the NLRB. The court found no new arguments were asserted by the plaintiff that would persuade it to alter its earlier opinion in *Sutherland v. Ernst & Young LLP.*, 726 F.3d 290, 296 (2nd Cir. 2013). In *Sutherland*, the Second Circuit followed the United States Supreme Court's decision in *Italian Colors* ruling that the prohibitive cost of individual arbitration on a low value, high cost claim did not prevent effective vindication of an employee's rights. *Sutherland*, 726 F.3d at 292-98. The Second Circuit affirmed the district court in *Patterson v. Raymours Furniture Co., Inc.*, 659 F. App'x 40, 41-42 (2nd Cir. 2016) *petition for cert. filed*, No. 16-388 (U.S. Sept. 22, 2016), finding that the EAP which prohibited class or collective adjudication of work-related claims was not illegal. The appellate court noted that it was following its earlier precedent in *Sutherland*, 726 F.3d 290 (2d Cir. 2013), which it was bound to follow absent an en banc

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argument, Chief Judge Wood appeared to agree with the NLRB, sounding as if she would recommend upholding *D. R. Horton* and affirming the district court's position. Judge Wood noted the same issue was decided regarding contracts stating an employee would not join a union, and that the benefits of arbitration remain even if a class participates, which was something that the class waiver prohibited. The attorney for the NLRB noted that the Section 7 right to collective activity is a substantive one, and that the United States Supreme Court's decision in *Gilmer* involved the Age Discrimination in Employment Act, which did not involve a substantive collective right. He noted further that the Court's decision in *Concepcion* did not involve Section 7 of the NLRA and thus it was not controlling.¹⁴² Instead, the Court's decisions in *National Licorice*,¹⁴³ *J. I. Case*,¹⁴⁴ and *Stone*¹⁴⁵ are relevant, as these cases all hold that the Section 7 right cannot be waived by individual contract.

The NLRB's amicus brief in the *Epic Systems* case reiterated the Board's holding from *D. R. Horton* as reaffirmed in *Murphy Oil*, that waivers of collective action in any and all forums, signed as a condition of employment, violate the NLRA, reaffirming the principle that individual employees cannot waive Section 7 rights prospectively.¹⁴⁶ The Board's Brief noted that the United States Supreme Court has not spoken to the issue of waivers of collective action in light of the Section 7 right to engage in concerted activity.¹⁴⁷ Collective action for mutual protection is so central to the NLRA that waivers depriving employees of this right are thus illegal and unenforceable, and fall within the FAA's savings clause.¹⁴⁸ In

or Supreme Court ruling to the contrary. Nonetheless, the court noted that "[i]f we were writing on a clean slate, we might well be persuaded, for the reasons forcefully stated in Chief Judge Wood's and Chief Judge Thomas's opinions in *Lewis* and *Morris*, to join the Seventh and Ninth Circuits and hold that the EAP's waiver of collective action is unenforceable." *Patterson*, 2016 WL 4598542 at *3. The employees from Raymours Furniture have since filed a petition for certiorari as they continue to seek a class action against the company. Petition for Writ of Certiorari, *Patterson v. Raymours Furniture Co., Inc.*, No. 16-388 (U.S. Sept. 22, 2016).

142. *Lewis* oral argument *supra* note 140.

143. *Nat'l Licorice Co. v. Nat'l Labor Relations Bd.*, 309 U.S. 350, 367 (1940) (holding that the contracts were in violation of the NLRA).

144. *J. I. Case Co. v. Nat'l Labor Relations Bd.*, 321 U.S. 332, 341-42 (1944) (holding that the contracts were invalid because they were used to prevent employees from taking advantage of benefits that were given to them through collective action).

145. *Nat'l Labor Relations Bd. v. Stone*, 125 F. 2d 752, 756-57 (7th Cir. 1942) (claiming that the blanket provision in the contract was unenforceable).

146. Brief for the NLRB as Amicus Curiae Urging Affirmance in Support of Plaintiff-Appellee at 2, *Lewis v. Epic Systems*, 823 F.3d 1147 (Dec. 16, 2015) (No. 15-2997), 2015 WL 9391946.

147. *Id.* at 4.

148. *Id.* at 19-21.

addition, the NLRA is a clear congressional command that overrides the FAA enforcement of contracts that inherently conflict with it.¹⁴⁹ The Board's Amicus Brief noted the fatal flaw in the reasoning of the circuit courts that have refused to enforce the holding of *D. R. Horton*, namely that the Supreme Court's precedents on the FAA have not spoken to this issue and thus are not dispositive because the other decisions have not involved the NLRA, a statute that is different than the others considered.¹⁵⁰

Chief Judge Wood authored the opinion of the Seventh Circuit, affirming the district court's decision denying Epic's motion to compel arbitration in the *Lewis* case.¹⁵¹ The judge noted that Epic's email to employees containing the arbitration agreement provided no option to opt-out of the agreement, that employees were considered to have accepted the agreement if they continued employment, and that the email contained instructions to review and acknowledge their agreement by clicking two buttons.¹⁵² Lewis complied with these instructions but later sought relief from alleged Fair Labor Standards Act violations in federal district court.¹⁵³ The district court agreed with Lewis and the NLRB's *D. R. Horton* ruling that the individual arbitration with collective action waiver violated the NLRA because it interfered with employees' concerted activities for mutual aid and protection.¹⁵⁴

The Seventh Circuit reviewed the district court's decision *de novo*.¹⁵⁵ The appellate court outlined longstanding precedent holding that the NLRA prevents employers from imposing contractual waivers of Section 7 rights to engage in concerted activities upon individual employees.¹⁵⁶ Collective legal proceedings are included in such concerted activities, and assist in equalizing the bargaining power of employees, one of the central purposes of the NLRA.¹⁵⁷ Following the NLRB's reasoning in *D. R. Horton*, the Seventh Circuit deferred to the Board's sensible interpretation of the statutory language, finding that employers may not use such individual waivers to bar access to collective remedies.¹⁵⁸ The court noted that "Section 7's . . . text signals that the activities protected are to be construed broadly."¹⁵⁹ Congress was aware of various forms of collective action

149. *Id.* at 22.

150. *Id.* at 23-27.

151. *Lewis*, 823 F.3d at 1151.

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.* at 1152.

157. *Id.* at 1153.

158. *Id.*

159. *Id.* at 1154 (citing 29 U.S.C. § 157).

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including legal proceedings when it enacted the NLRA, and, in light of the plain language of Section 7 and 8 of the Act, contract provisions seeking to waive employees' access to such remedies are unenforceable.¹⁶⁰

The court declared that Epic's arbitration provision impinged on Section 7 rights, running "straight into the teeth of Section 7" in that it prohibited collective, representative, or class legal proceedings which are concerted activities for mutual aid or protection.¹⁶¹ Such provisions are unlawful under the NLRA and unenforceable.¹⁶² The Seventh Circuit outlined that their earlier opinion in *NLRB v. Stone*, which it noted had not been undermined, would prompt a different conclusion from that reached by the Ninth Circuit in *Johnmohammadi v. Bloomingdale's, Inc.*¹⁶³ Thus, unlike the Ninth Circuit's conclusion that the availability of an opt-out from the individual arbitration and class waiver cured the illegality, the Seventh Circuit's earlier decision in *NLRB v. Stone* held that where an individual is "obligated to bargain individually," an arbitration agreement limiting Section 7 rights was a *per se* violation of the NLRA which could not "be legalized by showing the contract was entered into without coercion."¹⁶⁴ Nonetheless, despite the Seventh Circuit's dicta regarding the ability of an opt-out to cure such a provision, the court disclaimed the need to resolve this dissonance between the circuits since, in the instant case, Epic provided no opt-out to its agreement, making its arbitration provision a clear condition of continued employment that interfered with employees exercising their Section 7 rights.¹⁶⁵

Next the court turned to the impact of the Federal Arbitration Act on employees' rights under the NLRA, responding to Epic's contention that the FAA should override the NLRA.¹⁶⁶ The court essentially followed the NLRB's reasoning in *D. R. Horton*, that the FAA savings clause permits invalidation of agreements to arbitrate relating to generally applicable contract defenses, of which illegality is one such ground, ensuring that the two statutes "work hand in glove."¹⁶⁷ Unlike the Fifth Circuit in *D. R.*

160. *Id.*

161. *Id.* at 1155.

162. *Id.* (citing *Nat'l Licorice Co. v. Nat'l Labor Relations Bd.*, 309 U.S. 350, 361 (1940) and *D. R. Horton, Inc.*, 357 N.L.R.B. 2277, 2280 (2012), *enf. denied in relevant part*, 737 F.3d 344 (5th Cir. 2013), *reh'g en banc denied*, No. 12-60031 (5th Cir. Apr. 16, 2014)).

163. *Id.* (citing *Nat'l Labor Relations Bd. v. Stone*, 125 F.2d 752, 756 (7th Cir. 1942) and *Johnmohammadi v. Bloomingdale's, Inc.*, 755 F.3d 1072, 1077 (9th Cir. 2014)).

164. *Id.* (citing *Stone*, 125 F.2d at 756).

165. *Id.* As noted in Part I above, the NLRB ruled that opt-outs do not cure an otherwise illegal collective action waiver when it decided *On Assignment Staffing Servs., Inc.*, 362 N.L.R.B. No. 189, at *1 (Aug. 27, 2015), *rev'd summarily per curiam*, No. 15-60642, 2016 WL 3685206 (5th Cir. June 6, 2016).

166. *Lewis*, 823 F.3d at 1156.

167. *Id.* at 1157.

Horton, the Seventh Circuit saw no conflict between the two statutes in light of the operation of the FAA's savings clause, the FAA's silence regarding the necessity of individual arbitration, and the NLRA's pro-arbitration stance in that it "expressly allows unions and employers to arbitrate disputes between each other."¹⁶⁸ The problem with Epic's provision was that it banned collective action including collective arbitration and thus it "ran up against the substantive right to act collectively that the NLRA gives to employees."¹⁶⁹

The court stated that the two statutes in question are both federal and on "equal footing."¹⁷⁰ The FAA's savings clause prevents the FAA from mandating the enforcement of the collective action waiver, and works with the NLRA's prohibition of employers interfering with employees' protected concerted activities.¹⁷¹ In *Lewis v. Epic Systems*, the Seventh Circuit noted that the NLRA makes it illegal for an employer contracting with an individual to waive his Section 7 rights, and that even the attempt to do so is unlawful.¹⁷² The court declined to find that the NLRA was in conflict with the FAA, stating that this would make the FAA's savings clause "a nullity," which runs contrary to rules of statutory construction requiring the reading of all words and clauses as having meaning.¹⁷³ The court agreed with the NLRB that Section 7 rights are substantive, the very core of the statute, with the rest of the NLRA serving to enforce the rights that Section 7 protects.¹⁷⁴ The court noted that a " 'prospective waiver of a party's right to pursue statutory remedies' —that is, of a substantive right—are not enforceable."¹⁷⁵ The court distinguished the substantive right to collective action in Section 7 of the NLRA from the procedural device of class actions under other employment statutes, finding that the collective process was central to the Section 7 right, and that other employment statutes do not guarantee collective process but "[t]he NLRA does."¹⁷⁶

The court compared the associational rights embodied in the First Amendment of the U.S. Constitution to the collective right in Section 7, finding that it would be "odd indeed to consider . . . [the First Amendment right] non-substantive."¹⁷⁷ This was a brilliant comparison that showed the

168. *Id.* at 1158. The court noted that collective bargaining agreements "require employees to arbitrate individual employment disputes." *Id.*

169. *Id.*

170. *Id.*

171. *See id.* at 1158-59 (explaining why the NLRA is not in conflict with the FAA).

172. *Id.* at 1159.

173. *Id.*

174. *Id.* at 1159-60.

175. *Id.* at 1160.

176. *Id.* at 1161.

177. *Id.*

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court's strong belief in the importance of the associational right in Section 7 by equating it to the associational rights safeguarded by the First Amendment of the U.S. Constitution. Just as the First Amendment is foundational to the Bill of Rights, Section 7 is the foundation of the NLRA, which has also been equated to a workplace bill of rights.¹⁷⁸ The NLRB looks to protect the exercise of Section 7 rights in much the same way that courts protect the exercise of First Amendment rights, and both have good reason to look askance at prior restraints on the exercise or restraint from exercise of these fundamental rights. The Seventh Circuit agreed with the NLRB's position on mandatory individual arbitration provisions with class waivers, and noted that none of the courts that disagreed with the NLRB have "engaged substantively with the relevant arguments."¹⁷⁹

IV. THE EIGHTH CIRCUIT DECIDES AGAINST THE NLRB ON THE PRIMARY ISSUE OF THE LEGALITY OF A COLLECTIVE ACTION WAIVER IN AN INDIVIDUAL EMPLOYMENT ARBITRATION AGREEMENT, WIDENING THE CIRCUIT SPLIT

Exactly one week after the Seventh Circuit issued its ruling supporting the NLRB in *Lewis v. Epic Systems*, the Eighth Circuit found that a similar collective action waiver in an arbitration agreement did not violate the NLRA, following its own precedent in *Owen v. Bristol Care* and similar rulings from the Fifth Circuit.¹⁸⁰ In *Cellular Sales of Missouri*, the panel granted the employer's petition for review in part, and denied it in part.¹⁸¹ The denial affected the bulk of the NLRB's order relating to the arbitration provision's class waiver that the NLRB had found violated the NLRA.¹⁸²

When John Bauer was hired as an employee in January 2012, he signed an employment agreement as a condition of employment.¹⁸³ The agreement required individual arbitration of all claims, disputes or

178. See Christine Neylon O'Brien, *Am I Blue or Seeing Red? The NLRB Sees Purple When Employer Communications Policies Unduly Restrict Section 7 Rights*, 66 LAB. L. J. 75, 75 (2015) (stating Section 7 provides employees with a workplace bill of rights); see also AGIP USA, Inc., 196 N.L.R.B. 1144, 1145 (1972) ("[T]he Act was intended to be a 'bill of rights both for American workingmen and their employers . . .'" (quoting *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 371 U.S. 931 (1963)).

179. *Lewis*, 823 F.3d at 1159.

180. *Cellular Sales of Mo., LLC v. Nat'l Labor Relations Bd.*, 824 F.3d 772 (8th Cir. 2016) (citing *Owen v. Bristol Care, Inc.*, 702 F.3d 1050 (8th Cir. 2013)).

181. *Id.*

182. *Id.* at 775. See also Greene & O'Brien, *supra* note 5, at 121 (arguing that courts that discredit the Board's *D. R. Horton* decision have not "given serious consideration to the merits of the Board's analysis and the fact that the case raises issues that have not been addressed by the Supreme Court").

183. *Cellular Sales*, 824 F.3d at 774.



controversies related to his employment and waived class, collective or representative proceedings.¹⁸⁴ The arbitration was final, binding and while enforceable in court, it was not appealable.¹⁸⁵ When Bauer's employment ended in May 2012, he brought a class action in federal court alleging FLSA violations.¹⁸⁶ The district court granted the employer's motion to compel arbitration of the dispute pursuant to the employment agreement.¹⁸⁷ Bauer proceeded to arbitration where the parties settled and the lawsuit was dismissed.¹⁸⁸ Meanwhile, Bauer filed an unfair labor practice charge at the NLRB in light of the class action waiver in the arbitration agreement that he was required to sign.¹⁸⁹ The Board issued a complaint, an ALJ ruled in favor of the Board, and the NLRB affirmed.¹⁹⁰ The Board's order required the employer to rescind the arbitration agreement or revise it to preserve employees' rights to pursue collective action in some forum, either arbitral or judicial, and not restrict employees ability to file charges at the NLRB.¹⁹¹

After reviewing the Board's findings of fact and conclusions of law *de novo*, the court refused to defer to the NLRB's legal interpretation beyond that relating to the NLRA.¹⁹² Looking at the Fifth Circuit's refusal to enforce the NLRB in *D. R. Horton* and *Murphy Oil*, and its own decision in *Owen v. Bristol Care*, the Eighth Circuit granted the employer's petition for review and refused to enforce the NLRB's order regarding the class or collective action waiver.¹⁹³ However, the court enforced the part of the Board's order relating to the fact that the arbitration provision could reasonably be construed to bar employees from filing charges at the NLRB.¹⁹⁴ Without a savings clause to clarify that employees retained the right to file charges at the NLRB, the court agreed with the NLRB that the provision violated the Act and must be cured.¹⁹⁵ The employer argued that the arbitration agreement did not expressly prohibit employees from filing charges with the Board, nor did it mention agency or administrative

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.* at 774-75.

188. *Id.* at 775.

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.*

193. *Id.* at 776 (citing *Owen v. Bristol Care, Inc.*, 702 F.3d 1050, 1053-55 (8th Cir. 2013); *D.R. Horton, Inc. v. Nat'l Labor Relations Bd.*, 737 F.3d 344, 362 (5th Cir. 2013); and *Murphy Oil USA, Inc. v. Nat'l Labor Relations Bd.*, 808 F.3d 1013, 1018 (5th Cir. 2015), *reh'g en banc denied*, No. 14-608000 (5th Cir. May 13, 2016), *cert. granted*, No. 16-307, 2017 WL 125666 (U.S. Jan. 13, 2017)).

194. *Id.* at 777-78.

195. *Id.* at 778.

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proceedings, and thus it would not reasonably be construed to bar such filings.¹⁹⁶ The court was not persuaded by this argument and cited the Fifth Circuit's similar conclusion in *D. R. Horton*.¹⁹⁷ The breadth of the arbitration provision, as well as its generality, worked against the employer's argument, and the court noted that this was an area where the Board was entitled to deference in its reasonable interpretation of the arbitration agreement.¹⁹⁸

It is interesting that even the circuits that do not support the NLRB on the main issue regarding the illegality of class or collective action waivers in pre-dispute individual arbitration agreements, do agree with the NLRB about provisions that reasonably could be construed as barring the filing of claims at the NLRB. This could be in part because of the strong statutory provisions supporting employee access to the Board's processes. As the NLRB instructs,

Section 8(a)(4) makes it an unfair labor practice for an employer "to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act." This provision guards the right of employees to seek the protection of the Act by using the processes of the NLRB [I]t forbids an employer to discharge, layoff, or engage in other forms of discrimination in working conditions against employees who have filed charges with the NLRB, given affidavits to NLRB investigators, or testified at an NLRB hearing. Violations of this section are in most cases also violations of Section 8(a)(3).¹⁹⁹

Protecting access to NLRB processes is clearly protected by the language of the statute which is aimed at preventing employer interference with Section 7 rights, and the Board's test with respect to determining if an employer mandated arbitration provision would reasonably be construed to bar access to the NLRB is a logical one that deserves the deference of the courts. However, the larger issue of the class waiver itself remains incorrectly decided by the Fifth, Eighth and Second Circuits.²⁰⁰

196. *Id.* at 777.

197. *Id.* at 777-78 (citing *D. R. Horton*, 737 F.3d at 363-64).

198. *Id.* at 778.

199. See NAT'L LABOR RELATIONS BD., BASIC GUIDE TO THE NATIONAL LABOR RELATIONS ACT: GENERAL PRINCIPLES OF LAW UNDER THE STATUTE AND PROCEDURES OF THE NATIONAL LABOR RELATIONS BOARD 20 (1997), <https://www.nlr.gov/sites/default/files/attachments/basic-page/node-3024/basicguide.pdf> [<https://perma.cc/25BP-9KQD>].

200. See *Sutherland v. Ernst & Young LLP*, 726 F.3d 290, 297 n.8 (2d Cir. 2013) (following the Eighth Circuit's lead in *Owen v. Bristol Care* by rejecting the NLRA argument on class waiver's illegality because court owed no deference to the NLRB's preferences on remedial policies "where such preferences potentially trench upon federal statutes and policies unrelated to the NLRA"). It is noteworthy that the class waiver issue

V. THE NINTH CIRCUIT FOLLOWS THE SEVENTH CIRCUIT'S *EPIC* DECISION SUPPORTING THE NLRB'S RULE THAT MANDATORY CLASS AND COLLECTIVE ACTION WAIVERS VIOLATE THE NLRA

In *Morris v. Ernst & Young, LLP*, the Ninth Circuit agreed with the Seventh that substantive rights under the National Labor Relations Act prevent employers from mandating individual arbitration as the exclusive remedy for employment disputes.²⁰¹ The *Morris* decision is particularly important because the Ninth Circuit is the largest circuit—encompassing nine states—and the court's decision considerably strengthens the NLRB's position as well as that of the Seventh Circuit on this issue.²⁰² Both the Seventh and the Ninth Circuit majority opinions thoroughly explored the NLRB's arguments, finding that such DRA provisions cannot waive the substantive federal statutory right to act in concert, with the Ninth deeming Ernst & Young's separate proceedings clause the “‘very antithesis’ of § 7's substantive right to pursue concerted work-related legal claims.”²⁰³ The court further noted that “§7 rights would amount to very little if employers could simply require their waiver.”²⁰⁴ The majority made clear that the savings clause in the Federal Arbitration Act prevented any conflict with the NLRA, finding that the “arbitration requirement [wa]s not the problem,” rather the same problem would arise if the contract provided for individual court adjudication as the sole remedy.²⁰⁵ Instead, the problem was the restriction on concerted activity in the only forum allowed.²⁰⁶ The Ninth Circuit stated that “an employer may not defeat the right by requiring

goes well beyond the Board's ‘remedial preferences’ as these provisions undermine the most basic employee rights under the NLRA. See also Jon Steingart, *Solo Arbitration Violates Right to Concerted Activity*, 162 DAILY LAB. RPT. (BNA) at A-1 (Aug. 22, 2016) (quoting Professor Charlotte Garden of Seattle University School of Law that the Second and Eleventh Circuits rejected the NLRB rule “in drive-by fashion”).

201. *Morris v. Ernst & Young, LLP*, 834 F.3d 975, 980-84 (9th Cir. 2016), cert. granted, No. 16-300, 2017 WL 125665 (U.S. Jan. 13, 2017).

202. See Matthew Bultman, *Class Waiver Battle Appears Destined for Supreme Court*, LAW360 (Aug. 24, 2016), <https://www.law360.com/articles/832230/class-waiver-battle-appears-destined-for-supreme-court> [<https://perma.cc/V9A4-GTEZ>] (noting that the Ninth Circuit's decision was another win for workers and similar to the Seventh Circuit's previous ruling, but it also conflicted with the Fifth and Eighth Circuits).

203. *Morris*, 834 F.3d at 983 (9th Cir. 2016) (quoting *J.H. Stone & Sons*, 125 F.2d 752 (7th Cir. 1942)).

204. *Id.*

205. *Id.* at 984.

206. See *id.* at 989 (holding that the NLRA establishes a substantive right to concerted activity and Ernst & Young's “separate proceeding” provision interferes with this right by precluding concerted work-related claims).

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employees to pursue all work-related legal claims individually.²⁰⁷ Nor may the employer condition employment on signing such a contract.²⁰⁸ The appellate court vacated the district court's order compelling arbitration and remanded for the court to determine if the separate proceedings clause was severable.²⁰⁹

Despite the victory for employees represented in *Morris*, the decision itself was divided two-to-one, with Judge Ikuta writing a lengthy and pointed dissent that objected to the majority's violation of the FAA's mandate to enforce arbitration agreements and U.S. Supreme Court precedent.²¹⁰ This case will be heard at the U.S. Supreme Court.²¹¹ As it stands, the Ninth Circuit's decision follows the carefully crafted opinion of the Seventh Circuit in *Lewis*, which the majority noted was the only other circuit court to address the merits of the issue.²¹² The opinion emphasized the centrality of Section 7 of the NLRA, which creates substantive rights that cannot be waived in individual arbitration agreements that represent the exclusive mechanism for dispute resolution. The court held that "[t]he NLRA precludes contracts that foreclose the possibility of concerted work-related legal claims."²¹³

VI. OPTIONS TO ADDRESS THE PROBLEM OF MANDATORY PRE-DISPUTE ARBITRATION WITH CLASS WAIVERS FOR EMPLOYMENT DISPUTES: THE CIRCUIT SPLIT SHOULD BE RESOLVED AND THE POSSIBILITY OF LEGISLATIVE ACTION

There is considerable discussion about the conflict between the NLRB and the courts on the mandatory class action waiver issue and how it should or will play out.²¹⁴ The NLRB clearly upped its game by entering into

207. *Id.* at 983 (citing *J.I. Case Co. v. Nat'l Labor Relations Bd.*, 321 U.S. 332, 337 (1944)).

208. *Id.* at 990.

209. *Id.*

210. *Id.* at 990-98 (Ikuta, J., dissenting).

211. See Lawrence E. Dubé, Justices Will Consider Class Action Waivers, 26 DAILY LAB. RPT. (BNA) No. 9, AA-1 (Jan. 13, 2017) (noting that the U.S. Supreme Court has granted certiorari for three NLRA related cases, including *Morris*).

212. *Morris*, F.3d at 930 n.16

213. *Id.* at 990 (Ikuta, J., dissenting).

214. See William Emanuel et al., *NLRB Continues Attack on Class and Collective Action Waivers*, LITTLER MENDELSON (Feb. 22, 2016), <https://www.littler.com/publication-press/publication/nlr-continues-attack-class-and-collective-action-waivers> [<https://perma.cc/Z5P4-2VJM>] (outlining NLRB decisions, issues, and Supreme Court guidance); Gordon W. Renneisen, *Lewis v. Epic Systems: An Ongoing Debate Over Class Waivers*, LAW360 (June 13, 2016), <https://www.law360.com/articles/805857/lewis-v-epic-systems-an-ongoing-debate-over-class-waivers> [<https://perma.cc/H6U4-L5XK>] (noting that

cases on appeal that did not originate from complaints brought to the agency. The Board has also turned away from courts of appeal, such as the Fifth Circuit, that do not agree with its holding in *D. R. Horton*, and instead followed its standard policy of non-acquiescence. This means that unless the Supreme Court tells the agency it is wrong, it is not going to change its course on the mandatory arbitration issue. Now that the Seventh and Ninth Circuits have shown clear support for the NLRB, in sharp contrast to the Fifth and Eighth Circuits in particular, it will be up to the Supreme Court to make a decision between substantive rights under the NLRA and private contractual agreements that waive such rights of individual employees. The NLRB filed for certiorari regarding the Fifth Circuit's decision to deny enforcement or rehearing en banc in the *Murphy Oil USA, Inc.* decision, and the Board also filed a petition in another case from the Fifth Circuit, *National Labor Relations Board v. 24 Hour Fitness USA, Inc.*²¹⁵ Epic Systems filed a notice that it planned to appeal its loss at the Seventh Circuit to the U.S. Supreme Court, and subsequently filed a petition for certiorari, which the Supreme Court granted.²¹⁶ Ernst & Young also filed a petition for certiorari, and employees at Raymours Furniture filed a petition for certiorari appealing the Second Circuit's decision to send each employment dispute to individual arbitration.²¹⁷

There are other appellate decisions that the Board or a defeated employer may appeal to the Supreme Court as well. There has been a

the Seventh Circuit's decision in late May addressed all of the relevant arguments regarding interpretation of the NLRA and the effect on the FAA but that the court found no conflict with the FAA because Section 7 NLRA rights are substantive and may not be individually and prospectively waived, and the FAA savings clause harmonizes the two statutes where the agreement to arbitrate is illegal); Greene & O'Brien, *supra* note 5, at 128-30 (arguing that the courts should defer to the NLRB's position on *D. R. Horton* cases).

215. *24 Hour Fitness USA, Inc. v. Nat'l Labor Relations Bd.*, 2016 U.S. App. LEXIS 13082 (5th Cir. June 27, 2016) (per curiam) (granting employer's motion for summary disposition and refusing to enforce NLRB's order), *petition for cert. filed*, No. 16-689 (U.S. Nov. 23, 2016); *Murphy Oil USA, Inc.*, 361 N.L.R.B. No. 72, at *1-2, *8-10 (Oct. 28, 2014), *enf. denied in relevant part*, 808 F.3d 1013 (5th Cir. 2015), *reh'g en banc denied*, No. 14-608000 (5th Cir. May 13, 2016), *cert. granted*, No. 16-307, 2017 WL 125666 (U.S. Jan. 13, 2017)). In its *24 Hour Fitness* petition, the NLRB asked the court to hold the case pending its disposition of *Murphy Oil* and other related petitions and then apply the rule to the instant case. Matthew Perlman, *NLRB Asks High Court to Review Another Class Waiver Case*, LAW360 (Nov. 28, 2016), <https://www.law360.com/articles/866238/nlr-asks-high-court-to-review-another-class-waiver-case> [<https://perma.cc/YPM3-CEP9>].

216. *Lewis v. Epic Sys. Corp.*, No. 15-CV-82-BBC, 2015 WL 5330300, at *1 (W.D. Wis. Sept. 11, 2015), *aff'd*, 823 F.3d 1147 (7th Cir. 2016), *cert. granted*, No. 16-285, 2017 WL 125664 (U.S. Jan. 13, 2017). See Jon Steingart, *Solo Arbitration Violates Right to Concerted Activity*, 17 CLASS ACTION LITIG. REP. 845, 862 (Aug. 26, 2016) (noting the circuit split on solo arbitration NLRB cases).

217. *Patterson v. Raymours Furniture Co., Inc.*, 659 F. App'x. 40 (2d Cir. 2016), *petition for cert. filed*, No. 16-388 (U.S. Sept. 22, 2016); *Morris*, 834 F.3d 975.

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veritable avalanche of NLRB decisions on this issue over the past year that could be appealed, with over thirty of them pending before the the Fifth Circuit, which has been summarily reversing the Board on the class waiver issue based upon its ruling in *D. R. Horton and Murphy Oil*.²¹⁸

As the Supreme Court's new term began, there were four relevant petitions for certiorari before the Court.²¹⁹ Yet, there has been a wait for a grant of certiorari in these cases involving class action waivers in employment arbitration agreements, and it remains uncertain how the present or future Court will rule.²²⁰ The Court was understaffed after the death of Justice Scalia, but that is likely to change in 2017. If President Obama's nominee Chief Justice Merrick Garland of the D.C. Circuit Court of Appeals had been confirmed, the NLRB would have had a well-seasoned judge as the court's ninth member who has shown an understanding of the NLRB's role and been more than evenhanded in the

218. See Suevon Lee, *5th Circ. Reverses NLRB on Gym Chain Arbitration Pacts*, LAW360 (June 28, 2016), <https://www.law360.com/articles/811834/5th-circ-reverses-nlrb-on-gym-chain-arbitration-pacts> [<https://perma.cc/42TQ-MP58>] (noting that the NLRB argued against summary reversal in *24 Hour Fitness* case before the Fifth Circuit that "[t]he decision whether to seek Supreme Court review will affect not only *Murphy Oil*, but also approximately 70 board decisions like this one, including nearly 60 decisions pending in the various courts of appeals, of which over 30 are before this court"); Richard F. Griffin, Jr., Gen. Couns., Nat'l Labor Relations Bd., Keynote Speech at 43rd Annual Robert Fuchs Labor Law Conference (Nov. 3, 2016) (stating that, at the present time, there are sixty-nine such cases pending in the various federal courts of appeal with thirty-five pending before the Fifth Circuit).

219. See Vin Gurreri, *High Court Term Ends Without Employment Blockbusters*, LAW360 (June 28, 2016) (noting that the Supreme Court's term was thrown off by Justice Scalia's death, leaving the Court shorthanded and unable to reach a consensus in numerous key employment cases). As of the start of the new calendar year, *Epic Systems*, *Ernst & Young*, *Murphy Oil*, and *Raymours Furniture Co., Inc.*, were all fully briefed and awaiting a determination on petitions for certiorari from the Supreme Court. The Court conferenced on these cases January sixth and thirteenth, granted three of these four petitions on January thirteenth, and consolidated them for one hour of oral argument, leaving only *Raymours Furniture* out. See Braden Campbell, *Employment Cases to Watch in 2017*, LAW360 (Jan. 2, 2017) <https://www.law360.com/articles/870209/employment-cases-to-watch-in-2017> [<https://perma.cc/ECR3-WBYQ>]; Dubé, *supra* note 211 (outlining the petitions granted and noting that *Epic Systems* involved a private employment dispute rather than an unfair labor practice proceeding at the NLRB, such as in *Murphy Oil*).

220. The NLRB's General Counsel noted that the first opportunity for the United States Supreme Court Justices to conference on the four pending petitions for certiorari concerning individual arbitration provisions with collective action waivers would be the first or second week of December 2016. See Griffin, Fuchs Keynote Speech 2016, *supra* note 218. In fact, the conferences were eventually scheduled for January sixth and thirteenth, 2017. See Amy Howe, *Court Adds 16 New Cases to Its Merits Docket*, SCOTUSBLOG (Jan. 13, 2017, 3:10 PM), <http://www.scotusblog.com/2017/01/court-adds-16-new-cases-merits-docket/> [<https://perma.cc/NF6D-25YC>] (discussing actions taken at Supreme Court private conferences, including granting review in sixteen new cases).

deference shown to the Board in his opinions.²²¹ The present Court is somewhat more likely to see things the NLRB's way on the class waiver issue than it would have when Justice Scalia was on the Court because of his pro-arbitration stance.²²² If the Court considered these cases before a ninth justice was confirmed, it is possible that there could have been a tie vote on an eight-member court, thus leaving the lower court decisions as law, and failing to resolve the conflict among the circuits.

If the Supreme Court does not agree with the NLRB's rulings in *D. R. Horton*, *Murphy Oil*, and *On Assignment*, perhaps the NLRB's next best chance of protecting collective action might lie in the passage of The Arbitration Fairness Act of 2015 (AFA).²²³ In addition to antitrust and civil rights actions, the AFA exempts consumer and employment disputes from mandatory arbitration, where the arbitration is not "truly voluntary" and is agreed to prior to the occurrence of a dispute.²²⁴ The bill notes the problems with arbitration include the lack of transparency and inadequate judicial review.²²⁵ The AFA does not ban arbitration but it targets agreements that sign away an employee's right to protest prior to the existence of a dispute. The proposed bill includes areas that are protected by statute beyond employment, such as consumer, antitrust and civil rights, directly addressing areas where the Supreme Court has ruled that the FAA mandates enforcement of arbitration provisions that bar collective or class action.

It seems that the AFA is not all that likely to be enacted, as its progress has stalled out in prior efforts; the last noted action on the bill was when it was reintroduced in late March of 2017, and its potential for passage is certainly not increased by the bill's support of the right to sue in court on all statutory claims even if there is a collective bargaining

221. See Hannah Belitz, *The Supreme Court Vacancy and Labor: Merrick Garland*, ONLABOR (Feb. 23, 2016), <https://onlabor.org/2016/02/23/the-supreme-court-vacancy-and-labor-merrick-garland-2/> [<https://perma.cc/MA56-TF9A>] (noting Justice Garland's deference to agencies and labor).

222. See Jill I. Gross, *Justice Scalia's Hat Trick and the Supreme Court's Flawed Understanding of Twenty-First Century Arbitration*, 81 BROOK. L. REV. 111, 111-15 (2015) (arguing that Justice Scalia's 2013 *Italian Colors* opinion signified that the vindicating rights doctrine did not void an arbitration agreement with a class action waiver even though an individual suit was not affordable).

223. H.R. 2087, 114th Congress (1st Sess. 2015) (reintroducing a bill to amend Title 9 of the U.S. Code with respect to arbitration). The Arbitration Fairness Act was reintroduced in the Senate on March 7, 2017 by Senator Al Franken, and the legislative tracking service predicts a 3% chance of passage and the similar House Report bill is predicted to have a 2% chance of passage. S. 537: *Arbitration Fairness Act of 2017*, GOVTRACK, <https://www.govtrack.us/congress/bills/115/s537> [<https://perma.cc/A436-E4R3>].

224. H.R. 2087 at 2-3, 5.

225. *Id.*

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agreement with a dispute resolution process that ends in arbitration to encompass such claims.²²⁶ This provision seems unnecessarily protective of employee rights to sue in court rather than in arbitration, at least with respect to the requirements of the NLRA, because when a majority representative acts for the group and negotiates a contract, there is collective action present and the inclusion of statutory claims has been agreed to in the process of negotiating the best terms for the entire bargaining unit. Preventing a union from including statutory claims in the arbitration process goes well beyond what the NLRA requires and could result in the bill losing support from unions, making it less likely that the proposed act will pass.

CONCLUSION

Employment is a basic need for most individuals, and low-level workers in particular have little or no bargaining power when confronted with a contract of employment that requires individual arbitration as the exclusive means of settling future disputes. The class action waiver provision that accompanies such agreements ensures that most employees will never pursue their legal rights because it is just too expensive for an individual to do so in arbitration. In contrast, the availability of class or collective action often provides access to a lawyer who would be compensated on a contingency fee basis. Cutting off this avenue and substituting individual arbitration, where the individual employee must pay and perhaps pay for the employer's costs as well if he/she loses, makes the dispute resolution mechanism all but illusory. When prospective employees are forced to agree to a mandatory dispute resolution program with a collective action waiver, they are signing away rights they do not know they need long before they may need them. Arbitration is an excellent method for resolving disputes as long as it places the parties into a fair and neutral forum and both sides have an equivalent shot at justice. However, when arbitration is used as a sword by businesses to prevent individual employees from protesting violations of their federal and state statutory rights regarding employment conditions; when corporations write the rules and hire the judges, and employees are locked out of collective action by contract provisions that require them to sign away their rights if they want the job, the basic premise behind federal labor law is undermined, and employees are locked out of an equitable process.

The proposed Arbitration Fairness Act addresses the problem of

226. *See id.* at 2-6 (advocating that the FAA was not intended to encompass employee and consumer disputes, which are not justly adjudicated through arbitration in some circumstances).



mandatory pre-dispute arbitration as a one-sided agreement where the deck is stacked and dealt by the employer and most employees simply cannot afford the ante in order to play the individual arbitration game. However, passage of the AFA seems a long shot at best. Thus, federal courts need to enforce the labor law as it was written, to protect concerted activity for organizational purposes and mutual aid or protection among employees, including collective action with respect to workplace disputes. Allowing employers to mandate individual arbitration and ban collective action is no better than the so-called 'yellow dog' contracts employers required employees to sign swearing that they would not join a union, thus waiving their federal statutory right to organize under the NLRA. Yellow dog contracts violated the NLRA and the courts upheld the NLRB when it found such contracts illegal. The NLRB ruled that mandatory individual arbitration provisions with collective action waivers violate the NLRA, and it is correct in its interpretation of the statute as well as its duty to interpret the Act in light of changing industrial trends.

The Seventh Circuit upheld the NLRB's position in *Lewis* and the Ninth Circuit followed the same ruling in *Morris*. As the majority stated in *Morris*, "[a]t its heart, this is a labor law case, not an arbitration case."²²⁷ The FAA does not need to nor should it override the NLRA, as there is no conflict between the two statutes. The illegality of arbitration provisions that restrict concerted legal claims, a core substantive right under the NLRA, means that the savings clause in the FAA prevents the enforcement of such provisions. It is time for all the federal courts to uphold the Board on this issue. It is possible that the current pending cases—*Lewis*, *Morris*, and *Murphy Oil*—will provide the Supreme Court with the opportunity to make the NLRB's *D. R. Horton* rule the law of the land. The question presented by the NLRB in the *Murphy Oil* case is framed to enlist the Court's support for the proposition that the illegality of class waivers under the NLRA triggers the FAA's savings clause. The U.S. Chamber of Commerce would prefer to see the more broadly framed questions presented by *Lewis* and *Morris* decide the matter.²²⁸ With upwards of seventy percent of employers in the United States using mandatory arbitration provisions,²²⁹ the legality of these contract clauses is of tremendous importance to employees' individual and collective rights. It is

227. *Morris v. Ernst & Young, LLP*, 834 F.3d 975, 989 (9th Cir. 2016), cert. granted, No. 16-300, 2017 WL 125665 (U.S. Jan. 13, 2017).

228. See Matthew Bultman, *Biz Group Urges High Court To Hear 2 Class Waiver Cases*, LAW360 (Oct. 17, 2016), <https://www.law360.com/articles/851837/biz-group-urges-high-court-to-hear-2-class-waiver-cases> [<https://perma.cc/7CQL-TC47>] (discussing the U.S. Chamber of Commerce's lobbying of the Supreme Court in class waiver cases).

229. See Griffin, Fuchs Keynote Speech 2016, *supra* note 218 (estimating the prevalence of mandatory arbitration provisions in the private sector).

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important to note that contract law does not preempt the NLRA, a federal statute. As the Supreme Court has previously noted, it is the role of the NLRB to interpret the NLRA in light of changing industrial patterns.²³⁰ Mandatory individual arbitration provisions represent such a trend and such provisions clearly fly in the face of the substantive right that guarantees employees: “the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection,” as well as “the right to refrain from any or all such activities.”²³¹ In addition, the NLRA makes it an unfair labor practice for an employer “to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 157.”²³² Employers that mandate individual arbitration and prevent access to group action for dispute resolution, or collective bargaining regarding wages or other working conditions, are blocking concerted activities and collective bargaining in direct violation of the clear language of the statute. The Federal Arbitration Act does not conflict with the NLRA on this issue, because the FAA’s savings clause prevents the conflict. The Court should uphold the substantive right to collective action in employment that is embodied in the clear language of the NLRA, as it has in the past.

230. Nat’l Labor Relations Bd. v. J. Weingarten, Inc., 420 U.S. 251, 266 (1975).

231. 29 U.S.C. §157 (1947).

232. 29 U.S.C. §158(a)(1) (1974).

