TEN FREQUENTLY ASKED QUESTIONS ABOUT *D.R. HORTON Inc.* AND ANSWERS FOR EMPLOYEE RIGHTS ADVOCATES[1]

1. How did the *D.R Horton* case arise?

In 2006, D.R. Horton, Inc., a nationwide non-union homebuilding company, began requiring all employees to resolve their legal claims against the company through individual arbitration. In 2008, Michael Cuda, a former D.R. Horton employee who had been required to sign a forced arbitration agreement, joined with five co-workers to bring a nationwide Fair Labor Standards Act misclassification collective action in court. D.R. Horton successfully moved to compel arbitration, taking the position that only individual arbitration was permitted.

Cuda filed an unfair labor practice ("ULP") charge with the National Labor Relations Board ("NLRB") alleging that D.R. Horton's policy requiring employees to waive their rights to bring class, collective, or joint actions to challenge workplace conditions violated Sections 7 and 8(a)(1) of the National Labor Relations Act ("NLRA") of 1935. The General Counsel of the NLRB issued a ULP complaint supporting Cuda's claims.

An Administrative Law Judge in Florida rejected the General Counsel's argument that class and collective action prohibitions violate the NLRA. The General Counsel appealed the ALJ's ruling to the Board, and supporting *amicus* briefs were filed by the National Employment Lawyers Association ("NELA"), several labor unions, the U.S. Department of Labor, the U.S. Equal Employment Opportunity Commission, and dozens of civil rights groups. For more information on the case and to view case documents, please visit: http://www.nlrb.gov/case/12-CA-25764.

2. What did the *D.R. Horton* decision hold?

The NLRB ruled 2-0 (with the third member recused) that it is an unfair labor practice for employers to bar completely their NLRA-covered employees from bringing class, collective, or joint legal actions about wages or other terms and conditions of their employment. The Board's decision relied on decades of Board precedent that such group legal actions are protected concerted activity under Section 7 of the NLRA. The Board also found strong support for its decision in the Norris-LaGuardia Act of 1932, which predates the NLRA.

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[1] The National Employment Lawyers Association and The Employee Rights Advocacy Institute For Law & Policy extend our gratitude to Michael Rubin (Altshuler Berzon LLP) and Michael C. Subit (Frank Freed Subit & Thomas LLP) for their expert guidance and assistance in preparing this FAQ.

Distinguishing the federal labor law issue before it from the U.S. Supreme Court's state unconscionability law preemption decision in *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011), the Board further held that nothing in the Federal Arbitration Act of 1925 ("FAA") conflicted with or otherwise trumped the Board's interpretation of core federal labor law principles as prohibiting employers from banning collective or class employment actions. A copy of the Board's decision is available on the NLRB's website at: http://mynlrb.nlrb.gov/link/document.aspx/09031d458079f1de.

3. Does the decision protect all employees?

The decision protects all workers covered by the NLRA, union and non-union alike. While millions of workers are covered by the NLRA, there are several specific categories of excluded workers, including:

- Agricultural workers;
- Public employees, including of the federal government;
- Private-sector managers and supervisors, although a person's job title (like Michael Cuda's title of "supervisor") is not determinative of their NLRA status; and
- Workers whose employers have less than the annual revenue required for NLRA coverage (usually $500,000 but less in some industries).

Please visit the NLRB's website for more information on coverage: http://www.nlrb.gov/rights-we-protect/jurisdictional-standards.

4. Does the decision mean that forced pre-dispute employment arbitration agreements are forbidden?

No. There was no challenge to the forced arbitration agreement itself in *D.R. Horton*, and the Board's decision explained that an employer may still require employees to arbitrate all of their claims as a condition of employment, as long as the employer provides some meaningful forum (whether it be court or arbitration) for the employees to pursue class, collective, and joint employment claims.

5. Is there any conflict between *Concepcion* and *D.R. Horton*?

No. In *AT&T Mobility LLC v. Concepcion*, the Court held that the FAA preempted application of state unconscionability law to invalidate an arbitration agreement that prohibited consumers from pursuing their claims as a class action. *Concepcion* was not an employment case. Further, the consumer plaintiffs in *Concepcion* did not assert any rights under federal law. *Concepcion* certainly makes it far more difficult to assert state law challenges to forced employment arbitration agreements, but conceptually, it has no impact on challenges brought under the NLRA (like *D.R. Horton*) or under federal law (because one federal law, like the FAA, cannot preempt another). The Board's decision in *D.R. Horton* addresses several reasons why *Concepcion* did not preclude its NLRA-based holding. Additional reasons why *Concepcion*

should not control, and why the FAA's implied policies favoring consensual, streamlined arbitration (as identified in *Concepcion*) cannot trump the NLRA's core Section 7 protection of concerted workplace activity, are set forth in three *amicus* briefs in *D.R. Horton* written by NELA members:

- Public Justice, P.C., NELA, The Employee Rights Advocacy Institute For Law & Policy, and two dozen civil rights groups – http://mynlrb.nlrb.gov/link/document.aspx/09031d4580575371;
- SEIU – www.nela.org/NELA/docDownload/34617; and
- Change To Win – http://mynlrb.nlrb.gov/link/document.aspx/09031d4580575675.

6. Didn't the U.S. Supreme Court address a prohibition on class action employment arbitrations in *Gilmer*?

No. The NYSE rules at issue in *Gilmer v. Interstate/Johnson Lane Corp*., 500 U.S. 20, 26 (1991), carved out class actions from a forced arbitration requirement, and required class actions to be filed in court. *Gilmer* also specifically holds that arbitration agreements cannot be enforced to the extent they effect a waiver of substantive statutory rights. Just as a forced arbitration agreement cannot compel an employee to waive the statutory right to punitive damages and attorneys' fees for unlawful discrimination, for example, the Board's decision in *D.R. Horton* holds that such an agreement cannot compel waiver of the right to participate in a class, collective, or joint employment law action, because that is a **substantive** right under the NLRA.

7. Only two NLRB members participated in the *D.R. Horton* decision. Does that mean the decision is invalid?

No. In *New Process Steel L.P. v. NLRB*, 130 S.Ct. 2635 (2010), the U.S. Supreme Court unanimously agreed that a decision rendered by two members of the NLRB is valid as long as there are three Board members at the time of the decision. See *New Process Steel L.P.* at 2639. That is what happened in *D.R. Horton*, which was decided before Member Craig Becker's recess appointment expired and before the three current recess appointees were named.

8. Will the NLRB's decision be the last word on this issue?

No. D.R. Horton has filed a Petition for Review in the U.S. Court of Appeals for the Fifth Circuit (where it could file because that is where it resides or does business). A decision from the Fifth Circuit will technically be binding only in ULP cases arising from the parts of the country in that circuit. If the Board loses on appeal, it has the right to choose not to follow that ruling in other circuits. Whatever may happen in the Fifth Circuit, the case may eventually wind up in the U.S. Supreme Court.

9. If I represent NLRA-covered employees who are subject to arbitration agreements that include class or collective action prohibitions, how do I challenge the prohibitions?

You can file an unfair labor practice charge under Sections 7 and 8(a)(1) of the NLRA with your local region of the NLRB based on *D.R. Horton*. A sample ULP charge filed on behalf of workers at 24-Hour Fitness facilities in California is attached to this FAQ. The statute of limitations for a ULP is 180 days, but under NLRB law, the employer's maintenance of a policy and practice of prohibiting employees from engaging in concerted activity is considered a continuing violation. The NLRB's General Counsel will then decide whether to issue a complaint (which the region will prosecute on the employees' behalf), and whether to request approval from the Board to seek a federal court injunction against the employer's unfair labor practice.

If you have already filed a lawsuit and the employer has moved to compel arbitration of your clients' class, collective, or joint action claims, you should raise *D.R. Horton* in your opposition and point out that, under *Gilmer*, arbitration agreements that deprive employees of substantive statutory rights may not be enforced. You should emphasize the portions of the *D.R. Horton* decision that rest on the NLRA (and not just the portions relying on the Norris-LaGuardia Act) because, as in any case involving an administrative agency's construction of its own statute, courts must defer to the NLRB's interpretation of the NLRA.

These avenues are not mutually exclusive. You can pursue both options at the same time, and, if you file a ULP with the NLRB, you may also file a motion to stay any decision on the employer's motion to compel arbitration pending a resolution of the ULP charge you filed.

10. How can I get more information about using *D.R. Horton* to help my clients?

The NLRB's General Counsel has withdrawn his office's previous Guideline Memorandum in light of *D.R. Horton,* and has instructed its regional staff to track new ULP charges challenging employer class and collective action prohibitions and to inform the Division of Advice when the investigation of each new ULP charge has been completed. *See* OM-12-30, Cases Involving Employer Mandatory Arbitration (Jan. 23, 2012), http://www.nlrb.gov/publications/operations-management-memos.

If you are facing one of these issues in court or arbitration, please contact NELA & The Institute's Program Director Rebecca M. Hamburg (rhamburg@nelahq.org; (415) 296-7629). NELA & The Institute will be maintaining a database of companies that include these class action prohibitions in their contracts, and it has a complete set of the *D.R. Horton* briefs that set forth the various arguments of the parties and their *amici*. In addition, if you are a NELA member, please consider posting your query on NELANet. NELA can also put you in touch with fellow plaintiffs' attorneys who have experience in this area and may be able to answer your questions.

Please Review the Following Important Information Before Filling Out a Charge Form!

- Please call an Information Officer in the Regional Office nearest you for assistance in filing a charge. The Information Officer will be happy to answer your questions about the charge form or to draft the charge on your behalf. Seeking assistance from an Information Officer may help you to avoid having the processing of your charge delayed or your charge dismissed because of mistakes made in completing the form.
- Please be advised that not every workplace action that you may view as unfair constitutes an unfair labor practice within the jurisdiction of the National Labor Relations Act (NLRA). Please click on the Help Desk button for more information on matters covered by the NLRA.
- The section of the charge form called, "Basis of Charge," seeks only a brief description of the alleged unfair labor practice. You should **NOT** include a detailed recounting of the evidence in support of the charge or a list of the names and telephone numbers of witnesses.
- After completing the charge form, be sure to sign and date the charge and mail or deliver the completed form to the appropriate Regional Office.
- A charge should be filed with the Regional Office which has jurisdiction over the geographic area of the United States where the unfair labor practice occurred. For example, an unfair labor practice charge alleging that an employer unlawfully discharged an employee would usually be filed with the Regional Office having jurisdiction over the worksite where the employee was employed prior to his/her discharge. An Information Officer will be pleased to assist you in locating the appropriate Regional Office in which to file your charge.
- The NLRB's Rules and Regulations state that it is the responsibility of the individual, employer or union filing a charge to timely and properly serve a copy of the charge on the person, employer or union against whom such charge is made.
- By statute, only charges filed and served within **six (6) months** of the date of the event or conduct, which is the subject of that charge, will be processed by the NLRB.

FORM EXEMPT UNDER 44 U.S.C 3512

INTERNET
FORM NLRB-501
(2-08)

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
CHARGE AGAINST EMPLOYER

DO NOT WRITE IN THIS SPACE	
Case	Date Filed

INSTRUCTIONS:
File an original with NLRB Regional Director for the region in which the alleged unfair labor practice occurred or is occurring.

1. EMPLOYER AGAINST WHOM CHARGE IS BROUGHT

a. Name of Employer
24 Hour Fitness Worldwide, Inc.

b. Tel. No. 925-543-3100

c. Cell No.

f. Fax No. 925-543-3200

d. Address *(Street, city, state, and ZIP code)*
12647 Alcosta Blvd.
San Ramon, CA 94583

e. Employer Representative
Marla Loar
Sr. Director Human Resources
North Division

g. e-Mail

h. Number of workers employed
more than 30

i. Type of Establishment *(factory, mine, wholesaler, etc.)*
Fitness Center

j. Identify principal product or service
Fitness Center

k. The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8(a), subsections (1) and *(list subsections)* section 7 of the National Labor Relations Act, and these unfair labor practices are practices affecting commerce within the meaning of the Act, or these unfair labor practices are unfair practices affecting commerce within the meaning of the Act and the Postal Reorganization Act.

2. Basis of the Charge *(set forth a clear and concise statement of the facts constituting the alleged unfair labor practices)*

I have been employed at 24 Hour Fitness since 2008. I have worked at the Larkspur and Santa Rosa facilities and am currently working on-call at various regional facilities including Larkspur and Petaluma. During my employment all employees were required, as a condition of employment, to agree to a mandatory arbitration program which prohibited class and representative actions in court and in arbitration. It is my understanding that 24 Hour Fitness is still requiring all employees, as a condition of employment, to waive their right to participate in class and representative actions as a condition of employment.

Prohibition of class and representative actions is an unfair labor practice pursuant to NLRA sections 7 and 8(a)(1). 24 Hour Fitness' Mandatory arbitration agreement applies to all 24 Hour Fitness employees nationwide and also violates NLRA sections 7 and 8(a)(1) as it applies to these employees.

3. Full name of party filing charge *(if labor organization, give full name, including local name and number)*
Alton J. Sanders

4a. Address *(Street and number, city, state, and ZIP code)*
123 ABC Street
Anywhere, CA 00000

4b. Tel. No. XXX-XXX-XXXX

4c. Cell No.

4d. Fax No.

4e. e-Mail
xxxx@xxxxxx.net

5. Full name of national or international labor organization of which it is an affiliate or constituent unit *(to be filled in when charge is filed by a labor organization)* N/A

6. DECLARATION
I declare that I have read the above charge and that the statements are true to the best of my knowledge and belief.

By _____ Alton J. Sanders
(signature of representative or person making charge) *(Print/type name and title or office, if any)*

Address 123 ABC Street, Anywhere, CA 00000 _____
(date)

Tel. No. XXX-XXX-XXX

Office, if any, Cell No.

Fax No.

e-Mail

WILLFUL FALSE STATEMENTS ON THIS CHARGE CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)

PRIVACY ACT STATEMENT

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 *et seq.* The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing unfair labor practice and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is voluntary; however, failure to supply the information will cause the NLRB to decline to invoke its processes.