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NLRB Won't Take "No" For an Answer — Holds Class Action Waiver in Arbitration Agreement Unlawful Despite Two Previous Reversals at the Fifth Circuit

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The NLRB has once again held that a mandatory arbitration agreement including a class/collective action waiver violates the National Labor Relations Act. With barely an acknowledgment that the Fifth Circuit reversed its last two decisions reaching the same conclusion, the Board ruled in ***Amex Card Service Co., No. 28–CA–123865 (Nov. 10, 2015)***, that Amex committed an unfair labor practice by maintaining and enforcing an arbitration policy that required employees, as a condition of their employment, to resolve all claims against the company through individual arbitration.

Despite the Fifth Circuit's rejection of NLRB rulings striking down class/collective action waivers in *D.R. Horton (2013)* and again recently in ***Murphy Oil (2015)*** (which we discussed **here**), the Board appears undeterred. In the NLRB's view, mandatory resolution of employment claims through individual arbitration infringes upon the protected right to engage in concerted activity, regardless of what the Fifth Circuit has to say about it. In fact, the NLRB stressed in its *Amex* decision that the company's policy violated the (subsequently invalidated) precedent the Board had established in *D.R. Horton* and *Murphy Oil*.

The NLRB also found the policy unlawful because employees would reasonably believe it waived or limited their right to pursue an NLRB charge and held that Amex committed an additional violation when it moved to compel arbitration of its employees' FLSA claims in accordance with the policy. The Board ordered Amex to cease and desist from enforcing the policy and to reimburse the employees' expenses, including attorneys' fees, with interest.

Several NLRB observers have noted that the Board may be playing the long game here by attempting to obtain rulings on the validity of class action waivers in federal appeals courts beyond the Fifth Circuit. In the *Amex* decision, the employees worked in Arizona and any appeal would be heard in the Ninth or D.C. Circuit, thus raising the real possibility of a circuit split and eventual Supreme Court review. For this reason, the effectiveness of class/collective action waivers in reducing legal exposure for employment claims remains uncertain.

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