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**Arbitration Overview: An Update on the Legal and  
Strategic Issues that Inform Arbitration**

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## Arbitration Overview –

### **An Update on the Legal and Strategic Issues that Inform Arbitration**

#### I. Overview

The following paper provides an overview of the legal and practical issues that arise in connection with arbitrable disputes. Initially, we address the issue of pre-arbitration litigation. That is, when a dispute is potentially arbitrable, what is the current state of the law regarding the enforcement of arbitration agreements. Once a dispute is in arbitration, lawyers and their clients continue to face strategic and, sometimes, legal questions regarding how to proceed. The second half of this paper addresses these issues.

#### II. Update on Current Issues in the Enforcement of Arbitration Agreements

The use of mandatory, pre-dispute arbitration agreements in the employment setting is, by now, common and commonly enforceable. Since 1991, when the Supreme Court found that mandatory arbitration did not inherently conflict with federal civil rights law, employers have increasingly imposed arbitration on their workforces. Courts have, generally followed suit in their acceptance of such programs provided that employers do not grossly overreach in the decision of such agreements and programs. Arbitration agreements, however, continue to be challenged in litigation on multiple grounds.

##### A. Waivers of the Right to Proceed as a Class, Collective or Consolidated Action

In *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011), the U.S. Supreme Court upheld the validity of an arbitration agreement waiving consumers' right to bring contractual claims as a class and instead requiring them to resolve through individual arbitration. The Court held that a California rule that class action waivers in consumer adhesion agreements was preempted by the Federal Arbitration Act ("FAA"). The Ninth Circuit had held the opposite, in reliance on a California Supreme Court case, *Discover Bank v. Superior Court*, 36 Cal. 4th 148 (2005) which found no such preemption. The U.S. Supreme Court concluded that the rule impermissibly distinguished arbitration agreements from ordinary contracts, creating "a scheme inconsistent with the FAA." *Id.* at 1748.

That same year, the Court decided *American. Exp. Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013), a federal antitrust case, and likewise upheld the use of class waivers in contracts of adhesion. *Italian Colors* reinforces the Court's holding in *Concepcion* as the Court explained that the availability of Rule 23 class action procedures is no indication of Congressional intent to preclude waiver of the right to vindicate claims through the class mechanism. Although these two decisions have been widely applied to employment lawsuits, neither arose in the context of

employment claims and there remain some unsettled issues with respect to their application to employment suits.<sup>1</sup>

The principal challenge to the enforceability of class waivers is via the argument that such a waiver violates the National Labor Relations Act (“NLRA”) and the Norris LaGuardia Act. The National Labor Relations Board (the “Board”), in *In Re D. R. Horton, Inc.*, 357 NLRB No. 184 (Jan. 3, 2012), held that an arbitration agreement under which employees were required to waive their right to bring class or collective action violated Section 8(a)(1) of the NLRA. Specifically, the Board held that such agreements impermissibly restrict employees’ Section 7 rights to engage in “concerted action for mutual aid or protection.” *Id.* at \*1.

The Fifth Circuit is one of several circuits that has rejected the Board’s reasoning. In *D. R. Horton, Inc. v. NLRB*, 737 F.3d 344 (5th Cir. 2013), the court determined that the use of class action procedures was a procedural right and not a substantive one and found that there was no right to use class action procedures under various employment related statutes. The court reviewed the FAA’s limited exceptions to *See also, Sutherland v. Ernst & Young LLP*, 726 F.3d 290 (2d Cir. 2013); *Owen v. Bristol Care, Inc.*, 702 F.3d 1050 (8th Cir. 2013). In *D.R. Horton*, the court reached several important conclusions. First, the court noted that the Supreme Court has rejected one of the Board’s central findings – that the right to file a class action was a substantive right – and held that this was merely a procedural right subject to waiver. Second, the court found that the Board had elevated the NLRA over the FAA without any legislative basis for doing so. Once the statutes were considered on equal footing, there was no basis to conclude that a lawful waiver of a procedural right to class litigation violated the NLRA. The Fifth Circuit did, however, uphold the Board’s finding that this specific agreement violated Section 8(a)(1) because it could be construed as prohibiting the filing of an unfair labor practice charge. This, of course, is a drafting issue that is easily addressed.

Despite the federal courts’ rejection of its analysis, the Board has not budged in its position that class waivers violate the NLRA. In *Murphy Oil USA, Inc.*, 361 NLRB No. 72 (2014) enf. denied in relevant part 808 F.3d 1013 (5th Cir. 2015), the Board considered the Fifth Circuit’s holding in *D.R. Horton* and found it wanting. The Board makes several points in *Murphy Oil* that highlight the distinction between its view and the one that prevails in federal court. For example, the Board considers that the collective nature of employees’ Section 7 right to render it unique from other statutory frameworks that govern the workplace, under which employees’ rights may be vindicated in individual litigation. The Board also opined that the

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<sup>1</sup> The Court’s decision in *DIRECTV, Inc. v. Imburgia*, 135 S. Ct. 1547 (2015), completes a trilogy of Supreme Court decisions addressing the enforceability of class action waivers. *DIRECTV* affirms the Court’s focus on ensuring that arbitration agreements are interpreted consistent with broadly applicable contract law and rejected the California Supreme Court’s application of the state’s unconscionability doctrine to class waivers. Notably, however, the Court denied cert in *Iskanian v. CLS Transportation Los Angeles, LLC*, 59 Cal. 4th 348 (Cal. 2014). In *Iskanian*, the California Supreme Court held that the right to assert representative claims under the Private Attorneys General Act (PAGA) cannot be waived in an employment arbitration agreement. The Court acknowledged that mandatory class waivers in arbitration agreements are generally enforceable but found an exception for PAGA actions on the grounds of public policy. Some court watchers have concluded that the denial reflects the Court’s view that the holding did not conflict with *Concepcion* in that *Concepcion* holds only that judicial rules declaring class waivers unconscionable are preempted by the Federal Arbitration Act.

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