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Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

NLRB Judge Rips 24 Hour's Class Waiver, But Law Still Murky

By **Abigail Rubenstein**

Law360, New York (November 07, 2012, 9:23 PM ET) -- Employer arbitration policies barring class actions suffered a setback Tuesday when a National Labor Relations Board judge deemed 24 Hour Fitness USA Inc.'s policy unlawful in spite of a clause saying workers could opt out, but attorneys say the law remains unsettled and the fight over employment class waivers is far from over.

Citing the NLRB's D.R. Horton decision, Administrative Law Judge William L. Schmidt ruled that both the class action ban and a nondisclosure restriction contained in the fitness chain's arbitration policy unlawfully limited employees from exercising their rights under federal labor law.

In the D.R. Horton case, the board held that the homebuilder's mandatory arbitration agreement with its employees, which waived employees' right to pursue employment-related claims in a joint, collective or class manner in any arbitration or judicial forum, ran afoul of the National Labor Relations Act. Specifically, the NLRB said the agreement unlawfully restricted workers' rights under Section 7 of the law to engage in concerted action for mutual aid or benefit.

In deeming 24 Hour Fitness' arbitration policy similarly unlawful, Judge Schmidt rebuffed the fitness chain's contention that its policy was distinct from D.R. Horton's mandatory agreement because it includes a provision giving employees a 30-day window to opt out.

"This was the principal workaround of D.R. Horton that employers had hoped for ... but, as the administrative law judge points out, offering a 30 day opt-out does not eliminate the chilling effect of an unlawful class action prohibition," said Michael Rubin, who represented the Service Employees International Union as an amicus in the 24 Hour Fitness case.

"While the employer has the right to appeal this to the full NLRB in D.C., yesterday's election result suggests that the presently constituted board will stay in place for quite a while longer," Rubin said. "This decision gives a huge boost to workers throughout the country fighting to retain their right to join together in asserting their legal workplace rights."

But management-side attorneys who have been tracking the case said that even though the decision shows that an opt-out provision won't keep the NLRB from finding fault with a class waiver, the law will not be settled until the courts weigh in.

“The case represents yet another potential tripwire for NLRB scrutiny of employer policies and procedures that are not intended to intrude on employee rights,” said Charles I. Cohen, senior counsel at Morgan Lewis & Bockius LLP and a former NLRB member, but he added that as far as employers are concerned, the law on such issues is not yet settled and that review by the courts “will be necessary in order to provide the lasting rules of the road.”

The ALJ's decision came after the NLRB's Region 20 in San Francisco issued a complaint stemming from an unfair labor practice charge filed by 24 Hour Fitness worker Alton Sanders, a putative class member in a race and gender discrimination case in which the company asserted its arbitration policy.

Judge Schmidt agreed with Sanders and the NLRB's acting general counsel that the fitness chain's policy was unlawful in light of the D.R. Horton decision, saying the policy unlawfully requires employees to surrender core Section 7 rights.

The judge also rejected the notion that the U.S. Supreme Court's pro-arbitration decisions in the consumer context, AT&T Mobility v. Concepcion and CompuCredit v. Greenwood, meant the policy should be permitted, saying those rulings had little to do with arbitration in the employment context when it comes to agreements unilaterally imposed by employers.

Calling the opt-out provision “an illusion,” Judge Schmidt found that requiring employees to affirmatively act to preserve rights already protected by Section 7 rights through an opt-out process is unlawful.

As a remedy, Judge Schmidt not only called for 24 Hour Fitness to stop maintaining and enforcing its arbitration policy but also to notify any arbitral or judicial tribunal where it has pursued the enforcement of the policy since Aug. 15, 2010, that it desires to withdraw any such request and that it no longer objects to its employees bringing or participating in class or collective actions.

“What is important is that this opt-out was viewed appropriately as a cynical attempt to deprive people of their rights,” said Cliff Palefsky of McGuinn Hillsman & Palefsky, who represents Sanders. “The time has come for companies across the country to stop disrespecting the NLRB and to stop trying to find ways to avoid the clear laws that are on the books.”

An attorney for 24 Hour Fitness declined to comment on the decision, and a representative for the company did not immediately respond to a request for comment.

But management-side attorneys watching the case told Law360 that they expect the company will appeal the ALJ's decision to the board, where they anticipate it will be affirmed. From there, 24 Hour Fitness can appeal to either the Ninth Circuit or the D.C. Circuit.

Only after the appeals courts — or perhaps even the Supreme Court — have had their say in this case and in D.R. Horton, which is now pending before the Fifth Circuit, will employers have clear guidance on the use of class waivers, lawyers said, even though the NLRB's current stance means employers use such waivers at their own peril for now.

As such, as far as lawyers on the employer side see it, the fight over class waivers and the NLRA is far from over even though the ALJ in this case expanded on the D.R. Horton decision and others may follow suit.

“Employers that want to take advantage of a class action waiver in favor of individual arbitration will not back off simply because the NLRB has decided the way it did in D.R. Horton or the way the administrative law judge did in yesterday's 24 Hour Fitness case,” Jay Waks of Kaye Scholer LLP said. “It will likely eventually go to the U.S. Supreme Court.”

And with these high-stakes court battles over whether class waivers interfere with employee rights under the NLRA still to come, management-side attorneys expect employers to fare better before the courts than they have with the board.

“In my opinion this is an absolutely unsettled area of law,” Harold R. Weinrich of Jackson Lewis LLP said. “The labor board and its judges keep on coming, but at the same time the underlying Horton decision has not met the greatest reception among the various state and federal courts that have considered it with respect to enforcing waivers of class actions.”

“Employers would like to lawfully avoid class actions, and there is a lot of court jurisprudence allowing them to do it,” he added. “The Supreme Court has not been reluctant to express their opinion [on arbitration], and now all they have to do is express their opinion in an employment law case and be consistent with what they have done in AT&T Mobility v. Concepcion.”

Sanders is represented by Cliff Palefsky of McGuinn Hillsman & Palefsky.

24 Hour Fitness is represented by Garry Mathiason and Alan Levins of Littler Mendelson PC and Marshall Babson of Seyfarth Shaw LLP.

The case is 24 Hour Fitness USA Inc. and Alton J. Sanders, case number 20-CA-35419, before the National Labor Relations Board.

--Additional reporting by Ben James. Editing by John Quinn and Elizabeth Bowen.