***Epic Systems Corp. v. Lewis*, 138 S.Ct. 1612, (2018)**

**Chapter 3, Section 1, Note 9, pp. 163-64**:

**9.** Do collective or class action lawsuits constitute protected concerted activity under the Act? The Board has stated that class-waiver provisions in arbitration agreements infringe on employees' rights to engage in concerted activities. *See D.R. Horton, Inc.*, 357 N.L.R.B. 2277, 357 NLRB No. 184 (2012), *rev'd in relevant part*, 737 F.3d 344 (5th Cir. 2013) (concluding that employment agreements precluding employees from filing joint, class, or collective claims against their employer in any arbitral or judicial forum addressing wages, hours or other working conditions unlawfully restricts employees' Section 7 rights to engage in concerted action for mutual aid or protection, notwithstanding the Federal Arbitration Act).

Federal appellate courts have split on whether to follow *D.R. Horton*. Most recently, the Seventh and Ninth Circuits have adopted the Board's position. *See Lewis v. Epic Sys. Corp.*, 823 F.3d 1147 (7th Cir. 2016) (concluding that the company's arbitration provision requiring certain employees to agree to bring any wage and hour claims against the company through individual arbitration violates the NLRA and is unenforceable under the Federal Arbitration Act); *Morris v. Ernst & Young, LLP*, 834 F.3d 975 (9th Cir. 2016) (finding that the company's "separate proceeding" provision in the employment contract that precludes employees from bringing a concerted legal claim in any forum regarding wages, hours, and terms and conditions of employment interferes with the employees' protected rights to pursue concerted work-related legal claims). Nonetheless, the Second, Fifth, and Eighth Circuits have consistently rejected the Board's reasoning and have enforced class-waiver provisions. *See Sutherland v. Ernst & Young LLP*, 726 F.3d 290 (2d Cir. 2013); *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344 (5th Cir. 2013) *Cellular Sales of Missouri, LLC v. NLRB*, 824 F.3d 772 (8th Cir. 2016).

The courts rejecting the NLRB's rationale have done so largely because of policies promoting arbitration in the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1–16. These courts have found support for the FAA's arbitration "preference" in recent Supreme Court decisions including *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011), which held that the FAA pre-empted state law prohibiting the enforcement of a class arbitration waiver. The *D.R. Horton* line of cases, however, concern the interaction of two federal laws, the NLRA and the FAA. Does the FAA trump the NLRA? *See* Charles A. Sullivan & Timothy P. Glynn, *Horton Hatches the Egg: Concerted Action Includes Concerted Dispute Resolution*, 64 Ala. L. Rev. 1013 (2013) (asserting that the NLRA repeals the FAA to the extent it mandates enforcement of arbitration clauses barring concerted legal redress of employment law claims). Just before this book was published, the Supreme Court agreed to address this issue on a set of consolidated cases. See *Epic System Corp v. Lewis*, 137 S. Ct. 809 (2017)(granting cert.): *Ernst & Young, LLP v. Morris*, 137 S. Ct. 809 (2017) (same) *NLRB v. Murphy Oil USA, Inc.*, 137 S. Ct. 809 (2017)(same).

**[new paragraph:]**
In *Epic Systems Corp. v. Lewis*, 138 S.Ct. 1612, 200 L.Ed.2d 889 (2018), the Supreme Court stated that the NLRA "does not express approval or disapproval of arbitration. It does not mention class or collective action procedures. It does not even hint at a wish to displace the Arbitration Act—let alone accomplish that much clearly and manifestly, as our precedents demand." Puzzlingly, Justice Gorsuch

commented on Section 7's phrase 'other concerted activities for the purpose of . . . other mutual aid or protection' as follows: . . . "the term appears at the end of a detailed list of activities speaking of 'self-organization,' 'form[ing], join[ing], or assist [ing] labor organizations,' and 'bargain[ing] collectively.' And where, as here, a more general term follows more specific terms in a list, the general term is usually understood to 'embrace only objects similar in nature to those objects enumerated by the preceding specific words.'" Narrowly read, *Epic Systems* establishes that enforcement of class arbitration waivers does not violate the NLRA. But Justice Gorsuch's expansive dicta reads the phrase "concerted activities" in a way that is much more closely linked to the activities of labor organizations than current Supreme Court authority holds. *See* Labor Board v. Washington Aluminum Co., 370 U.S. 9 (1962). It is too early to tell whether this language forecasts a broad change in the Court's view of Section 7's scope.