Case No. 12-55578

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FATEMEH JOHNMOHAMMADI,
Plaintiff-Appellant,

v.

BLOOMINGDALE'S, INC.,
Defendant-Appellee.

On Appeal from the United States District Court
For the Central District of California
Honorable George H. Wu
Case No. 2:11-cv-06434-GW-AJW

AMICUS BRIEF OF THE CALIFORNIA EMPLOYMENT LAWYERS ASSOCIATION IN SUPPORT OF REVERSAL

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

FEDERAL STATUTES

MISCELLANEOUS

CORPORATE DISCLOSURE STATEMENT

The California Employment Lawyers Association is an unincorporated association.

Pursuant to Fed. R. App. P. 29, the California Employment Lawyers Association, with the consent of all parties, submits this amicus brief in support of appellant Fatemeh Johnmohammadi.[1]

INTEREST OF AMICUS

The California Employment Lawyers Association ("CELA") is an organization of over 1,000 California attorneys whose members primarily represent workers in a wide range of employment cases. CELA and its members have a substantial interest in protecting the statutory and common law rights of workers in California and nationwide, and in ensuring the vindication of public policies set forth in the California and federal labor laws. CELA has taken a leading role in advancing and protecting the rights of California employees by, among other things, submitting amicus briefs and letters on issues affecting the employment law rights of workers, including by protecting the rights of workers to pursue claims on a class and collective action basis, and to oppose the imposition of mandatory arbitration agreements containing unlawful and unconscionable terms.

The undersigned counsel for CELA has been counsel for plaintiffs in several mandatory arbitration cases in this court, and has been counsel for Charging Party

[1] No party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting this brief; and no person other than amicus and its members and counsel contributed money that was intended to fund preparing or submitting this brief. *See* Fed. R. (…continued)

or amici in support of Charging Party in the two NLRB cases that most squarely address the issues presented on this appeal: *D.R. Horton, Inc.*, 357 NLRB No. 184, 2012 WL 36274 (January 3, 2012), *pets. for review and enforcement pndg*. (5th Cir. No. 12-60031), and *24 Hour Fitness USA, Inc.* (ALJ Decision pending), NLRB No. 20-CA-35419.[2]

INTRODUCTION

In *D.R. Horton, Inc*., the National Labor Relations Board ("NLRB" or "Board") held that an employer violates Section 8(a)(1) of the National Labor Relations Act ("NLRA"), 29 U.S.C. §158(a)(1), by implementing a workplace policy that interferes with its employees "core, substantive right" under Section 7 of the NLRA to initiate or participate in class, collective, and other representative legal actions. Bloomingdale's, Inc. has imposed such a policy on its employees since 2004, and has enforced that policy against all employees who failed to "opt-out" of its mandatory arbitration program within their first 30 days of employment. Because Bloomingdale's class action prohibition "interferes with, coerces, or

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App. P. 29(c)(5).

[2] The NLRB's General Counsel issued a Complaint in 24 Hour Fitness on April 30, 2012, alleging that the company's class action prohibition violated Section 7 and 8(a)(1) of the NLRA under D.R. Horton, notwithstanding the company's defense that new hires could opt out within their first 30 days of employment. The case was tried in late June 2012, post-trial briefs were filed in August, and a decision from the ALJ is expected shortly.

restrains" its employees in the exercise of their well-settled Section 7 right to engage in "concerted action," it is invalid and unenforceable under the NLRA, 29 U.S.C. §158(a)(1), and the Norris-LaGuardia Act, 29 U.S.C. §101-03.[3]

Section 8(a)(1) is violated whenever an employer's policies, viewed objectively, have the likely effect of burdening or otherwise interfering with its employees' ability to exercise their Section 7 right to engage in concerted protected activity – which includes the "substantive . . . core right[]" under Section 7 to engage in concerted legal activity to improve workplace conditions. *D.R. Horton*, 2012 WL 36274 at *7. By stripping employees of that right at the outset of employment and requiring them to jump through a series of procedural hoops within a short time frame to reclaim it, Bloomingdale's has interfered with its employees' free exercise of Section 7 rights. *See D.R. Horton*, 2012 WL 36274 at *5-*6 & n.6 and cases cited.

The NLRA extends the protections of Section 7 to all covered employees as a matter of federal labor policy and statutory law. Employers cannot subvert those protections by stripping workers of their Section 7 rights at the outset of

[3] As the Court is aware, the *D.R. Horton* decision is currently on appeal to the Fifth Circuit. CELA fully supports the legal analysis presented by the NLRB and its supporting amici in that case. Rather than repeating that analysis, which is clearly set forth in that brief, CELA will mostly focus below on the 30-day opt-out provision, which is not at issue in *D.R. Horton* (although it will soon be presented to the Board after the ALJ issues his ruling in *24 Hour Fitness*).

employment and forcing them to take affirmative steps to request Section 7 protection. That burden-shifting, which requires employees to identify themselves, put a target on their chest, risk and fear retaliation and notify the employer that they want to preserve their right to sue the company inherently interferes with, restrains, and coerces employees in their ability to exercise Section 7 rights.

Bloomingdale's violation of Section 8(a)(1) in this case is particularly egregious because, in a transparent effort to discourage employees from taking the steps necessary to regain their forfeited Section 7 rights, the company: 1) failed to give adequate notice to new employees of what rights they will be forfeiting by not opting out, misled them as to the benefits of not opting out, and failed to explain why their Section 7 rights are significant and legally protected; 2) made opting out an unnecessarily cumbersome process without any justification for doing so; and 3) offered no meaningful assurances of anonymity or confidentiality to any employee who sought to initiate the opt-out procedure, despite the employees' reasonable fear of retaliation.

STATEMENT OF FACTS

In 2004, Bloomingdale's instituted a policy that prohibited any of its employees from pursuing any workplace claims on a joint, class, collective, representative, or other concerted action basis in court, arbitration, or anywhere

else. ER164. In pertinent part, that policy provides (in a paragraph buried on page 14 of a single-spaced 20 page Plan Document):

> The Arbitrator shall not consolidate claims of different Associates into one (1) proceeding, nor shall the Arbitrator have the power to hear an arbitration as a class action (a class action involves representative members of a large group, who claim to share a common interest, seeking relief on behalf of the group).

ER190. In other words, Bloomingdale's prohibits each of its employees from joining with any other employees in pursuing legal relief against the company, whether through joint or consolidated actions, Rule 23 class actions, state law representative actions (for example, under California's Labor Code Private Attorney General Act, Labor Code §2698 *et seq*.), or FLSA or ADEA collective actions.

Bloomingdale's deliberately buried these prohibitions in its lengthy InSTORE Program Plan Document, which employees do not receive unless they specifically request a copy. ER158. It never mentioned those prohibitions in its Application for Employment, *see* ER81-82; in the 64-page Employee Handbook that every employee receives when they begin employment, *see* ER83-147; or in the Statement of Awareness that every employee must sign upon receipt of that Employee Handbook, *see* ER147. Nor does the opt-out form itself make any reference to these prohibitions. ER160. And the only reference to these policies in Bloomingdale's 12-page booklet describing its Early Dispute Resolution Program – whose every page is devoted to touting the supposed "benefits" of the multi-step

arbitration procedure, *see* ER148-59 – is on the last line of a chart on the last page which, falsely claims that employees win arbitrations more than 50% of the time (compared to 15% of the time in court) and win 18% of their requested remedies in arbitration (compared to 10.5% in court). Alexander Colvin, *An Empirical Study of Employment Arbitration: Case Outcomes &* Processes, 8 J. Empirical Legal Stud. 1 (2011); ER159. That brochure says nothing about Bloomingdale's additional prohibition against joint, consolidated, collective, and representative actions. It never explains what a "class action" is, or why the right to pursue workplace claims on a class action basis is significant. And it certainly never informs the new employees that their right to engage in concerted legal activity is protected by federal labor law or that the decision to opt-out will be deemed confidential and will not subject the employee to retaliation.

New employees of Bloomingdale's are entitled to refuse to submit to the company's mandatory arbitration policy if they sign an opt-out form within 30 days of being hired and mail it to an address in Ohio. ER82, 160. However, unless those employees research the precise features of the Early Dispute Resolution policy by going beyond the materials provided at the start of employment and obtaining a copy of the actual Program Plan Document, they will have no way of knowing that they will forever be precluded from pursuing any claim on a joint, class, or other collective action basis if they fail to opt-out within 30 days.

Certainly nothing in the opt-out form explains that consequence. *See* ER160. Instead, that form strongly reinforces the pro-arbitration bias of the Early Dispute Resolution brochure by informing new employees that by signing that form they are choosing to "decline the benefits of arbitration." ER160. Moreover, because Bloomingdale's makes it impossible for any new employee to opt-out of its class action prohibition without also opting out of arbitration (by failing to separate its class action prohibition from its Early Disputes Resolution policy), any employee who wanted to arbitrate any future workplace disputes could not take advantage of that procedure without at the same time forfeiting his or her Section 7 rights.

ARGUMENT

I. The Board's Decision in *D.R. Horton* Governs This Case

The Board rested its analysis in *D.R. Horton* on three basic principles. First, it cited a long history of cases, dating back to 1942, holding that Section 7 protects the right of workers to pursue employment claims in court or in arbitration on a concerted action basis.[4] This has long been the law, even before class actions

[4] *See* 2012 WL 36274 at *2-4 (citing *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565-66 (1978); *Spandsco Oil & Royalty Co*., 42 NLRB 942, 948-49 (1942) (three employees' joint FLSA lawsuit); *Salt River Valley Water Users Ass'n*, 99 NLRB 849, 853-54 (1952), *enfd*. 206 F.2d 325 (9th Cir. 1953) (designating employee as co-workers' representative to seek FLSA back wages); *NLRB v. City Disposal Systems* (1984) 465 U.S. 822 (pursuing collective grievances in arbitration)); *see also Brady v. National Football League*, 644 F.3d 661, 673 (8th Cir. 2011) (a "lawsuit filed in good faith by a group of employees to achieve more favorable
(…continued)

became commonplace. Indeed, the right of employees to pursue legal challenges to workplace policies on a concerted action basis is so critical to the NLRA's purposes that the Board in *D.R. Horton* repeatedly described it as a "core" right and a "substantive" statutory right.[5]

Second, the Board cited an equally long history of decisions under Section 8(a)(1), holding that "[j]ust as the substantive right to engage in concerted activity aimed at improving wages, hours or working conditions through litigation or arbitration lies at the core of the rights protected by Section 7, the prohibition of individual agreements imposed on employees as a means of requiring that they waive their right to engage in protected, concerted activity lies at the core of the prohibitions contained in Section 8." *Id*. at *7. The Board had little difficulty

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terms or conditions of employment is 'concerted activity' under §7 of the National Labor Relations Act."); *Mohave Elec. Co-op, Inc. v. NLRB*, 206 F.3d 1183, 1188 (D.C. Cir. 2000); *United Parcel Service v. NLRB*, 677 F.2d 421 (6th Cir. 1982), *enf'g* 252 NLRB 1015, 1018, 1022 n.26 (1980); *Trinity Trucking & Materials Corp. v. NLRB*, 567 F.2d 391 (7th Cir. 1977) (mem. disp.), *cert. denied*, 438 U.S. 914 (1978), *enf'g* 221 NLRB 364, 365 (1975); *Le Madri Restaurant*, 331 NLRB 269, 275 (2000); *Harco Trucking, LLC*, 344 NLRB 478 (2005).

[5] 2012 WL 36274 at *7 ("the substantive right to engage in concerted activity aimed at improving wages, hours or working conditions through litigation or arbitration lies at the core of the rights protected by Section 7. . . ."); *id*. at *12 ("The right to engage in collective action – including collective legal action – is the core substantive right protected by the NLRA and is the foundation on which the Act and Federal labor policy rest."); *id*. at *4 ("Such conduct is not peripheral but central to the Act's purposes."); *id*. at *14 ("Section 7 of the NLRA manifests a strong federal policy protecting employees' right to engage in protected concerted
(…continued)

concluding in *D.R. Horton* that an employer's prohibition against concerted legal activity on its face interferes with, coerces, and restrains employees in the exercise of protected Section 7 rights, and is thus unlawful under Section 8(a)(1) and under the parallel provisions of the Norris-LaGuardia Act. *Id*. at *7-*8 (citing *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004)).

Third, the Board explained why there was no conflict between the NLRA (as the Board construed it) and the implied policies of the Federal Arbitration Act of 1925 (as identified by the Supreme Court in *AT&T Mobility LLC v. Concepcion*, __ U.S. __, 131 S. Ct. 1740 (2010)). *See* 2012 WL 36274 at *10-*16 ("[Our] well established interpretation of the NLRA and . . . core principles of Federal labor policy, does not conflict with the letter or interfere with the policies underlying the FAA and, even if it did, that . . . finding represents an appropriate accommodation of the policies underlying the two statutes."). As the Board explained, "the purpose of the FAA was to prevent courts from treating arbitration agreements less favorably than other private contracts," and "[t]o find that an arbitration agreement must yield to the NLRA is to treat it no worse than any other private contract that conflicts with Federal labor law." *Id*. Moreover, "the Supreme Court's jurisprudence under the FAA . . . makes clear that the agreement may not require a party to 'forgo the substantive rights afforded by the statute,'" and here, D.R.

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action, including collective pursuit of litigation or arbitration.").

Horton's "categorical prohibition of joint, class, or collective federal state or employment law claims in any forum directly violates the substantive rights vested in employees by Section 7 of the NLRA." *Id*. at *12 (citing *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991)).[6]

Further, "nothing in the text of the FAA suggests that an arbitration agreement that is inconsistent with the NLRA is nevertheless enforceable." *Id*. at *14. To the contrary, Section 2 of the FAA, 9 U.S.C. §2, expressly provides that "arbitration agreements may be invalidated in whole or in part upon any "grounds as exist at law or in equity for the revocation of any contract" – which includes the ground "that a term of the contract is against public policy." *Id*. (quoting 9 U.S.C. §2 and citing *Town of Newton v. Rumery*, 480 U.S. 386, 392 (1987); *Kaiser Steel Corp. v. Mullins*, 455 U.S. 72, 83–84 (1982)). "Finally, even if there were a direct conflict between the NLRA and the FAA, there are strong indications that the FAA would have to yield under the terms of the Norris-LaGuardia Act," which precludes enforcement of any "private agreement that seeks to prohibit a 'lawful means [of]

[6] As the Board noted, although there may be no substantive Section 7 right to *obtain* class certification (which depends on whether Rule 23 standards have been satisfied), there is a substantive Section 7 right to *seek* such certification. *Id*. at *12 & n.24.

aiding any person participating or interested in' a lawsuit arising out of a labor dispute (as broadly defined)." *Id*. at *16.[7]

For these reasons, the Board concluded that an employer policy that prohibits joint, consolidated, class, collective, and representative actions (as in *D.R. Horton* and here) violates Section 8(a)(1) because it unlawfully interferes with the employees' right to engage in concerted legal activity protected by the Act.

[7] Where a case involves rights and obligations under two federal statutes, the relevant inquiry is not one of "preemption," but of "implied repeal" – whether Congress intended to repeal part or all of a previously enacted statute as a result of its enactment of a subsequent, inconsistent statute. Findings of implied repeal, though, are highly disfavored and should never be presumed. *See, e.g., United States v. Borden Co.*, 308 U.S. 188, 198 (1939) (intention to repeal must be "clear and manifest"). Even when two federal statutes cover the same subject, "the rule is to give effect to both if possible." *Id*.; *D.R. Horton*, 2012 WL 36274 at *10 (quoting *Morton v. Mancari*, 417 U.S. 535, 551 (1974) (when two federal statutes "are capable of co-existence," both should be given effect "absent a clearly expressed congressional intention to the contrary.")); *see also Direct Press Modern Litho*, 328 NLRB 860, 861 (1999); *Image Systems*, 285 NLRB 370, 371 (1987). In those rare cases in which two federal statutes are in "irreconcilable conflict," moreover, it is the *later*-enacted statute – in this case the 1932 Norris-LaGuardia Act and 1935 NLRA – that must be found to have impliedly repealed any inconsistent provisions in the *earlier* statute – the 1925 FAA. *See Posadas v. National City Bank*, 296 U.S. 497, 503 (1936). Thus, to the extent any actual conflict existed between the FAA and the NLRA – a conclusion the Board in *D.R. Horton* expressly rejected – the proper question to ask would be whether the two statutes could be reconciled; and, if not, the NLRA would have to be found to have impliedly repealed any inconsistent provisions in the earlier enacted FAA, not vice versa.

II. Bloomingdale's Opt-Out Procedure Does Not Eliminate Its Section 8(a)(1) Violation

Bloomingdale's presumably hopes to distinguish *D.R. Horton* factually, by noting that although D.R. Horton's employees were required to waive their Section 7 rights as a "condition of employment," its own employees were given the option of not forfeiting that right. But this attempt to distinguish *D.R. Horton* cannot be reconciled with the Board's legal analysis. There was no occasion in *D.R. Horton* for the Board to address whether an opt-out provision could in some circumstances excuse an otherwise unlawful prohibition, *see* 2012 WL 36274 at *16 n.28 (reserving issue); and decades of decisions under Section 8(a)(1), and the reasoning of *D.R. Horton* itself, require that any such attempted distinction be rejected.

As a threshold matter, the right to engage in concerted legal activity to vindicate state and federal workplace protections is a core, substantive right under Section 7 and the Norris-LaGuardia Act. *D.R. Horton*, 2012 WL 36274 at *7; *see supra* at p.9 n.5. An employer cannot impose forfeiture of such a right as the default condition of employment for new employees. To the contrary, any procedure that deprives employees of this right at the outset of employment and requires those employees to act affirmatively in order to reinstate that right is inherently coercive and violative of Section 8(a)(1) – just as if the Section 7 right

at issue were the right to join or support a union. *See D.R. Horton*, 2012 WL 36274 at *5 (discussing yellow dog contracts).

Section 7 coverage is the statutorily-protected default, not an option that new employees must specifically request from their employer upon pain of permanent forfeiture. For this threshold reason, Bloomingdale's Section 7 forfeiture provisions conflict with the statutory scheme.[8]

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[8] As the social science literature makes clear, even when potentially valuable benefits are offered, participation levels are dramatically lower when the benefit cannot be obtained without engaging in some affirmative conduct to claim that benefit. "The more difficult the opt-out process, the less likely consumers are to avail themselves of it." Sovern, *Opting In, Opting Out*, 74 Wash. L. Rev. 1033, 1087, 1090 (1999) (citation omitted) (requiring consumers who do not wish personal information to be sold "to write to the cable company in a separate letter" does "not provide an easy or convenient mechanism for opting out" and is one reason the opt-out procedure is "ineffective" and "unlikely to reflect consumer preferences accurately"). Social scientists describe a process referred to as "optimistic bias," which leads people to "systematically underestimate risk" and is one of the reasons why few employees starting a new job are likely to exercise an opt-out right concerning how to resolve future workplace disputes. *See, e.g.*, Christine M. Reilly, *Achieving Knowing and Voluntary Consent in Pre-Dispute Mandatory Arbitration Agreements at the Contracting Stage of Employment*, 90 Cal. L. Rev. 1203, 1229 (July 2002) (citations omitted.) The consequence of optimistic bias has been examined in the context of pre-dispute, employer-mandated arbitration agreements like Bloomingdale's:

> Applicants at the contracting stage of employment are not immune from optimistic bias. Few applicants think prospectively about potential conflict before they are employed and few consider the possibility of the relationship going sour, let alone a situation arising that would necessitate taking a dispute to court. Even if applicants did consider this possibility, they would probably dismiss it. . . . The employee is unlikely to properly value the mandatory arbitration

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Moreover, Section 8(a)(1) prohibits all interference, restraint or coercion, even when that interference does not rise to the level of a successful across-the-board ban. When the Board evaluates workplace agreements for compliance with Section 8(a)(1), it focuses on the practical impacts and effects of those agreements, not simply on the technical language drafted by the employer's sophisticated attorneys. Nowhere is that point better stated than in *D.R. Horton* itself, in which the Board cites a series of cases holding that employer pressure to enter into an agreement to waive Section 7 rights violates the NLRA even if not all employees succumb to that pressure. *See* 2012 36274 at *5-*7 (citing *National Licorice Co.*

> clause because he will tend to discount the probability that he will ever engage in a dispute with this employer. . . Optimistic bias, therefore, significantly impedes an applicant's careful deliberation of a [pre-dispute mandatory arbitration agreement].

Id. (citations and internal quotation marks omitted); *see also* Deborah R. Hensler & Thomas D. Rowe, Jr. *Beyond "It Just Ain't Worth It": Alternative Strategies for Damage Class Action Reform* 64 Law & Contemps. Probs. 137, 146-47 (Spring 2001) (citation omitted); Sovern, *Opting In, Opting Out*, 74 Wash. L. Rev. at 1057, 1069 (although one poll found that "eighty-nine percent of the public is concerned about threats to personal privacy" and another poll found that "ninety-eight percent of respondents believe that their privacy is being substantially threatened by marketers and advertisers," "[c]ommentators estimate that the proportion of consumers who take advantage of opt-outs [to protect personal information] is twenty percent or less") (citing Karlene Lukovitz, *Cashing in on Renting Your List* Folio (Oct. 1985) ("Publishers interviewed by FOLIO uniformly reported that very few readers take advantage of the option to not have their names rented; CBS, for instance, gets such requests from under 2 percent of subscribers."); Laurie Peterson, *The Great Privacy Debate* (Sept. 23, 1991) ADWEEK – W. Advertising News 24 ("Studies show that when given the choice, fewer than 10% of consumers
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v. NLRB, 309 U.S. 350, 360 (1940) (affirming Board ruling that individual employment contract violates Section 8(a)(1) because it discouraged, without forbidding, discharged employee from presenting grievance to employer except on an individual basis); *J. I. Case Co. v. NLRB*, 321 U.S. 332, 337 (1944) ("Individual contracts no matter what the circumstances that justify their execution or what their terms, may not be availed of to defeat or delay the procedures prescribed by the National Labor Relations Act."); *NLRB v. J.H. Stone & Sons*, 125 F.2d 752, 756 (7th Cir. 1942) (individual employment contract language requiring employees first to attempt to resolve employment disputes individually with employer is a per se violation of the Act, even if "entered into without coercion" and even though some employees declined to sign those contracts, because it was a "restraint upon collective action"); *Jahn & Ollier Engraving Co.*, 24 NLRB 893, 900-01, 906-07 (1940), *enfd. in relevant part*, 123 F.2d 589, 593 (7th Cir. 1941) ("profit-sharing" contract offered to employees who had worked for employer for at least one year that purported to waive employees' right to strike was unlawful interference under Section 8(a)(1), even though one employee had declined to sign it, apparently without consequence)).

As the Board wrote in *Jahn & Ollier Engraving Co.*, 24 NLRB 893:

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will ask to receive no more catalogs.").

> Whether the words or actions of an employer constitute interference, restraint, or coercion, within the meaning of the Act, must be judged, not as an abstract proposition, but in the light of the economic realities of the employer-employee relationship. It need hardly be stressed that the dominant position of an employer, who exercises the power of economic life and death over his employees, gives to an employer's statements, whether or not ostensibly couched as argument or advice, an immediate and compelling effect that they would not possess if addressed to economic equals.

24 NLRB at 906-07 (internal citation omitted) (cited in *D.R. Horton*, 2012 WL 36274 at *5 n.7). What matters under Section 8(a)(1), then, is whether the employer's policies, reasonably construed, have the likely practical effect of impinging upon protected Section 7 rights, whether or not they actually prevent every employee from engaging in the covered activity. *Id*. at *5 (citing *U-Haul Co. of Calif.*, 347 NLRB 375, 377-78 (2006); *Lutheran Heritage Village-Livonia*, 343 NLRB 646); *see also Lafayette Park Hotel*, 326 NLRB 824, 825 (1998) (proper inquiry is whether employer policy "would reasonably tend to chill employees in the exercise of their Section 7 rights"); *Guardsmark, LLC v. NLRB*, 475 F.3d 369, 374 (D.C. Cir. 2007) (Section 8(a)(1) violated when employer's rules would "'reasonably tend to chill employees in the exercise of their statutory rights'").[9]

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[9] The Board in *D.R. Horton* found that the same conclusion was also required by the Norris-LaGuardia Act, which also prohibits employers from inducing employees to waive their right to engage in concerted activity for their mutual aid and protection. *See* 2012 WL 36274 at *7, *16. In the Norris-
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LaGuardia Act, Congress recognized the inherent disparity in bargaining power between employers and individual workers. *See* 29 U.S.C. §102 ("under prevailing economic conditions . . . the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment."). To help workers overcome that gross economic disparity, Congress proclaimed as a core foundational element of federal labor policy that workers must be free "from . . . interference, restraint, or coercion . . . in . . . concerted activities for . . . mutual aid or protection," *id*., and it explicitly provided that "[a]ny undertaking or promise . . . in conflict with the public policy declared in section 102 of this title, is declared to be contrary to the public policy of the United States." 29 U.S.C. §103.

This statutory prohibition against enforcement of any agreement that conflicts with Section 2 of the Norris-LaGuardia Act, 29 U.S.C. §102, contains no exception for agreements with opt-out clauses. As the Board explained in *D.R. Horton*:

> Congress has aimed to prevent employers from imposing contracts on individual employees requiring that they agree to forego engaging in concerted activity since before passage of the NLRA. In fact, the provisions of the Norris-LaGuardia Act prohibit the enforcement of a broad array of "yellow dog"-like contracts, including agreements comparable to that at issue here.

2012 WL 36274 at *7. When Congress enacted the Norris-LaGuardia Act in 1932, it knew full well that individual workers lacked meaningful power to negotiate workplace agreements on an equal basis with their economically dominant employers. That is why it prohibited "any" such undertaking or promise, without limitation. While the Board in *D.R. Horton* appropriately applied these statutory principles in the context of the case before it, in which the individual arbitration agreement happened not to contain an opt-out clause, nothing in the Board's analysis – and certainly nothing in the language of the Norris-LaGuardia Act itself – requires proof that an agreement in violation of the Act's protections was involuntarily imposed as a condition of employment, rather than being imposed as the result of implicit pressure – or even mutual agreement. *See also Pratt Towers, Inc.*, 338 NLRB 61, 64 (2002) (even where employer had right to deny re-employment, conditioning reinstatement on signing agreement renouncing union was unlawful); *Metro Networks, Inc.*, 336 NLRB 63, 66 (2001) ("an employer may

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The unlawful coerciveness of Bloomingdale's opt-out procedure is underscored by the cases prohibiting employers from "interrogating" or "polling" workers about their desire to engage in collective activity. Here, Bloomingdale's prohibits its employees from exercising their Section 7 right to engage in collective legal activity unless they individually step forward and reveal their identities and their right to engage in collective action (to an employer they reasonably believe, based on the language of the Early Dispute Resolution brochure and the opt-out form itself, is hostile to the exercise of that right), thus targeting themselves as potential troublemakers. This is an inherently coercive burden upon the exercise of protected rights.

In *Allegheny Ludlum Corp.*, 333 NLRB 734, 739 (2001), the Board held that a similar opt-out provision violated Section 8(a)(1) because it had the practical effect of being an unlawful coercive poll. The employer in *Allegheny Ludlum* had taped an anti-union video that included images of employees at their work stations. When the union complained, the employer distributed a notice to employees stating that if they did not want to participate in the video, they must inform the company. As here, the employer imposed a default burden on the employees' Section 7 right, subject to an opportunity to "opt-out." The Board held that this

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not coercively condition an individual's return to employment on . . . forbearance from future charges and concerted activity because 'future rights of employees as
(…continued)

opt-out approach was inherently coercive because it forced employees "'to make an observable choice that demonstrates their support for or rejection of the union.'" *Id.* at 745. Consequently, the Board held that the "requirement that employees wishing to 'opt-out' notify the Respondent or its agents, constituted an unlawful poll of employees in violation of Section 8(a)(1) of the Act." *Id.* at 746.

The Board has similarly held that an employer violates Sections 7 and 8(a)(1) by polling employees as to their voting choices in union representation elections. *See, e.g.*, *Chinese Daily News & Commc'ns Workers of Am.*, 353 NLRB No. 66, 2008 WL 5382359, at *3 (2008) ("an employer's interrogation of an employee concerning how that employee intends to vote, or has voted, in a secret-ballot election violates the Act."); *Gladieux Food Serv., Inc.*, 252 NLRB 744, 746 (1980) ("Ortiz' question to Molero asking her how she intended to vote in the forthcoming election constituted an unlawful coercive interrogation."). Indeed, the very purpose of secret ballot elections is to ensure that employees may exercise Section 7 rights without coercion. *Fessler & Bowman, Inc.*, 341 NLRB 932, 933 (2004) ("Board-conducted elections support such a [Section 7] right by providing a forum where employees may freely express their representation choices via secret ballot."); *see also Chinese Daily News*, 2008 WL 5382359, at *3. Bloomingdale's opt-out procedure, which requires employees to disclose to their employer whether

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well as the rights of the public may not be traded away in this manner'").

they intend to exercise their Section 7 rights, is unlawfully coercive on its face under Section 8(a)(1).

Even if Bloomingdale's had made the opt-out procedure simpler to accomplish, easier to understand, and less inherently coercive in practice, the very act of mandating forfeiture of protected rights subject to a condition subsequent would be enough to violate Section 8(a)(1). But Bloomingdale's violation was much more egregious, because it never offered its employees meaningful notice or a meaningful opt-out opportunity, and never took any steps to ensure that its employees' Section 7 rights would be fairly protected.

Bloomingdale's intentionally stacked the deck against its employees' ability to regain their Section 7 rights. It did so through a combination of factors. First, it misleadingly describes arbitration as providing a lengthy series of "advantages and benefits" for employees that are not available to them in litigation, including a higher success rate and recovery rate for employees, a "more satisfying" experience, and a "clear, unbiased process" under which "if the decision is in your favor, you receive the benefits, not just your lawyer," because "[i]n court cases, the legal fees have become so large that in the end, it's the lawyers who benefit the most from any monetary awards." ER148-58. Second, it fails to explain what rights are being waived or limited (including, in particular, the right to engage in the protected Section 7 activity by not opting out). Third, it makes forfeiture of

Section 7 rights the employer-favored default, requiring employees to take affirmatively steps to preserve their statutory rights. Fourth, it limits the employees' opportunity to regain their Section 7 rights to a limited, 30-day one-time-only period immediately after hire, before most new employees would have any idea what they were waiving and when they had no particular reason to consider the possibility of future workplace disputes that could affect them and their co-workers on a classwide basis. Fifth, it retains for itself, but not the new employee, the right to unilaterally change any of the terms of its arbitration policy *without* giving employees a new right to opt-out of any revised policy. ER147, 196. Sixth, it requires employees to undertake a series of steps to effect a valid opt-out, including filling out a form and sending it to the company's post office box in Mason, Ohio. Seventh, perhaps most importantly, it never tells employees that their decision to opt-out will be deemed confidential and that employees who opt-out will not be retaliated against for having defied Bloomingdale's clearly expressed preference for arbitration.

Particularly in the employment context, where the pressure to conform to employer preferences is so great and the fear of retaliation or blackballing for not toeing the line is so powerful (as the Board itself recognized in *D.R. Horton*, 2012 WL 36274 at *3 n.5), employees will always feel pressured not to opt-out of a default workplace policy, particularly where, as here, the employer touts that

policy as mutually beneficial. *See* Sarah Rudolph Cole, *Incentives and Arbitration: The Case Against Enforcement of Executory Arbitration Agreements Between Employers and Employees*, 64 UMKC L. Rev. 449 (Spring 1996); Jean R. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 Wm. & Mary L. Rev. 1 (Oct. 2000). Employer retaliation is a real and serious problem, which has caused Congress and the state legislatures to enact many statutes to protect workers from its consequences.[10] As the Board and many courts have repeatedly recognized, rank-and-file workers reasonably fear that they will be retaliated against or blackballed if they dare take steps that might be seen as "disloyal" or adversarial or that in any way challenge the employer's prerogatives in the workplace.[11] While Bloomingdale's Early

[10] *See, e.g.*, 42 U.S.C. §12203(a) (retaliation after complaints regarding disability discrimination); 29 U.S.C. §215(a)(3) (retaliation for complaints regarding federal wage claims); 29 U.S.C. §623(d) (retaliation for complaints regarding age discrimination); Cal. Labor Code §98.6 (retaliation after employee seeks to recover wages owed); Cal. Labor Code §1102.5 (retaliation after reporting illegal employer conduct); Cal. Labor Code §6310 (retaliation after complaining about workplace safety issues).

[11] *See, e.g.*, *D.R. Horton*, 2012 WL 36274 at *3 n.5; *Gentry v. Superior Court*, 42 Cal.4th 443, 460 (2007) (collecting cases) ("federal courts have widely recognized that fear of retaliation for individual suits against an employer is a justification for class certification in the arena of employment litigation . . ."); *Mitchell v. Robert De Mario Jewelry, Inc.*, 361 U.S. 288, 292 (1960) ("it needs no argument to show that fear of economic retaliation might often operate to induce aggrieved employees quietly to accept substandard conditions"); Sung Hui Kim, *Ethics in Corporate Representation: The Banality of Fraud: Re-Situating the*
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Dispute Resolution brochure states that one of the advantages of arbitration is that "It's Free of Retaliation," ER152, nowhere in any materials presented to its new employees does Bloomingdale's ever reassure them opting out will not trigger a retaliatory response, or even that any opt-out submissions will be deemed confidential. *See* ER160. To be sure, the company *claims* that it does not retaliate and any opt-outs would be confidential, *see* ER166, but there is no evidence in the record that it ever *informs* its employees of those supposed facts.

Inside Counsel as Gatekeeper, 74 Ford. L.Rev. 983, 1024-26 (Dec. 2005) (employee silence about issues and problems at work results from fear of retaliation or punishment, and fear of being labeled or viewed negatively as a troublemaker or complainer); David Weil & Amanda Pyles, *Why Complain? Complaints, Compliance, and the Problem of Enforcement in the U.S. Workplace*, 27 Comp. Lab. L & Pol'y J. 59, 83 (Fall 2005) (citing studies showing that "being fired is widely perceived to be a consequence of exercising certain workplace rights."); Milliken, Morrison & Hewlin, *An Exploratory Study of Employee Silence: Issues that Employees Don't Communicate Upward and Why*, NYU Bus. School (Nov. 4, 2003), http://w4.stern.nyu.edu/emplibrary/Milliken.Frances.pdf (discussing study on employee fear of retaliation or punishment, and employee fear of being labeled or viewed by employer negatively, as reasons for employee not acting on concerns or problems, including disagreement with company policies or decisions); Cynthia Estlund, *Free Speech and Due Process in the Workplace*, 71 Indiana L.J. 101, 120-23 (Winter 1995) (discussing fear of employer retaliation as key reason for workers not reporting wrongdoing); *The Litigation Stigma: Lawsuits Come Back to Haunt*, HR Focus, Vol. 70, No. 2 (February 1993); *see also* Janet M. Bowermaster, *Two (Federal) Wrongs Make a (State) Right: State Class-Action Procedures as an Alternative to the Opt-In Class-Action Provision of the ADEA*, 25 U. Mich. J.L. Reform 7, 29 n.145 (Fall 1991) (citations omitted) (FLSA lawsuits, where workers must take affirmative steps to join class, have reduced class sizes and tend to be brought by former employees rather than current employees, who fear retaliation).

Bloomingdale's has no justification for making forfeiture of Section 7 rights the "default" condition for new employees, for making it so difficult for new employees to understand the consequences of not opting out, or for making it so burdensome or threatening for new employees to opt-out within the 30-day deadline. Nor does it have any explanation for not making Section 7 protection the default upon inaction, rather than an option requiring completion of a multi-step procedure. The company's obvious goal was not to protect its workers, but to compel a forfeiture of their core Section 7 right to pursue collective legal activity.[12]

Providing new rank-and-file employees with a limited, short-term opportunity to revive their right to engage in concerted activity, in the face of powerful economic and workplace pressure not to assert that right, cannot immunize an employer from Section 8(a)(1) liability. As long as it is reasonably foreseeable that an employee would feel pressured to accept the status quo and not take the affirmative steps required to opt-out of its employer's individualized arbitration program, that is enough to constitute a violation of Section 8(a)(1),

[12] As the Board explained in *D.R. Horton*, even if an employer's policy does not on its face prohibit a particular category of protected Section 7 activity (as Bloomingdale's prohibitions do here), it would still violate Section 8(a)(1) if: 1) a reasonable employee would construe it as having that effect; 2) the policy was promulgated in response to protected Section 7 activity (which, in this case, would likely include prior class action lawsuits against Bloomingdale's); or 3) the policy was applied in a manner that restricted the exercise of Section 7 rights (as Bloomingdale's plainly has done. *D.R. Horton*, 2012 WL 36274 at *5, citing
(…continued)

especially given the Board's "well-established policy against ready inference of waivers of Section 7 rights." *Daniel Constr. Co.*, 239 NLRB 1335, 1335 (1979).

In addition, it appears from the record that Bloomingdale's strips all new employees of their Section 7 rights immediately upon the first date of hire, and does not allow them to regain those rights unless and until the employee has successfully completed the multi-step opt-out process. Thus, even if the company's opt-out procedure were otherwise sufficient to avoid Section 8(a)(1) liability, the fact that Bloomingdale's deprives *every* employee of their Section 7 rights at the commencement of employment and does not let any of those employees regain the forfeited rights until at least several days have passed, independently constitutes a violation of Section 8(a)(1).

For all these reasons, Bloomingdale's opt-out option is not sufficient to avoid the Board's holding in *D.R. Horton* that an employer's prohibition against concerted legal action violates Section 8(a)(1).

Dated: November 2, 2012

Respectfully submitted,

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**CERTIFICATE PURSUANT TO F.R.A.P. 32(a)(7)(C)
AND CIRCUIT RULE 32-1**

I certify, pursuant to F.R.A.P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, that the Amicus Brief of the California Employment Lawyers Association in Support of Appellant is proportionately spaced, has a typeface of 14 points, and contains 6,824 words.

Dated: November 2, 2012

/s/ Cliff Palefsky
Cliff Palefsky

CERTIFICATE OF SERVICE

Case Name: *Fatemeh Johnmohammadi v. Bloomingdale's, Inc.*
Case No. 12-55578
Court: United States Court Of Appeals For The Ninth Circuit

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on November 2, 2012.

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I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid to the following non-CM/ECF participant:

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