NLRB Provides Additional Guidance on Mandatory Arbitration Agreements

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Practice Area: Labor and Employment

The National Labor Relations Board (the "Board" or the "NLRB") continues to address the issue of the validity of mandatory arbitration agreements requiring individualized arbitration of employment-related claims under the National Labor Relations Act (the "NLRA"). Generally, such arbitration agreements are valid, so long as they do not infringe upon an employee's right to file unfair labor practices charges and otherwise have access to Board processes and procedures. The Board's recent decision in *Alexandria Care Center, LLC*, 369 NLRB No. 94 (June 2, 2020) is the Board's most recent guidance on how to draft valid arbitration agreements.

Mandatory Arbitration Agreements are Valid, but Cannot Restrict Access to the Board

As most employers are aware, in *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018), the U.S. Supreme Court held that employer-employee agreements containing class action waivers requiring mandatory individualized arbitration do not violate the NLRA, and should be enforced as written pursuant to the Federal Arbitration Act. The *Epic Systems* decision overruled prior Board law that rendered such mandatory arbitration agreements unlawful under Section 8(a)(1) of the NLRA.

Although *Epic Systems* legalized mandatory class and collective action waivers in arbitration agreements, the *Epic Systems* decision did not change existing Board law holding that employees have the right to access the Board and file unfair labor practice charges. Accordingly, an employer may require an employee to sign a mandatory arbitration agreement waiving class and collective actions as a condition of employment, but the mandatory arbitration agreement may still be found to be invalid if it infringes upon an employee's right to file charges with the Board and otherwise have access to the Board.

Certainly, an explicit prohibition on filing Board charges or participating in a Board investigation would be unlawful under Section 8(a)(1) of the NLRA. However, the question arises, "What if the language in the arbitration agreement is facially neutral — it does not specifically require the employee to submit NLRB claims to arbitration — but can still reasonably be interpreted to apply to Board claims? Will such an agreement be valid?"

The Board addressed this question in *Prime Healthcare Paradise Valley, LLC*, 368 NLRB No. 10 (2019). In *Prime Healthcare Paradise Valley*, the Board found that a mandatory arbitration agreement requiring employees to waive their rights to pursue class or collective actions involving employment-related claims in all forums, whether arbitral or judicial, interfered with access to the Board procedures. Even though the arbitration agreement in *Prime Healthcare Paradise Valley* did not *explicitly* prohibit filing of claims with the Board, the Board held that, under the analytical framework announced in *The Boeing Co.*, 365 NLRB No. 154 (2017), the arbitration agreement, when *reasonably interpreted* by an objectively reasonable employee, would prohibit the filing of claims with the Board. Therefore, the Board ordered rescission of the employer's arbitration agreement.

"Savings" Clauses: When and How Will They Be Valid?

The *Prime Healthcare Paradise Valley* decision makes clear that employers must be careful to draft mandatory arbitration agreements to preserve employee access to the Board. Recent Board cases have provided guidance on the use of a "savings" clause to render a mandatory arbitration agreement lawful. A savings clause is language reminding employees that, despite the arbitration mandate for other claims, they have a right to access and file charges with the Board.

In *Briad Wenco, LLC d/b/a Wendy's Restaurant*, 368 NLRB No. 72 (2019), the Board held that an arbitration agreement requiring employees to arbitrate federal statutory claims — which would include claims arising under the NLRA — was lawful because it also included clear and prominent savings clause language stating that employees were free to file charges with the Board. Because the savings clause explicitly and prominently informed employees that they retained the right to file charges with the Board and access its processes, the Board upheld the lawfulness of the arbitration agreement.

Similarly, in *Anderson Enterprises, Inc. d/b/a Royal Motor Sales*, 369 NLRB No. 70 (2020), the Board addressed the lawfulness of an employer policy that required employees to arbitrate employment-related disputes but also included a savings clause informing employees they were free to file charges with the Board. Although the coverage language in *Anderson Enterprises*, when reasonably interpreted, included claims arising under the NLRA, the savings clause provided sufficient language specifically and affirmatively stating that employees may bring claims and charges before the Board. Therefore, the Board held that the policy could not reasonably be understood to interfere with access to the Board and its processes.

The *Alexandria Care Center, LLC* Decision

In *Alexandria Care Center*, the employer maintained an Employment Dispute Resolution (EDR) Program broadly subjecting employment-related disputes to arbitration for all employees not covered by a collective-bargaining agreement. The EDR Program policy also contained language stating that the employer could "seek to enforce the EDR Program (including its class and collective action provisions) and seek dismissal of any lawsuit filed under the National Labor Relations Act." The EDR Program included a savings clause stating that "the EDR Program does not constitute a waiver of your rights under the National Labor Relations Act." Further, the next sentence in the savings clause affirmed the right of employees to pursue employment related disputes before federal and state administrative agencies, to file a claim with a federal or state agency, and to cooperate in a federal or state agency investigation.

The Administrative Law Judge ("ALJ") found the EDR Program unlawful. The ALJ reasoned that an employee would understand the provision allowing the employer to seek dismissal of NLRA lawsuits to mean that employees themselves were prohibited from filing charges with the Board. The Board reversed the ALJ on the basis of the savings clause. The Board reasoned that the savings clause language clearly stated that employees did not waive their rights under the NLRA and that they retained their rights to pursue employment disputes before federal administrative agencies, such as the NLRB. The Board noted that the position of the savings clause was prominently located in the policy. Finally, the Board held that the language found objectionable by the ALJ would be interpreted by a reasonable employee to mean that the employer could merely defend itself with various procedural and substantive arguments in a Board proceeding, the merits of which would be determined by the Board. Therefore, a reasonable employee would not interpret the language to restrict access to the Board.

What These Decisions Mean for Employers
The NLRA applies to most private sector employers nationwide. Therefore, it is critical that employers — whether union or non-union — be familiar with the requirements for compliance under the NLRA in order to reduce vulnerability to unfair labor practice charges and protect their interests in drafting, maintaining, and enforcing employee arbitration agreements.

Many employers find mandatory arbitration agreements of employment-related disputes to be useful tools to resolve workplace issues without proceeding to costly litigation. In order to maintain the integrity of these agreements, it is important to ensure that they comply with the evolving standards set forth in NLRB decisional law. Not only can an incorrectly drafted mandatory arbitration agreement become unenforceable as written, merely maintaining such a policy, even without seeking to enforce it, can constitute an unfair labor practice under Section 8(a)(1) of the NLRA.

Because the consequences of an improperly worded arbitration agreement are serious and wide-ranging, we recommend that employers promptly review all such policies to ensure compliance with the relevant standards. Employers seeking additional guidance may wish to speak with experienced labor counsel to ensure that their arbitration agreements are valid, enforceable, and maintain compliance with the NLRA.
