

## **NLRB Issues Guidance Regarding Class Action Waivers in Individual Arbitration Agreements**

**June 22, 2010**

Employers are increasingly entering into mandatory arbitration agreements with individual employees, requiring that employment disputes be resolved by an arbitrator rather than in court. These agreements often contain class and collective action waivers, permitting the employee only to bring the claim in arbitration on his or her own behalf. The Supreme Court and other federal courts have made clear that the law under the Federal Arbitration Act (the FAA) generally favors clearly drafted arbitration agreements and, although not entirely settled, allows for class and collective action waivers.

There has been limited jurisprudence and guidance, however, on the relationship between federal arbitration law and individual employees' rights under the National Labor Relations Act of 1935 (the NLRA). Under Section 7 of the NLRA, employees have "the right . . . to engage in [] concerted activities for the purpose of . . . mutual aid or protection" even when the employees are not currently represented by a labor organization.<sup>1</sup> The National Labor Relations Board (the NLRB) has explained that protected concerted activities occur when two or more employees (or a single employee acting on behalf of the group) engage in activity for employees' "mutual aid or protection" and not solely on their own behalf. The question that then arises is whether class and collective action waivers in arbitration agreements abridge an employee's Section 7 rights.

On June 16, the General Counsel for the NLRB issued a memorandum to the NLRB's regional offices providing guidance on this very issue. Although the memorandum does not have the force of law, it will determine how unfair labor practice (ULP) charges will be investigated by the NLRB's regional offices, and whether a complaint will be issued on a particular charge.

The memorandum set forth four analytical principles for the regional offices to consider:

1. The concerted filing of a class or collective action lawsuit or demand for arbitration seeking to enforce employment statutes is protected by Section 7 of the NLRA. Therefore, if any employer threatens, disciplines, or discharges an employee for engaging in such concerted activity, the employer is in violation of the NLRA.
2. A mandatory arbitration agreement with language that is so broadly worded that a reasonable employee could believe the agreement waives his or her Section 7 rights, such as the right to join

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<sup>1</sup> 29 U.S.C. § 157.

other employees in a class or collective action to improve working conditions, is impermissible under the NLRA.

3. Employers may still require employees to enter into mandatory arbitration agreements regarding non-NLRA statutory claims, and seek to compel arbitration in the event a lawsuit is filed for an arbitrable claim. The enforceability of those agreements, including any class or collective action waiver, should be determined under non-NLRA law.
4. Employers must make clear to employees that their Section 7 rights are not waived and they will not be subjected to retaliation, even if they challenge the validity of an arbitration agreement or its provisions.

In issuing this memorandum, the General Counsel sought to balance the law's acceptance of arbitration (as a beneficial alternative to adjudicating claims in court) with an employee's rights under the NLRA. As the memorandum explained:

[I]f mandatory arbitration agreements are drafted to make clear that the employees' Section 7 rights to challenge those agreements through concerted activity are preserved and only individual rights are waived, no issue cognizable under the NLRA is presented by an employer's making and enforcing an individual employee's agreement that his or her non-NLRA employment claims will be resolved through the employer's mandatory arbitration system.

While this memorandum provides some clarity on this issue, it leaves open several significant questions, including which kinds of employment-based class or collective actions will be considered "protected concerted activity," and thus nonarbitrable under the NLRA. If the regional offices take the aggressive view that most employment-related class and collective actions are "protected concerted activity," then this may pose a significant challenge to employers' enforcement of their arbitration agreements.

In light of the General Counsel's memorandum, employers with arbitration agreements that contain class or collective action waivers would be well advised to review those agreements and to consider including the following:

1. A provision stating explicitly that the agreement does not waive the employee's right to file an unfair labor practice charge under the NLRA
2. A provision stating that the employee has the right to challenge the validity of the arbitration agreement upon grounds that may exist in law and equity
3. A nonretaliation provision

In general, in light of recent Supreme Court opinions further shaping the scope of arbitration agreements and this memorandum, employers should reexamine any current arbitration agreements that they utilize.

If you would like more information or have any questions on any of the issues discussed in this LawFlash, please contact any of the members of the firm's Labor and Employment Practice, or one of the following Morgan Lewis attorneys:

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