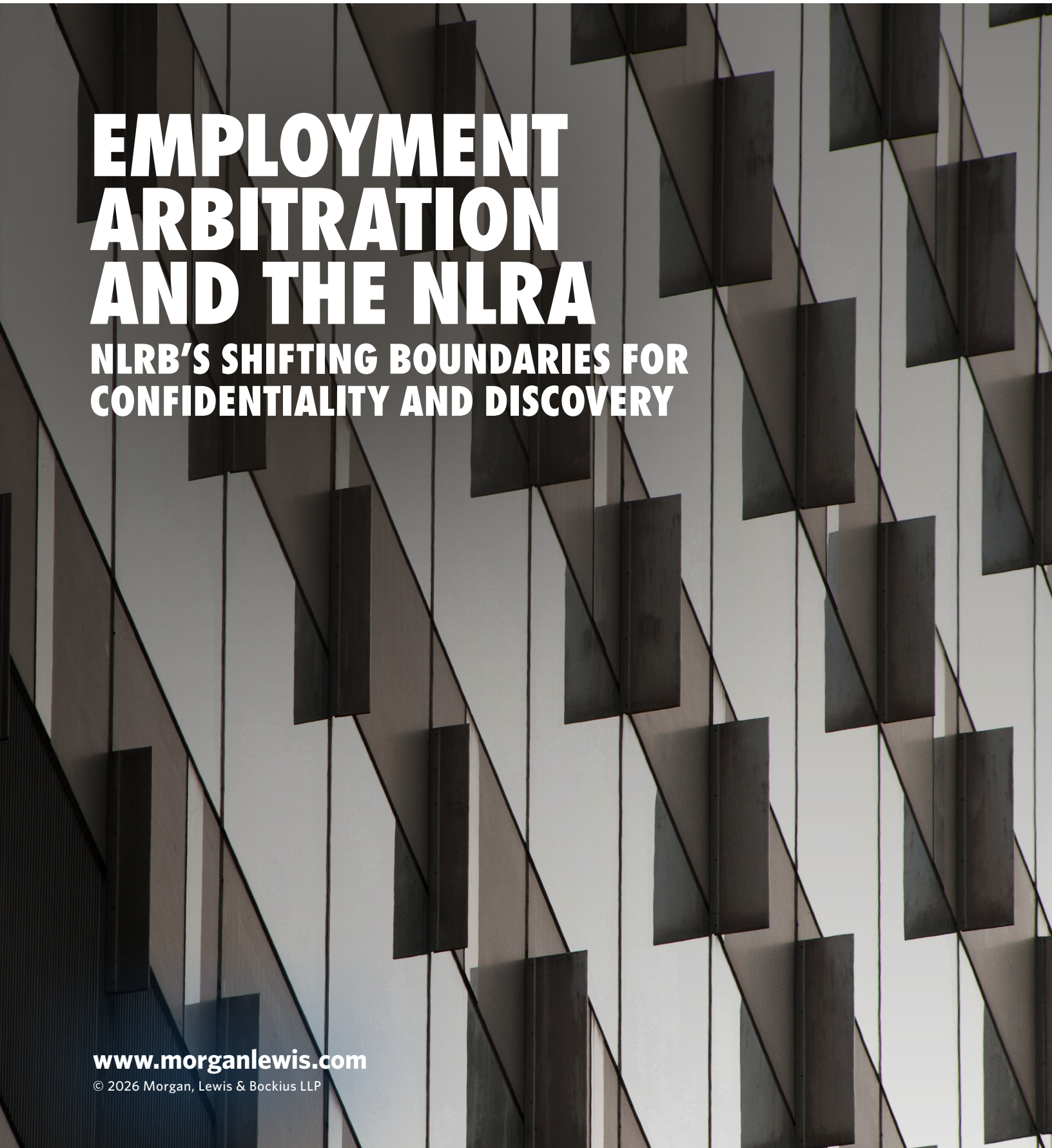
Morgan Lewis

REPORT



EMPLOYMENT ARBITRATION AND THE NLRA

NLRB'S SHIFTING BOUNDARIES FOR CONFIDENTIALITY AND DISCOVERY

www.morganlewis.com

© 2026 Morgan, Lewis & Bockius LLP

EMPLOYMENT ARBITRATION AND THE NLRA

NLRB'S SHIFTING BOUNDARIES FOR CONFIDENTIALITY AND DISCOVERY

In 2018, the US Supreme Court rejected the National Labor Relations Board's (NLRB's or the Board's) position that federal labor law banned class action waivers in employment arbitration agreements. In *Epic Systems Corp. v. Lewis*, the Court held that the Federal Arbitration Act (FAA) requires courts to enforce agreements calling for mandatory individualized arbitration and that the National Labor Relations Act (NLRA) supplies no contrary command.[1]

A year later, the NLRB applied that principle, holding in *Cordúa Restaurants* that employers generally may require employees to sign such agreements as a condition of employment.[2] The practical lesson seemed simple: draft the agreement carefully, avoid ordinary contract-law defects under state law, and the FAA controls the rest—preempting state law rules that prohibit or obstruct arbitration.[3]

Subsequent Board decisions have complicated that conclusion. In the years since *Epic Systems*, a series of Board decisions has revealed something less obvious: *Epic Systems* may protect the arbitration itself without protecting everything an employer does to conduct it.

The next important dispute may not concern whether an employer can require arbitration at all. Instead, it may concern what can be kept confidential, what can be requested in discovery, how an employer may respond when employees discuss a dispute with one another, and whether conduct that is perfectly ordinary in litigation can itself create a risk of NLRB oversight and enforcement.

The NLRB's recent decision in *Ralphs Grocery Company* brings this second layer of risk into sharper focus.[4] *Ralphs*, which addresses the contours of confidentiality obligations in an employment arbitration agreement, is not a direct challenge to *Epic Systems*. But it illustrates how an employer can prevail on the threshold question—whether arbitration may be required—only to encounter a different body of federal law governing what happens next.

EPIC SYSTEMS AND THE SCOPE OF MANDATORY ARBITRATION

In October 2017, the Court heard oral argument in *Epic Systems v. Lewis*, a hotly contested trio of cases concerning whether the inherently collective nature of the NLRA trumped employers' ability to enter into mandatory individual arbitration agreements with their employees.

For years, the parties and their amici had worked the cases through the appellate courts to resolve a circuit split.

---

[1] *Epic Systems Corp. v. Lewis*, 584 U.S. 497, 505–25 (2018).

[2] *Cordúa Restaurants, Inc.*, 368 NLRB No. 43 slip op. at 1 (2019).

[3] *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 341 (2011).

[4] *Ralphs Grocery Co.*, 375 NLRB No. 25, slip op. at 2–5 (Aug. 10, 2026).

Six months later, the Supreme Court gave its answer: although the NLRA protects concerted employee activity, that general principle does not displace the equally strong congressional command embodied in the Federal Arbitration Act. Employers could require employees to resolve employment disputes through mandatory individualized arbitration.[5]

The majority reasoned that the FAA was intended to preserve "arbitration's fundamental attributes"; that its savings clause did not prevent enforcement of the agreements before the Court; that the NLRA did not expressly—or even implicitly—address class or collective-action waivers; and that, to the extent the NLRA had any bearing on arbitration, the two statutes could be read in harmony.[6]

For employers, *Epic Systems* appeared to be a victory. But the decision answered only the threshold question of arbitrability. It offered far less guidance about the outer boundaries of the Board's authority to regulate employer conduct adjacent to arbitration.[7]

That distinction matters because mandatory arbitration is more than an agreement to appear before an arbitrator. It involves both arbitral procedure—discovery, confidentiality restrictions, witness participation, and hearings—and the enforcement of arbitral rules, orders, and awards.

Each of those features of the arbitral process can implicate employee rights that exist independently of the FAA—or, at minimum, rights that *Epic Systems* did not expressly prevent the NLRB from policing. And it was in those related questions that the boundary announced in *Epic Systems* would soon begin to be tested.

ARBITRATION CONFIDENTIALITY AND *CALIFORNIA COMMERCE CLUB*

The first NLRB case to meaningfully apply and extend *Epic Systems* was *Cordúa Restaurants, Inc*.[8] There, a Board majority held that an employer generally may require employees to execute mandatory arbitration agreements as a condition of employment.[9]

The Board nevertheless recognized an important distinction between requiring individual arbitration and retaliating against employees for engaging in protected concerted activity in connection with arbitration. The former was sanctioned by *Epic Systems*; the latter remained within the NLRB's traditional domain.

In the Board's view, this division provided the most harmonious reading of the NLRA and FAA—the same general reconciliation Justice Gorsuch had contemplated in *Epic Systems*.

But accepting the legitimacy of individualized arbitration only raised the next question: how much control could an employer exercise over what employees said and did once the arbitration began?

[5] Epic Systems Corp., 584 US at 503.

[6] *Id*. at 510-21.

[7] *See Id*. at 505-25.

[8] Cordúa Rests., Inc., 368 NLRB No. 43.

[9] *Id*.

Two years later, the Board confronted the question whether employers could mandate confidentiality during arbitration. In *California Commerce Club*, it dismissed a complaint alleging that an employer violated Section 8(a)(1) by maintaining a confidentiality provision in an arbitration agreement.[10] The agreement prohibited disclosure outside the arbitration of evidence and of the ultimate award or decision.[11]

The Board acknowledged that employees' ability to communicate about wages, hours, workplace disputes, and other terms and conditions of employment lies at the heart of Section 7.

Nevertheless, it concluded that the FAA controlled because the confidentiality requirement formed part of the agreed rules governing arbitration. Provisions requiring arbitration to remain confidential—including restrictions on disclosure of evidence and awards—therefore generally had to be enforced.[12]

Critically, however, the Board construed the provision as allowing employees to discuss the existence of the arbitration, their claims against the employer, the legal issues involved, or the facts and circumstances giving rise to the dispute. Nor did the provision prohibit disclosure of information employees possessed independently of the arbitration.[13]

That distinction—between regulating information generated or obtained through arbitration and suppressing discussion of the underlying workplace controversy—has become central to the Board's mandatory arbitration jurisprudence. The line the Board was drawing was therefore not simply between confidential and nonconfidential information. It was between the arbitral process and the workplace dispute that preceded it.

California Commerce Club also established another important limitation. Even when an arbitration-confidentiality provision is enforceable, an employer may violate Section 8(a)(1) by discharging or otherwise disciplining an employee for disclosing information deemed confidential by the arbitration contract if the disclosure is otherwise protected by Section 7.[14]

At first glance, that holding sits uneasily beside *Epic Systems*.[15] But the Board appears to reconcile the two by reasoning that a "no-discipline" rule does not interfere with the fundamental attributes of arbitration that are unquestionably shielded by *Epic Systems*.

[10] *California Com. Club, Inc.*, 369 NLRB No. 106 slip op. at 1 (2020)

[11] *Id*. at 2-3.

[12] *Id*. at 3-6.

[13] *Id*. at 6.

[14] *Id.* at 9; *see also Covenant Care Cal., LLC*, 369 NLRB No. 112, slip op. at 3 & n.4 (2020).

[15] *Epic Sys. Corp. v. Lewis*, 584 US 497, 508 (2018) (cautioning against regulators that employ "subtle methods" to "interfer[e] with fundamental attributes of arbitration").

Instead, it places employees on similar footing with nonemployee claimants, against whom a company ordinarily would have to seek contractual relief from an arbitrator or court.[16] The result was a subtle but consequential division: the arbitration agreement might be enforceable even when employment discipline imposed for violating it is not.

DISCOVERY, HEARINGS, AND AWARDS

Dish Network and *Pfizer*

Once the Board had drawn that distinction, however, it had to decide where the arbitration itself began and ended. The Board confronted that question in *Dish Network, LLC*.[17] There, the arbitration agreement required confidentiality regarding proceedings, including hearings, discovery, settlements, and awards. A Board majority upheld the confidentiality requirements governing hearings, discovery, and awards, reasoning that those matters concern the procedures by which arbitration is conducted.[18]

The Board unanimously reached a different conclusion regarding settlements. Because settlement may occur instead of arbitration and is not necessarily part of the arbitral process, the FAA did not provide the same protection for employers seeking to keep that information confidential.[19]

That distinction has direct implications for discovery disputes. Under current Board precedent, an arbitration agreement generally may require materials produced in arbitral discovery to remain confidential. But an employee's independently acquired knowledge of workplace conditions does not become confidential merely because the same information later appears in discovery or is introduced as evidence.

The Board reaffirmed that principle earlier this year in *Pfizer, Inc*.[20] There, the confidentiality provision expressly extended to "disclosures in discovery," submissions to the arbitrator, hearings, and awards. The Board held that each restriction concerned an integral aspect of arbitration and therefore constituted a rule under which arbitration would be conducted, bringing it within the FAA protection recognized in *California Commerce Club*.[21]

Significantly, *Pfizer* also involved an express carve-out providing that confidentiality did not prohibit employees from engaging in protected discussions concerning wages, hours, or other terms and conditions of employment. The Board emphasized that employees remained free to discuss otherwise confidential subject matter so long as the information had been independently obtained.[22]

---

[16] *See California Com. Club, Inc.*, 369 NLRB No. 106 at *9.

[17] *Dish Network, LLC*, 370 NLRB No. 97 slip op. at 4 (2021).

[18] *Id.*, slip op. at 3–4.

[19] *Id.* at 5.

[20] *Pfizer, Inc.*, 374 NLRB No. 55 slip op. at 4 (2026).

[21] *Id.*, slip op. at 2–3.

[22] *Id.* at 4.

For employers, *Pfizer* thus provides a useful drafting model: define confidentiality by reference to the source and procedural status of information, rather than merely its subject matter.

Discovery produced by another party, arbitral submissions, transcripts, and awards may be protected. Independently known facts about wages, scheduling, discipline, discrimination, safety, or other workplace conditions should not be swept into the restriction simply because those facts happen to be relevant to an arbitration.

By this point, a pattern was emerging. The closer a restriction came to governing the mechanics of arbitration, the stronger the FAA protection; the closer it came to controlling employees' discussion of the underlying workplace dispute, the more room remained for the NLRA.

RALPHS GROCERY AND THE LINE BETWEEN ARBITRATION PROCEDURE AND NLRA RIGHTS

The Board's August 2026 decision in *Ralphs Grocery Co.* is the latest development. The employer's arbitration policy restricted employees from disclosing the "existence, content, or outcome" of an arbitration. On remand from the US Court of Appeals for the Ninth Circuit, the Board divided that formulation into two parts.[23]

A Board majority upheld the contractual requirement that the content and outcome of an arbitration remain confidential. Those restrictions, the majority reasoned, concerned the arbitration process itself and fit within the FAA protection the Board had previously recognized in *California Commerce Club*.

But the Board unanimously struck down the prohibition on disclosing the existence of an arbitration. Telling a coworker that an arbitration exists does not interfere with the fundamental attributes of arbitration; instead, the Board concluded, prohibiting that communication impermissibly restricts employees from discussing a workplace dispute—a core Section 7 right.[24]

Seeking to reconcile its result with *Epic Systems*, the Board majority tried to draw a seemingly clean distinction: *Epic Systems* protects the proceeding, but not the underlying workplace conversation. The majority accordingly placed *Ralphs* alongside a line of Board cases—including *California Commerce Club*, *Dish Network*, and *Pfizer*—reading the decisions so that employers may protect material generated through arbitration while employees remain free to discuss workplace facts they know independently.[25]

But the disagreement within *Ralphs* hints at how the distinction is easier to state than to apply: the arbitration proceeding and the workplace dispute underlying it inevitably overlap.

[23] *Ralphs Grocery Co.*, 375 NLRB No. 25, slip op. at 2–5 (2026).

[24] *Id.* at 3; California Comm. Club, Inc., 369 NLRB No. 106, slip op. at 1 (2020).

[25] *Pfizer, Inc.*, 374 NLRB No. 55, slip op. at 2–3 (2026); *Dish Network, LLC*, 370 NLRB No. 97, slip op. at 3–4 (2021); *California Commerce Club, Inc.*, 369 NLRB No. 106, slip op. at 3–6 (2020).

NLRB Chairman James R. Murphy and Member Scott A. Mayer read the term "content" as limited to the rules and materials associated with the arbitration itself.[26] NLRB Member David M. Prouty would have read the term more broadly. In his view, "content" was capacious enough to encompass the facts and circumstances underlying the employment dispute and therefore could be understood by employees to prevent them from discussing matters protected by Section 7.[27]

Member Prouty's position highlights a drafting risk even under the majority's rule. Broad terms such as "content," "information relating to arbitration," or "all information concerning the proceeding" invite uncertainty about whether employees remain free to discuss independently known workplace facts. And disagreements over those terms can become NLRB cases—particularly as the Board's composition and enforcement priorities change.

For employers, precision is therefore the safer course: identify arbitration-generated materials subject to confidentiality while expressly preserving employees' ability to discuss independently known facts and engage in NLRA-protected activity. That approach appears permissible under either reading offered in *Ralphs*.[28]

THE MORE IMPORTANT QUESTION: WHAT HAPPENS IN PRACTICE?

Drafting is only half the problem. Even a carefully written and facially lawful arbitration agreement must eventually be used. And it is in that administration—enforcing confidentiality and seeking discovery—that unintended conflict with the NLRA may become harder to avoid.

California Commerce Club makes the point clearly. The Board recognized that a confidentiality requirement in an arbitration agreement could be lawful while simultaneously holding that discipline for a particular disclosure could violate Section 8(a)(1) if the employee's communications constituted protected Section 7 activity.

That can place an employer in an uncomfortable position. Imagine that an employee violates a valid confidentiality provision while engaging in activity protected by Section 7 of the NLRA. The employer may have a contractual remedy, but monetary damages may be difficult, if not impossible, to calculate, and obtaining any other relief may require proceedings before an arbitrator or court that take months or even years to resolve. The contract, in other words, may be enforceable, while one of the most immediate means of enforcing it is not.

The problem extends beyond discipline. The same tension can affect how an employer responds to communications among co-workers, frames a motion to compel compliance with discovery, determines what information to ask an arbitrator to order produced, and decides what to do with information once obtained.

---

[26] *Ralphs Grocery Co.*, 375 NLRB No. 25, slip op. at 3 (Aug. 10, 2026).

[27] *Id.* at 8-10.

[28] California employers will need to exercise even more caution because a confidentiality provision that is permissible under current Board precedent may nevertheless be unenforceable under California law if it impedes protected wage or working condition discussions, whistleblowing, disclosure of unlawful acts, informal witness interviews, or the development of comparator and pattern evidence.

That is why the current moment is easy to underestimate. Recent developments suggest a movement away from attacking mandatory arbitration itself and toward applying the NLRA to the procedures surrounding arbitration.

The result could be increased Board involvement in a process that *Epic Systems* appeared to have placed largely beyond the Board's reach. Unless and until the Supreme Court clarifies that boundary, employers will continue to grapple with whether—and how far—the NLRA may reach conduct surrounding an otherwise enforceable arbitration agreement.

ARBITRATION DISCOVERY MAY BE THE NEXT AREA OF FOCUS

Discovery is where the tension becomes especially concrete.

The existing cases generally permit employers to keep arbitration-generated discovery confidential. They do not, however, convert independently known workplace information into confidential material merely because that same information becomes relevant to an arbitration.[29] That much has been clear since *California Commerce Club*.

So far, the cases have largely asked what an employer may prevent employees from disclosing. Now reverse the direction of the problem: what happens when the employer is the one asking employees to disclose?

Suppose an employer seeks discovery of employee group texts, Slack messages, emails, or other communications concerning workplace conditions. An arbitrator may regard those communications as relevant and discoverable. But if the communications themselves reflect confidential protected concerted activity, can the act of demanding them create a separate NLRA problem?

Employee-plaintiffs have already attempted to limit production of such information by asserting a Section 7 "NLRA privilege" against discovery.[30] Courts thus far have declined to recognize a freestanding labor privilege.[31]

The absence of a formal privilege, however, does not necessarily leave employers with an unrestricted discovery right. Labor law may reach the same problem from another direction.[32] It is possible that NLRB judges could apply the Board's three-part framework from *Guess?, Inc.* to employer discovery requests.

[29] *Pfizer, Inc.*, 374 NLRB No. 55, slip op. at 3-4 (2026).

[30] *Adler v. Twitter, Inc.*, No. 3:23-cv-1788-JD (May 20, 2024) (ECF No. 60); *Kinzer v. Whole Foods Market, Inc.,* No. 1:20-cv-11358-ADB (D. Mass. Dec. 17, 2021) (ECF No. 97).

[31] *See, e.g.*, *Crescent Drilling & Prod., Inc.*, No. 5:19-cv-1194-FB, 2020 WL 8509909, at *3 (W.D. Tex. Dec. 9, 2020); *DeGrandis v. Children's Hosp. Bos.*, 203 F. Supp. 3d 193, 196–99 (D. Mass. 2016); *Kinzer v. Whole Foods Market, Inc.,* No. 1:20-cv-11358-ADB (D. Mass. Dec. 17, 2021) (ECF No. 97); *Chicago Bridge & Iron Co. v. Fairbanks Joint Crafts Council*, 2019 WL 2579627, at *4; *Adler v. Twitter, Inc.*, No. 3-23-cv-1788-JD, (N.D. Cal. July 15, 2024) (ECF No. 75).

[32] *Leslie v. Starbucks Corp.*, No. 23-1194, 2024 WL 2186232, at *7 (2d Cir. May 15, 2024)

Under that framework, employers could be required to explain why (1) the information sought is relevant, rather than merely responsive; (2) the employer does not have an unlawful objective in seeking it; and (3) the employer's need for the information outweighs employees' Section 7 confidentiality interests.[33]

The *Guess?* test may be difficult to apply and may also be inapplicable to discovery requests in federal court or arbitration. When reviewing litigation-adjacent employer conduct, the NLRB should instead limit its analysis to its well-established "interrogation" standard.[34]

That possibility became more than a hypothetical in *Whole Foods Market*. There, an NLRB administrative law judge concluded that discovery requests made in parallel federal litigation violated Section 8(a)(1), including requests directed to employee group communications and an NLRB affidavit.[35] The case remains pending before the Board, but it offers a useful warning about the potential labor-law risks arising from otherwise ordinary discovery requests.[36]

THE TWO-TRACK PROBLEM

The practical risk, then, is that even when an arbitrator or court orders production, an employer may face a separate unfair labor practice charge directed at the request itself, its scope, or a perceived effort to identify employees engaged in protected activity. This creates a tension: the same discovery request could be permissible in one forum and potentially unlawful in another forum because it was made at all.

If the *Guess?* test is applied to arbitral discovery, relevance becomes more than an ordinary discovery limitation. It becomes the first step in a separate NLRA inquiry. Requests drafted more broadly than necessary could therefore create labor-law risk even when the requested material otherwise falls comfortably within an arbitrator's discovery authority.

The second and third *Guess?* factors could likewise require employers to explain their litigation purpose for seeking protected communications and address less intrusive alternatives—date limitations, subject-matter restrictions, anonymization, or outside-counsel-only review—before obtaining information that ordinarily would be discoverable.

The result could be a two-track discovery regime in employment arbitration. Ordinary arbitral rules would determine whether information may be produced, while Section 7 would inject a second layer of uncertainty into how an employer requests, receives, identifies, and uses that information. That possibility makes discovery a particularly important area to watch after *Ralphs*.

[33] *Guess?, Inc.*, 339 NLRB 432, 434–35 (2003)

[34] *Starbucks Corp. v. Nat'l Lab. Rels. Bd.*, 173 F.4th 230, 231 (5th Cir. 2026)

[35] *Whole Foods Market, Inc.*, Case 01-CA-288032, JD-23-24 (Apr. 11, 2024).

[36] *Id.*

ABERRATION OR PREVIEW?

What *Ralphs* May Say About the Future

All of this leaves a larger question hanging over *Ralphs*: are these cases merely the product of a particular moment at the Board, or are they exposing a tension that *Epic Systems* could never fully anticipate?

Some of the tension between the FAA and current Board precedent appears structural and therefore unlikely to disappear entirely. It was, after all, a Republican Board majority that decided *California Commerce Club*. That history suggests that the underlying problem is not entirely ideological. It is built into the uneasy coexistence of two statutes protecting different things: one, the integrity of arbitration; the other, employees' ability to act and communicate together for "mutual aid and protection" broadly applied by the NLRB in many cases.

How aggressively the Board pushes into that area will depend on future cases and, inevitably, the Board's composition. But the more important point for employers is that the doctrinal architecture for these disputes already exists.

That does not mean employers should retreat from arbitration. It means they should not view arbitration agreements as self-contained documents whose labor-law consequences end once the employee signs. If the cases discussed above point in one direction, it is that the legal significance of an arbitration agreement increasingly depends not only on what it says but also on what employers do with it.

WHAT EMPLOYERS SHOULD DO NOW

For employers, the practical response is not to abandon arbitration or assume that every discovery request creates a labor-law problem. Instead, NLRA compliance should be treated as part of arbitration design and administration, rather than as an issue that begins only after an unfair-labor-practice charge has been filed.

- **Expressly preserve access to the NLRB**: Name the NLRB and preserve employees' rights to file charges, cooperate with investigations, and participate in Board proceedings.
- **Protect the arbitration without making the dispute secret**: Avoid prohibiting employees from disclosing that an arbitration exists or discussing independently known facts underlying the dispute.
- **Define confidential information by source**: Protect the content and outcome of arbitration, including arbitration-generated discovery, submissions, transcripts, evidence, and awards rather than everything broadly "relating to" the underlying dispute.
- **Build NLRA considerations into discovery procedures**: Protective orders, redactions, anonymization, and other accommodations may help distinguish arbitration-generated material from independently known workplace facts and reduce unnecessary Section 7 concerns.
- **Plan for NLRA issues during administration, not merely drafting**: Employers and arbitration counsel should anticipate Section 7 questions when managing discovery, employee communications, confidentiality disputes, motions, and enforcement.

Although *Epic Systems* resolved the largest question surrounding mandatory employment arbitration, it did not anticipate the smaller questions that have become similarly important. Employers know they may require individualized arbitration. What remains unsettled is how much of the workplace dispute can follow the employee through the arbitration-room door—and how far labor law reaches into the arbitral process.

CONTACTS

If you have any questions or would like more information on the issues discussed in this report, please contact any of the following:

Authors

David R. Broderdorf	+1.202.739.5817	david.broderdorf@morganlewis.com
Samuel S. Sadeghi	+1.714.830.0489	sam.sadeghi@morganlewis.com
Morgan A. McGreevy	+1.713.890.5143	morgan.mcgreevy@morganlewis.com

ABOUT US

Morgan Lewis is recognized for exceptional client service, legal innovation, and commitment to its communities. Our global depth reaches across North America, Asia, Europe, and the Middle East with the collaboration of more than 2,200 lawyers and specialists who provide elite legal services across industry sectors for multinational corporations to startups around the world. For more information about us, please visit www.morganlewis.com.

Morgan Lewis

At Morgan Lewis, we're always ready to respond to the needs of our clients and craft powerful solutions for them.

Connect with us

www.morganlewis.com

© 2026 Morgan Lewis

Morgan, Lewis & Bockius LLP, a Pennsylvania limited liability partnership.
Morgan Lewis Stamford LLC is a Singapore law corporation affiliated with Morgan, Lewis & Bockius LLP.
Morgan, Lewis & Bockius UK LLP is a limited liability partnership registered in England and Wales under number OC378797 and is a law firm authorised and regulated by the Solicitors Regulation Authority. The SRA authorisation number is 615176.
Our Beijing and Shanghai offices operate as representative offices of Morgan, Lewis & Bockius LLP.
In Hong Kong, Morgan, Lewis & Bockius is a separate Hong Kong general partnership registered with The Law Society of Hong Kong.
In Riyadh, the Kingdom of Saudi Arabia, Morgan, Lewis & Bockius LLP is registered as a foreign company branch with commercial registration number 7051326226 and is authorised and regulated by the Ministry of Justice under the Ministry of Justice license number 460122000035.

This material is provided for your convenience and does not constitute legal advice or create an attorney-client relationship.
Prior results do not guarantee similar outcomes. Attorney Advertising.

100126_262343