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NLRB Ruling Redraws Arbitration Confidentiality Limits

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The National Labor Relations Board is continuing to explore the boundaries set by the U.S. Supreme Court in Epic Systems Corp. v. Lewis.

In 2018, the Epic decision held that the Federal Arbitration Act requires courts to enforce FAA-covered agreements calling for mandatory individualized arbitration, and found that the National Labor Relations Act does not void such agreements.

The court emphasized that its ruling preserved "arbitration's fundamental attributes."[1] For employers, that was a major victory. Nevertheless, questions remained about how far the NLRB could go in regulating employer conduct surrounding the arbitration proceeding.

On Aug. 10, the board's decision in Ralphs Grocery Co. brought this second layer of risk into sharper focus.[2] For employers, the decision underscores the tension between arbitration procedures protected by the FAA and employee rights protected by the NLRA.

The decision also adds to a growing body of board precedent with important takeaways for how employers may draft and administer the confidentiality restrictions and discovery procedures in employment arbitration agreements to maximize their enforceability.

Ralphs Grocery and Confidentiality Under the NLRA

The dispute in Ralphs Grocery began in 2009, when security guard Terri Brown filed a California wage and hour class action, Brown v. Ralphs Grocery, in the Superior Court of California, County of Los Angeles.

Ralphs Grocery sought to compel individual arbitration pursuant to their agreement, which included a policy requiring employees to keep the "existence, content, and outcome" of arbitration proceedings confidential.

Brown then filed an unfair labor practice charge with the NLRB in 2012, challenging the policy under the NLRA.[3] And he initially prevailed. An administrative law judge ruled against Ralphs Grocery in 2013, and the board affirmed in 2016.

The board found that the policy violated Section 8(a)(1) of the NLRA on three grounds: It required employees to waive class or collective actions, interfered with their access to the NLRB, and restricted protected workplace discussions through its confidentiality requirement.[4]

Ralphs Grocery petitioned the U.S. Court of Appeals for the Ninth Circuit to review that decision. While its challenge was pending, the Supreme Court decided Epic Systems in 2018, holding that the FAA requires enforcement of agreements providing for individualized employment arbitration.

The Ninth Circuit then vacated the class waiver portion of the board's order and, at the board's request, remanded the remaining issues: whether the policy's confidentiality requirement violated the NLRA, and whether the policy interfered with employees' access to the board.[5]

After many years, in August, a board majority upheld the confidentiality requirements for the content and outcome of arbitration, treating those restrictions as rules governing the arbitration proceeding under the board's post-Epic Systems confidentiality precedents, including its 2020 decision in California Commerce Club Inc. and related cases.

The board found that a confidentiality restriction preventing employees from disclosing an arbitration's existence, even after the proceeding ended, was overbroad and therefore violated labor law, reasoning that such a restriction interfered with employees' ability to discuss workplace disputes, an activity at the heart of Section 7 of the NLRA.[6]

However, the board expressly left open whether a prohibition limited to a pending arbitration would likewise fall outside the FAA's protection.

As to the content of the arbitration, the board majority found no violation of labor law, reading the term "content" as covering arbitration procedures and case materials as squarely within the protection offered to employers by Epic Systems and California Commerce Club.

NLRB member David Prouty dissented in part, reading the term broadly enough to encompass underlying workplace facts and discourage protected employee discussions. That difference in interpretation illustrates why employers should carefully spell out exactly what confidentiality in arbitration covers.[7]

The majority also rejected the board-access challenge under its 2023 decision in Stericycle Inc., which asks whether an employee who depends on an employer for their livelihood could reasonably read a rule to restrict Section 7 rights, even if a nonrestrictive reading is also reasonable.[8]

Applying that standard, the majority relied on a prominent, stand-alone paragraph in Ralphs Grocery's mediation and binding arbitration policy that expressly preserves employees' right to file NLRB charges. That specific assurance resolved any ambiguity created by the policy's broader arbitration requirements, so employees could not reasonably read the policy to bar board access.[9]

Together, these holdings favor clear boundaries. In order to avoid violating labor law, take care in identifying the arbitration terms that are subject to confidentiality, and affirm employees' continuing workplace and agency access rights.

How Employer Conduct During Arbitration Can Lead to Liability

Drafting is only half the problem, and California Commerce Club makes that point clearly. There, the board upheld confidentiality rules covering arbitration evidence and awards while preserving employees' right to discuss independently known workplace facts. It also recognized that disciplining an employee for a disclosure protected by Section 7 can violate the NLRA, even when the confidentiality provision is enforceable on its face.

Ralphs Grocery reiterated that principle.[10] The board reconciled those results with Epic Systems through the contractual remedies that employers retain. An employer can seek damages or other relief from an arbitrator or court, subject to the agreement's forum provisions and applicable remedial requirements, just as a business would against a nonemployee claimant who breached a confidentiality agreement.

From the board's perspective, that approach preserves arbitration's fundamental attributes while protecting employees' Section 7 activity.[11]

For employers, however, those remedies present practical challenges. Monetary damages for a confidentiality breach may be difficult — if not impossible — to calculate, and obtaining relief from an arbitrator or court may require additional proceedings and expense.

Again, employers should carefully consider what information related to an arbitration must truly remain confidential and what information need not be.

These questions are likely to persist as the board's membership changes. After all, a Republican board majority decided California Commerce Club. That history suggests the tension runs deeper than ideology. It arises from two statutes protecting different interests: The FAA safeguards the integrity of arbitration, while the NLRA protects employees' ability to act and communicate together for mutual aid and protection.

Why Arbitration Discovery Could Be the Next Inflection Point

Ralphs Grocery highlights how the arbitration proceeding and the underlying workplace dispute inevitably overlap. So far, the cases have largely asked what information employers may lawfully prevent employees from disclosing. Now let's reverse the direction: What happens when an employer asks employees to disclose information that may be protected by the NLRA?

Consider a discovery request for employee-to-employee group texts, emails or Slack messages about workplace issues. An arbitrator may regard those communications as relevant and discoverable, while employees may argue that demanding them intrudes on confidential protected concerted activity.[12]

Even when an arbitrator orders production, an employer may face a separate unfair labor practice charge over the request's scope or purpose, particularly where the board perceives an unlawful effort to identify employees who are engaged in protected concerted activity.[13]

How the NLRB Could Apply the Guess? Inc. Test to Employer Discovery Requests in Arbitration

In 2024, in Chemtrade West US LLC, the board applied its 2003 decision in Guess? Inc. to deposition questioning in a federal wage and hour lawsuit. Guess? held that asking an employee to identify co-workers who attended union meetings violated Section 8(a)(1) because the employer's need for their

names did not outweigh employees' confidentiality interests.

Chemtrade found that questioning about an employee's protected discussions with co-workers and union representatives likewise failed that balancing test. Neither decision addressed discovery in FAA-governed arbitration.[14]

Under that framework, employers could have to explain to the NLRB why (1) the requested information bears on the claims or defenses in the case; (2) the request serves no purpose prohibited by the NLRA; and (3) assuming both conditions are satisfied, the employer's litigation need carries greater weight than the employees' interest under Section 7 in keeping protected activities confidential.[15]

The test could complicate arbitration. Employers may advocate for the board to review litigation-related employer conduct under its well-established interrogation standard, arguing that this approach better preserves arbitration's fundamental attributes that the court identified in Epic Systems.[16]

For employers, the practical risk is a two-track discovery process. The filing of a charge, however, does not itself establish a violation; the effect of any production order must be assessed in context.

How Employers Can Protect Against This Emerging Labor Risk

Employers may start by carefully drafting the arbitration agreement. They should define confidential material by source and procedural status, specifically identifying covered arbitral submissions, transcripts, awards and materials obtained solely through discovery.

Employers should also expressly preserve employees' ability to discuss an arbitration's existence and workplace facts that they know independently of the arbitration.[17] They should also preserve disclosures that are otherwise protected by law.

Further, employers should expressly preserve access to the NLRB by naming the agency and preserving employees' rights to file charges, cooperate with investigations, and participate in board proceedings without prior employer approval or an arbitration prerequisite. Prominent, straightforward language helps employees understand how those rights fit alongside an agreement to confidentially arbitrate workplace disputes.[18]

California employers must also assess generally applicable unconscionability rules and statutory disclosure protections, subject to FAA preemption. NLRA compliance alone does not establish enforceability. Covered workplace confidentiality provisions must include the disclosure language required by California Government Code Section 12964.5.

Employers should carry that precision into discovery. They should tailor requests by date and subject matter; document the reason for seeking potentially protected communications; and consider protective orders, redactions or anonymization. These measures can help address confidentiality interests, while allowing employers to obtain information needed to defend a claim.

Finally, build labor law review into arbitration administration. Employers should anticipate Section 7 questions when handling employee communications, discovery motions, confidentiality disputes and enforcement. Review proposed discipline for a confidentiality breach, assessing both contractual remedies and the employee's protected activity before acting.[19]

The practical lesson of Ralphs Grocery reaches beyond the precise wording of an arbitration confidentiality clause. Employers put themselves in the strongest position when they treat NLRA compliance as part of both arbitration design and administration.

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[1] Epic Systems Corp. v. Lewis, 584 U.S. 497, 508-10 (2018).

[2] Ralphs Grocery Co., 375 NLRB No. 25, slip op. at 1-4 (Aug. 10, 2026).

[3] Ralphs Grocery, 375 NLRB No. 25, slip op. at 1; Ralphs Grocery Co., 363 NLRB 1166 (2016), Order para. 2(c) (identifying Los Angeles Superior Court Case No. BC423782).

[4] Ralphs Grocery Co., Case No. 21-CA-073942 (ALJ July 31, 2013), adopted as modified in Ralphs Grocery Co., 363 NLRB 1166, 1166-68 (2016).

[5] Ralphs Grocery, 375 NLRB No. 25, slip op. at 1-2; Epic Systems, 584 U.S. at 505-25.

[6] Ralphs Grocery Co., 375 NLRB No. 25, slip op. at 1-3 (Aug. 10, 2026); California Commerce Club, Inc., 369 NLRB No. 106, slip op. at 3-6 (2020).

[7] Ralphs Grocery, 375 NLRB No. 25, slip op. at 2-3, 6-7 (including Member Prouty's partial dissent); California Commerce Club, 369 NLRB No. 106, slip op. at 5-6.

[8] Stericycle, Inc., 372 NLRB No. 113, slip op. at 2 (2023).

[9] Stericycle, Inc., 372 NLRB No. 113, slip op. at 2 (2023); Ralphs Grocery, 375 NLRB No. 25, slip op. at 3-4.

[10] California Commerce Club, 369 NLRB No. 106, slip op. at 3-6; Ralphs Grocery, 375 NLRB No. 25, slip op. at 2 n.6.

[11] See California Commerce Club, 369 NLRB No. 106, slip op. at 6 (recognizing enforcement of the confidentiality provision by an arbitrator or a court).

[12] See Ralphs Grocery, 375 NLRB No. 25, slip op. at 2-3, 6-7; Guess?, Inc., 339 NLRB 432, 434-35 (2003).

[13] Cf. Guess?, Inc., 339 NLRB at 434-35; Starbucks Corp. v. NLRB, 173 F.4th 230, 231 (5th Cir. 2026) (addressing liability arising from board-issued subpoenas).

[14] Chemtrade West US LLC, 373 NLRB No. 43, slip op. at 1 n.1, 3 (Apr. 16, 2024); Guess?, Inc., 339 NLRB 432, 434-35 (2003).

[15] Guess?, Inc., 339 NLRB at 434.

[16] See Starbucks Corp. v. NLRB, 173 F.4th 230, 231 (5th Cir. 2026); Epic Systems Corp. v. Lewis, 584 U.S. 497, 508-11 (2018).

[17] Pfizer Inc., 374 NLRB No. 55, slip op. at 2-4 (2026); Dish Network LLC, 370 NLRB No. 97, slip op. at 3-4 (2021); Ralphs Grocery, 375 NLRB No. 25, slip op. at 2-3.

[18] Ralphs Grocery, 375 NLRB No. 25, slip op. at 3-4; Prime Healthcare Paradise Valley, LLC, 368 NLRB No. 10, slip op. at 4-6 (2019).

[19] California Commerce Club, 369 NLRB No. 106, slip op. at 6; Ralphs Grocery, 375 NLRB No. 25, slip op. at 2 n.6.