The NLRB Still Has Something To Say About Mandatory Arbitration Agreements

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In May 2018, the U.S. Supreme Court rejected the argument that the National Labor Relations Act (the "Act") prohibits mandatory arbitration agreements that contain class and collective action waivers. But that has not stopped the National Labor Relations Board (NLRB), the federal agency that enforces the Act, from weighing-in and declaring other arbitration agreement provisions unlawful.

As a string of recent NLRB decisions makes clear—the newest of which is *Beena Beauty Holding, Inc.*, 368 NLRB No. 91 (2019)—mandatory arbitration provisions, even in non-union workplaces, that can reasonably be interpreted by employees to limit or interfere with their ability to file unfair labor practice charges with the NLRB are likely unlawful.

The offending language, from the NLRB's perspective, is one that generally requires arbitration of all claims relating to an employee's employment, whether under state or federal law, without exception. As the NLRB's decisions show, it does not matter whether the Act or NLRB are specifically mentioned. Rather, it is a violation of the Act if an arbitration agreement could reasonably be interpreted to prevent employees from filing charges with the NLRB. In other words, provisions in an arbitration agreement that make arbitration the exclusive forum for violations of the Act are unlawful, whether such provisions are expressly stated or reasonably implied.

Fortunately, the NLRB has also given insight as to what is acceptable under the Act. In *Briad Wenco, LLC*, 368 NLRB No. 72 (2019), the NLRB ruled that the following "savings clause" rendered the employer's arbitration provision lawful: "Nothing in this Agreement shall be construed to prohibit any current or former employee from filing any charge or complaint or participating in any investigation or proceeding conducted by an administrative agency, including but not limited to . . . the National Labor Relations Board . . . ." It is not enough, however, to include language stating that the arbitration provision does not apply to claims "preempted by federal labor laws." The NLRB has already ruled that such language is insufficient under the Act. *Cedars-Sinai Medical Center*, 368 NLRB No. 83 (2019).

Bearing all of this in mind, the bottom line is that even non-union employers should be aware that they—and their mandatory arbitration agreements—continue to be targeted by the NLRB. The addition of a savings clause like the one described in the preceding paragraph may help limit or eliminate the potential for NLRB scrutiny—but we note that arbitration provisions are construed as a whole, so it is best to consult with experienced labor counsel to ensure that arbitration agreements are drafted to limit potential liability and compliance concerns.

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