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Are Your Mandatory Arbitration Agreements Still Enforceable?

Authors: Chris Barrett, Elizabeth Ann Liner
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On March 18, 2021, the National Labor Relations Board (NLRB) reconsidered the lawfulness of terms in employment arbitration agreements that require employees to sign as a pre-dispute condition of employment. Ultimately the NLRB decision, which is available here, represents a surgical excision of *Epic Systems v. Lewis* that will have a lasting effect on employment agreements for years to come.

Bottom Line

The NLRB held that confidentiality requirements for arbitration hearings, discovery, and awards are enforceable. However, as to arbitration settlements, the Board ruled agreements cannot silence workers regarding the details of the settlements through pre-dispute confidentiality provisions. According to the NLRB, the Federal Arbitration Act has no jurisdiction over employment-related arbitration *settlements* such that confidentiality provisions intended to gag employees as to the result of settlement negotiations would interfere with workers' rights to discuss employment-related concerns. The same could, in turn, per the NLRB, chill employees' ability to access the NLRB.

Notably, the Board stated that confidentiality of settlements could be agreed upon when negotiated, but pre-dispute confidentiality provisions, as a condition of employment, cannot be enforceable. The NLRB reiterates that broad agreements providing for the arbitration of all employment-related claims could constitute a violation of the National Labor Relations Act (the Act) if the arbitration agreement, when read in light of *Boeing*, would interfere with the individual's rights under the Act, such as filing a charge with the NLRB.

Relation to Court Precedent

The NLRB holding is largely consistent with the notorious holding in *Epic Systems*: employment arbitration agreements remain enforceable at the NLRB level. However, the March 18, 2021 ruling dissects the intricacies of *Epic Systems* with scalpel-like precision. In the end, the NLRB cannot circumvent that holding, but by carving thinner lines around it, the ruling on certain arbitration provisions has shifted the employment agreement landscape.

Immediate Effect

While certainly not a *coup de 'tat* on the *Epic Systems* decision, the subtle distinctions from the ruling will have a long-lasting impact on employers' settlements of related claims. Chief among these concerns – labor disputes that result in settlement are going to present a patent, but common worry with which many businesses grapple when considering the settlement of employment claims: the employee cashes the check and tells coworkers that the company paid and the amount of the payment. The long-term risk to employers is underscored by the speed with which word will travel through labor organizations around the country.

What Can Employers Do?

As stated, in the pre-dispute posture, employers that appear before the NLRB or negotiate employment agreements with their employees should take prompt action to:

- Eliminate mandatory confidentiality provisions in employment agreements contemplating confidential settlement of disputes before they arise, as a condition of employment with the organization;

- Eliminate or revise arbitration provisions that can be read to prohibit an employee from filing a charge with the NLRB or otherwise from exercising rights under the Act;

- Identify the risk associated with outstanding and ongoing NLRB claims and negotiated settlements;

- Instruct counsel handling these disputes to mandate a separately stated, conspicuous provision in the arbitration settlement agreement that provides consideration for confidentiality of the settlement terms; and

- In all cases involving labor disputes proceeding to arbitration and the NLRB, demand at the commencement of settlement negotiations that the employer will not settle any claim without contemplation of, and ascension to, an agreement of confidentiality that sufficiently protects the organization from disparagement and disclosure of confidential settlement negotiations.

While the landscape related to NLRB enforcement of pre-dispute arbitration provisions has shifted, employers can implement proactive action plans to mitigate the pitfalls the failure to contemplate such issues would likely present. We continue to follow these developments closely. Please contact Stuart R. Goldberg, Chris Barrett, Elizabeth Liner, or your Baker Donelson Labor & Employment attorney to discuss how we can work with you in developing a plan to address these issues.