



The NLRB's Attack On Dealership Arbitration Agreements

Insights

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Many of our dealership clients utilize binding arbitration agreements to resolve employee disputes. Arbitration agreements provide a number of unique benefits to those dealerships that wish to avoid the costs and negative publicity typically associated with a jury trial. By asking employees to agree to binding arbitration, dealerships are able to address employment claims in a less formal and more efficient setting than can be found in the federal courthouse.

NLRB Strikes Down Dealer Arbitration Agreement

However, the National Labor Relations Board (NLRB) recently found that the arbitration agreement maintained by one California dealership, Concord Honda, was unlawful because it contained a class action waiver. The NLRB directed the dealership to rescind the arbitration agreement or revise it to exclude this key provision.

In light of this decision, many dealers may feel pressure to abandon their own arbitration programs or risk similar penalties. We would caution you not to overreact. Arbitration agreements remain an important tool in defending employment claims and should not be discarded on the basis of one flawed decision from the NLRB.

Class Action Waivers Remain Important

One of the most significant advantages to arbitration is that it allows dealerships to handle employees' threatened claims on an individual, rather than class-wide, basis. In 2011, the U.S. Supreme Court held that companies can prohibit individuals from pursuing most class action claims in court by requiring them to arbitrate all claims on an individual basis (read more [here](#)).

In the employment context, this has become an extremely effective tool in managing litigation costs. As class and collective action claims rise under the Fair Labor Standards Act, Fair Credit Reporting Act, Equal Pay Act, and other federal and state laws, employers are able to manage defense costs by litigating a single employee's claim in arbitration, as opposed to hundreds of employees' claims in federal court.

Labor Board Remains Hostile; Courts To The Rescue?

This is exactly why the NLRB has put arbitration agreements in its crosshairs. According to the Board, any arbitration agreement that requires employees to waive their right to pursue class or collective actions is unlawful because it supposedly prohibits employees from engaging in protected

concerted activity with their coworkers. The NLRB has therefore consistently sought to invalidate arbitration agreements including class action waivers.

There is just one big problem with the NLRB's approach – it has consistently been rejected by federal appellate courts. In fact, whenever the NLRB has held that an arbitration agreement containing a class action waiver is unlawful, a federal court has overruled the decision and enforced the agreement.

We expect that the same will happen in this case. Concord Honda has appealed the NLRB's decision to the 9th Circuit Court of Appeals, where it will hopefully achieve the same result as other companies that have challenged the NLRB's overreach.

What Should Dealerships Do?

In the meantime, this is a critical time for you to reevaluate existing arbitration agreements. If your agreement has not been updated in the last couple of years, it may not be providing all of the protections that it should. Even worse, it may be subject to attack by the NLRB. We therefore encourage you to consult with labor and employment counsel to make sure you have a lawful and up-to-date arbitration agreement that protects you in the event of employment litigation.

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