



NLRB Clarifies Use Of Class Action Waivers In Arbitration Agreements

Insights

6.24.10

Four days before retiring from his post as General Counsel of the National Labor Relations Board ("NLRB"), Ronald Meisburg issued a Memorandum that severely limits the use and usefulness of mandatory arbitration agreements in a non-union setting. Although not legally binding, General Counsel Memorandums serve as case-handling guidelines for Regional offices nationwide.

Section 7 of the National Labor Relations Act protects an employee's right to engage in concerted activity for the group's mutual aid and protection. This has long been interpreted to allow employees to band together to address interests related to their wages, hours and working conditions in both judicial and administrative forums. But more and more employers are requiring employees to consent to arbitration agreements as a condition of employment. These agreements often contain class action and collective action waivers.

The courts have generally upheld these waivers so long as class action relief is not "essential to the vindication" of the law at issue. In his Memorandum, General Counsel Meisburg addressed whether Section 7 of the Act prohibits the use of class and collective action waivers by employers.

Guidance Is Less Than Clear

Meisburg's conclusion truly walks a razor's edge. He advised Regional Offices as follows:

1. The concerted filing of a class action lawsuit or arbitral claim is protected activity and if an employer threatens, disciplines or discharges an employee for such concerted activity, the employer violates the Act.
2. A mandatory arbitration agreement that could reasonably be read as prohibiting employees from joining with others to file a class action lawsuit is unlawful.
3. Employers, nonetheless, may require individual employees to sign a waiver of their right to file a class or collective claim without automatically violating the Act. So long as the wording makes clear that their right to act concertedly to challenge these agreements by pursuing class and collective claims will not be subject to discipline or retaliation by the employer, and that those rights "consistent with Section 7" are preserved, no violation of the Act will be found.
4. Even if an employee is covered by a lawful arrangement, the employees are still protected by Section 7 of the Act if they concertedly file an employment-related class action lawsuit in the face of that agreement and may not be threatened or disciplined for doing so.

of that agreement and may not be threatened or disciplined for doing so.

Put more succinctly, although an employer can require a mandatory arbitration clause which includes a waiver of class and collective claims, these agreements must inform employees that that they have the right to collectively challenge the validity of the waiver by filing a class action or collective claim and that they will not be retaliated against for doing so. The only recourse available to the employer at that point would be to seek dismissal on the basis of the legitimacy of the agreement.

If you would like assistance in evaluating your current mandatory arbitration policies, please contact your regular Fisher Phillips attorney.

This Legal Alert provides an overview of a specific General Counsel Memorandum. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.