



Time To Revisit Arbitration Agreements: Employers Dealt A Blow By Unanimous Labor Board

Insights

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Employers may be surprised to learn that the Republican-controlled National Labor Relations Board just issued a unanimous decision invalidating an employer's mandatory arbitration agreement that could be reasonably interpreted as preventing employees from filing charges with the Board. The June 18 *Prime Healthcare* decision analyzed the employer's arbitration agreement using the relatively new *Boeing Co. standard* for evaluating facially neutral policies and rules that potentially interfere with employees' protected rights, but fell on the side of the workers. Yesterday's decision may require you to adjust your arbitration agreements to ensure you stay on the right side of the law.

The *Prime Healthcare* Arbitration Agreement

Prime Healthcare required employees to sign an arbitration agreement that did not explicitly prohibit them from filing charges with the National Labor Relations Board (NLRB). Rather, the agreement included broad language that "all claims or controversies for which a federal or state court would be authorized to grant relief" are subject to arbitration and included examples of such covered claims, including those related to wages, breach of contract, discrimination, and violations of any "federal, state or other governmental constitution, statute, ordinance, regulation or public policy."

The agreement did not specifically identify claims under the National Labor Relations Act (NLRA) as being covered, but it also did not explicitly exclude them. The agreement, however, did exclude from arbitration some claims, such as workers' compensation and unemployment claims.

The Applicable Standard

The Board first explained that nothing in the U.S. Supreme Court's recent *Epic Systems decision*—which approved class and collective action waivers in mandatory arbitration agreements—disturbed the longstanding precedent that the NLRA provides workers with the right to file charges with the Board, nor does the Federal Arbitration Act authorize agreements limiting that right. The Board then explained that an arbitration agreement explicitly prohibiting the filing of charges with the NLRB or, more generally, with administrative agencies, must be found unlawful because such an agreement would constitute an explicit prohibition on the exercise of employee rights under the NLRA.

Acknowledging that Prime Healthcare's arbitration agreement did not *explicitly* prohibit the filing of charges with the NLRB, the Board analyzed whether the agreement was nevertheless unlawful

under *Boeing's balancing test*. In *Boeing*, the Board held that when a facially neutral policy or rule, when reasonably interpreted, potentially interferes with employees' rights under the NLRA, the Board must balance the nature and extent of the potential impact with legitimate justifications associated with the policy or rule.

Applying *Boeing*, the Board concluded that the arbitration agreement at issue, when reasonably interpreted, potentially interfered with employees' rights because it effectively covered *all* claims (with limited exceptions) and did not expressly exclude NLRA claims. The Board then determined that the potential impact on employee rights was significant, opining that the right to file charges with the NLRB was "indispensable to the effectuation of national labor policy."

Prime Healthcare offered no legitimate justifications for the breadth of its arbitration agreement, nor could it have according to the Board. The Board explained, "As a matter of law, there is not and cannot be any legitimate justification for provisions, in an arbitration agreement or otherwise, that restrict employees' access to the Board or its processes."

Accordingly, the Board held that Prime Healthcare's arbitration agreement was unlawful to the extent it prohibited employees from filing charges with the NLRB. The Board ordered Prime Healthcare to rescind the agreement (which it had already done, replacing it with an agreement that specifically carved out NLRB charges from mandatory arbitration) and notify current and former employees who signed the agreement that it was no longer in effect.

What This Means For Employers

In light of yesterday's decision, you should promptly review any arbitration agreements you maintain to determine whether they include broad language that might be read as precluding employees from filing charges with the Board. The decision also intimated that general disclaimer language, such as "nothing in this agreement is intended to interfere with employees' rights or violate the law" may not be sufficient to save it. Consequently, if you believe your arbitration agreements are safe because of a general disclaimer, you should also take a second look.

We will continue to monitor any impact and provide additional information as it becomes available, so make sure you are subscribed to [Fisher Phillips' alert system](#) to gather the most up-to-date information. If you need assistance reviewing your arbitration agreements to ensure compliance, please contact your Fisher Phillips attorney or any member of the firm's [Labor Relations Practice Group](#).

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

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