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Employer Alert

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NLRB Bars Waivers of Collective Action in Arbitration and Litigation

Questions?
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The National Labor Relations Board (NLRB) has thrown up a roadblock to employers who require employees to use arbitration exclusively to settle their employment-related claims. This is the latest action taken by the NLRB that directly impacts the non-union workplace. It follows on the heels of the posting requirement that is currently scheduled to go into effect April 30, 2012 requiring employers to advise employees of their rights under the National Labor Relations Act (NLRA), and the protection provided employees who post comments about their employer on Facebook or other social media.

Arbitration to resolve disputes has been embraced by courts, companies, unions, and employees as a means of limiting costly litigation, avoiding the delays inherent in the court system, having an informal process, foregoing juries and judges, employing knowledgeable arbitrators, and keeping the proceedings private. Congress has long supported arbitration, and the Supreme Court has recently reiterated its support for arbitration when it held that a contract between a credit card company and a consumer can require that disputes be resolved only in arbitration.

Despite this support for arbitration, the NLRB has ruled that agreements between an employer and employee requiring the employee to waive the right to pursue a claim against the employer as part of a collective action in arbitration and court unlawfully infringes employees' rights to engage in concerted action.

The NLRA guarantees the right of employees to act together with regard to the terms and conditions of employment. The NLRB decision focused on the restraint placed on concerted activity, one of the fundamental rights employees have under the NLRA. The NLRB still considers arbitration an important dispute resolution process, but it concluded that denying employees the right to act collectively through a "class action" arbitration or lawsuit went too far and violated public policy.

Undoubtedly this case will be appealed and ultimately may need to be resolved by the Supreme Court due to the tension between the federal law encouraging arbitration and the NLRA. There are, however, ways to still require arbitration. First, the case only applies to employees who

are protected by the NLRA. That law does not provide protection to managers, supervisors or independent contractors. Therefore an agreement that requires such personnel to agree to waive collective actions in court and in arbitration is not impacted by this decision. Second, employers may still require employees to waive either going to court as a class or arbitrating a matter as a class, just not both.

Employers should conduct a careful review of the scope of the restriction on collective actions in their existing policies and agreements as we await the appeal process and the likely Supreme Court decision down the road.

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