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NLRB Again Invalidates Arbitration Agreements

Last week, in *Acevedo v. Amex Card Servs. Co.*, Case No. 28-CA-123865, the National Labor Relations Board (NLRB) again found that arbitration agreements that include class action waivers are illegal and unenforceable under the National Labor Relations Act (NLRA) and the NLRB's prior decisions in *D.R. Horton, Inc.* and *Murphy Oil USA, Inc.* The United States Court of Appeals for the Fifth Circuit subsequently rejected these prior decisions. This more recent case, however, originates in the United States District Court for the District of Arizona, which falls under the Ninth Circuit Court of Appeals.

The *Acevedo* decision arises from a lawsuit filed by several employees of Amex Card Services Company (Amex), a subsidiary of American Express. In January 2014, several call center employees filed a lawsuit against Amex pursuant to the Fair Labor Standards Act, alleging that they were not paid for work performed outside of their shifts or during meal breaks. Amex then moved to compel arbitration, citing both its arbitration policy (Policy) and a new hire employment arbitration policy acknowledgment form (Form). Both the Policy and the Form provide that, as a condition of employment, Amex employees must submit any employment-related disputes to arbitration, that any right to a trial before a judge or jury is waived, and that there shall be no right or authority for any claims to be arbitrated on a class or collective basis. While the Policy explicitly states that claims under the NLRA are not covered by it, the Form does not explicitly state that claims under the NLRA are exempt from the Policy.

In addition to opposing Amex's motion to compel arbitration, the employees filed an unfair labor practice charge with the NLRB, alleging that the requirement to arbitrate was an unfair labor practice. Although the district court granted the motion to compel arbitration and the parties eventually settled, the NLRB charge remained pending until this week.

Relying on precedent, the NLRB again held that an employer violates Section 8(a)(1) of the NLRA "when it requires employees covered by the Act, as a condition of their employment, to sign an agreement that precludes them from filing joint, class, or collective claims addressing their wages, hours, or other working conditions against the employer in any forum, arbitral or judicial." Based on that standard, the NLRB concluded that Amex's Policy and Form are facially unlawful. Additionally, it found that Amex further violated the NLRA by enforcing the arbitration policy through the district court.

Based on these violations, the NLRB ordered several remedies. First, it ordered Amex to cease and desist maintaining and/or enforcing any mandatory arbitration policy that is contrary to the NLRA. Next, it ordered Amex to reimburse the plaintiffs for all reasonable expenses and legal fees, with interest, they incurred in opposing Amex's "unlawful" motion to compel arbitration. Finally, it ordered Amex to rescind or revise the Policy and Form to make clear to employees that these documents do not constitute a waiver of their right to maintain employment-related joint, class, or collective actions in all forums, and to so notify all employees who were required to sign the Policy and Form.

Impact on Employers

The *Acevedo* decision highlights the ongoing divide between the NLRB and the judicial system regarding the enforceability of arbitration agreements that include class and collective action waivers. Several courts have enforced such arbitration agreements under the Federal Arbitration Act, while the NLRB consistently has found that they violate the NLRA and constitute an unfair labor practice. Amex has stated that it intends to appeal the *Acevedo* decision, and the issue ultimately may have to be resolved by the United States Supreme Court.

Until there is such a resolution, employers face a difficult choice. If they want to ensure that their arbitration agreements are enforceable and do not violate the NLRA, then they must limit their applicability to individual claims. Such a limitation, however, exposes employers to the risk and cost of defending class and collective action proceedings in court.

Employers should recognize that the NLRB is likely to continue to issue unfair labor practice findings with respect to arbitration agreements that impose waivers of employees' rights to pursue class and collective actions. Accordingly, employers should carefully review any such arbitration agreements and determine whether they should be modified and amended.

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