



January 12, 2012

Labor & Employment Update

## **AGREEMENT TO ARBITRATE DISPUTES WHICH PROHIBITS ALL JOINT, CLASS OR COLLECTIVE CLAIMS VIOLATES THE NATIONAL LABOR RELATIONS ACT**

The expense and time involved in defending employee lawsuits in court has led many employers to require employees to sign agreements requiring them to resolve claims by arbitration rather than by litigation. Last week, the National Labor Relations Board (“Board”) held one such agreement to be illegal. The Board ruled that an employer violated the National Labor Relations Act (“Act”) by requiring employees to sign an agreement that (1) required all employment claims and disputes to be resolved through arbitration, rather than in court or another forum, and (2) prohibited employees from arbitrating claims collectively (allowing only individual, not group, claims). The Board reasoned that the employer’s agreement violated employees’ rights to engage in concerted action for mutual aid or protection.

In this case an attorney notified the Company that he had been retained to represent employee C, and a class of similarly situated employees, in an arbitration proceeding to determine whether the Company had improperly classified certain employees as exempt under the Fair Labor Standards Act. The Company rejected C’s arbitration claim, because it involved C’s participation in a class action. C then filed a charge with the Board alleging that the agreement violated his rights under the Act.

The Board agreed. The Board held that Section 7 of the Act vests employees with a substantive right to engage in activities in concert with other employees, not only for collective bargaining, but also for other “mutual aid or protection.” This includes the right of employees to improve their terms and conditions of employment through channels outside of the immediate employer-employee relationship, such as collective litigation or arbitration. As the Board stated: “[E]mployees who join together to bring employment-related claims on a classwide or collective basis in court or before an arbitrator are exercising rights protected by Section 7 of the [Act].” An employer interferes with this right, and violates the Act, when it forces employees to sign individual agreements which require employees to pursue claims individually.

The Board claimed that it was not mandating class arbitration to protect employee rights. Rather, it held only that employers may not compel employees to waive their right to pursue litigation collectively. As long as the employer leaves open a judicial forum for collective claims, they preserve employees’ rights under the Act. Said differently, if employees can pursue collective claims in court, an employer can insist that arbitration proceedings be conducted on an individual basis.

The Board did not reach the more difficult questions of (1) whether an employer can require employees to waive their right to pursue collective actions in court so long as the employees retain the right to pursue collective claims in arbitration, and

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If you have any questions about the issues addressed here, or any other matters involving Labor & Employment law issues, please feel free to contact:

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(2) whether an employer and an individual employee can enter into an agreement, that is not a condition of employment, to resolve disputes through non-class arbitration rather than litigation in court. The Board also noted that its decision only applied to agreements with employees covered by the Act. Thus, this decision would not apply to supervisory or managerial employees under the Act.

We will have to wait to see whether this decision is appealed to the courts. For now, however, it is clear that an agreement between an employer and a covered employee which prohibits the employee, as a condition of employment, from pursuing joint, class or collective litigation in any forum (both in arbitration and court) violates the National Labor Relations Act. Employers who maintain agreements with employees limiting the manner in which employment disputes may be litigated should review such agreements to determine their validity under this decision.

If you have questions about this case or agreements to arbitrate in general, please contact:

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