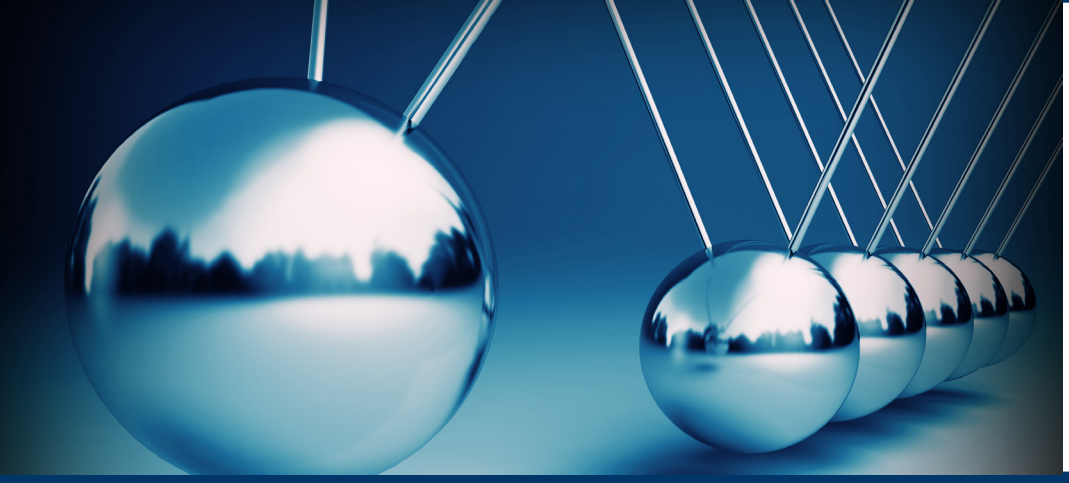

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NLRB CHANGES DEFERRAL STANDARDS: EMPLOYERS WITH COLLECTIVE BARGAINING AGREEMENTS SHOULD CONSIDER CHANGES TO ARBITRATION PROVISIONS

Most collective bargaining agreements between employers and labor unions contain dispute resolution procedures that end up with final and binding arbitration for those disputes the parties cannot work out themselves. There are some disputes that arise in unionized workforces that involve issues under the National Labor Relations Act ("NLRA") as well as the parties' collective bargaining agreement. NLRA disputes are under the jurisdiction of the National Labor Relations Board ("NLRB"), and the NLRB has its own processes for deciding cases that allege violations of the NLRA.

For the past sixty years, the NLRB has applied a system under which it allows, under certain circumstances, the arbitration system under a collective bargaining agreement to act as the primary method of a resolving a dispute that implicates both the collective bargaining agreement and the NLRA. This "deferral" system has avoided duplication of efforts in multiple forums and allowed parties to generally work out their disputes with minimal oversight from the NLRB.

However, the NLRB recently made some significant changes to the circumstances under which it will defer to arbitration under a collective bargaining agreement. These changes will, in the absence of some specific changes to existing collective bargaining agreements, make deferral much less likely. Employers with collective bargaining agreements should carefully consider whether, when and how to propose such changes to the unions with which they have agreements.

In a nutshell, the NLRB has decided that it will only defer to arbitration when (1) the parties explicitly authorized the arbitrator to decide the NLRA issue; (2) the arbitrator was actually presented with and considered the NLRA issue; and (3) the arbitrator's decision is reasonably consistent with NLRB rulings on similar topics. In addition, the party that is trying to get the NLRB to defer to the arbitration has the burden of proving each of these elements to the NLRB.

Before the NLRB's new procedures, the parties did not need to grant the arbitrator explicit authorization to address NLRA Unfair Labor Practice issues; such authorization could be inferred in particular circumstances. For example, if a collective bargaining agreement provided that the employer needed "just cause" to terminate an employee, the NLRB would reason that an arbitrator would probably consider exercise of NLRA rights as part of "just cause" and therefore the Board would be inclined to defer to arbitration, even if the parties never really told the arbitrator that he or she could consider

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the NLRA. Now, the arbitrator will need explicit authorization. This authorization can be blanket – by being included within the collective bargaining agreement – or agreed to (or not) on a case by case basis, but it needs to be explicit.

Similarly, before the recent shift in the law, the NLRB would often assume that the NLRA issue was part of the arbitration even if it was not explicitly presented. Again using the example of "just cause," if an arbitrator found that the employer fired the employee because the employee stole money from the company, the NLRB did not require the arbitrator to say in the award that he or she had considered whether the employer violated the NLRA – the Board instead assumed that if the real reason for the termination was theft, then it was not due to protected activity. Now, the Board will require that the arbitration award explicitly state that the arbitrator considered the statutory issue and to make an actual decision on that issue.

Finally, the NLRB tightened the scrutiny it will use to review actual arbitration awards. In the past, the NLRB would reject an award only if it found that the findings were "clearly repugnant" to the NLRA. Now, however, the Board will require that arbitration awards represent a "reasonable application of the statutory principles that would have governed the Board's decision." It remains to be seen how exacting this standard will be, but it seems clear that some awards that previously would have been accepted will be rejected, subjecting the employer to a second proceeding similar to the arbitration.

As a result of this change, an employer should consider whether it wants to have a blanket agreement with the union to alter the grievance and arbitration procedure so that the NLRB will defer in all, or at least most, cases in which there is overlap between contractual and statutory claims. While in the past the decision to ask the NLRB to defer to arbitration was relatively easy, and nearly always resulted in the matter proceeding through arbitration with little if any involvement by the NLRB, the new standards change that. In any given case, the employer may not want to empower the arbitrator to look beyond the contract itself, because in some cases the statutory issue may give the arbitrator more authority than the employer wants him or her to have.

Awards of arbitrators are rarely overturned on appeal, even when the arbitrator gets the law wrong. So if an employer faces an important issue under the National Labor Relations Act, it may well want that issue decided by the NLRB, which is subject to court review, than by an arbitrator. A blanket agreement may inadvertently result in the employer waiving certain protections afforded it by the Act.

On the other hand, a case-by-case approach gives the union veto power in any given case, and it is often the union that benefits from two separate proceedings, one of which – the NLRB proceeding – is investigated and potentially prosecuted by the government at no cost to the union.

An employer may be best served through a hybrid approach that provides explicit standing authority for an arbitrator to consider NLRA issues in connection with discipline cases, but reserves other situations to a case-by-case agreement. Of course, all of this would need to be negotiated with the union.

Those employers that currently have a collective bargaining agreement probably do not need to open up discussions. But when the agreement next comes up for re-negotiation, the employer should give serious consideration to addressing this issue in the contract.

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