NLRB: Employers Win When Their Employees Can't "Opt-In"

Mark A. Konkel

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In the first post-*Epic Systems* decision regarding arbitration agreements, the NLRB has underscored just how pro-arbitration courts and regulators have become. In *Cordúa Restaurants*, the Board put its stamp of approval on employers revising arbitration provisions *even after* employees file a claim. In doing so, employers can exercise more control as to how employees must bring their claims and—particularly, as in the case of *Cordúa Restaurants*, by limiting class and collective actions.

FACTS

In *Cordúa Restaurants*, employees, as a condition of their employment, had to sign arbitration agreements waiving "their right to file, participate or proceed in class or collective actions." Despite this agreement, some employees still filed collective wage and hour actions in federal court. Additional employees began "opting-in" to these collective actions.

In response, the employer revised its arbitration agreement so that employees waived their right to opt-in to a collective action. The agreement was revised to say "I agree that I cannot file or opt-in to a collective action under this Agreement, unless agreed upon by me and the Company in writing." Employees had to sign this new arbitration agreement as a condition of employment.

THE HOLDING

The Board found that the employer could lawfully change its arbitration provisions even after a claim was filed, and could lawfully require that signing the new arbitration provision is a condition of employment.

Relying on *Epic Systems*, the Board held that the act of "opting-in" to a collective action is simply a procedural step to participating in a collective action. Since the Supreme Court in *Epic Systems* already held that employers don't violate the National Labor Relations Act by requiring employees to bring individual claims as opposed to collective claims, then an employer could lawfully require an employee to waive their right to "opt-in" to these types of claims. Even if the change in the arbitration agreement was a direct result of employees filing collective actions, it would still not violate the law since individual arbitration agreements are legal under the Act.

Additionally, the Board explained that since the revised arbitration agreement was lawful, the employer was allowed to require an employee to sign the revised agreement as a condition of employment.

WHAT THIS MEANS FOR EMPLOYERS

The *Cordúa Restaurants* decision can now be set alongside the recent *Epic Systems* and *Lamps Plus* decisions as proof positive that employers can draft arbitration provisions to the exact specifications they want, and the provisions will likely be upheld (the recent New York anti-harassment law notwithstanding, which will likely be found pre-empted in the coming year). Given this new reality, employers should not hesitate to review their arbitration provisions and revise them to cover all necessary claims, and also ensure that employees are waiving their right to file class or collective actions. However, even if employers aren't quick enough to get this done, they can always revise their arbitration agreements later to mitigate the damage.

What's the takeaway? We've always viewed the value of agreements to arbitrate employment disputes as threefold:

- First, properly drafted, they limit or eradicate the risk of class actions, the inherent dynamics of which are insanely expensive to defend—win, lose or draw.
- Second, arbitration agreements provide for confidential proceedings. While confidentiality has gotten a bad rap in the wake of the #MeToo movement and truly egregious (even criminal) behavior, the fact is that many claims are baseless or defensible, but that doesn't stop the press from reporting on a publicly-filed, totally unproven complaint as "ABC Corp. has been sued for race discrimination/sexual harassment/other bad conduct." In our experience, the average reader doesn't say "Well, it's only *alleged* race discrimination/sexual harassment/other bad conduct." So confidentiality matters.
- Third, jury awards can be unaccountably huge, and laws that provide for punitive damages have rendered awards so large as to be disconnected from any version of reality. Arbitration awards in favor of claimants are geared more towards reasonable, actual damages—and therefore are far less costly.

Kelley Drye's L&E group has helped many employers structure, draft and enforce arbitration agreements. We're happy to help with yours.