

**ALERT**

## **LABOR & EMPLOYMENT LAW**

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# **Memo May Signal Increased NLRB Attention to Mandatory Arbitration of Employment Claims**

In what may be a sign of greater scrutiny of mandatory arbitration clauses, the outgoing General Counsel of the National Labor Relations Board (NLRB) issued a memo that is intended to review and clarify the NLRB's position on mandatory arbitration clauses. Employers routinely mandate that employees sign arbitration clauses as a condition of employment. Such clauses, often upheld in court as valid provided they do not limit employees' substantive remedies, prohibit employees from challenging employment practices in a venue other than private arbitration. While experts' and employers' opinions on such clauses vary widely, supporters of the use of arbitration clauses maintain they can substantially limit employers' employment litigation defense costs.

While the clauses typically do not address matters before the NLRB, even in nonunion work forces the National Labor Relations Act (NLRA) applies. Section 7 of the NLRA states, among other things, that employees can join in concerted activities (whether through a union or otherwise) for the purpose of mutual aid and protection. According to the memo, mandatory arbitration agreements do not impinge on Section 7 rights, so long as the agreements make clear that only individual rights to file a lawsuit in court are waived and that employees retain their Section 7 rights, including the right to challenge the agreements through concerted activity under the NLRA.

With respect to requiring the arbitration of claims that would potentially be part of class action lawsuits – currently a very hot topic – those that are filed by employees for their mutual aid and protection implicate NLRA rights. However, not all class action lawsuits or grievances involve protected concerted activity. Such claims must be analyzed on a case by case basis. Nonetheless, a mandatory arbitration agreement that prohibits all class action grievances and lawsuits likely impinges upon protected activity.

The memorandum encourages NLRB regional offices to give close attention to mandatory arbitration clauses. Employers using or considering such clauses are well advised to review them with legal counsel in light of possible increased NLRB attention. Possible additions to an overly broad mandatory arbitration agreement could include language assuring employees:

1. That the agreement does not constitute a waiver of employees' collective rights under Section 7, including the employees' right concertedly to pursue any covered claim before a state or federal court on a class, collective, or joint action basis;
2. That the employer recognizes the employees' right concertedly to challenge the validity of the forum waiver agreement upon such grounds as may exist at law or in equity; and
3. That no employee will be disciplined, discharged, or otherwise retaliated against for exercising their rights under Section 7 of the NLRA.

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