Labor & Employment Client Alert

Evolving Considerations for Employment Arbitration Agreements

By Chris Thrutchley and Hope Forsyth
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Because plaintiffs constantly attack the enforceability of mandatory employment-related arbitration agreements, the law in this area has been rapidly evolving. Last year, in *Epic Systems Corp. v. Lewis*, the Supreme Court affirmed a decades-long trend favoring the enforceability of arbitration agreements. After *Epic*, employers may require applicants and employees to submit all employment-related disputes to binding arbitration and to waive the right to bring costly class and collective actions.

Earlier this year, in *Prime Healthcare Paradise Valley*, the National Labor Relations Board ("NLRB") considered the difference between litigation and administrative remedies. Although under *Epic,* parties can contract to use the quicker, more private, and more efficient route of arbitration instead of the often slow, public, and costly route of litigation, the NLRB ruled in *Prime Healthcare* that arbitration agreements must make clear that they do not abridge employees' *administrative* avenues, such as filing charges with the NLRB or EEOC. If agreements do not make this clear or include an attempt to waive employees' rights to file administrative charges, they are unenforceable.

Now, in another new NLRB decision released on August 14, *Cordúa Restaurants, Inc.*, the Board ruled on additional considerations regarding arbitration agreements: promulgating arbitration agreements in response to collective actions, and addressing the consequences of declining to sign such agreements.

Reaffirming its longstanding precedent, the NLRB made clear that employers cannot take adverse action against employees for engaging in concerted activity by filing a class or collective action. However, the NLRB explained, "[a]s the Supreme Court made clear in *Epic Systems*, an agreement requiring that employment-related claims be resolved through individual arbitration, rather than through class or collective litigation, does not restrict [employees'] rights in any way." In other words, employees who have agreed to arbitrate can still bring their claims—they just consent to bring them in a specific procedural setting, and so no infringement of their substantive rights occurs. Based on this reasoning, the NLRB ruled that promulgating a binding arbitration agreement, even if the employer acts in response to employee activity such as filing of a collective action, does not violate the National Labor Relations Act.

Additionally, since arbitration agreements are lawful and do not restrict employees' rights, employers are not prohibited from informing employees that failing or refusing to sign a mandatory arbitration agreement will result in the employees' discharge. Specifically in *Cordúa Restaurants*, management's statements that "[explained] the lawful consequences" of failing to sign an arbitration agreement and "[expressed] the view that it would be preferable" not to experience those consequences were not unlawful threats of reprisal since *Epic* allowed employers to condition employment on acceptance of arbitration agreements.

In sum, the past year has seen numerous developments in the employment arbitration arena. Requiring arbitration agreements is lawful and cost-effective—and employers may inform employees about potential consequences of failing to agree—but papers must be structured not to invade the area of administrative agencies.

GableGotwals has extensive experience drafting and enforcing arbitration agreements. Our team of experienced labor and employment attorneys is here to assist in drafting, implementing, and updating your company's approach to these important dispute resolution considerations. Please contact any GableGotwals Labor & Employment attorney for assistance.

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