

# Labor Board Revisits Arbitration Agreements after Supreme Court's 'Epic' Decision

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July 8, 2019

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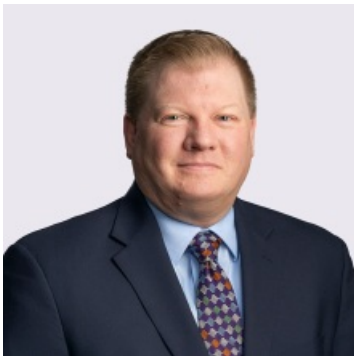
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Arbitration agreements that could be reasonably construed to prohibit filing of unfair labor practice charges with the National Labor Relations Board (NLRB) are unlawful under the National Labor Relations Act (NLRA), the NLRB has held. *Prime Healthcare Paradise Valley, LLC*, 368 NLRB No. 10 (June 18, 2019).

In so deciding, the NLRB affirmed the primacy of the employee right protected by Section 7 of the NLRA to file unfair labor practice labor charges. This right is afforded to employees regardless of whether they are represented by a union.

The ruling clarifies that the Supreme Court's decision in *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018), does not grant employers free rein to resolve all workplace disputes through arbitration. (See our article, [Supreme Court Rules Class Action Waivers in Employment Arbitration Agreements Valid.](#))

### Background

In this case, the employer maintained a Mediation and Arbitration Agreement (referred to in the Board's decision as the "M & AA") from July 2012 to May 2014. The M & AA provided for arbitration of all claims "for which a federal or state court would be authorized to grant relief." The M & AA listed the following as covered: wage claims, breach of contract claims, and statutory claims of discrimination and harassment. The M & AA also carved out certain claims from arbitration coverage, including workers' compensation and unemployment claims. It did not, however, expressly permit or exclude filing of charges with the NLRB or other government agencies.

Subsequently, in May 2014, the employer implemented a revised arbitration agreement (referred to in the decision as the "MAA"). The MAA disclaimed any intent to prevent employees from filing and pursuing charges with the NLRB. It also disclaimed any intent to limit Section 7 rights.

### Procedural History

In 2016, the NLRB found unlawful both the M & AA and the MAA. See *Prime Healthcare Paradise Valley, LLC*, 363 NLRB No. 169. That decision was mainly based on the requirement that employees waive their rights to pursue class or collective actions. That part of the Board's decision was invalidated by the Supreme Court's *Epic Systems* decision, in which the Court held arbitration agreements requiring individualized arbitration do not violate the NLRA.

The NLRB also had ruled in its 2016 decision that the M & AA violated the NLRA because employees reasonably would construe it to restrict their access to the NLRB's processes. When *Epic Systems* was decided, the *Prime Healthcare* proceedings were pending at the U.S. Court of Appeals for the District of Columbia Circuit. After the Supreme Court's ruling, the Court of Appeals denied enforcement of the Board's order

as to the part that was governed by *Epic Systems*. The Court of Appeals then remanded the rest of the case, regarding the issue of prohibition of filing charges, to the Board for further proceedings.

### NLRB's Analysis

Addressing again whether the M & AA violated the NLRA, the NLRB examined the potentially problematic sections under its 2017 decision in *Boeing Co.*, 365 NLRB No. 154. In *Boeing*, the Board held that when it considers a facially neutral policy that could interfere with the exercise of NLRA rights, it will evaluate: (1) the nature and extent of the potential impact on NLRA rights; and (2) any legitimate justifications associated with the rule. After conducting this evaluation, the NLRB would place each type of evaluated work rule into one of the following three categories:

Category 1: Lawful work rules do not reasonably interfere with protected rights or whose impact is outweighed by the rule's justifications.

Category 2: Rules that warrant individualized scrutiny.

Category 3: Rules that are unlawful to maintain because they would prohibit NLRA-protected conduct and the adverse impact on NLRA rights is not outweighed by justifications for the rule.

Here, the Board reiterated the importance of the Section 7 right to use the NLRB's processes, including through filing unfair labor practice charges. It explained that, in *Epic Systems*, the Supreme Court held employer-employee agreements that contain class- and collective-action waivers and stipulate that employment disputes are to be resolved by individualized arbitration must be enforced as written pursuant to the Federal Arbitration Act (FAA). However, the Board also noted that the FAA's requirement that arbitration agreements be enforced according to their terms may be "overridden by a contrary congressional command." Here, there was a contrary congressional command — the primacy of Section 7 rights. Thus, the Board held the FAA does not authorize arbitration agreements that interfere with an employee's right to file charges with the NLRB.

The NLRB also recognized that the M & AA in this case did not expressly prohibit charge filing. It therefore applied *Boeing Co.* and held that the M & AA could reasonably be interpreted to interfere with Section 7 rights. The Board found the M & AA's particular language, taken as a whole, could be interpreted to make arbitration the exclusive forum for resolution of all federal statutory claims, including those under the NLRA. The NLRB also explained that this "reasonable interpretation" is an objective evaluation of the document's wording. Thus, the NLRB did not consider it to be relevant that some employees may have filed administrative charges despite the M & AA or that the employer had not used the M & AA to bar such charges.

The NLRB then applied the next step in the *Boeing* test by balancing the effect of the M & AA with the legitimate justification for such a policy. The NLRB found that there could not be any legitimate justification for provisions in an arbitration agreement that restrict access to the NLRB and its processes. Indeed, the Board held that any attempt to justify such a restriction "must be rejected as contrary to the judgment and intent of Congress." The NLRB thus placed provisions that make arbitration the exclusive forum for resolution of all claims into *Boeing* Category 3.

## Implications

Employers with employment arbitration agreements should review them to ensure that they do not expressly limit access to the Board's processes or can reasonably be interpreted to do so.

Some open questions remain after the Board's decision. For example, the Board expressly did not decide whether a generic "savings clause" that permits employees to use administrative proceedings would make lawful an otherwise unlawful arbitration provision like the one at issue in this case. Presumably, a future decision will address whether such a disclaimer must specifically mention the NLRB or contain other specific language.

Jackson Lewis attorneys are available to answer questions about compliance with *Prime Healthcare* and other developments from the Board.

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