Legal Update Article

Supreme Court's *Epic Systems* Decision on Arbitration Interpreted Broadly by Labor Board

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An employer may lawfully issue to its employees a new or revised mandatory arbitration agreement containing a class- and collective-action waiver specifying that employment disputes are to be resolved by individualized arbitration, even if it was in response to employees opting into a collective action (such as a wage lawsuit), the National Labor Relations Board (NLRB) has ruled. *Cordúa Restaurants, Inc.*, 368 NLRB No. 43 (Aug. 14, 2019). The NLRB also concluded that the NLRA does not prohibit an employer from threatening to discharge an employee who refuses to sign such an agreement.

The Board also: (1) held that filing a class or collective action about wages, hours, or other terms and conditions of employment constitutes protected concerted activity under the NLRA and that it is a violation of the NLRA for an employer to discipline or discharge employees for filing such an action; and (2) issued a notice to show cause why allegations that several handbook rules were unlawful should not be remanded to the administrative law judge (ALJ) for further consideration in light of *Boeing Co.*, 365 NLRB No. 154 (2017). In *Boeing Co.*, the Board announced a new, more employer-friendly, standard for analyzing handbook rules. The ALJ had applied the previous, employee-friendly analysis.

Chairman John F. Ring was joined by Members Marvin E. Kaplan and William J. Emanuel in the majority opinion. Member Lauren McFerran dissented in part.

Facts

The employer maintained an arbitration agreement that required employees to waive their rights to "file, participate or proceed in class or collective actions ... in any civil court or arbitration proceeding." Seven employees filed a collective action in federal court alleging violations of state and federal wage laws. After several employees opted into the action, the employer distributed a revised arbitration agreement that, in addition to the prohibitions that existed in the previous agreement, prohibited employees from opting into collective actions. In response to two employees' objections to signing the agreement, the supervisor told them, among other things, they would be removed from the schedule if they did not sign the agreement. The employer also discharged employee Steven Ramirez, allegedly for dishonesty. Ramirez had discussed wage issues with his coworkers and filed a collective action under the Fair Labor Standards Act (FLSA).

Holdings

After a trial, an NLRB ALJ, applying existing Board precedent *(Murphy Oil USA, Inc.*, 361 NLRB 774 [2014]), found the employer had violated the NLRA by promulgating and maintaining the revised arbitration agreement. The Board reversed this holding based on the U.S. Supreme Court's decision in *Epic Systems Corp. v. Lewis,* 138 S. Ct. 1612 (2018), where the Court held, reversing *Murphy Oil,* that class- and collective-action waivers in mandatory arbitration agreements do not violate the NLRA.

Regarding the timing of the revised arbitration agreement's implementation, the Board

also found that promulgating the agreement after the filing of (and in response to) the wage action did not violate the NLRA, even if filing the wage action could be considered protected concerted activity under Section 7 of the law. The Board quoted *Epic Systems* for the proposition that an agreement such as that under review "does not restrict Section 7 rights in any way." The Board held that opting into a collective action is simply a required procedural step for an individual to be a plaintiff in a collective action. Therefore, an arbitration agreement prohibiting opting into a collective action also did not restrict Section 7 rights.

(The dissent argued that the employer's promulgating the revised arbitration agreement was an attempt to discourage employees from engaging in protected activity. However, the Board rejected this view, deciding it did not send a message that would tend to discourage employees from engaging in any and all protected concerted activity in the future.)

The NLRB also reversed the ALJ's finding that the employer violated the NLRA based on the supervisor's statements to the objecting employees. The Board found that *Epic Systems* permits an employer to condition employment on an employee's entering into an arbitration agreement containing a class- or collective-action waiver. Therefore, explaining to employees the lawful consequences of failing to sign the agreement did not violate the NLRA.

The NLRB also upheld the ALJ's decision that employee Ramirez had been discharged unlawfully because he had discussed wage issues with his coworkers and filed an FLSA collective action alleging minimum wage and overtime violations. The Board held: (1) "longstanding Board precedent establish[es] that Section 7 protects employees when they discuss their wages and other terms and conditions of employment"; and (2) the filing of the FLSA collective action constituted protected concerted activity because "Section 7 has long been held to protect employees when they pursue legal claims concertedly." (The Board also affirmed the ALJ's decision that the employee's request to access his personnel records was protected. It held that access to the records was sought for the purpose of verifying the employer's compliance with its obligations under state and federal minimum wage laws, and the request "logically grew out of [the employee's] protected concerted wage discussions with his coworkers.")

Takeaways

Two important points can be gleaned from the NLRB's decision:

- The Board interprets *Epic Systems* broadly. Indeed, in a footnote, the NLRB quoted former member Harry I. Johnson for the proposition that "[p]rotecting employees from job-related retaliation is the mission of this agency. Determining the terms under which litigation or arbitration is to be conducted is not."
- Despite its broad application of *Epic Systems,* the Board has continued to adhere to traditional definitions of protected concerted activity, such as were present in this case.

Please contact a Jackson Lewis attorney with any questions about this case or the NLRB.

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