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The NLRB Holds That Employers May Implement Class Waivers in Response to Class Claims and Discipline Employees Who Refuse to Sign Them

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Employers wishing to implement **class action waivers in response to class claims** and discipline employees who refuse to sign them just got some very good news from the National Labor Relations Board (NLRB or Board) in Cordua Restaurants, Inc., 368 NLRB No. 43.

By way of background, in Epic Systems Corp v. Lewis, 138 S. Ct. 1612 (2018) the SCOTUS held that agreements containing class and collective action waivers and requiring that employment disputes be resolved by individualized arbitration do NOT violate the National Labor Relations Act (NLRA or the Act) and that an employer is free to condition employment on an employee's entry into such an agreement. Thus, according to Court, such arbitration agreements are to be enforced as written pursuant to the Federal Arbitration Act.

Although good news for employers, *Epic Systems* left a number of significant questions unanswered. Yesterday, the NLRB answered two of these open legal issues in *Cordua Restaurants, Inc.*, holding that it is *not* unlawful under the NLRA for an employer to promulgate such waivers and individualized arbitration agreements in response to class claims and that it is *perfectly lawful* under the Act for an employer to threaten employees with discipline for refusing to enter into an arbitration agreement. Here is how the Board reached these conclusions.

Why the Promulgation of a Class Waiver Arbitration Agreement in Response to Class Claims Does Not Violate the NLRA

The NLRB has long held that an employer may violate the Act when it promulgates an otherwise lawful rule in response to employees engaging in protected concerted activity because of the chilling effect that that the promulgation of a new facially lawful rule may have on the exercise of rights protected by the Act's Section 7. But, as observed by the Court in *Epic Systems*, Section 7 does nothing to address the question of class and collective actions. Seizing on this text and because opting into a collective action is merely a procedural step required in order to participate as a plaintiff

in a collective action, the Board concluded that an arbitration agreement that prohibits employees from opting into a collective action and is enforceable in a court of law or by an arbitrator does *not* restrict or implicate the exercise of Section 7 rights, rendering the arbitration agreements promulgation lawful. Indeed, as the Board noted, "any finding that the promulgation of [an arbitration] agreement violate[s] the Act because it was in response to opt-in activity would be inconsistent with the . . . holding in *Epic Systems* that individual arbitration agreements do not violate the Act and must be enforced according to their terms."

Why Threatening Adverse Action Against Employees Who Express Concerns About Signing Individualized Arbitration Agreements Does Not Violate the NLRA

Since the Board found the Employer's promulgation of the arbitration agreement lawful, it also found the Employer's statements threatening possible discipline of those who refused to sign the arbitration agreements lawful. Indeed, because *Epic Systems* specifically permits an employer to condition employment on an employee's entering into an individual arbitration agreement containing a class waiver, the Board held that an employer's statements threatening employees who refused to sign the agreements with "being removed from the schedule" amounted to nothing more than "an explanation of the lawful consequences of failing to sign the agreement and an expression of the view that it would be preferable not to be removed from the schedule."

Takeaways

The current Board is giving a broad and literal reading to the *Epic Systems* decision and will not treat those who seek to join or opt into collective or class employment actions as engaging in protected concerted activity.

The current Board will also likely treat the promulgation and enforcement of class waivers/individualized arbitration agreements in a preferential way in deference to the federal policies favoring arbitration as embodied in the Federal Arbitration Act.

Although *Cordua Restaurants* did not present a case of actual discipline, a plain reading of the case and its reliance on an employer's right to condition employment on an employee's entry into an individual arbitration agreement containing class waivers, it is a good bet that an employer's taking adverse action on a non-discriminatory basis against a recalcitrant worker because they refuse to sign such an agreement will not be found to violate the Act.

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