

Escape Clause in Mandatory Arbitration Agreement Carries the Day for Employer in NLRB's Unfair Labor Practice Analysis

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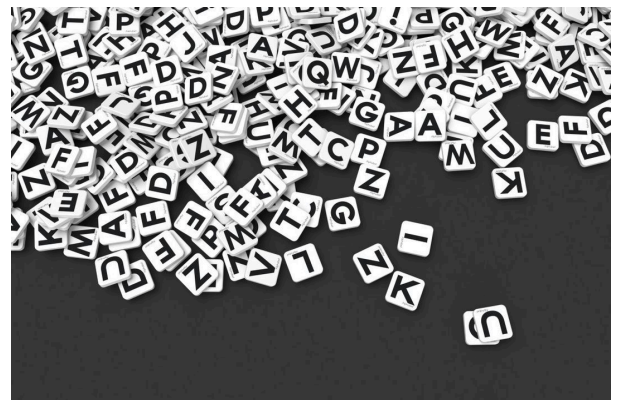
Aug 24, 2020

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Historically, there has been a “push and pull” between the National Labor Relations Board (Board) and employers over mandatory arbitration agreements and class action waivers. Although most of the disputes have been resolved by recent SCOTUS jurisprudence, the Board remains concerned with restrictions in arbitration agreements that limit the ability of employees to file unfair labor practice charges before the Board if employees believe their Section 7 rights have been violated.

In *Four Season Healthcare & Wellness Center, LLP and Ana Cruz*, the Board upheld an employer’s mandatory arbitration agreement against an unfair labor practice charge. In large part, the employer was vindicated because of an appropriately worded “savings clause” which preserved the right of employees to file charges with the Board. In the final paragraph—and just above the signature line—the arbitration agreement said:

I also acknowledge and agree that nothing in this ADR Policy shall be construed as precluding any employee from filing a charge with a state or federal administrative agency, such as the U.S. Equal Employment Opportunity Commission or the National Labor Relations Board. A state or federal administrative agency would also be free to pursue any appropriate action. However, any claim that is not resolved administratively through such an agency shall be subject to this agreement to arbitrate and the ADR Policy.



The policy initially was reviewed by the Board’s Administrative Law Judge under the “reasonably construed” prong of the test set forth in *Lutheran Heritage Village – Livonia*. However, the Board overruled the analysis in that case by virtue of its later decision in *Boeing Co.* The Board announced the new standard in *Boeing*, which it will

apply when it evaluates the lawfulness of facially neutral rules and policies. That new rule also was applied retroactively in all pending cases.

Under the *Boeing* standard, the Board first determines whether a reasonably interpreted challenged rule or policy potentially would interfere with the exercise of Section 7 rights. If there is no interference, the rule or policy is valid. Alternatively, if it potentially interferes with Section 7 rights, the Board would then evaluate interference based on the nature and extent of the potential impact on Section 7 rights. The Board also would consider the business justification associated with the rule. In conducting its evaluation, the Board will attempt to strike a proper balance between the business justification and the extent of the alleged interference with Section 7 rights under the National Labor Relations Act.

In *Four Seasons*, the Board found that the policy, when reasonably interpreted, does not interfere with employees' right to file Board charges and participate in its proceedings. Specifically, the Board found that the placement of the "savings clause" right above the signature line was not "buried" or disguised in other language. The Board also found that this particular policy makes clear that employees retain the right to file unfair labor practices with the Board, and it even mentions the Board in express and specific terms. Moreover, the Board noted that the two documents—the agreement and the policy—are relatively short and the savings clauses were found in separate, free-standing paragraphs.

This case provides useful drafting guidance for employers, should they decide to implement a mandatory arbitration obligation in the workplace. It is important to remember that appropriate savings clauses, like the one in this case, provide protection against unfair labor practice charges by employees who later might seek to avoid their arbitration obligations.

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- [NLRB Provides Section 7 Guidance to Employers Regarding Drafting of Arbitration Agreements](#)

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