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Requiring Employees to Maintain the Confidentiality of Arbitration Proceedings Held to be Lawful Under the NLRA…For Now

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In a recent decision by the NLRB, the Board upheld the lawfulness, in part, of an arbitration agreement that required employees to maintain the confidentiality of the arbitration proceedings, including the discovery process and the hearing. *Dish Network, LLC*, 370 NLRB No. 97 (March 18, 2021). However, Chairman McFerran's considerable dissent likely signals that the Board's position on arbitration-confidentiality agreements will be short-lived.

Majority Opinion

Broad Arbitration-Exclusivity Provision was Unlawful Because it Restricted Access to the NLRB. The Board reviewed a policy maintained by the employer that was a broad, all-encompassing arbitration clause, requiring all claims, controversies or disputes between the employer and employees "arising out of and/or in any way related to Employee's application for employment, employment and/or termination of employment…shall be resolved by arbitration." The Board reviewed the facially-neutral policy under *Boeing*, and found that the policy was overbroad, because it made arbitration the exclusive forum for resolving all employment-related disputes between the employer and its employees, ***including claims arising under the National Labor Relations Act***. As such, the Board held that the agreement, often referred to as an arbitration-exclusivity agreement, restricted employees' access to the Board and, therefore, rendered the agreement ***unlawful***.

Confidentiality of Arbitration Proceedings was Lawful, but Settlement Terms Need Not Be Confidential. The Board next reviewed the portion of the arbitration agreement that required confidentiality of "all arbitration proceedings, including but not limited to hearings, discovery, settlements, and awards." The NLRB General Counsel asserted that the agreement unlawfully prohibited employees from discussing their terms and conditions of employment. The Board majority, consisting of Members Ring and Kaplan, held that the arbitration-confidentiality requirement ***did not violate the Act*** to the extent that it required confidentiality of arbitration *proceedings*, including hearings, discovery, and awards, explaining that the confidentiality provision "sets forth rules under which arbitration will be conducted." Relying on Supreme Court precedent interpreting the Federal Arbitration Act ("FAA"), the Board reiterated that the "FAA requires that courts rigorously enforce arbitration agreements according to their terms, including terms that specify…the rules under which…arbitration will be conducted."

However, the Board majority came to the opposite conclusion concerning the arbitration-confidentiality requirement to the extent it pertained to settlements, which the Board found to be outside of the protection of the FAA where settlements are generally an alternative to arbitration and not part of it. According to the Board, requiring settlements be kept confidential unlawfully restricts employee conversations about terms and conditions that give rise to claims and disputes covered by the arbitration-confidentiality agreement and requires employees to prospectively waive their Section 7 right to discuss terms and conditions with fellow employees.

Chairman McFerran Dissents

In dissenting from the majority's holding that the arbitration-confidentiality agreement was lawful to the extent that it requires employees to maintain the confidentiality of arbitration proceedings, Chairman McFerran strongly disagreed with the majority's interpretation of Supreme Court jurisprudence and with the majority's conclusions about the interplay between the FAA and the NLRA. In fact, Chairman McFerran accused the majority of "unnecessarily sacrifice[ing] the statute that Congress has charged us with administering" in finding that the protections under the NLRA must give way under the FAA, despite the Board's charge under the NLRA to vigorously protect access to the Board and uphold workers' core Section 7 rights.

Chairman McFerran argued that broad arbitration-confidentiality provisions, like the one involved in this case, unlawfully restrained employees from exercising their Section 7 right to communicate with co-workers about information relevant to terms and conditions of their employment acquired during the course of arbitration proceedings, thereby interfering with a right that "lies at the heart of protected Section 7 activity."

Contrary to the majority's holding, Chairman McFerran argued that such arbitration-confidentiality provisions are not "shielded" by the FAA simply because they are included within a mandatory arbitration agreement. Rather, Chairman McFerran asserted that "invalidating arbitration-confidentiality provisions, because of their demonstrable impact on Section 7 rights, is the proper accommodation between the NLRA and the FAA" that serves to preserve core rights under the NLRA without diminishing any "fundamental attribute" of arbitration. In Chairman McFerran's view, Congress' purpose in enacting the FAA was to make arbitration agreements as enforceable as other contracts—but not more so.

Takeaway

The Board's decision is instructive in reinforcing the principle that employers cannot reinforce the confidentiality of arbitration settlements, to the extent such confidentiality agreements prohibit employees from discussing the terms of the settlements with their co-workers. The decision also is noteworthy to the extent an exceedingly broad mandatory arbitration procedure may be interpreted by the Board as unlawful, where the agreement would theoretically require private arbitration of alleged violations of the NLRA, rather than through the Board.

While employers hoping to maintain the confidentiality and integrity of arbitration proceedings may find some comfort in the Board's holding, this comfort may be fleeting. As we reported here, Lauren McFerran was recently appointed NLRB Chairman by President Biden. While she may represent a minority voice on the Board today, we anticipate a change in the Board's composition and labor policy agenda after Member Emanuel's term expires this August. Chairman McFerran's dissent, which stated that the Board's "decision is part of an alarming trend reflected in the Board's recent decisions", suggests that Chairman McFerran is likely to reverse what she views as a "string of recent Board decisions [that] have made it easier for employers to maintain and enforce confidentiality rules against employees, even when the rules deter activity protected by Section 7 of the Act" as soon as she becomes part of the Board's majority.

As always, we will continue to monitor further developments from the Board.

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