National Labor Relations Board Strikes Arbitration Agreement

December 20, 2019

Do you require your employees to agree to mandatory arbitration of employee disputes? If so, the policy may need to be revised.

After the Supreme Court decision in *Epic Systems* last year (138 S. Ct. 1612), in which the Court held that employers could require employees to agree to binding arbitration waiving class action participation, many employers adopted such policies, and even the Equal Employment Opportunity Commission (EEOC) recently rescinded its policy prohibiting such requirements.[1]

However, earlier this week, the National Labor Relations Board (whose jurisdiction reaches most employers, regardless of whether they have a union) ruled that such policies must **explicitly** provide that they do not apply to the right to file an unfair labor practice charge under the National Labor Relations Act (NLRA). *E. A. Renfroe & Co. Inc. & Kimani Adams*, 368 NLRB No. 147 (Dec. 16, 2019). Even though the policy did provide that it did NOT apply to "workers' compensation, unemployment benefits, or other claims that, as a matter of law, the parties cannot agree to arbitrate", the Board found this was not sufficient: The Board found the burden on the employee of determining what claims are excluded as a matter of law is unreasonable.

Therefore, the employer's decision to terminate the employee because she refused to agree to the policy was a violation of the NLRA and the Board ordered the employer to offer her reinstatement, full back pay, and compensation for the expenses related to job search efforts and tax consequences of her termination. The employer was also ordered to amend its policy and so inform all employees.

If you have an arbitration policy and need assistance in reviewing its status in light of *Renfore*, please contact a Brooks Pierce Labor and Employment attorney, linked below.

[1] https://www.eeoc.gov/eeoc/newsroom/wysk/recission_mandatory_arbitration.cfm