National Labor Relations Board Rules That Mandatory Arbitration Clause Violates The National Labor Relations Act

October 16, 2006

In a recent decision potentially affecting all companies that use mandatory arbitration agreements, the National Labor Relations Board (the "NLRB" or "Board") held in a ruling of first impression that an employer violated the National Labor Relations Act (the "NLRA") by instituting a mandatory arbitration policy with broad language that could reasonably be read by employees to prohibit the filing of unfair labor practice charges with the Board. *See* U-Haul Co. of Cal., 347 N.L.R.B. No. 34, 2006-2007 NLRB Dec. ¶ 17138, 2006 WL 1635426 (June 8, 2006).[1] This memorandum examines the Board's decision and discusses what steps employers might consider in light of the ruling.

THE *U-HAUL* DECISION

U-Haul's Arbitration Policy

On May 20, 2003, U-Haul Co. of California promulgated the "U-Haul Arbitration Policy," together with an explanatory memorandum entitled "U-Haul Agreement to Arbitrate." The arbitration policy stated that it applied to:

> [a]ll disputes relating to or arising out of an employee's employment with [the company] or the termination of that employment. Examples of the type of disputes or claims covered by the [U-Haul Arbitration Policy] include, but are not limited to, claims for wrongful termination of employment, breach of contract, fraud, employment discrimination, harassment or retaliation under the Americans With Disabilities Act; the Age Discrimination in Employment Act; Title VII of the Civil Rights Act of 1964 and its amendments; the California Fair Employment and Housing Act; or any other state or local antidiscrimination laws, tort claims, wage or overtime claims or other claims under the Labor Code, or any other legal or equitable claims and causes of action recognized by local, state or federal laws or regulations.

Id. at *4.

The arbitration policy was made a mandatory condition of employment. All employees were informed that the "decision to accept employment or to continue employment with [U-Haul] constitutes [the employee's] agreement to be bound by the [U-Haul Arbitration Policy]." *Id.*

[1] Chairman Battista and Members Liebman and Schaumber participated in the decision.

The Unfair Labor Practice Charges

At the time the arbitration policy was disseminated, U-Haul did not have any employees represented by a union. However, in June 2003, two U-Haul employees active in union organization efforts were terminated. In the subsequent unfair labor practice proceedings, the NLRB argued that the employees were unlawfully fired for supporting the union. The Board also argued separately that U-Haul's mandatory arbitration policy interfered with the employees' right to file charges with the NLRB under Section 7 of the NLRA, which protects, *inter alia*, an employee's right to file unfair labor practice charges with the NLRB, and violated Sections 8(a)(1) and (4) of the NLRA.[2]

Administrative Law Judge Pollack conducted a hearing on the charges. On February 6, 2004, Judge Pollack ruled that U-Haul violated Sections 8(a)(1) and (4) of the NLRA by instituting the arbitration policy. *Id.* at *26. The judge found that the language of the arbitration policy was "certainly broad enough to apply to NLRB proceedings" and held that the policy "tends to inhibit employees from filing charges with the Board, and, therefore, restrains the employees' Section 7 rights." *Id.* at *22-23.

The NLRB Decision

U-Haul appealed the ALJ's decision to the NLRB. The majority of the three-member panel agreed with Judge Pollack's conclusion that the arbitration policy was unlawful because the language of the policy—covering "any other legal or equitable claims and causes of action recognized by local, state or federal law or regulations"—could reasonably be understood by employees to encompass unfair labor practice charges and lead them to believe that they were prohibited from filing such charges with the Board. *Id.* at *5.

In reaching this conclusion, the Board relied on a prior decision in *Lutheran Heritage Village-Livonia*, 343 N.L.R.B. No. 75, 2004-05 NLRB Dec. ¶ 16786, 2004 WL 2678632 (Nov. 19, 2004). In *Lutheran Heritage*, "the Board held that in determining whether a challenged rule is unlawful, the inquiry begins with the issue of whether the rule explicitly restricts activities protected by Section 7." *U-Haul*, 347 N.L.R.B. at *5. If so, the rule is unlawful and no further inquiry is necessary. If the restriction of Section 7 activities is not express in the challenged rule, "the finding of a violation is dependent upon a showing of one of the following: (1) reasonable employees would construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights." *Id.* (citing *Lutheran Heritage*, 343 N.L.R.B. at *2).

Applying the *Lutheran Heritage* test, the Board held that the arbitration policy did not expressly prohibit employees from engaging in activities protected by Section 7. Nevertheless, the policy

[2] Section 8(a)(1) generally creates an unfair labor practice for conduct by an employer that restrains Section 7 rights, and Section 8(a)(4) creates an unfair labor practice for adverse action by an employer against an employee for filing a charge or testifying under the NLRA.

violated the NLRA because U-Haul employees could "reasonably" conclude, based on the breadth of the language used in the arbitration policy and, specifically, the policy's applicability to causes of action recognized by "federal laws or regulations," that it prohibited them from filing unfair labor practice charges with the NLRB in violation of their Section 7 rights:

> Plainly, the employees would reasonably construe the remedies for violations of the [NLRA] as included among the legal claims recognized by Federal law that are covered by the policy. Thus, we find that the language of the policy is reasonably read to require employees to resort to the Respondent's arbitration procedures instead of filing charges with the Board.

U-Haul, 347 N.L.R.B. at *5.

The Board rejected U-Haul's argument that the explanatory memorandum accompanying the arbitration policy, which stated "that the arbitration process is limited to disputes, claims or controversies that a *court of law* would be authorized to entertain," limited the policy's broad language and made clear that it did not extend to filing NLRB charges. *Id.* (emphasis added). The Board noted that "there is nothing in this portion of the memo that reasonably suggests that its intent is to modify the policy language referencing the applicability of the policy to causes of action recognized by Federal laws or regulations." *Id.* Moreover, federal appellate courts, including the U.S. Circuit Courts of Appeals, are authorized to review NLRB unfair labor practice decisions. Thus, contrary to U-Haul's argument, a "court of law" could in fact entertain such cases. *Id.* ("[m]ost nonlawyer employees would not be familiar with [the] intricacies of Federal court jurisdiction, and thus the language is insufficient to cure the defects in the policy.").

In a footnote, the Board noted that its findings were limited to the facts of the U-Haul arbitration policy and were not intended generally to condemn mandatory arbitration provisions as unlawful. *Id.* at *6 n.11 ("Our decision . . . is limited to the specific clause at issue in this case. . . . We do not pass on the lawfulness of mandatory arbitration provisions."). However, the Board also drew a comparison to Equal Employment Opportunity Commission ("EEOC") charges, stating that "even in the context of other employment statutes, the courts and other administrative agencies have consistently recognized that individuals possess a nonwaivable right to file charges with the EEOC, and that mandatory arbitration provisions that attempt to restrict such rights are void and invalid as a matter of public policy." *Id.*

In its remedial order, the NLRB required U-Haul to: cease and desist from requiring employees to execute waivers of their rights to take legal action, to the extent such waivers applied to filing Board charges; remove from its files all unlawful waivers and notify each employee who executed such waiver that this had been done and that the waiver would not be used in any way; and post a notice to employees stating that the company will rescind the arbitration provision and not require waivers to the extent they apply to filing Board charges. *Id.* at *8-9.

PRACTICAL IMPLICATIONS OF THE *U-HAUL* DECISION[3]

The decision of the NLRB is currently on appeal to the D.C. Circuit Court of Appeals. It is possible that the D.C. Circuit will find that, notwithstanding employees' rights under the NLRA, the breadth of the *U-Haul* ruling runs afoul of Supreme Court precedent and the strong federal policy favoring arbitration agreements. *See* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991).

For example, in *Gilmer*, the United States Supreme Court rejected the argument that subjecting an Age Discrimination in Employment Act ("ADEA") claim to compulsory arbitration would undermine the role of the EEOC in enforcing the ADEA, noting that an individual subject to an arbitration agreement would still be free to file a charge of discrimination with the EEOC, which the EEOC could choose to pursue.[4] *Id.* at 28. Moreover, the Court noted that "the mere involvement of an administrative agency in the enforcement of a statute is not sufficient to preclude arbitration." *Id.* at 28-29.

Notably, the *Gilmer* Court neither invalidated the arbitration agreement at issue in that case nor required that the agreement be amended to contain express carve-out language advising employees of their right to file an EEOC charge, as the NLRB would seem to require in its *U-Haul* decision. Thus, although the Court in *Gilmer* was not directly confronted with the question of whether the

---

[3] Because Section 2(3) of the NLRA specifically excludes supervisors from the definition of "employee," *see* 29 U.S.C. § 152(3), the *U-Haul* holding does not extend to, or affect the validity of, mandatory arbitration agreements signed by individuals who qualify as supervisors, *e.g.*, those with authority to make, or effectively recommend, decisions on hiring, firing, promotion, discipline and the like. In that regard, employers should be mindful of the Board's recent decision in *Oakwood Healthcare, Inc.*, 348 N.L.R.B. No. 37 (Sep. 29, 2006), in which the Board re-interpreted certain definitional terms in the NLRA and developed new standards for assessing whether individuals should be classified as employees protected by the NLRA or supervisors. Indeed, the decision has caused concern among labor advocates who fear that the Board's interpretation will allow employers to reclassify as supervisors many workers who were previously considered employees, thereby decreasing the number of employees protected by the NLRA.

[4] The Court reached this conclusion in the context of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 200e et seq., under which, unlike the NLRA enforcement structure, the EEOC claimant has the right to commence a *de novo* action in federal court seeking full relief. Specifically, under the NLRA, there is no private right of action by an aggrieved individual: he or she must file a charge with the NLRB and the matter goes forward, prosecuted by the General Counsel of the NLRB, only if the agency determines that there is sufficient merit in the charge to "go to complaint." On the other hand, although an individual alleging age discrimination must first file a charge of discrimination with the EEOC, he or she has the statutory right thereafter to file a claim in federal court.

absence of a specific carve-out from the arbitration clause for filing EEOC charges invalidated the arbitration agreement, no court has required such a carve-out in the fifteen years following that decision. Moreover, even the EEOC — which otherwise is jealous of its prerogatives to ensure that there are no impediments to employees filing charges with the agency (*i.e.,* by prohibiting covenants not to sue that do not expressly exclude the filing of EEOC charges from their reach) — has not taken that position.

Based upon the foregoing, an employer has several options in responding to the *U-Haul* decision:

(1) Revise a mandatory arbitration policy to expressly state that it does not in any way preclude the filing of an NLRB claim. While this would ensure strict compliance with the Board's decision, it could have the unintended effect of alerting employees to a claim they might not have otherwise considered.

(2) Include a generalized caveat in the mandatory arbitration policy that mandates arbitration only "to the extent permissible under law." In light of the NLRB's expansive reading of the U-Haul Arbitration Policy, however, it is not clear that this solution would pass muster. Moreover, a broad caveat such as this may introduce other, unintended opportunities for an employee to avoid arbitration, as well as litigation over the extent to which mandatory arbitration is permissible.

(3) Do nothing, at least in the interim pending the appellate consideration of the case. Because the *U-Haul* decision may be limited to the specific facts of that case, and/or vacated by the court of appeals, a third option for an employer is to make no changes to its current arbitration policies. The risk of this approach to an employer should be limited to a possible finding that its arbitration policy is deficient, in which case the employer could revise its policy to strictly comply with the *U-Haul* decision. However, if the entire policy were invalidated for lack of an appropriate carve-out of NLRB claims, which is the practical result of the Board's remedy requiring the removal of any offending, overbroad arbitration policy or agreement from the file and prohibiting use of it, the employer could face the prospect of being forced to litigate other claims that would otherwise have been covered by a valid arbitration agreement.

If you would like further information about these developments or to obtain a copy of the decision discussed above, please contact J. Scott Dyer (jdyer@stblaw.com), Fagie Hartman (fhartman@stblaw.com) or Julie Levy (jlevy@stblaw.com) by e-mail or at (212) 455-2000.