June 22, 2006

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NLRB ISSUES SPLIT DECISION FINDING NON-UNION EMPLOYER'S MANDATORY ARBITRATION POLICY UNLAWFUL

In a June 8, 2006 split decision, the National Labor Relations Board ("NLRB" or the "Board"), held that an arbitration policy contained in the employee handbook of a nonunionized employer, requiring employees to arbitrate "all disputes relating to or arising out of an employee's employment [with the Company] or the termination of that employment," was unlawful under the National Labor Relations Act ("NLRA" or the "Act"), because the policy might reasonably be read by employees to prohibit the filing of unfair labor practice charges with the Board. U-Haul Co. of California, 347 NLRB No. 34 (2006).

FACTS

Like many employers, U-Haul Co. of California ("U-Haul" or the "company") maintains an employee handbook outlining its policies and procedures, which it distributes to all new hires. On May 20, 2003, the company distributed a new policy entitled "U-Haul Arbitration Policy" and a separate document entitled "U-Haul Agreement to Arbitrate." The company explained to employees that the purpose of the policy was to cut down on litigation costs. The documents explained that the arbitration policy applied to the following:

> All 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 coved 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.

The policy further stated that "Your decision to accept employment or to continue employment with [U-Haul] constitutes your agreement to be bound by the [arbitration policy]." The memo distributed by the company stated that the "arbitration process is limited to disputes, claims or controversies that a court of law would be authorized to entertain or would have jurisdiction over to grant relief. . . ." The arbitration policy had never been enforced by the company and no employee was disciplined for failing to sign the agreement.

Significantly, the employees to whom U-Haul distributed the Arbitration Policy and the Agreement to Arbitrate were not represented by a union, and the Arbitration Policy did *not* make any specific reference to claims arising under the National Labor Relations Act.

The Machinists Union, which was trying to organize some of U-Haul's employees, filed unfair labor practice charges with the NLRB arguing, in part, that the Arbitration Policy violated the Act. After a hearing, an administrative law judge ("ALJ") held that U-Haul's mandatory arbitration policy unlawfully limited employees' rights under the NLRA, because he found it "reasonably tends to inhibit employees from filing charges with the Board, and, therefore, restrains the employees' Section 7 right to engage in concerted activities for collective bargaining or other mutual aid or protection."

The company appealed the ALJ's decision and filed exceptions with the NLRB in Washington. In its June 8, 2006, decision, the Board upheld the ALJ's finding by a 2-1 vote. The two member majority, consisting of Members Liebman (Democrat) and Schaumber (Republican), agreed with the ALJ's conclusion that the broad wording and catchall language of the arbitration policy, i.e. that it covered "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 with the NLRB and to therefore mean that employees were prohibited from filing such charges.

In reaching this conclusion Members Liebman and Schaumber relied on the NLRB's 2004 decision in *Lutheran Heritage Village-Livonia* ("*Lutheran Village*"), 343 NLRB No. 75 (2004), which struck down an employee handbook provision barring loitering and unlawful strikes. In that case, the Board set forth a two-part inquiry for determining the lawfulness of an employer's rule. First, the Board examines whether the rule explicitly restricts the right of employees to engage in activities protected by Section 7 of the Act. If the answer is yes, the rule is unlawful. If the rule does not explicitly prohibit activity protected by Section 7 of the Act, the determination that a ULP has been committed will depend upon a finding of one of the following: (1) reasonable employees would construe the language to prohibit conduct protected by Section 7 of the Act, (2) the rule was promulgated by the employer in response to union activity on the part of its employees, or (3) the rule has been applied in a manner intended to restrict the exercise of Section 7 rights.

Applying the *Lutheran Village* test, the majority in *U-Haul of California* held that while the arbitration policy adopted by U-Haul did not expressly prohibit employees from engaging in activities protected by Section 7, it nevertheless violated the Act because employees would "reasonably" conclude, *based on the breadth of the policy*, that it prohibited them from filing unfair labor practice charges with the NLRB in violation of their Section 7 rights. The majority rejected the company's argument that the reference in the memo accompanying the policy to controversies in a "court of law" precluded application to NLRB charges because the arbitration policy did not specifically exclude administrative proceedings before the NLRB and because NLRB administrative proceedings can be appealed to the United States Courts of Appeals.

In a footnote, the Board noted that "[o]ur decision, however, is limited to the specific clause at issue in this case. . . . We do not pass on the lawfulness of mandatory arbitration provisions. We note, however, 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."

Chairman Battista dissented, lamenting that "[t]his is yet another in a series of cases in which the [NLRB's] General Counsel attacks a policy as unlawful on its face. That is, there is no evidence that the rule has been applied to the protected activity of invoking Board processes." According to Chairman Battista, *Lutheran Village* requires the Board to find that the challenged policy expressly interferes with Section 7 rights, or it must be reasonably read in such a manner before the Board can find a violation. Insofar as U-Haul's arbitration policy did not expressly refer to the Section 7 right of unfettered access to file charges with the NLRB, the issue is whether the policy could be reasonably read to so apply. While Chairman Battista concedes that the policy is broadly worded, he found that the memo accompanying the policy clearly restricts its application to courts of law and the NLRB is not a court of law. Moreover, he finds that the policy does not impose any sanction against an employee who files a charge with the Board. Accordingly, he would not find the policy unlawful.

ANALYSIS

Arbitration provisions like the one in this case are increasingly common, particularly in the context of nonunion workplaces. Many employers rely upon such alternate dispute resolution procedures both as a means to reduce costly litigation and as a mechanism to provide employees with a say without having to choose union representation.

The Board's decision in *U-Haul of California* reflects a troubling trend, in which the NLRB is finding relatively innocuous and common employee workplace practices maintained by nonunion employers to be unlawful, even more so because the Board's decision ignores the plain language of the memo the company distributed with the policy, which expressly limits the application of the policy to actions that would otherwise be brought in courts. The Board's conclusion that a reasonable reading of the policy by an employee is that it would foreclose the filing of NLRB charges seems itself to be unreasonable and overreaching.

While most employers would recognize that a policy specifically prohibiting an employee from engaging in activities protected by the NLRA (or filing charges with the NLRB, the EEOC or similar administrative agencies) to be unlawful, both unionized and nonunion employers now need to reexamine their arbitration and ADR policies and their handbooks and policy manuals, to assess whether they could be interpreted by the NLRB as restricting employees' rights to file charges with the Board or to engage in other forms of concerted, protected activity protected by the Act, even where the employer did not intend to prohibit such activity.

The full text of the NLRB's decision in *U-Haul of California* is available online from the NLRB's website: **http://www.nlrb.gov/nlrb/shared_files/decisions/347/347-34.htm**

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If you have any questions regarding this significant decision by the NLRB or its impact on your workplace, please contact **Steven M. Swirsky** at (212) 351-4640, **sswirsky@ebglaw.com.**

Donald S. Krueger, Senior Counsel in EBG's **New York** office, assisted with the preparation of this alert.