

in this issue:

JUNE 2006

National Labor Relations Board finds mandatory arbitration policy unlawful because it did not expressly exclude from coverage unfair labor practice charges filed under the National Labor Relations Act.

Employment Arbitration Policies Must Expressly Exclude NLRA Charges

By William J. Emanuel and Debra L. Schroeder

All private sector employers that maintain mandatory employment arbitration policies for nonunion employees should review those policies as a consequence of the recent decision of the National Labor Relations Board (“the Board” or NLRB) in *U-Haul Co. of California*, 347 NLRB No. 34 (2006). In that decision, the Board held that an employer’s policy violated the National Labor Relations Act (NLRA) because it did not expressly exclude from the disputes subject to mandatory arbitration any unfair labor practice charges that may be filed under the NLRA.

In *U-Haul*, the employer maintained a mandatory arbitration policy as a condition of employment for all employees. As provided in typical arbitration policies used by many employers, the policy covered all disputes relating to or arising out of employment with the company or the termination of that employment. It specifically covered:

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 anti-discrimination 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 law or regulations.

The policy made no reference to the NLRA.

The 2-1 Board majority (Members Liebman and Schaumber, with Chairman Battista dissenting) acknowledged that the arbitration policy did not explicitly restrict employees from resorting to the NLRB’s remedial procedures. Nevertheless, the majority concluded that the policy violated the NLRA because it would reasonably tend to inhibit employees from filing unfair labor practice charges with the NLRB. Specifically, they found that the phrase “any other legal or equitable claims and causes of action recognized by local, state or federal law or regulations” encompassed the filing of unfair labor practice charges, and thus employees could reasonably believe that they were precluded from filing them. In addition, the Board noted that courts and other administrative agencies have recognized that individuals possess a nonwaivable right to file charges with the Equal Employment Opportunity Commission, and that mandatory arbitration provisions that attempt to restrict such rights are void and invalid as a matter of public policy.

The Board ordered the employer to (1)

rescind its arbitration policy at all facilities where it was in effect; (2) post a remedial notice regarding the policy at all of those facilities; (3) remove from its files all unlawful waivers of the right to take legal action executed by its employees; and (4) notify in writing each present or former employee who executed such a waiver that this has been done and that the waiver will not be used in any way.

Some experts believe that this decision could lead to a clash between the NLRA, which assigns primary jurisdiction over unfair labor practice charges to the NLRB, and the equally strong policy of the Federal Arbitration Act, which favors enforcement of arbitration agreements. Nevertheless, it would be prudent for all NLRA-covered employers that maintain mandatory arbitration policies for nonunion employees to avoid that potential dispute entirely by amending their policies to expressly exclude from mandatory arbitration any unfair labor practice charge under the NLRA.

William J. Emanuel is a Shareholder and Debra L. Schroeder is Of Counsel in Littler Mendelson's Los Angeles office. If you would like further information, please contact your Littler attorney at 1.888.Littler, info@littler.com, Mr. Emanuel at wemanuel@littler.com, or Ms. Schroeder at dschroeder@littler.com.
