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Jef Fagan

Senior Vice President Labor Relations & Risk Management, NECA

Mandatory Arbitration and PAGA Updates - 2023

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Mandatory Arbitration and the NLRA

- On May 21, 2018, in ***Epic Systems Corporation v. Lewis; Ernst & Young, LLP v. Morris; and NLRB v. Murphy Oil USA, Inc.***, the Supreme Court upheld the enforceability of CBAs with arbitration agreements containing class and collective action waivers of wage and hour disputes.
- The majority in ***Epic*** held that the (i) FAA mandates the enforcement of arbitration agreements and (ii) right to pursue class or collective relief is not a protected concerted activity under Section 7 of the NLRA.
- In short, the Supreme Court held that Congress meant what it is said in the FAA: "Congress has instructed federal courts to enforce arbitration agreements according to their terms—including terms providing for individualized proceedings."

NECA Grievance Process and CIR

- NECA's grievance process and CIR is a form of contractual arbitration. Even if you don't have CIR, you have arbitration.
- Mandatory [or as opponents call it "forced" arbitration] is under attack at the state level.
- PAGA is a unique issue in CA.
- **The Courts have stated that PAGA class action rights may be waived.**

Mandatory Arbitration and the NLRA

- The National Labor Relations Board issued a 3–1 decision in ***Cordúa Restaurants, Inc., 368 NLRB No. 43 (2019)***, that provides significant guidance following *Epic* regarding the intersection of arbitration agreements and the National Labor Relations Act (NLRA).
  - Employers are not prohibited under the National Labor Relations Act (NLRA) from informing employees that failing or refusing to sign a mandatory arbitration agreement will result in their discharge.
  - Employers are not prohibited under the NLRA from promulgating mandatory arbitration agreements in response to employees opting into a collective action under the Fair Labor Standards Act or state wage-and-hour laws.

California's legislative attack on arbitration

- Under **AB 51**, employers are prohibited in California from requiring employees to sign as a condition of employment or employment-related benefits arbitration agreements concerning disputes arising under the California Fair Employment and Housing Act or California Labor Code. AB 51 purports to apply to any arbitration agreement entered into, modified, or extended on or after January 1, 2020.
- **Section 432.6** prevents employers from requiring applicants to sign arbitration agreements "as a condition of employment, continued employment, or the receipt of any employment-related benefit." The law adds criminal and civil sanctions against any employer that retaliated, discriminated, threatened, or discharged an employee who refused to consent to arbitration.

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California PAGA

- The Private Attorneys General Act of 2004 (PAGA) is a California statute that allows private individuals to stand in the shoes of the state to bring representative actions on behalf of other "aggrieved employees" for alleged wage and hour law violations. PAGA penalties can get very high very quickly – often in the amounts of hundreds of thousands or even millions of dollars.

- Since its passage into law, there has been a consistent flood of PAGA litigation in California. The large volume of PAGA cases continued after the Appellate Court in California held in ***Arias v. Superior Court*** that employees do not have to meet the stringent requirements for class certification in order for a case to proceed as a PAGA representative action.

Viking River Cruises, Inc. v. Moriana

- On June 15, 2022, the Supreme Court ruled in favor of ***Viking River Cruises Inc.*** in a case over whether it could use an arbitration agreement to force a lawsuit brought under PAGA on behalf of aggrieved employees into arbitration.
- The Court reasoned that the Federal Arbitration Act (FAA) requires the enforcement of an arbitration agreement that **waived** an employee's right to bring individual claims through PAGA and that once those individual claims are sent to arbitration there is no standing to bring representative claims for violations of the California Labor Code on behalf of other aggrieved employees.

Johnson v. Lowe's Home Centers, LLC

- In ***Johnson v. Lowe's Home Centers, LLC***, a decision issued on September 21, 2022, a federal judge in the U.S. District Court for the Eastern District of California issued an order compelling arbitration of a plaintiff's individual claims under the PAGA and dismissing the remaining representative PAGA claims.

Chamber of Commerce v. Bonta

- On February 15, 2023, the Ninth Circuit Court of Appeals (Ninth Circuit) struck down California **AB 51**, the state's anti-arbitration legislation, holding that the Federal Arbitration Act (FAA) "preempts **AB 51** as a whole to the extent it applies to arbitration agreements."
- The opinion reverses the Ninth Circuit's prior position that certain provisions of **AB 51** prohibiting employers from requiring applicants and employees to arbitration as a condition of employment (or continued employment) did "not run afoul of the FAA."

8(f), 9(a) and Letters of Assent A and B

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8(f) vs. 9(a) – What's the Big Deal?

- 8(f) Agreement
  - Unique to construction industry.
  - Employer under no *legal* duty to continue to bargain upon contract expiration – may demand an election or clear showing of majority support.
  - CBA contain *contractual obligation* to bargain for new contract.
  - Makes it a distinction without a difference.

8(f) vs. 9(a) – What's the Big Deal?

- 9(a) Agreement
  - Generally established by either an NLRB-certified election or an employer's voluntary grant of 9(a) recognition.
    - The presumption of an 8(f) relationship is overcome where language in the parties' collective-bargaining agreement unequivocally indicates that the union requested and was granted recognition as the majority or 9(a) representative of the unit employees.
  - Duty to bargain upon contract expiration *legally* required.
  - Bars recognition petition by rival unions.

Letter of Assent A vs. B

- IBEW Letters of Assent are recruiting forms – purely administrative. They may contain 9(a) language, but that does no harm to NECA.
- NECA does not control Letters of Assent.
- **The distinction between A & B is that A assigns NECA local Chapter as bargaining representative, B does not.**
- Cannot stop Letter B legally or practically.
- We are addressing at the National level – as we obviously prefer Letter A - but contractors cannot be forced to use NECA Chapters to bargain.
- Letter B can always be trumped by affiliation agreement with assignment of bargaining rights.

What Issues Are Out There?

- Are we seeing more Letter Bs?
- Is this ultimately creating issues?
- Turning contractors away from NECA?
- How can National help?

Feel Free to Contact Me Directly

Questions?

JEF@necanet.org

301-944-4399