

ALERT

LABOR & EMPLOYMENT LAW

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NLRB Strikes Down Employer's Mandatory Arbitration Policy And Orders Reinstatement of Employees Who Opposed Policy

In May, the U.S. Supreme Court in *AT&T v. Concepcion* issued a landmark decision favoring the arbitration of claims which buoyed employers' hope for a similar finding in the employment context. But a recent ruling of the National Labor Relations Board at least reminds employers of the limits of arbitration policies in the employment context.

In *Supply Technologies, LLC v. Teamsters Local 120*, NLRB, Case No. 18-CA-19587 (May 31, 2011), the NLRB struck down an employer's mandatory arbitration policy as an unfair labor practice. In *Supply Technologies*, the employer implemented a mandatory grievance-arbitration program for its employees, called the "Total Solution Management" (TSM). The TSM program consisted of three steps (internal review, mediation, and binding arbitration) and, with limited exception, was the sole means for resolving any claims against the employer. Employees who refused to participate in the TSM program were terminated.

The Teamsters filed a complaint with the Board alleging that the TSM program unlawfully interfered with employees' rights under the National Labor Relations Act to file an unfair labor practice charge with the Board or access the procedures available at the Board. The Board agreed. Without addressing the Supreme Court's decision in *AT&T*, the Board struck down the employer's mandatory arbitration program by relying on inconsistencies in the paperwork describing the program and the employees' ability to understand the nature of the program.

In rolling out the program, the Company simply distributed several documents about the program, in English, despite the fact that a significant percentage of the workforce did not speak English. Testimony suggested that the employer discharged employees who claimed not to understand, who requested explanations or who failed to cooperate. The Board in fact found the documents for the TSM to be confusing and full of inconsistencies.

Most significantly, the TSM documents stated that the *only* claims that employees could bring outside the TSM policy were criminal claims, and claims for workers' compensation and unemployment benefits. This language suggested an employee had to bring any unfair labor practice charge through the TSM program, and thus could not make that charge with the Board. Thus, the TSM program materials appeared to require arbitration of any charges that could have been filed with the NLRB.

In addition, the employer's TSM program stated that employees waived any right to remedial relief recovered by any agency. Thus, even if the TSM program did not prevent an employee from filing a charge with the Board, the Board believed that the waiver requirement would serve to deter and discourage employees from exercising their rights to bring a charge with the Board or utilize its processes. Since the NLRA prohibits such conduct, the Board struck down the employer's mandatory arbitration policy.

The *Supply Technology* decision provides an illustrative example of the limits of a mandatory arbitration policy in the employment context and the critical role that drafting and roll-out can play in implementing such a policy. Employers who may be considering implementation of such a program should contact their legal counsel to discuss not only how federal labor law may affect a mandatory arbitration program, but other federal and state laws that could impact a program of this type.

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