



Can You Have Confidentiality Requirements In Mandatory Arbitration Pacts?

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Many companies have mandatory arbitration programs that require employees to bring employment-related legal claims before an arbitrator instead of bringing them in court. When arbitration pacts are in place, most contain confidentiality requirements related to such proceedings. Employers who use these types of programs should be aware that the National Labor Relations Board (NLRB) is taking a fresh look at this issue and may decide to limit companies' ability to have confidentiality requirements in these agreements.

According to a [press release from the agency](#), the NLRB is inviting "parties and amici to submit briefs addressing whether the Board should adopt a new legal standard to determine whether confidentiality requirements in a mandatory arbitration agreement violate Section 8(a)(1) of the National Labor Relations Act and other legal issues related to mandatory arbitration agreements."

In other words, the [newly constituted Biden Board](#) wants to weigh in on whether and to what extent companies can place confidentiality restrictions on employees in this context. Since a majority of NLRB members are considered to have pro-labor leanings, employers can expect changes and restrictions on this to be forthcoming.

For those unfamiliar, mandatory arbitration agreements are a tool companies can use to filter employment-related claims to arbitration. Employees typically

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sign the pacts at the onset of employment. If an employee believes they have a legal claim against the company (e.g., for unpaid wages, harassment or discrimination), they must proceed to arbitration instead of filing a lawsuit. Some companies believe arbitration can be a better forum because, for example, cases often are processed quicker than they are in federal court. In addition, arbitration programs can contain [class action waivers](#) that preclude employees from joining together and filing costly, complex class cases against companies. These programs don't make sense for every employer, but having the tool at your disposal may be beneficial in some cases.

Employers who utilize mandatory arbitration programs for their workforce should closely monitor this issue. Any ruling by the NLRB on the permissibility of confidentiality requirements in this context will apply to both union and non-union companies. Stay tuned.