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Not So Final And Binding – The NLRB Proposes Changes To Arbitration Deferral Policy

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On Feb. 7, 2014, the National Labor Relations Board invited parties to submit comments on its deferral to arbitration standard. While reported and discussed in some outlets, the significance of this development may not be fully appreciated. The change being suggested by the NLRB could significantly impact what "final and binding" arbitration will mean.

It appears the NLRB is very serious about narrowing the standard under which it will defer to an arbitration award, proposing to change the standard to require that an employer show the arbitrator has considered and applied the statutory principles articulated in Board cases to what otherwise might be a contractually covered issue.

Historically, when a collective bargaining agreement provides for final and binding arbitration, an employer can request deferral of an unfair labor practice charge to the parties' grievance and arbitration process. Once deferred, the matter is then determined by an arbitrator through that contractual process and the application of traditional rules of contract interpretation existing in the labor arbitration context. Whole books have been devoted to this topic like *Elkouri & Elkouri*. However, depending on how the NLRB might narrow its standard for reviewing whether an arbitrator's decision also meets the Board's statutory requirements in any given Section 8(a)(1) and 8(a)(3) cases, it could put employers in the tough position of having an arbitrator's award later being ignored by NLRB and a statutory claim being reinstated. The result – "final and binding" will not seem either "final" or "binding."

There are also concerns related to the "scope" of the change the Board will adopt. The National Labor Relations Act has been interpreted to limit the Board's authority to interpret contracts. But, by narrowing its willingness to either "defer" cases by finding that the contract does not sufficiently cover a statutory issue and/or accept an arbitrator's award as consistent with statutory standards developed through the Boards decisional law, the Board could effectively backdoor its way into the position of being the final arbitrator of issues equally covered by a contract interpretation analysis. This would fly in the face of the Act and encroach on the long standing reliance on arbitration as a principle means to resolve labor disputes. It will also encourage unions to engage in secondary challenges of arbitration results, inevitably adding a layer of uncertainty to what has traditionally been considered a "final and binding" process. Bottom line: the effectiveness of the arbitration will be weakened. Conversely, it would mean more work for the NLRB.

Should the Board expand the standard, it would be keeping with many of the

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initiatives pursued by President Obama's NLRB. Under this administration, the Board has repeatedly made inroads into areas that the Board has traditionally abstained, such as the D.R. Horton case addressing class action waivers and the Board's now defunct poster rule, as well as expanding its jurisdictional reach into every crevice of employer's policies and work rules. Similarly, the Board has made other jurisdictional power grabs by recently claiming jurisdiction over charter schools and certain religious institutions.

All of these initiatives by the NLRB demonstrate an aggressive stance designed to increase the relevance and reach of the NLRB. The chosen vehicle of the NLRB is clear: chip away at areas of traditionally fairly settled law, in an effort to expand its reach in an environment which otherwise sees eroding union support. To be sure – this is not a trend that will end anytime soon.