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NLRB's General Counsel Issues Memo on Arbitration Issue Pending at Supreme Court

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As a result of the Supreme Court's recent decision to grant certiorari and address the dispute over whether class and collective action waivers are lawful in an arbitration agreement, many employers have asked whether similar cases pending at the NLRB will be held in abeyance while the Court resolves this issue. The NLRB's general counsel recently issued a [memorandum](#) to the agency's regional offices providing a partial answer to this question.

The general counsel's memo refers to arbitration agreements that include such waivers as "*Murphy Oil*" agreements, which is a reference to the NLRB decision now pending at the Supreme Court on this issue. Many employers refer to this as the "*D.R. Horton*" issue, referring to the Board's initial decision involving such waivers. These terms are synonymous for this purpose.

Conditional Settlement Agreement

The memo discusses the procedure to be followed after a regional director determines that an unfair labor practice charge involving the *Murphy Oil* issue has merit. Such a finding is virtually automatic under NLRB precedent if an arbitration agreement includes a class or collective action waiver.

The memo instructs regional directors to propose that the employer sign a conditional settlement agreement, which would be conditioned on the Board's prevailing in the cases now pending at the Supreme Court. Although the memo lacks detail on this point, we understand it means that if the Court decides that class and collective action waivers are unlawful, the employer would cease enforcing the arbitration agreement and comply with standard NLRB remedies including the posting of a notice to employees. But if the Court decides that such waivers are lawful, the

charge against the employer would be dismissed. Meanwhile, the regional office would issue a notice holding the case in abeyance until the Court issues a decision.

The memo does not explain how the regional offices should respond if an employer declines to sign a conditional settlement agreement. However, it is our understanding that under these circumstances the regional office would issue a notice holding the case in abeyance pending a decision by the Supreme Court if the employer agrees to sign a waiver stating that it will not contend at a later time that the Board's general counsel has engaged in "piecemeal litigation." In NLRB terminology, this is known as a "*Jefferson Chemical*" waiver. See *Frontier Hotel and Casino*, 324 NLRB No. 186 (1997). It appears that this waiver would apply if the Supreme Court eventually upholds the Board's position in the pending cases that class and collective waivers are unlawful, but not if the Court rejects that theory.

If an employer declines to sign either a conditional settlement agreement or a waiver of the piecemeal litigation argument, it appears that the Board's regional office will refuse to hold the case in abeyance and thus continue to litigate the *Murphy Oil* issue while the Supreme Court is considering the same issue.

In addition, the general counsel's memo does not address the possibility that a Supreme Court decision on the pending cases might not clearly resolve the *Murphy Oil* issue, or might not do so under all factual circumstances. This possibility should be considered by employers in deciding whether to sign a conditional settlement agreement or the piecemeal litigation waiver described above.

Unrelated Allegations

The memo also addresses a situation in which a charge includes both the *Murphy Oil* issue and allegations that are unrelated to that issue. Under these circumstances, the regional office is directed to follow the procedure set forth above as to the *Murphy Oil* issue, and attempt to settle the unrelated allegations if they are found to have merit after an investigation. If the employer does not settle the unrelated allegations, the regional office is directed to "go forward" as to them, which apparently means to sever those issues and issue a complaint, followed by a trial before an administrative law judge.

One typical allegation in a *Murphy Oil* charge is that the arbitration agreement contains a provision that would cause employees to believe they could not file a charge with the NLRB on some issue unrelated to the class and collective action waiver. We understand allegations of this type will be included in the "unrelated" category discussed above.

Opt-Out and Other Distinguishable Provisions

The memo states that the regional offices should hold in abeyance any cases involving opt-out clauses in mandatory arbitration agreements, or where it is argued that some other feature of an agreement renders it distinguishable from the agreement in *Murphy Oil*. This is an apparent reference to Ninth Circuit precedent, which treats agreements with an opt-out clause to be voluntary and thus an exception to the law of that circuit now under Supreme Court review.

Abeyance Requests and Motions to Stay

Finally, the memo indicates that other cases involving requests for abeyance or motions to stay a case will be considered by the general counsel on a case-by-case basis. This would apparently include cases in which a complaint in a *Murphy Oil* case has already been issued and is pending before an ALJ. Based on limited experience thus far, it appears that such cases will be held in abeyance.

Cases Pending in Washington

Although there has not been an official announcement, it appears that the processing of *Murphy Oil* cases at the Board level has been informally suspended pending a decision by the Supreme Court. In addition, it has been possible in recent months to obtain an indefinite extension of time to file exceptions to an ALJ decision involving this issue.

Conclusion

Before signing a conditional settlement agreement or a waiver of piecemeal litigation as described above, employers should carefully evaluate the terms and their application to the issues involved. Littler Mendelson is advising a number of clients how to respond to the general counsel's memo and regional requests for conditional settlements. Each situation requires review by experienced labor counsel on a case-by-case basis. We will continue to monitor developments and provide updates.