

## The Storm On The Horizon

By Byrona J. Maule, Phillips Murrah P.C.

Last year, I was in Washington D.C. for an American Bar Association Labor and Employment Law Seminar, where the ABA celebrated the 75th anniversary of the National Labor Relations Act (NLRA). At this seminar, many attendees lamented the declining influence of the National Labor Relations Board (NLRB). Some outright opined that the NLRB was becoming less relevant in today's workforce.

However, the NLRB's outgoing General Counsel issued a guidance that should grab the attention of every HR professional.<sup>1</sup> The guidance deals with mandatory arbitration agreements in employment that require employees to waive their rights to file any claims in court, including class action claims. The guidance highlights the collision course of two distinct theories of law.

### ARBITRATION AGREEMENTS IN EMPLOYMENT

The Supreme Court has held that mandatory arbitration agreements are enforceable. Therefore, an employer can require employees agree to arbitrate their individual employment claims as a condition of employment.<sup>2</sup>

### SECTION 7 OF THE NLRA

Employees' rights to engage in concerted activity, such as a collective action or class action, are protected by Section 7 of the NLRA. Further, Section 7 prohibits retaliation by the employer for engaging in

concerted protected activities – regardless of whether the employee is a member of a union or not. Translation: Section 7 of the NLRA applies to non-union workforces.

### THE CONFLICT

Case law has upheld mandatory arbitration agreements in employment, including those requiring employees to waive the right to pursue class action relief. However, Section 7 of the NLRA protects the employees' rights to take concerted action. These two incongruous tenants could result in the perfect storm – one that may ultimately require Supreme Court intervention.

### THE GUIDANCE

If an employer threatens, disciplines or discharges an employee for pursuing a class action, it is a violation of Section 7. The NLRB proposed that “any mandatory arbitration agreement established by an employer...not be drafted using language so broad that a reasonable employee could read the agreement and/or related employer documents as conditioning employment on a waiver of Section 7 rights, such as joining with other employees to file a class action lawsuit...” However, the NLRB continues: “[A]n employer does not violate Section 7 by seeking the enforcement of an individual



employee's lawful Gilmer agreement to have all his or her individual employment disputes resolved in arbitration. Similarly, an employer may lawfully seek to have a class action complaint dismissed on the ground that each purported class member is bound by his or her signing of a lawful Gilmer agreement/waiver.”<sup>3</sup>

### THE STORM APPROACHES

The Supreme Court has agreed to hear *Laster, et al v. Vincent Concepcion, et al.* The issue: an arbitration agreement that contained a waiver of the right to pursue a class action – in a consumer contract. The Ninth Circuit Court of Appeals held the waiver was unconscionable under California state law, which arguably was not preempted by the Federal Arbitration Act. This decision by the Supreme Court just might be indicative of which way the prevailing winds will take the issue of class action waivers in

mandatory arbitration agreements in employment.

### BATTEN DOWN THE HATCHES

Until this conflict is resolved, employers should review their arbitration agreements to make certain that they are not too broad. Beyond that, employers should take a wait-and-see approach; the horizon may look totally different after the Supreme Court rules on *Laster*.

**About the Author...** Byrona J. Maule is a successful labor and employment attorney with over 20 years of experience representing employers - from the courtroom to the boardroom - in H.R. matters. A director at Phillips Murrah P.C., Oklahoma City's third-largest law firm, Maule provides her clients with the power of a strategic partner. You may contact Maule at [bjmaule@phillipsmurrah.com](mailto:bjmaule@phillipsmurrah.com) or (405) 235-4100.

<sup>1</sup>Memorandum GC 10-06, June 16, 2010 by Ronald Meisburg, General Counsel.

<sup>2</sup>*Gilmer v. Interstate/Johnson Lane Corp*, 500 U.S. 20, 31 (1991).

<sup>3</sup>Memorandum GC 10-06, June 16, 2010 by Ronald Meisburg, General Counsel.