

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES**

SAN RAFAEL HEALTHCARE AND WELLNESS, LLC

and

Case 20–CA–204948

NATIONAL UNION OF HEALTHCARE WORKERS

Joseph D. Richardson, Esq.,
for the General Counsel.

Adam C. Abrahms & Christina C. Rentz, Esqs. (Epstein Becker & Green, P.C.),
for the Respondent Company.

Florice Hoffman, Esq.,
for the Charging Party Union.

DECISION

JEFFREY D. WEDEKIND, Administrative Law Judge. This is another case involving employer mandatory arbitration provisions. The Respondent Company, a California skilled nursing facility, has maintained such provisions in its Alternative Dispute Resolution (ADR) Policy since at least November 2012, and has required its employees to enter into and sign the policy as a condition of employment.¹ The General Counsel contends that, by doing so, the Company has violated Section 8(a)(1) of the National Labor Relations Act because the provisions, as they would reasonably be construed by employees or otherwise reasonably interpreted, prohibit or restrict employees from filing unfair labor practice charges with the Board.²

The ADR Policy is three pages long and is set forth in the Employee Handbook. In relevant part, it states as follows:

ALTERNATIVE DISPUTE RESOLUTION POLICY

In any organization, employment disputes will arise, sometimes requiring resolution through a formal proceeding. Traditionally, this proceeding has been

¹ There is no dispute, and the record establishes, that the Board has jurisdiction.

² On November 29, 2017, the parties filed a joint motion requesting that the case be decided based on an attached stipulated record. The motion was granted on November 30, and the General Counsel and the Company thereafter filed briefs on January 26 and 29, 2018, respectively. As discussed *infra*, the briefs argue the case under both the “reasonably construe” standard set forth in *Lutheran Heritage*, 343 NLRB 646 (2004), which applied at the time the complaint issued and the stipulation was approved, and the new balancing test recently announced in *Boeing Co.*, 365 NLRB No. 154 (Dec. 14, 2017), which the Board majority held would apply retroactively to all pending cases at whatever stage.

conducted through our court system. However, our court system too often has proven to be an exceedingly costly and time consuming process, thus failing to provide the parties involved with an acceptable resolution of the dispute.

5 With this in mind, your employer has developed and implemented this Alternative
Dispute Resolution Policy ("ADR Policy"). We believe that the procedures set
forth in this ADR Policy will result in a fair and equitable means for resolving
those types of employment disputes that all too often become unnecessarily
10 protracted. These procedures ensure that all parties have an opportunity to meet
and see if there is a mutually satisfactory basis for resolving their dispute. Failing
to reach an amicable resolution, these procedures provide for a fair hearing before
an impartial, objective individual who has been selected by both sides. The
neutral arbitrator will have the full authority to resolve this matter protecting the
rights of all parties.

15 We hope that you will never find the need to utilize these procedures and that
your employment will be free of major disputes or issues. However, in the event a
dispute should arise, these procedures are there to ensure that the dispute is
handled fairly and efficiently.

20

WHO IS COVERED BY THE ADR POLICY

25 The ADR Policy will be mandatory for ALL DISPUTES ARISING BETWEEN
EMPLOYEES, ON THE ONE HAND, AND YOUR EMPLOYER, AND/OR ITS
EMPLOYEES AND OFFICERS (HEREINAFTER COLLECTIVELY
THE "COMPANY"), ON THE OTHER HAND. Any disputes which arise and
which are covered by the ADR Policy must be submitted to final and binding
resolution through the procedures of the Company's ADR Policy.

30 For parties covered by this Alternative Dispute Resolution Policy, alternative
dispute resolution, including final and binding arbitration, is the exclusive means
for resolving covered disputes (as defined below); no other action may be brought
in court or in any other forum. This agreement is a waiver of all rights to a civil
court action for a covered dispute; only an arbitrator, not a Judge or Jury, will
35 decide the dispute.

40 *Nothing in this ADR Policy precludes the parties from discussing a mutually
acceptable resolution of the dispute without the necessity of formal arbitration
proceedings. Additionally, the parties may agree to engage in mediation prior to
arbitration.*

COVERED DISPUTES

45 Nothing in this Alternative Dispute Resolution Policy is intended to require
arbitration of any claim or dispute which the courts of this jurisdiction have
expressly held are not subject to mandatory arbitration.

Nothing in this agreement is designed to compel arbitration of any claims or causes of action expressly excluded by the provisions of the 2010 Defense Appropriations Act (H.R. 3326).

5 Covered disputes include any dispute arising out of or related to my employment, the terms and conditions of my employment and/or the termination of your employment, including, but not limited to, the following:

- 10 • Alleged violations of federal, state and/or local constitutions, statutes or regulations;
- 15 • Claims of unlawful harassment, discrimination, retaliation or wrongful termination that cannot be resolved by the parties or during an investigation by an administrative agency (such as the Equal Employment Opportunity Commission); Covered claims include, but are not limited to, claims under Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act, the Age Discrimination in Employment Act, the Equal Pay Act, and any other statutory scheme covering claims of discrimination or harassment on the basis of race, color, age, religious creed, national origin, ancestry, disability, sexual orientation, gender identity, sex or any other characteristic protected by law;
- 20 • Claims based on any purported breach of contract (including breach of the covenant of good faith and fair dealing, claims of wrongful termination or constructive termination);
- 25 • Claims of unfair demotion, transfer, reduction in pay, or any other change in the terms and conditions of employment;
- 30 • Claims alleging failure to compensate for all hours worked, failure to pay overtime, failure to pay minimum wage, failure to reimburse expenses, failure to pay wages upon termination, failure to provide accurate, itemized wage statements, failure to provide meal and/or rest breaks, entitlement to waiting time penalties and/or other claims involving employee wages, including, but not limited to, claims brought under the Fair Labor Standards Act and any other statutory scheme related to wages or working hours;
- 35 • Claims based on any purported breach of duty arising in tort, including alleged violations of public policy and for emotional distress;
- Claims of defamation, pre and post-termination; and
- Any claim the Company may enjoy against employees, regardless of the nature, arising from the employment relationship.

The following types of disputes are expressly excluded and are not covered by this ADR Policy:

- 40 • Disputes related to workers' compensation and unemployment insurance;
- 45 • Disputes or claims that are expressly excluded by statute or are expressly required to be arbitrated under a different procedure pursuant to the terms of a team member benefit plan.

If you, or the Company, file a lawsuit in court involving both claims that are subject to arbitration in accordance with this ADR Policy as well as claims that are not subject to arbitration, the court will stay, or place on hold, any litigation of the claims in the case that are not subject to arbitration and require arbitration of the claims that are subject to arbitration proceed before any litigation in court of claims that are not subject to arbitration. In that event, the arbitrator's decision as to the claims that are subject to arbitration, including any determinations as to disputed factual or legal issues, will be entitled to full force and effect, and be binding, in any later court proceedings related to claims that are not subject to arbitration.

CLASS ACTION WAIVER

I understand and agree this ADR Program prohibits me from joining or participating in a class action or representative action, acting as a private attorney general or representative of others, or otherwise consolidating a covered claim with the claim of others. Under this Policy, no arbitrator shall have the authority to order any such class action or representative action.

INITIATING THE ALTERNATIVE DISPUTE RESOLUTION PROCEDURES

* * * *

THE ARBITRATION

* * * *

FEES AND COSTS

* * * *

SEVERABILITY

* * * *

Nothing in this Alternative Dispute Policy is intended to preclude any employee from filing a charge with the Equal Employment Opportunity Commission, the National Labor Relations Board or any similar federal or state agency seeking administrative resolution. However, any claim that cannot be resolved through administrative proceedings shall be subject to the procedures of this ADR Policy.³

³ The foregoing policy appears to be very similar if not identical to that in *Montecito Heights Healthcare & Wellness Centre, LP*, 31–CA–129747, ALJD issued Nov. 30, 2016 (2016 WL 7011128), currently pending before the Board on cross-exceptions. There is no contention that the Charging Party Union here agreed to the policy or waived the right to bargain over it.

The General Counsel argues that employees would reasonably construe the foregoing mandatory arbitration policy to prohibit or restrict filing Board charges for several reasons. First, the opening section titled “Who is Covered by the ADR Policy” emphasizes that “ALL DISPUTES” arising between the employer and employees are covered. Second, the following section titled “Covered Disputes” specifically states that covered disputes include, inter alia, “any dispute arising out of or related to . . . employment, the terms and conditions of . . . employment and/or the termination of . . . employment,” including, among other disputes, “alleged violations of federal . . . statutes” and “[c]laims of unfair demotion, transfer, reduction in pay, or any other change in the terms and conditions of employment.” Third, the following section titled “Class Action Waiver” broadly prohibits “joining or participating” in a class or representative action “or otherwise consolidating a covered claim with the claim of others,” which on its face would encompass a Board charge filed by an employee with or on behalf of other employees. Fourth and finally, although the policy later states that the nothing therein is intended to preclude “any employee from filing a charge with . . . the National Labor Relations Board . . . seeking administrative resolution,” this statement does not appear until the very end of the three-page policy, after several additional sections, and is not highlighted by either a separate section heading (it has no apparent relation to “Severability”) or by capitalizing or italicizing the statement.⁴

The General Counsel’s argument is consistent with past Board decisions. See, for example, *Lincoln Eastern*, 364 NLRB No. 16 (2016), where the Board found the employer’s mandatory arbitration policy unlawful in part because the exclusion of unfair labor practice charges did not appear until well into the 3 ½-page policy after repeated statements that the policy applied to all employment disputes and prohibited pursuing any claim as a member or representative of a class. See also *SolarCity*, 363 NLRB No. 83 (2015), where the Board likewise found the employer’s policy unlawful in part because it contained language prohibiting “class, collective, or representative action” that on its face would encompass an unfair labor practice charge that alleged a group or collective violation.

The Company argues (Br. 4–5) that its mandatory arbitration policy is different because it “clearly” applies only to claims raised in lawsuits in court. In support, the Company cites the preamble and subsequent sections indicating that the policy applies to employment disputes that traditionally have been resolved in the “court system” and claims “that cannot be resolved . . . during an investigation by an administrative agency” or “through administrative proceedings.” However, the policy is not as clear as the Company contends. The second paragraph of the “Who is Covered by the ADR Policy” section—which the Company’s brief entirely omits and ignores—states that no covered disputes may be brought in court “or in any other forum.”⁵ Further, unfair labor practice charges are not always finally resolved at the administrative agency level, but often end up before a federal court of appeals for review and enforcement of a Board

⁴ The General Counsel does not argue that the policy is also unlawful because of the last paragraph of the “Covered Disputes” section.

⁵ The same paragraph goes on to state that the “agreement” waives the right to a “civil court action for a covered dispute.” However, as indicated above, the previous sentence indicates that the policy also precludes bringing actions “in any other forum.”

decision. See *U-Haul of California*, 347 NLRB 375, 377–378 (2006) (rejecting the respondent employer’s similar argument in that case), *enfd. mem.* 255 Fed. Appx. 527 (D.C. Cir. 2007).⁶

5 The Company also argues (Br. 9, 11, 13) that its mandatory arbitration policy is distinguishable from those in *Lincoln Eastern* and *SolarCity* and other similar cases because the sentence preserving the right to file Board charges is “strategically” and “conspicuously” placed near the end rather than in the middle of the policy. However, as indicated by the General Counsel, there is nothing conspicuous about the placement of the sentence. Nor is there any other record or rational basis to conclude that the Company’s strategy was to emphasize or
10 highlight the right of employees to file unfair labor practice charges.

Finally, the Company argues (Br. 9) that cases such as *U-Haul*, *SolarCity*, and *Lincoln Eastern* were “effectively overruled” by the Board’s recent decision in *Boeing Co.*, 365 NLRB No. 154 (2017). In that case, which involved a no-camera rule, a majority of the five-member
15 Board overruled the “reasonably construe” standard that had been set forth in *Lutheran Heritage*, 343 NLRB 646 (2004) and generally applied in subsequent cases evaluating facially neutral workplace rules and policies, including mandatory arbitration provisions. Instead, the majority stated that the Board would apply a “balancing” test in evaluating such workplace rules or policies. Specifically, two members of the majority (then-Chairman Miscimarra and Member Emmanuel) stated that they would examine whether, “as reasonably interpreted,” “focusing on
20 the employees’ perspective,” the rule or policy “would potentially interfere with the exercise of NLRA rights”; “the nature and extent of the potential impact on NLRA rights”; and “legitimate justifications associated with” the rule or policy. Slip op. at 3 and 16. The third member (then-Member Kaplan) stated that he “agree[d]” that the Board must “strike the balance between
25 employees’ [NLRA rights] and employers’ business justifications” in evaluating workplace rules and policies. He noted, “however,” that, in his view,

30 the threshold inquiry of whether the rule, when reasonably interpreted, prohibits or interferes with [NLRA rights] should be determined by reference to the perspective of an objectively reasonable employee who is “aware of his legal rights but who also interprets work rules as they apply to the everydayness of his job. The reasonable employee does not view every employer policy through the prism of the NLRA.”

35 Slip op. at n. 14 (quoting *T-Mobile USA, Inc. v. NLRB*, 865 F3d 265, 271 (5th Cir. 2017)). See also n. 16 (emphasizing that he would apply an “objective standard, and that the reasonable interpretation of the rule is conducted from the perspective of a reasonable employee”).

40 As the Company’s argument implicitly acknowledges, however, the *Boeing* majority did not specifically address or expressly overrule *U-Haul*, *SolarCity*, and *Lincoln Eastern* or similar cases involving mandatory arbitration provisions. See slip op. at 12 n. 51 (“Other than the cases addressed specifically in this opinion, we do not pass on the legality of the rules at issue in past

⁶ A charging party employee has the right to seek federal appellate court review of an adverse Board decision dismissing all or some of the administrative complaint allegations. See Sec. 10(f) of the Act (29 U.S.C. Sec. 160(f)); and *Auto Workers v. Scofield*, 382 U.S. 205, 210 (1965).

Board decisions that have applied the *Lutheran Heritage* ‘reasonably construe’ standard.”). Nor, as indicated by the General Counsel, does the majority’s balancing test dictate a different result, either in those cases or here. As discussed above, regardless of whether the plurality or concurring statement of the threshold inquiry is applied, the mandatory arbitration policies, as reasonably interpreted, prohibit or restrict the right of employees to file charges with the Board. Further, that right is central to the federal nationwide labor policy and enforcement contemplated by the NLRA; no Board complaint can issue, no matter how serious or extensive the alleged violations, without a charge.⁷ Finally, while the benefits of arbitrating disputes are generally well recognized—as indicated by the Company, arbitration may substantially benefit employers and employees by providing an “expedient, cost-effective resolution of disputes” (Br. 14)⁸—there is insufficient basis in current law and precedent to conclude that this justification is sufficient to outweigh such potentially pervasive interference with employees’ fundamental rights and protections under the Act.⁹

Accordingly, the Company’s ADR Policy violates Section 8(a)(1) of the Act, as alleged.

ORDER¹⁰

The Respondent, San Rafael Healthcare and Wellness, LLC, San Rafael, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining a mandatory arbitration policy that, as reasonably interpreted, bars or restricts employees from filing charges with the National Labor Relations Board.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind its ADR Policy or revise it to so that, as reasonably interpreted, it does not bar or restrict employees from filing charges with the National Labor Relations Board.

⁷ See Sec. 10(b) of the Act (29 U.S.C. Sec. 160(b)); and *NLRB v. Scrivener*, 405 U.S. 117, 121 (1972). See also Sec. 8(a)(4) of the Act (29 U.S.C. Sec. 158(a)(4)) (making it an unfair labor practice for an employer to discriminate against an employee for filing a charge with the Board).

⁸ See also *Stolt-Nielsen S.A. v. AnimalFeeds International Group*, 559 U.S. 662, 685 (2010).

⁹ Indeed, citing *Scrivener*, above, the General Counsel argues (Br. 8) that “[n]o legitimate justification could be offered for interfering with Congress’ intent to secure complete freedom for employees to access or participate in the Board’s processes.”

¹⁰ If no exceptions are filed as provided by Sec. 102.46 of the Board’s Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

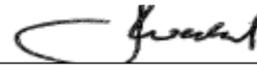
(b) Notify all current and former employees who were required to sign or otherwise become bound to the ADR Policy that it has been rescinded or revised, and provide them with a copy of the revised policy, if any.

5 (c) Within 14 days after service by the Region, post the attached notice marked
“Appendix” at its facility in San Rafael, California.¹¹ Copies of the notice, on forms provided by
the Regional Director for Region 20, after being signed by the Respondent’s authorized
representative, shall be posted by the Respondent and maintained for 60 consecutive days in
10 conspicuous places including all places where notices to employees are customarily posted. In
addition to physical posting of paper notices, the notices shall be distributed electronically, such
as by email, posting on an intranet or an internet site, and/or other electronic means, if the
Respondent customarily communicates with its employees by such means. Reasonable steps
shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by
any other material. In the event that, during the pendency of this proceeding, Respondent has
15 gone out of business or closed the facility, Respondent shall duplicate and mail, at its own
expense, a copy of the notice to all current and former employees employed by Respondent at
any time since February 23, 2017.

20 (d) Within 21 days after service by the Region, file with the Regional Director a
sworn certification of a responsible official on a form provided by the Region attesting to the
steps that the Respondent has taken to comply.

Dated, Washington, D.C., February 14, 2018

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Jeffrey D. Wedekind
Administrative Law Judge

¹¹ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading “Posted by Order of the National Labor Relations Board” shall read “Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.”

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT maintain a mandatory arbitration policy that, as reasonably interpreted, bars or restricts employees from filing charges with the National Labor Relations Board.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL rescind our Alternative Dispute Resolution (ADR) Policy or revise it so that, as reasonably interpreted, it does not bar or restrict you from filing charges with the National Labor Relations Board.

WE WILL notify all current and former employees who were required to sign or otherwise become bound to the ADR Policy that it has been rescinded or revised, and provide them with a copy of the revised policy, if any.

SAN RAFAEL HEALTHCARE AND WELLNESS,
LLC

(Employer)

Dated _____ By _____
(Representative) (Title)

The Administrative Law Judge's decision can be found at www.nlr.gov/case/20-ca-204948 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlr.gov.

901 Market Street, Suite 400, San Francisco, CA 94103-1735

(415) 356-5130, Hours: 8:30 a.m. to 5 p.m.

The Administrative Law Judge's decision can be found at www.nlr.gov/case/20-CA-204948 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE
THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE
DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY
OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE
WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S
COMPLIANCE OFFICER, (628) 221-8875.