

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

UBER TECHNOLOGIES, INC.

and

Case 20-CA-181146

LENZA H. McELRATH III

**COUNSEL FOR THE GENERAL COUNSEL'S RESPONSE**  
**TO NOTICE TO SHOW CAUSE**

The General Counsel does not oppose the Board remanding this case to the administrative law judge for further proceedings and reconsideration in light of the new standard, set forth in *The Boeing Co.*,<sup>1</sup> for determining whether the maintenance of a work rule or policy that does not expressly restrict employee access to the Board, such as Respondent's "Dispute Resolution Agreement" at issue herein, violates Section 8(a)(1) of the Act.

In the event the Board chooses to decide the merits of the case in lieu of remand, the General Counsel's position is that the complaint should be dismissed because under the Board's recent decisions in *Private National Mortgage Acceptance Company LLC* ("PennyMac"), 368 NLRB No. 126 (2019), *Kelly Services, Inc.*, 368 NLRB No. 130 (2019), and *Briad Wenco, LLC d/b/a Wendy's Restaurant*, 368 NLRB No. 72 (2019), Respondent's "Dispute Resolution Agreement" does not violate the Act when considered under the *Boeing* standard. Although Respondent's policy requires employees to agree to arbitrate employment-related disputes, it nonetheless expressly allows, *inter alia*, that

Regardless of any other terms of this Agreement, claims may be brought before and remedies awarded by an administrative agency if applicable law permits access to such an agency notwithstanding the existence of an agreement to arbitrate. Such administrative claims include without limitation claims or charges brought before the . . . National Labor Relations Board (www.nlr.gov) . . .

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<sup>1</sup> 365 NLRB No. 154 (2017)

Similar to Respondent’s “Dispute Resolution Agreement,” the “Mutual Arbitration Policy” at issue in *Pennymac* required mandatory, binding arbitration of all employment-related disputes, yet it also specifically exempted “any claims that could be made to the National Labor Relations Board.” *Pennymac*, 368 NLRB No. 126, slip op. at 1 (2019). Applying the *Boeing* standard, the Board stated that the policy’s explicit exclusion “from its coverage ‘any claims that could be made to the National Labor Relations Board’ . . . precludes a finding that the [policy] reasonably interferes with employees’ right to file charges with the Board.” *Id.*, slip op. at 3.

As the Board articulated in *Prime Healthcare Paradise Valley, LLC*, under *Boeing*, if a mandatory arbitration agreement does not explicitly prohibit filing charges with the Board, then the first step in deciding the lawfulness of the policy is to “determine whether that agreement, ‘when reasonably interpreted, would potentially interfere with the exercise of NLRA rights.’” *Prime Healthcare Paradise Valley, LLC*, 368 NLRB No. 10, slip op. at 5 (2019) (quoting *The Boeing Co.*, above, slip op. at 3). Because the policy at issue in *Pennymac* specifically excluded any claims that could be made to the NLRB, the Board found that reasonable, objective employees would understand that the arbitration policy does not require them to arbitrate claims that could be made to the Board, and therefore the policy does not potentially interfere with employees’ exercise of their right to access the Board or its processes. *Pennymac*, above, at 3. Accordingly, a mandatory arbitration policy that includes an effective exclusion clause for Board claims is a *Boeing* Category 1(a) rule that is lawful because, when reasonably interpreted, it has no tendency to interfere with Section 7 rights. *Id.* Such policies are presumed lawful; no balancing of rights and justifications is warranted. *Id.*

Because the “Dispute Resolution Agreement” at issue herein contains an exclusion clause allowing that claims may be brought before administrative agencies, including “without

limitation claims or charges brought before the . . . National Labor Relations Board,” reasonable employees would understand that the “Dispute Resolution Agreement” does not restrict their access to the Board. Under the *Boeing* framework, the “Dispute Resolution Agreement” is a Category 1(a) rule that has no tendency to interfere with Section 7 rights and is lawful. As no balancing of rights and justifications is warranted, the General Counsel’s position is that the complaint herein should be dismissed.

DATED AT San Francisco, California this 26<sup>th</sup> day of December, 2019

Respectfully submitted,

/s/ Jennifer Benesis  
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REGION 20**

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**LENZA H. MCELRATH III, an Individual**

**AFFIDAVIT OF SERVICE OF COUNSEL FOR THE GENERAL COUNSEL'S RESPONSE  
TO NOTICE TO SHOW CAUSE**

I, the undersigned employee of the National Labor Relations Board, being duly sworn, say that on **December 26, 2019**, I served the above-entitled document(s) by **electronic mail** upon the following persons, addressed to them at the following addresses:

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December 26, 2019

Katherine Yan, Designated Agent of  
NLRB

\_\_\_\_\_  
Date

\_\_\_\_\_  
Name

/s/ K. Yan

\_\_\_\_\_  
Signature