

*United States Government*  
*National Labor Relations Board*  
OFFICE OF THE GENERAL COUNSEL  
**Advice Memorandum**

DATE: September 20, 2013

TO: Olivia Garcia, Regional Director  
Region 21

FROM: Barry J. Kearney, Associate General Counsel  
Division of Advice

SUBJECT: Bristol Farms  
Case 21-CA-103030

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The Region submitted this case for advice as to whether the Employer violated Section 8(a)(1) by maintaining an arbitration agreement that has been enforced to preclude collective legal action, where the Employer solicits the agreement as part of the hiring process but does not require employees to sign the agreement as a condition of employment. We conclude that although employees are told that the arbitration agreement is voluntary, the maintenance of the agreement, as interpreted by the Employer, unlawfully interferes with employees' Section 7 right to engage in collective legal activity and with employees' access to the Board and its processes.<sup>1</sup>

**FACTS**

The Employer, Bristol Farms, holds mandatory orientation sessions for its new employees, where those employees are presented with a host of documents to sign, including a document entitled "Mutual Agreement To Arbitrate." The new employees are told that the arbitration agreement is voluntary and they do not have to sign it, and about a third of the current nonexempt employees have in fact not signed the arbitration agreement.

The agreement provides in pertinent part:

You and Bristol Farms agree that final and binding arbitration shall be the exclusive remedy for any dispute between you and

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<sup>1</sup> The Region has determined that with respect to the Charging Party, the Employer unlawfully maintained and enforced a mandatory arbitration agreement as a condition of employment and intends to issue complaint alleging those Section 8(a)(1) violations, absent settlement.

Bristol Farms, except for claims for Workers' Compensation, Unemployment Compensation, or any other claim that is non-arbitrable under applicable state or federal law. Thus, except for the claims carved out above, this Agreement includes all common-law and statutory claims, including but not limited to, any claim for breach of contract, unpaid wages, wrongful termination, and for violation of laws forbidding discrimination, harassment, and retaliation on the basis of race, color, religion, gender, age, national origin, disability, and any other protected status. You understand that you are giving up no substantive rights, and this Agreement simply governs forum.

In addition, the following statement appears above the signature line:

**BY SIGNING THIS AGREEMENT, YOU AND THE COMPANY ACKNOWLEDGE THAT THE RIGHT TO A COURT TRIAL AND TRIAL BY JURY IS OF VALUE, AND KNOWINGLY AND VOLUNTARILY WAIVE SUCH RIGHT FOR ANY DISPUTE SUBJECT TO THE TERMS OF THIS AGREEMENT.**

Although the agreement does not on its face preclude collective legal action, in the Charging Party's class-action lawsuit the Employer took the position that the agreement requires employees to arbitrate all of their claims against the Employer on an individual basis,<sup>2</sup> and successfully moved to compel an individual arbitration of the Charging Party's claims.

### **ACTION**

We conclude that although employees are told that the arbitration agreement is voluntary, the maintenance of the agreement, as interpreted by the Employer, unlawfully interferes with employees' Section 7 right to engage in collective legal activity and with employees' access to the Board and its processes.

The Employer's arbitration agreement unlawfully interferes with employees' Section 7 right to participate in collective and class litigation.

In *D.R. Horton, Inc.*, the Board held that a policy or agreement precluding employees from filing employment-related collective or class claims against their employer restricts employees' Section 7 right to engage in concerted action for mutual

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<sup>2</sup> See Def.'s Notice of Mot. and Mot. to Compel Arbitration at 7-10, *Renteria v. Bristol Farms*, No. BC491186 (Cal. Super. Ct. Apr. 2, 2013).

aid or protection, and therefore violates Section 8(a)(1) of the Act.<sup>3</sup> The Board applied the *Lutheran Heritage Village* test,<sup>4</sup> and found that an agreement requiring employees to waive their right to collectively pursue employment-related claims in all forums violates Section 8(a)(1) “because it expressly restricts Section 7 activity or, alternatively, because employees would reasonably read it as restricting such activity.”<sup>5</sup> In sum, the Board definitively held in *D.R. Horton* that an employer violates Section 8(a)(1) by requiring employees “as a condition of their employment, to sign an agreement that precludes them from filing joint, class, or collective claims addressing their wages, hours or other working conditions against the employer in any forum, arbitral or judicial.”<sup>6</sup>

While the Employer’s arbitration agreement here is silent on its face as to whether arbitration may be heard on a collective or class basis, the Employer explicitly has taken the position in the Charging Party’s class-action lawsuit that the agreement requires individual arbitration. Thus, as the agreement precludes any forum other than arbitration from resolving employment disputes, the Employer has effectively foreclosed all collective employment-related litigation by employees. Given the Section 8(a)(1) standard in *Lutheran Heritage Village-Livonia* that a violation will be found where a “rule has been applied to restrict the exercise of Section 7 rights,”<sup>7</sup> it is clear that the agreement is unlawful as applied. Under *D.R. Horton*, such an agreement unlawfully restricts employees’ Section 7 right to engage in concerted action for mutual aid or protection, and violates Section 8(a)(1).

Further, we conclude that the principles enunciated in *D.R. Horton* are dispositive here even though the Employer informs employees that the arbitration agreement is voluntary and they are not required to sign it.<sup>8</sup> First, regardless of what the employees are told, once this arbitration agreement is signed and becomes effective, it becomes a condition of employment. Thus, the Employer can now preclude employees’ exercise of their Section 7 rights to engage in collective legal activity (as it did with its successful motion to compel individual arbitration of the Charging Party’s state-law claims), and current employees can reasonably expect that they may be

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<sup>3</sup> 357 NLRB No. 184, slip op. at 1-7 (Jan. 3, 2012).

<sup>4</sup> *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 646-47 (2004).

<sup>5</sup> 357 NLRB No. 184, slip op. at 7.

<sup>6</sup> *Id.*, slip op. at 1.

<sup>7</sup> 343 NLRB at 647.

<sup>8</sup> See (b) (7)(A)  
(b) (7)(A)

disciplined as well as face legal action if they breach the arbitration agreement. Moreover, the arbitration agreement is also a condition of employment for employees who do not sign the agreement because those employees are prevented from acting concertedly with employees who do sign.

Second, even if the agreement were not a condition of employment, it would still be unlawful. As the Board explained in *D.R. Horton*, the Board has long held, with court approval, that employers cannot avoid NLRA obligations, or obviate employees' rights under the Act, through agreements with individual employees.<sup>9</sup> As the Supreme Court explained shortly after the statute's enactment, "employers cannot set at naught the National Labor Relations Act by inducing their workmen to agree not to demand performance of the duties which [the statute] imposes[.]"<sup>10</sup> Consistent with this principle, individual agreements requiring employees to adjust their grievances with their employer individually, rather than concertedly, "constitute[] a violation of the Act per se," even when they are "entered into without coercion," as they are a "restraint upon collective action."<sup>11</sup> Pursuant to the same principle, the Board has regularly set aside settlement agreements that require employees to prospectively waive their right to act in concert with coworkers in disputes with their employer.<sup>12</sup>

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<sup>9</sup> 357 NLRB No. 184, slip op. at 4-5. See, e.g., *J.I. Case Co. v. NLRB*, 321 U.S. 332, 337, 339 (1944), *affirming, as modified*, 134 F.2d 70 (7th Cir. 1943), *enforcing, as modified*, 42 NLRB 85 (1942).

<sup>10</sup> *National Licorice Co. v. NLRB*, 309 U.S. 350, 364 (1940).

<sup>11</sup> *NLRB v. Stone*, 125 F.2d 752, 756 (7th Cir. 1942), *cert. denied*, 317 U.S. 649 (1942), *quoted in D.R. Horton*, 357 NLRB No. 184, slip op. at 5.

<sup>12</sup> See, e.g., *Bon Harbor Nursing & Rehabilitation Center*, 348 NLRB 1062, 1073, 1078 (2006) (employer unlawfully conditioned employees' reinstatement, after discharges for concerted protected protest, on agreement not to engage in further similar protests); *Bethany Medical Center*, 328 NLRB 1194, 1105-06 (1999) (same); *Ishikawa Gasket America, Inc.*, 337 NLRB 175, 175-76 (2001), (employer unlawfully conditioned discharged employee's severance payments on agreement not to "engage in any dispute or work disruption" with the employer or to act "contrary to the [employer's] interests in remaining union-free," as "future rights of employees as well as the rights of the public may not be traded away in this manner"), *enforced*, 354 F.3d 534 (6th Cir. 2004). See also, e.g., *BP Amoco Chemical-Chocolate Bayou*, 351 NLRB 614, 614-16 (2007), in which the Board, while finding a settlement/waiver agreement valid, also made clear that it is reluctant to find that employees have effectively waived their right to relief over matters that were not yet investigated or even contemplated by the employee.

In this regard, in *D.R. Horton* the Board expressly found arbitration agreements prohibiting collective legal activity to be comparable to “yellow dog” contracts prohibiting employees from joining labor unions.<sup>13</sup> Significantly, the Board has long found that an employer violates Section 8(a)(1) by soliciting such agreements,<sup>14</sup> as this conduct “has an inherent and direct tendency to interfere with, restrain, and coerce employees in the exercise of their rights under Section 7 of the Act . . .”<sup>15</sup> An irrevocable waiver of employees’ prospective Section 7 rights eliminates employees’ choice as to whether to engage in protected conduct or not, and an employer’s solicitation and maintenance of such a waiver, even if on an ostensibly “voluntary” basis, necessarily interferes with employees’ exercise of their statutory rights and violates Section 8(a)(1) of the Act.

Here, as in *D.R. Horton* itself, the arbitration agreement expressly requires employees to arbitrate all disputes that might arise between the employee and the Employer, and, as interpreted by the Employer, prohibits representative, collective,

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<sup>13</sup> 357 NLRB No. 184, slip op. at 5-6. In fact, it may be argued that the agreement at issue here interferes with employees’ Section 7 rights even more than traditional yellow dog contracts, as the restrictions on employees’ collective legal activity against the Employer remain in effect even after their employment has ended, and as the agreement is intended to be fully enforceable in court and thereby to use governmental authority to enforce the prohibition on protected concerted activity.

<sup>14</sup> *Heck’s, Inc.*, 293 NLRB 1111, 1121 (1989) (“[b]y requesting ... employees to promise to be bound by the Respondent’s written policy that it does not want its employees to be represented by a union and that there is no need for a union or other paid intermediary to stand between the employees and the Company, the Respondent ... has interfered with, restrained, and coerced [its] employees in the exercise of their rights under Section 7”); *Western Cartridge Company*, 44 NLRB 1, 6-8, 19 (1942) (invalidating individual contracts that purportedly gave employer right to fire any employee who “participated in a strike or any other concerted activity regarded as interfering with his ‘faithfully’ fulfilling ‘all his obligations,’” because they effectively restricted employees’ right to engage in concerted activity), *enforced*, 344 F.2d 240 (7th Cir.), *cert. denied*, 320 U.S. 746 (1943); *Superior Tanning Company*, 14 NLRB 942, 951 (1939) (individual contracts, which were part of the employer’s plan to discourage unionization, were unlawful; the Board noted that, “[e]ven if no explicit compulsion of [employees’] signatures had taken place, it is clear that the contracts were presented with the full weight and authority of the respondent’s approval behind them”), *enforced*, 117 F.2d 881 (7th Cir. 1940), *cert. denied*, 313 U.S. 559 (1941).

<sup>15</sup> *Heck’s, Inc.*, 293 NLRB at 1120.

and class actions. Therefore, we conclude that the Employer violated Section 8(a)(1) of the Act by maintaining an arbitration agreement prohibiting collective legal activity.

The Employer's arbitration agreement also unlawfully interferes with employees' access to the Board and its processes.

We further conclude that the Employer's maintenance of the arbitration agreement unlawfully interferes with employees' access to the Board and its processes. Mandatory arbitration agreements and policies are unlawfully overbroad where employees would reasonably read them to prohibit the filing of unfair labor practice charges.<sup>16</sup> Thus, in *Dish Network Corp.*, the Board found unlawful an arbitration agreement that applied to any claims arising out of the employee's employment or termination of employment, where specific exceptions were enumerated and those exceptions did not include claims under the NLRA.<sup>17</sup> The Board upheld the Administrative Law Judge's finding that "[i]nsofar as claims under the National Labor Relations Act are not excluded, whereas unemployment and worker compensation benefits are excluded, ... the agreement 'would reasonably be read by employees to prohibit the filing of unfair labor practice charges with the Board.'"<sup>18</sup>

Here also, the arbitration agreement provides that arbitration "shall be the exclusive remedy" for any claims against the Employer, with the specific exception of unemployment and workers compensation claims, but without a specific exception of claims under the NLRA. The Employer argues that the exclusion of "any other claim that is non-arbitrable under applicable state or federal law" and the language stating that "you are giving up no substantive rights" convey that the filing of unfair labor practice charges is not precluded. But neither of these clauses is specific enough to put employees on notice that they will continue to have access to the Board.<sup>19</sup> And, in

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<sup>16</sup> *U-Haul Co. of California*, 347 NLRB 375, 377-78 (2006) (mandatory arbitration policy that covered "all disputes relating to or arising out of an employee's employment," and set forth a long list of examples that concluded with "any other legal or equitable claims and causes of action recognized by local, state or federal law or regulations" violated Section 8(a)(1)), *enforced*, 255 F. App'x 527 (D.C. Cir. 2007); *2 Sisters Food Group*, 357 NLRB No. 168, slip op. at 2 (Dec. 29, 2011) (policy mandating arbitration of "all [employment] disputes and claims" was unlawfully overbroad).

<sup>17</sup> 358 NLRB No. 29, slip op. at 1, 7-8 (Apr. 11, 2012).

<sup>18</sup> *Id.*, slip op. at 7.

<sup>19</sup> *See generally Ingram Book Co.*, 325 NLRB 515, 516, n.2 (1994) ("[r]ank-and-file employees ... cannot be expected to have the expertise to examine company rules from

any event, the agreement taken as a whole is ambiguous and confusing since it also states that it applies to “all ... statutory claims, including ... any claim for ... violation of laws forbidding discrimination, harassment, and retaliation on the basis of ... protected status.” Employees would reasonably construe that language to foreclose the filing of unfair labor practice charges. Finally, for the reasons articulated above, an employer’s maintenance of an agreement requiring employees to prospectively waive their right of access to the Board violates Section 8(a)(1), even if execution of the agreement is voluntary.

Accordingly, the Region should issue complaint, absent settlement, alleging that the Employer has violated Section 8(a)(1) by maintaining an arbitration agreement that interferes with employees’ Section 7 right to engage in collective legal activity and with employees’ access to the Board and its processes.

/s/  
B.J.K.

H:ADV.21-CA-103030.Response.BristolFarms (b) (6), (b) (7)(C)

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a legal standpoint.”); *McDonnell Douglas Corporation*, 240 NLRB 794, 802 (1979) (“employee would not know what conduct is protected by the National Labor Relations Act and, rather than take the trouble to get reliable information on the subject, would elect to refrain from engaging in conduct that is in fact protected by the Act.”).