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Hoot Winc, LLC and Ontario Wings, LLC d/b/a Hooters of Ontario Mills, Joint Employers and Alexis Hanson and Jamie West and Chanelle Panitch.
Cases 31–CA–104872, 31–CA–104874, 31–CA–104877, 31–CA–104892, 31–CA–107256 and 31–CA–107259

May 6, 2020

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS KAPLAN AND EMANUEL

On September 1, 2015, the National Labor Relations Board issued a Decision and Order finding that the Respondents violated Section 8(a)(1) of the National Labor Relations Act (NLRA or Act) by maintaining a mandatory arbitration agreement. *Hooters of Ontario Mills*, 363 NLRB No. 2 (2015). Applying the analysis set forth in *D. R. Horton, Inc.*, 357 NLRB 2277 (2012), enf. denied in relevant part 737 F.3d 344 (5th Cir. 2013), and *Murphy Oil USA, Inc.*, 361 NLRB 774 (2014), enf. denied in relevant part 808 F.3d 1013 (5th Cir. 2015), the Board found the agreement unlawfully required employees, as a condition of their employment, to waive their right to pursue class or collective actions in any forum, whether arbitral or judicial. 363 NLRB No. 2, slip op. at 2. The Board also found that the arbitration agreement violated the Act on the basis that employees reasonably would construe it to prohibit their right to file unfair labor practice charges with the Board. *Id.*, slip op. at 1–2.

The Respondents filed a petition for review with the United States Court of Appeals for the Ninth Circuit. The

¹ In *Boeing*, the Board overruled the “reasonably construe” prong of the *Lutheran Heritage* standard that governed whether maintenance of a policy that does not expressly prohibit Sec. 7 activity nevertheless violates Sec. 8(a)(1) of the Act. *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 647 (2004). Under *Boeing*, the Board first determines whether a challenged rule or policy, reasonably interpreted, would potentially interfere with the exercise of rights under Sec. 7 of the Act. If not, the rule or policy is lawful. If so, the Board determines whether an employer violates Sec. 8(a)(1) of the Act by maintaining the rule or policy by evaluating two things: “(i) the nature and extent of the potential impact on NLRA rights, and (ii) legitimate justifications associated with the rule.” *Boeing*, slip op. at 3 (emphasis omitted). In conducting this evaluation, the Board will strike a proper balance between the asserted business justifications and the invasion of employee rights in light of the Act and its policies, viewing the rule or policy from the employees’ perspective. *Id.* As a result of the *Boeing* analysis, “the Board will delineate three categories” of work rules:

Category 1 will include rules that the Board designates as lawful to maintain, either because (i) the rule, when reasonably interpreted, does not prohibit or interfere with the exercise of NLRA rights; or (ii) the

Board filed a cross-application for enforcement, and the Charging Parties filed a motion to intervene, which the court granted. On May 21, 2018, the Supreme Court held that employer-employee agreements that contain class- and collective-action waivers and require individualized arbitration do not violate Section 8(a)(1) of the Act and should be enforced as written pursuant to the Federal Arbitration Act (FAA). *Epic Systems Corp. v. Lewis*, 584 U.S. ___, 138 S. Ct. 1612, 1632 (2018).

On June 28, 2018, the Ninth Circuit granted the Board’s motion to (1) summarily grant the Respondents’ petition for review and deny enforcement of the portion of the Board’s Decision and Order governed by *Epic Systems*, and (2) remand the remainder of the case for further proceedings before the Board. *Hoot Winc, LLC & Ontario Wings, LLC v. NLRB*, Nos. 15–72839, 15–72931 (9th Cir. June 28, 2018). On November 20, 2018, the Board issued a Notice to Show Cause why this case should not be remanded to the administrative law judge for further proceedings in light of *Boeing Co.*, 365 NLRB No. 154 (2017).¹ The General Counsel and the Respondents filed statements of position, each opposing remand. Because no party favors a remand and the remaining allegation may be decided based on the existing record, we find that a remand is unnecessary.

The Board has considered its previous decision and the record in light of the General Counsel’s and the Respondents’ statements of position. For the reasons set forth below, we find that under *Boeing* and its progeny, the Respondents’ arbitration agreement unlawfully restricts employee access to the Board and its processes. Accordingly, we conclude that the Respondents violated Section 8(a)(1) of the Act by maintaining the arbitration agreement.

potential adverse impact on protected rights is outweighed by justifications associated with the rule. . . .

Category 2 will include rules that warrant individualized scrutiny in each case as to whether the rule would prohibit or interfere with NLRA rights, and if so, whether any adverse impact on NLRA-protected conduct is outweighed by legitimate justifications.

Category 3 will include rules that the Board will designate as *unlawful* to maintain because they would prohibit or limit NLRA-protected conduct, and the adverse impact on NLRA rights is not outweighed by justifications associated with the rule.

Id., slip op. at 3–4 (emphasis in original). The subdivisions of Category 1 were subsequently redesignated 1(a) and 1(b). See *LA Specialty Produce Co.*, 368 NLRB No. 93, slip op. at 2 fn. 2 (2019). Placement of a rule or policy in Category 1(a) does not result from balancing NLRA rights and legitimate justifications. See *id.*, slip op. at 2 (for a Category 1(a) rule, “there is no need for the Board to take the next step in *Boeing* of addressing any general or specific legitimate interests justifying the rule”). The Board in *Boeing* also decided to apply the new standard retroactively to all pending cases. 365 NLRB No. 154, slip op. at 16–17.

Background

At all material times, Respondents Hoot Winc, LLC and Ontario Wings, LLC d/b/a Hooters of Ontario Mills (collectively “Respondents”) have been joint employers of the employees of Ontario Wings, LLC d/b/a Hooters of Ontario Mills. At all material times, the Respondents have maintained an “Agreement to Arbitrate” (“Arbitration Agreement” or “Agreement”), which employees are required to sign as a condition of their employment. The relevant portion of the Agreement reads as follows:

This Agreement requires you to arbitrate any legal dispute related to your application for employment, the application and[]or interview process, your employment, or the termination of your employment with Ontario Wings, L.L.C.

By signing this Agreement, you and the Company² each agree that all Claims between you and the Company shall be exclusively decided by arbitration

The Arbitration Agreement further defines “Claims” as all disputes arising out of or related to your application for employment, the application and recruitment process, the interview process, the formation of the employment relationship, your employment by the Company, or your separation from employment with the Company. The term “Claims” includes, but is not limited to, any claim whether arising under federal, state, or local law, under a statute such as Title VII of the Civil Rights Act of 1964, under a rule, under a regulation or under the common law, including, but not limited [to] ANY CLAIM OF DISCRIMINATION, SEXUAL OR OTHER TYPE OF HARASSMENT, RETALIATION, WRONGFUL DISCHARGE, ANY CLAIM FOR WAGE AND HOUR VIOLATIONS, OR ANY CLAIM FOR WAGES, COSTS, INTEREST, ATTORNEYS’ FEES OR PENALTIES. “Claim” does not include any dispute that cannot be arbitrated as a matter of law.

GC Exh. 11 (emphasis in original).

Discussion

This case is controlled by the Board’s decisions in *Prime Healthcare Paradise Valley, LLC*, 368 NLRB No. 10 (2019) (*Prime Healthcare*), *Everglades College, Inc. d/b/a Keiser University*, 368 NLRB No. 123 (2019)

² The Agreement defines “the Company” as “Ontario Wings, L.L.C. and its affiliates, subsidiaries, and parent companies, including without limitation, HOOT WINC, LLC, California Hooters Opportunity Partners, L.L.C (CHOP) as well as any Hooters restaurant where you have applied for employment or have been hired for employment as well as any of its officers, directors, employees, agents, owners, shareholders,

Everglades), and *Countrywide Financial Corp., Countrywide Home Loans, Inc., and Bank of America Corp.*, 369 NLRB No. 12 (2020) (*Countrywide*).³ Consistent with the clear congressional command in Section 10(a) of the Act that the Board’s power to prevent unfair labor practices “shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise,” we held in *Prime Healthcare* that the FAA does not authorize the maintenance or enforcement of arbitration agreements that interfere with an employee’s right to file charges with the Board. 368 NLRB No. 10, slip op. at 5. We also held that an arbitration agreement that explicitly prohibits the filing of claims with the Board or, more generally, with administrative agencies must be found unlawful because such an agreement constitutes an explicit prohibition on the exercise of employee rights under the Act. *Id.*⁴

Where an arbitration agreement does not contain such an express prohibition but rather is facially neutral, the standard set forth in *Boeing*, above, applies. *Id.* Under that standard, the Board must first determine whether that agreement, “when reasonably interpreted, would potentially interfere with the exercise of NLRA rights.” *Boeing*, above, slip op. at 3. If it does, the Board will proceed to analyze the rule under *Boeing*’s balancing test, weighing the agreement’s potential interference with Section 7 rights against the employer’s legitimate business justifications. *Id.*

In *Prime Healthcare*, we concluded that where provisions in an arbitration agreement or elsewhere make arbitration the exclusive forum for the resolution of employment-related claims, including claims for violations of federal statutes, then such provisions are unlawful and fall within *Boeing* Category 3. 368 NLRB No. 10, slip op. at 6–7. As we explained, such provisions, reasonably interpreted, interfere with the exercise of the right to file charges with the Board; such provisions significantly impair employee rights, the free exercise of which is vital to the implementation of the statutory scheme established by Congress in the NLRA; and the adverse impact of such provisions on employee rights and the administration of the Act cannot be outweighed by any legitimate business justification. *Id.*

Applying *Prime Healthcare* here, we conclude that the Arbitration Agreement interferes with employee rights

ownership or parent, subsidiary, or affiliated entities.” GC Exh. 11 (emphasis in original).

³ The Notice to Show Cause in this case issued before the Board decided these cases.

⁴ As we noted in *Prime Healthcare*, the Supreme Court in *Epic Systems* did not address whether the Act prohibits agreements that restrict employees’ access to the Board or its processes. *Id.*

under the Act and falls within *Boeing* Category 3. Although the Arbitration Agreement does not explicitly prohibit an employee from filing a charge, it does interfere, when reasonably interpreted, with the right to file charges with the Board. The Agreement states that “all Claims between you and the Company shall be exclusively decided by arbitration,” and it defines the term “Claims” as all employment-related disputes, including “any claim whether arising under federal . . . law . . . [or] statute.” Employees would reasonably interpret this language to restrict the filing of charges with the Board. See *id.*, slip op. at 6 (reasonably interpreted, provisions that make arbitration the exclusive forum for the resolution of all employment-related claims restrict the filing of charges with the Board). And, as we explained in *Prime Healthcare*, no legitimate justification outweighs, or could outweigh, the adverse impact of such a provision on employee rights and the administration of the Act. *Id.*, slip op. at 6–7.

Applying our recent decisions in *Everglades* and *Countrywide*, we also conclude that the Agreement’s exclusion clause is too vague to salvage the Arbitration Agreement. The Agreement contains language excluding from the definition of covered claims “any dispute that cannot be arbitrated as a matter of law.” We recently held in *Countrywide* that “a reasonable employee interpreting vague, generalized exclusion-clause language . . . cannot be expected to divine any intent to exclude from the coverage of an arbitration agreement claims arising under the NLRA, given that rank-and-file employees do not generally carry law books and cannot be expected to have the expertise to examine company rules from a legal standpoint.” 369 NLRB No. 12, slip op. at 3 (citing *Everglades*, 368 NLRB No. 123, slip op. at 3–4) (internal quotations omitted). As in *Countrywide*, the language at issue here, which excludes claims that “cannot be arbitrated as a matter of

law,” would leave a reasonable employee in the dark as to *what* exactly can and cannot be arbitrated “as a matter of law.” *Ibid.*; see also *Aryzta, LLC*, 369 NLRB No. 55, slip op. at 3 (2020) (finding that a clause excluding “any dispute if arbitration of the dispute is prohibited by law” was “insufficient to apprise employees that they may file charges with the Board and otherwise access its processes”).⁵

In sum, the language of the Arbitration Agreement, when reasonably interpreted under *Boeing*, makes arbitration the exclusive forum for resolution of claims arising under the Act, and the exclusion clause language is legally insufficient. The Agreement restricts employee access to the Board, and such restriction of Section 7 rights cannot be supported by any legitimate business justification. Therefore, the Agreement belongs in *Boeing* Category 3, and we find that the Respondents violated Section 8(a)(1) of the Act by maintaining it.⁶

ORDER

The Respondents, Hoot Winc, LLC and Ontario Wings, LLC d/b/a Hooters of Ontario Mills, joint employers, Ontario, California, their officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining an Agreement to Arbitrate that employees would reasonably believe bars or restricts their right to file 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 the Agreement to Arbitrate in all its forms, or revise it in all its forms to make clear to employees that the Agreement to Arbitrate does not bar or restrict

⁵ In the “Facts and Procedural Background” section of their exceptions brief, the Respondents quote a provision of the Agreement, entitled “Arbitrators’ Authority,” which states in part that the Agreement “shall not be construed to deprive a party of any substantive right preserved by law.” The Respondents do not rely on that provision in their argument, and therefore we need not address it. In any event, however, Chairman Ring and Member Kaplan would find this language legally insufficient for the same reason the Agreement’s exclusion clause fails: both would impermissibly require employees “to ‘meticulously determine the state of the law’ themselves.” See, e.g., *E. A. Renfroe & Co.*, 368 NLRB No. 147, slip op. at 3 (2019) (quoting *Prime Healthcare*, 368 NLRB No. 10, slip op. at 3).

⁶ In adopting the finding of an 8(a)(1) violation, Member Emanuel notes that the language of the arbitration agreement in the case at hand is different from agreements that he has previously found lawful in *Everglades* and *Countrywide*. In *Everglades*, the mandatory arbitration agreement covered “[a]ny controversy or claim arising out of or relating to Employee’s employment [or] separation from employment . . . except where specifically prohibited by law.” *Supra*, slip op. at 1–2. Similarly, in *Countrywide*, the respondent’s arbitration agreement provided that

“[n]othing in this Agreement shall be construed to require arbitration of any claim if an agreement to arbitrate such claim is prohibited by law.” *Supra*, slip op. at 3. Giving effect to both the NLRA and FAA as a harmonious whole, Member Emanuel found these arbitration agreements lawful, as the mandatory exclusive arbitration of claims arising under the NLRA would be “prohibited by law,” and therefore expressly excluded from coverage under the plain language of these agreements. *Countrywide*, *supra*, slip op. at 3 fn. 6; *Everglades*, *supra*, slip op. at 6–7.

In contrast, here the Respondents’ Arbitration Agreement broadly covers all employment-related claims, but contains an exclusion clause that carves out from coverage “any dispute that *cannot* be arbitrated as a matter of law” (emphasis added). This exclusion clause clearly would not encompass claims arising under the NLRA, as NLRA claims can be, and often are, subject to arbitration through collectively-bargained dispute resolution procedures. Accordingly, as the exclusion clause here would not exempt NLRA claims from coverage, Member Emanuel agrees with his colleagues that the Respondents’ Arbitration Agreement unlawfully interferes with employees’ access to the Board’s processes in violation of Sec. 8(a)(1). See *Aryzta LLC*, 369 NLRB No. 55, slip op. at 3 fn. 5 (2020).

employees' right to file charges with the National Labor Relations Board.

(b) Notify all current and former employees who were required to sign or otherwise became bound to the Agreement to Arbitrate in any form that the Agreement to Arbitrate has been rescinded or revised and, if revised, provide them a copy of the revised agreement.

(c) Post at their Ontario, California facility, and at all other facilities where the unlawful arbitration agreement is or has been in effect, copies of the attached notice marked "Appendix."⁷ Copies of the notice, on forms provided by the Regional Director for Region 31, after being signed by the Respondents' authorized representative, shall be posted by the Respondents and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondents customarily communicate with their employees by such means. Reasonable steps shall be taken by the Respondents to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondents have gone out of business or closed the facility involved in these proceedings, the Respondents shall duplicate and mail, at their own expense, a copy of the notice to all current employees and former employees employed by the Respondents at any time since April 15, 2013.

(d) Within 21 days after service by the Region, file with the Regional Director for Region 31 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondents have taken to comply.

Dated, Washington, D.C. May 6, 2020

John F. Ring, Chairman

Marvin E. Kaplan, Member

⁷ If the facilities involved in these proceedings are open and staffed by a substantial complement of employees, the notices must be posted within 14 days after service by the Region. If one or more of the facilities involved in these proceedings are closed due to the Coronavirus pandemic, the notices must be posted within 14 days after the facility reopens and a substantial complement of employees have returned to work, and the notices may not be posted until a substantial complement of employees have returned to work. Any delay in the physical posting of

William J. Emanuel, Member

(SEAL) 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 an Agreement to Arbitrate that our employees reasonably would believe bars or restricts their right to file 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 the Agreement to Arbitrate in all its forms, or revise it in all its forms to make clear that the Agreement to Arbitrate does not restrict your right to file charges with the National Labor Relations Board.

WE WILL notify all current and former employees who were required to sign or otherwise became bound to the Agreement to Arbitrate in any form that the Agreement to Arbitrate has been rescinded or revised and, if revised, WE WILL provide them a copy of the revised agreement.

HOOT WINC, LLC AND ONTARIO WINGS, LLC D/B/A
HOOTERS OF ONTARIO MILLS, JOINT EMPLOYERS

The Board's decision can be found at www.nlr.gov/case/31-CA-104872 or by using the QR

paper notices also applies to the electronic distribution of the notice if the Respondent customarily communicates with its employees by electronic means. 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."

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.

