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**San Rafael Healthcare and Wellness, LLC and National Union of Healthcare Workers.** Case 20–CA–204948

June 12, 2020

DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS KAPLAN AND EMANUEL

On February 14, 2018, Administrative Law Judge Jeffrey D. Wedekind issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge’s rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

I. BACKGROUND

The Respondent operates a skilled nursing facility. Since at least November 2012, it has required employees to agree to its 3-page Alternative Dispute Resolution Policy (Policy) as a condition of employment. The Policy includes the following provisions (emphasis in original).

In the middle of the first page of the Policy, under the heading “WHO IS COVERED BY THE ADR POLICY,” it provides in relevant part that

[t]he ADR Policy will be mandatory for ALL DISPUTES ARISING BETWEEN EMPLOYEES . . . AND [THE COMPANY]. 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.

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 decide the dispute.

The next section of the Policy, spanning the bottom of the first page to the middle of the second page and headed “COVERED DISPUTES,” instructs in part that

[n]othing 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.

....

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:

- Alleged violations of federal, state and/or local constitutions, statutes or regulations;
- Claims of unlawful harassment, discrimination, retaliation or wrongful termination that cannot be resolved by the parties or during an investigation by an administrative agency . . . .
- Claims of unfair demotion, transfer, reduction in pay, or any other change in the terms and conditions of employment;

....

- Claims of defamation, pre and post-termination[.]

....

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

- Disputes related to workers’ compensation and unemployment insurance;
- 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.

....

Next, a “CLASS ACTION WAIVER” section states that employees

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.

Approximately one page later, in a section headed “SEVERABILITY” at the end of the Policy, it provides that

[i]n the event that any provision of this ADR Policy is determined by a court of competent jurisdiction to be illegal, invalid or unenforceable to any extent, such term or provision shall be enforced to the extent permissible under the law and all remaining terms and provisions of this ADR Policy shall continue in full force and effect.

Nothing in this Alternative Dispute Policy is intended to preclude any employee from filing a charge with . . . 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.

The judge found that the Respondent's maintenance of the Policy violated Section 8(a)(1) of the National Labor Relations Act because employees would reasonably construe the Policy to prohibit or restrict their right to file Board charges. He agreed with the General Counsel that the "WHO IS COVERED BY THE ADR POLICY," "COVERED DISPUTES," and "CLASS ACTION WAIVER" sections state or strongly suggest that all potential employment disputes are subject to mandatory arbitration. He also found that the statement at the end of the Policy that "[n]othing [herein] is intended to preclude any employee from filing a charge with . . . the National Labor Relations Board" does not mitigate the earlier language because it "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."

In the judge's view, this interpretation of the Policy is consistent with *Lincoln Eastern Management Corporation*, 364 NLRB No. 16 (2016), and *SolarCity Corp.*, 363 NLRB No. 83 (2015), cases in which similar arbitration policies were found unlawful under the "reasonably construe" prong of *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004) (*Lutheran Heritage*). He acknowledged that in *Boeing Co.*, 365 NLRB No. 154 (2017) (*Boeing*), the Board overruled that part of *Lutheran Heritage* and announced a new balancing standard, which applies retroactively, for evaluating the lawfulness of a facially neutral policy. *Id.*, slip op. at 2–3.<sup>1</sup> Nonetheless, he found the Policy unlawful under *Boeing*, emphasizing the importance of preserving employees' right to file unfair labor practice charges, and the Board's decision in *Boeing* not to address the continuing viability of most cases decided

under *Lutheran Heritage* at that time. See *id.*, slip op. at 12 fn. 51.

## II. DISCUSSION

Unlike the judge, we find that the Policy, when reasonably interpreted, does not interfere with employees' right to file Board charges and participate in Board proceedings.

In *Prime Healthcare Paradise Valley, LLC*, the Board 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 "[s]uch an agreement constitutes an explicit prohibition on the exercise of employee rights under the Act." 368 NLRB No. 10, slip op. at 5 (2019). Where an arbitration agreement does not contain such an explicit prohibition but rather is facially neutral, the Board determines whether the agreement, "when reasonably interpreted, would potentially interfere with the exercise of NLRA rights." *Id.* (quoting *Boeing*, *supra*, slip op. at 3).<sup>2</sup> This standard is an objective one and looks solely to the wording of the rule, policy, or other provision at issue interpreted from the perspective of an objectively reasonable employee, who does not view every employer policy through the prism of the NLRA. See *LA Specialty Produce*, 368 NLRB No. 93, slip op. at 2.

In *Briad Wenco, LLC d/b/a Wendy's Restaurant*, 368 NLRB No. 72 (2019) (*Briad Wenco*), the Board addressed the lawfulness of an arbitration agreement that required employees to arbitrate federal statutory claims but also included "savings" language that clearly and prominently informed employees that they were free to file charges with the Board. The first paragraph of the arbitration agreement at issue in *Briad Wenco*, when reasonably interpreted, included claims arising under the Act within the scope of its arbitration mandate. *Id.*, slip op. at 1. But the agreement also contained a savings clause providing that "[n]othing in this Agreement shall be construed to prohibit any current or former employee from filing any charge or complaint or participating in any investigation or proceeding conducted by an administrative agency, including . . .

<sup>1</sup> 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 balancing "the nature and extent of the potential impact on NLRA rights" against "legitimate justifications associated with the rule," viewing the rule or policy from the employees' perspective. *Id.* slip op. at 3. As a result of this balancing, the Board places a challenged rule into one of three categories. Category 1(b) consists of rules that are lawful to maintain because, although the rule, reasonably interpreted, potentially interferes with the exercise of Sec. 7 rights, the interference is outweighed by legitimate employer interests. Category 3, in contrast, consists of rules that are unlawful to maintain because their potential to interfere with the exercise of Sec. 7

rights outweighs the legitimate interests they serve. Categories 1(a), 1(b), and 3 designate *types* of rules; once a rule is placed in one of these categories, rules of the same type are categorized accordingly without further case-by-case balancing (for Category 1(b) and 3 rules; balancing is never required for rules in Category 1(a)). Some rules, however, resist designation as either always lawful or always unlawful and instead require case-by-case analysis under *Boeing's* balancing framework. These rules are placed in Category 2. See *id.*, slip op. at 3–4; *LA Specialty Produce Co.*, 368 NLRB No. 93, slip op. at 2–3 (2019).

<sup>2</sup> A challenged rule may not be found unlawful merely because it could hypothetically be interpreted to potentially limit Sec. 7 activity or because the employer failed to eliminate all ambiguities from the rule. See *Boeing*, *supra*, slip op. at 9.

the National Labor Relations Board,” and the Board found the savings clause sufficiently prominent within the agreement. *Id.*, slip op. at 1–2. Because the savings clause explicitly informed employees that they retained the right to file charges with the Board and access its processes, the Board concluded that employees could not reasonably interpret the agreement to prohibit them from filing Board charges or participating in Board proceedings. *Id.*, slip op. at 2.

Here, like the arbitration agreement in *Briad Wenco*, the Policy initially requires arbitration of all disputes between employees and the Respondent, which would include claims arising under the Act. However, at the end of the Policy is a savings clause stating that “[n]othing in this Alternative Dispute Policy is intended to preclude any employee from filing a charge with . . . the National Labor Relations Board.” This savings clause, like the one in *Briad Wenco*, specifically and affirmatively states that employees may file charges with the Board.

We also find the savings clause sufficiently prominent. We disagree with the judge that its placement at the end of the Policy and without special emphasis negates its effectiveness. The Policy is only three pages long, and a reasonable employee would not easily overlook or disregard the savings clause, which is set apart from other provisions in a separate paragraph.<sup>3</sup> Indeed, the clause’s placement at the end of the document enhances rather than detracts from its conspicuousness: it is literally the last word in the Policy. Finally, to the extent the cases the judge relied on—*Lincoln Eastern Management Corporation*, *supra*, and *SolarCity*, *supra*—could be read to require a different result here, we recently overruled those cases in *Anderson Enterprises, Inc. d/b/a Royal Motor Sales*, 369 NLRB No. 70, slip op. at 4–5 (2020).

For these reasons, employees would not reasonably interpret the Policy to potentially interfere with their right of access to the Board and its processes. It is therefore lawful under *Boeing* Category 1(a). See *Boeing*, *supra*, slip op. at 4 (holding that Category 1(a) consists of “rules that are lawful because, when reasonably interpreted, they would have no tendency to interfere with Section 7 rights”)

<sup>3</sup> The judge’s reliance on the supposed incongruity of placing the savings clause in a section headed “Severability” is misplaced. For one thing, the terms may be used interchangeably. See, e.g., *Anders v. Hometown Mortgage Services, Inc.*, 346 F.3d 1024, 1027 (11th Cir. 2003) (noting that arbitration agreement “include[d] a severability or savings clause”); Black’s Law Dictionary (10th ed. 2014) (recognizing similarity of “saving[s] clause” and “severability clause”). Regardless, we see no reason why the “Severability” heading would lead employees to ignore the clause and its clear acknowledgment of their right to file Board charges.

<sup>1</sup> There is no dispute, and the record establishes, that the Board has jurisdiction.

(footnote omitted). Accordingly, we will dismiss the complaint.

#### ORDER

The complaint is dismissed.

Dated, Washington, D.C. June 12, 2020

\_\_\_\_\_  
John F. Ring, Chairman

\_\_\_\_\_  
Marvin E. Kaplan, Member

\_\_\_\_\_  
William J. Emanuel, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

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

*Adam C. Abrahms and 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.<sup>1</sup> 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.<sup>2</sup>

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.

<sup>2</sup> 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.

Traditionally, this proceeding has been 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.

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 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.

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.

#### WHO IS COVERED BY THE ADR POLICY

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.

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 decide the dispute.

*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

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).

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:

- Alleged violations of federal, state and/or local constitutions, statutes or regulations;
- 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;
- 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);
- Claims of unfair demotion, transfer, reduction in pay, or any other change in the terms and conditions of employment;
- 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;
- 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:

- Disputes related to workers’ compensation and unemployment insurance;
- 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.<sup>3</sup>

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,

<sup>3</sup> 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.

<sup>4</sup> The General Counsel does not argue that the policy is also unlawful because of the last paragraph of the "Covered Disputes" section.

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.<sup>4</sup>

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."<sup>5</sup> 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 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).<sup>6</sup>

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

<sup>5</sup> 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."

<sup>6</sup> 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).

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 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 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 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 employees' [NLRA rights] and employers' business justifications" in evaluating workplace rules and policies. He noted, "however," that, in his view,

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.

Slip op. at fn. 14 (quoting *T-Mobile USA, Inc. v. NLRB*, 865 F.3d 265, 271 (5th Cir. 2017)). See also fn. 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").

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 fn. 51 ("Other than the cases addressed specifically in this opinion, we do not pass on the legality of the rules at issue in past 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.<sup>7</sup> 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)<sup>8</sup>—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.<sup>9</sup>

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

#### ORDER<sup>10</sup>

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.

(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.

(c) Within 14 days after service by the Region, post the attached notice marked "Appendix" at its facility in San Rafael, California.<sup>11</sup> 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 conspicuous

<sup>7</sup> 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).

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

<sup>9</sup> 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."

<sup>10</sup> 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.

<sup>11</sup> 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."

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 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.

(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