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Employers Can Prohibit Talking About Arbitration, NLRB Says

By **Jon Steingart**

Law360 (June 22, 2020, 5:25 PM EDT) -- A Southern California hotel didn't violate federal labor law by telling workers they may not discuss arbitration proceedings with one another, the National Labor Relations Board said Friday.

The decision allows California Commerce Club Inc., which does business as Commerce Hotel & Casino near Los Angeles, to maintain its policy that what happens in arbitration, as well as the arbitrator's decision, must remain confidential. But confidentiality provisions that encompass topics outside the scope of arbitration proceedings may violate employees' rights to discuss workplace matters, the board said.

"No provision of the [National Labor Relations] Act mentions confidentiality rules or agreements, much less prohibits them," the board said. Parties are free to craft arbitration rules as they see fit, including confidentiality requirements, the board said.

The board's decision is in line with the Supreme Court's May 2018 ruling in Epic Systems v. Lewis, it said. In Epic, the Supreme Court held that arbitration agreements that **preclude collective arbitration** don't violate the NLRA and must be enforced according to the Federal Arbitration Act. "The FAA therefore requires that the confidentiality provision be enforced according to its terms," the board said Friday.

The NRLB general counsel's office changed its position mid-stream, declaring in August 2018 that California Commerce's policy complied with **new labor board precedent** on evaluating whether a workplace rule violates labor law. The new approach, adopted in the board's 2017 The Boeing Co. decision, called for the legality of companies' policies to be determined on a case-by-case basis, turning away from a bright-line standard that said rules were unlawful if they could be "reasonably construed" to prohibit protected activity. The general counsel said the Supreme Court's ruling underscored its argument because "Epic holds that the procedures to which the parties agree in arbitration should be enforced unless clearly violative of the [National Labor Relations] Act."

The board in June 2016 sided with the general counsel's earlier position, which was the hotel's policy violated the "reasonably construed" standard. California Commerce appealed the board's decision to the D.C. Circuit, which waited until the Supreme Court decided a separate question addressing the validity of arbitration agreements that precluded collective arbitration. After the Supreme Court handed down its Epic ruling, the D.C. Circuit sent the case back to the NLRB with instructions to take another look at its Commerce decision.

The case came to the NLRB when William Sauk, a former California Commerce employee, filed a charge against California Commerce in April 2015, contending that its arbitration rules violated the NLRA. An administrative law judge agreed and recommended in a January 2016 decision that the board find the rules' confidentiality requirements and prohibition on collective arbitration constituted an unfair labor practice.

Representatives for the NLRB and California Commerce declined to comment.

The NLRB is represented in-house by Lindsay Parker.

California Commerce is represented by Jason Kearnaghan of Sheppard Mullin Richter & Hampton LLP.

The case is California Commerce Club Inc., case number 21-CA-149699, before the National Labor Relations Board.

--Editing by Adam LoBelia.

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