OFFICE OF THE GENERAL COUNSEL

MEMORANDUM GC 10-06 June 16, 2010

To: All Regional Directors, Officers-in-Charge and Resident Officers

From: Ronald Meisburg, General Counsel

Subject: Guideline Memorandum Concerning Unfair Labor Practice Charges Involving Employee Waivers in the Context of Employers' Mandatory Arbitration Policies

Issues have arisen regarding the validity of mandatory arbitration agreements that prohibit arbitrators from hearing class action employment claims while at the same time requiring employees to waive their right to file any claims in a court of law, including class action claims. This Guideline Memorandum describes the legal framework to use in considering these and related issues when they arise in the future.[1]

Briefly summarized, Section 7 of the NLRA guarantees employees the right to engage in concerted activities for the purpose of mutual aid and protection. In *Eastex, Inc., v. NLRB*,[2] the Supreme Court recognized that the right of employees to act concertedly under Section 7 includes the right to be free from employer retaliation when employees seek to improve their working conditions by resort to administrative and judicial forums. To hold such activity unprotected "would leave employees open to retaliation for much legitimate activity that could improve their lot as employees."[3] At the same time, however, the Supreme Court in *Gilmer v. Interstate/Johnson Lane Corp. (Gilmer),*[4] determined that an employer can require an employee, as a condition of employment, to channel his or her individual non-NLRA employment claims into a private arbitral forum for resolution. The orderly development of the law under the Act and the sound exercise of prosecutorial discretion by the General Counsel demand that we take account of the long term, well developed body of case law in this area.

Cases coming before the General Counsel have raised the question whether there is a conflict between the Board law protecting employees who concertedly seek to vindicate their employment rights in court and the court law upholding individual waivers of the right to pursue class action relief. Resolving this important question requires

---

[1] This memorandum only covers mandatory arbitration agreements unilaterally imposed by employers in non-union settings. Such agreements between employers and individual employees may be dissolved upon the employees' selection of an exclusive bargaining representative pursuant to Section 9(a) of the NLRA. See *J.I. Case Co. v. NLRB,* 321 U.S. 332 (1944); *14 Penn Plaza v. Pyett*, ___U.S. ___, 129 S.Ct. 1456 (2009).

[2] 437 U.S. 556, 565-66 (1978).

[3] Id.

[4] 500 U.S. 20, 31 (1991).

careful attention to the precise scope of the rights afforded to employers and employees under the relevant statutes. In addition, all the legitimate interests of the affected parties should be weighed in the balance. It should not be overlooked that employers and employees alike may derive significant advantages from arbitrating claims rather than adjudicating them in a court of law. For example, employers have a legitimate interest in controlling litigation costs, and employees too can benefit from the relative simplicity and informality of resolving claims before arbitrators.

Analysis of mandatory arbitration programs should be guided by the following principles:

(1) The concerted filing of a class action lawsuit or arbitral claim seeking to enforce employment statutes is protected by Section 7 of the Act, and if an employer threatens, disciplines or discharges an employee for such concerted activity, the employer violates Section 8(a)(l) of the NLRA.

(2) Any mandatory arbitration agreement established by an employer may not be drafted using language so broad that a reasonable employee could read the agreement and/or related employer documents as conditioning employment on a waiver of Section 7 rights, such as joining with other employees to file a class action lawsuit to improve working conditions.

(3) Nonetheless, an employer's conditioning employment on an employee's agreeing that the employee's individual non-NLRA statutory employment claims will be resolved in an arbitral forum is permissible under the Supreme Court's holding in *Gilmer,* supra. The validity of such individual employee forum waivers is normally determined under non-NLRA law, such as the Federal Arbitration Act and the employment statutes at issue.

(4) So long as the wording of these individual forum waiver agreements makes clear to employees that their Section 7 rights are not waived and that they will not be retaliated against for concertedly challenging the validity of those agreements through class or collective actions seeking to enforce their employment rights, an employer does not violate Section 7 by seeking the enforcement of an individual employee's lawful *Gilmer* agreement to have all his or her individual employment disputes resolved in arbitration. Similarly, an employer may lawfully seek to have a class action complaint dismissed on the ground that each purported class member is bound by his or her signing of a lawful *Gilmer* agreement/waiver.

In sum, if mandatory arbitration agreements are drafted to make clear that the employees' Section 7 rights to challenge those agreements through concerted activity are preserved and that only individual rights are waived, no issue cognizable under the NLRA is presented by an employer's making and enforcing an individual employee's agreement that his or her non-NLRA employment claims will be resolved through the employer's mandatory arbitration system. In such cases, an employer is acting in accord with its rights under *Gilmer* and its progeny.

I. ANALYSIS

1. The concerted filing of a class action lawsuit or arbitral claim is protected activity.

The Board has found protected concerted activity to include the filing of collective and class action lawsuits regarding employment matters. For example, in *Trinity Trucking & Materials Corp.*,[5] the Board held that the filing of a lawsuit by a group of employees alleging that their employer had failed to pay them contract scale was protected activity. In *Le Madri Restaurant*,[6] the Board found that an employer unlawfully discharged two employees for engaging in protected concerted activity, which included filing a lawsuit in federal court on behalf of 17 other employees. The lawsuit alleged violations of federal and state labor laws. In *Novotel New York*,[7] the Board found that an "opt-in" class action lawsuit alleging employer violations of the Fair Labor Standards Act ("FLSA") was protected concerted activity. In *United Parcel Service, Inc.*,[8] the Board found that an employer unlawfully discharged an employee for bringing a class action lawsuit regarding employee rest breaks. Most recently, the Board in *Saigon Gourmet*[9] concluded that the employer violated the Act when it promised to raise delivery workers' wages if they abandoned their plan to file a wage and hour lawsuit and by discharging employees because they engaged in protected concerted activities. The Board acknowledged that the employer "knew that employees were preparing to file a wage and hour lawsuit, [which is] clearly protected concerted activity . . . [.]".[10]

In light of the above precedent, class action lawsuits that can be characterized as having been filed by employees for their mutual aid and protection implicate NLRA rights. Unlike other statutory contexts—where a class action lawsuit could be viewed as merely a procedural mechanism for enforcing a separate underlying right—the NLRA's cornerstone principle is that employees are empowered to band together to advance their work-related interests on a collective basis.

This conclusion, however, should not be read as overstating that all class action lawsuits or grievances involve protected concerted activity. Such claims also must continue to be analyzed under the standard for "concerted activity" set forth by the

---

[5] 221 NLRB 364, 365 (1975), enfd. mem. 567 F.2d 391 (7th Cir. 1977), cert. denied 438 U.S. 914 (1978) (contrary decision by arbitrator deemed repugnant to the purposes of the Act).
[6] 331 NLRB 269, 275-76 (2000).
[7] 321 NLRB 624, 633-636 (1996) (union did not engage in objectionable pre-election conduct by aiding employee lawsuit).
[8] 252 NLRB 1015, 1018, 1022 & fn. 26 (1980), enfd. 677 F.2d 421 (6th Cir. 1982) (employee initiated and filed class action lawsuit, including circulating petition among employees to join suit; "[i]t is well settled that activities of this nature are concerted, protected activities[.]").
[9] 353 NLRB No. 110, see fn. 4, supra.
[10] Id., slip op. at 1.

Board in *Meyers* and its progeny.[11] In addition, class action lawsuits—like any employee lawsuits—are not protected by Section 7 if brought for a forbidden object or if the allegations are knowingly and recklessly false or pursued in bad faith.[12] Moreover, while employees have the right to request class action status from a court or arbitrator, they do not have the right to be granted such status if the claims at issue do not satisfy class action standards such as commonality, numerosity, etc. That said, a mandatory arbitration agreement that prohibits all class action grievances and lawsuits necessarily inhibits some protected activity.

2. A mandatory arbitration agreement that could reasonably be read by an employee as prohibiting him or her from joining with other employees to file a class action lawsuit is unlawful.

Because, as discussed above, employees have a Section 7 right concertedly to seek to enforce their statutory employment rights before courts and other administrative tribunals, an employer's conditioning employment on an employee's waiving his or her right to engage in concerted activity would violate fundamental employee rights.[13] For similar reasons, a mandatory arbitration agreement that could be reasonably read by an employee as prohibiting him or her from joining with other employees to file a class action amounts to an overly broad employer rule and hence is unlawful.[14]

Possible modifications for remedying an overly broad mandatory arbitration agreement would include the insertion of language in the agreement assuring

---

[11] See *Meyers Industries (Meyers I)*, 268 NLRB 493, 497 (1984), reaffirmed*, Meyers Industries (Meyers II)*, 281 NLRB 882, 887 (1986), affd. 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988) (stating that concerted activity cannot be presumed, and only group activity—two or more employees acting together, or an individual seeking to initiate/invoke group activity, or activity by one who raises a group complaint to the employer—is concerted.

[12] *Elevator Constructors (Long Elevator)*, 289 NLRB 1095 (1988), enfd. 902 F.2d 1297 (8th Cir. 1990) (union violated §8(b)(4)(ii)(A) by filing grievance predicated on a contract construction that, if accepted, would render the contract provision violative of §8(e)); *Leviton Mfg. Co*., 203 NLRB 309 (1973) (employees' filing of civil suit against employer is protected activity absent proof that proceeding was commenced maliciously or in bad faith) enf. denied 486 F.2d 686 (1st Cir. 1973) (finding bad faith); *Altex Ready Mixed Concrete Corp*., 223 NLRB 696, 699-700 (1976), enfd. 542 F.2d 295 (5th Cir. 1976) (charge that employee provided a knowingly false affidavit in support of union injunction not proven).

[13] See e.g., *Barrow Utilities and Electric,* 308 NLRB 4, 11, fn. 5 (1992) ("The law has long been clear that all variations of the venerable 'yellow dog contract' are invalid as a matter of law."); *Eddyleon Chocolate Co*., 301 NLRB 887 (1991) ("It is axiomatic that such agreements and their solicitation are barred under the 8(a)(1) prohibition of coercion directed at employee exercise of rights protected by Section 7.").

[14] See *U-Haul Company of California, Inc*.**,** 347 NLRB 375, 377-78 (2006), enfd. 2007 WL 4165670 (D.C. Cir. 2007), (employer interfered with employee rights by maintaining a mandatory arbitration policy that employees would reasonably construe to prohibit the filing of unfair labor practice charges with the Board).

employees: (i) that the employer's arbitration agreement does not constitute a waiver of employees' collective rights under Section 7, including the employees' right concertedly to pursue any covered claim before a state or federal court on a class, collective, or joint action basis; (ii) that the employer recognizes the employees' right concertedly to challenge the validity of the forum waiver agreement upon such grounds as may exist at law or in equity; and (iii) that no employee will be disciplined, discharged, or otherwise retaliated against for exercising their rights under Section 7.

3. Supreme Court and circuit court precedent establishes that employers, nonetheless, may require individual employees to sign a *Gilmer* waiver of their right to file a class or collective claim without *per se* violating the Act.

In *Gilmer* v. *Interstate/Johnson Lane Corp.,* 500 U.S. 20, 31 (1991) *(Gilmer),* the Supreme Court decided that an employer could require an employee, as a condition of employment, to channel his or her individual non-NLRA employment claims to a private arbitral forum for resolution. The courts of appeals have extended *Gilmer* in holding that employment agreements that require the employee to waive the filing of class or collective claims both in court and in the employer's arbitration procedure are not *per se* unenforceable. See, e.g., *Carter v. Countrywide Credit Industries, Inc.,* 362 F.3d 294, 298 (5th Cir. 2004); *Horenstein v. Mortgage Market, Inc.,* 9 Fed.Appx. 618, 619, 2001 WL 502010, 1 (9th Cir. 2001). Rather, the legitimacy of such programs is tested under the standards of the Federal Arbitration Act, which provides that pre-dispute arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Thus, courts have upheld an individual's waiver of the right to seek class action relief both in arbitration and in court so long as the court is satisfied that class action relief is not essential to the vindication of the particular substantive law at issue. Compare *Johnson v. West Suburban Bank*, 225 F.3d 366, 368-378 (3d Cir. 2000) and *Carter v. Countrywide Credit Industries, Inc.*, supra at 298 with *Kristian v. Comcast Corp.*, 446 F.3d 25, 53-61 (1st Cir. 2006). The validity of such individual employee forum waivers is normally determined by reference to the employment law at issue and does not involve consideration of the policies of the National Labor Relations Act.

These cases should not be regarded differently under the NLRA just because an individual employee, in waiving his or her right to a judicial forum, is also in effect waiving his or her individual right to pursue a class action. Although these courts have not analyzed individual class action waivers with the provisions of Section 7 of the NLRA in mind, Section 7 does not require a different outcome. Under the principles enunciated in *Meyers Industries (Meyers I),* 268 NLRB 493, 497 (1984), remanded, 755 F.2d 941, 957 (D.C. Cir. 1985), reaffirmed, *Meyers Industries (Meyers* 11), 281 NLRB 882, 887 (1986), affd. 835 F.2d 1481 (D.C. Cir. 1987), Board law requires a careful distinction between purely individual activity and concerted activity for mutual aid and protection. *Holling Press, Inc.,* 343 NLRB 301, 302 (2004); *United Pacific Insurance,* 270 NLRB 981, 982 (1984), review denied sub nom. *Whitman v. NLRB,* 767 F.2d 935 (9th Cir. 1985) (Table). While an employer may not condition employment on its employees' waiving collective rights protected by the NLRA, individual employees

possessed of an individual right to sue to enforce non-NLRA employment rights can enter into binding individual agreements regarding the resolution of their individual rights in arbitration. So long as purely individual activity is all that is at issue in the individual class action waiver cases that have been upheld under *Gilmer*, the results of those cases are consistent with extant Board law.

No merit was found in arguments that, while a *Gilmer* forum waiver alone may not raise Section 7 issues, an employer's demand that employees agree not to institute a class action to further his or her individual claims does implicate Section 7, because filing a class action is inherently concerted activity on behalf of others. It was concluded that an individual's pursuing class action litigation for purely personal reasons is not protected by Section 7 merely because of the incidental involvement of other employees as a result of normal class action procedures. Similarly, an individual employee's agreement not to utilize class action procedures in pursuit of purely personal individual claims does not involve a waiver of any Section 7 right. To conclude otherwise would be a return to the concept of "constructive concerted activity" that the Board rejected in *Meyers Industries (Meyers I)*, 268 NLRB 493, 495-496 (1984), remanded, 755 F.2d 941, 957 (D.C. Cir. 1985), reaffirmed*, Meyers Industries (Meyers II)*, 281 NLRB 882, n.11 (1986), affd. 835 F.2d 1481 (D.C. Cir. 1987) (overruling the holding in *Alleluia Cushion Co*., 221 NLRB 999, 1000 (1975) that a single employee's seeking to enforce statutory provisions "designed for the benefit of all employees" is concerted activity "in the absence of any evidence that fellow employees disavow such representation"). So expanding the concept of "concerted activity" would also have the effect of overturning cases such as *Carter v. Countrywide Credit Industries, Inc.,* 362 F.3d 294, 298 (5th Cir. 2004), thereby disserving the Congressional objectives that have been recognized in *Gilmer* and its progeny.

For these reasons, it is concluded that no Section 7 right is violated when an employee possessed of an individual right to sue enters such a *Gilmer* agreement as a condition of employment and that no Section 7 right is violated when that individual agreement is enforced.

4. Even if an employee is covered by an arrangement lawful under *Gilmer,* the employee is still protected by Section 7 of the Act if he or she concertedly files an employment-related class action lawsuit in the face of that agreement.

Even if Section 7 cannot insulate individual employees from the consequences of lawful individual agreements respecting arbitration of non-NLRA rights, Section 7 does protect the right of those same employees to band together to test the validity of their individual agreements and to make their case to a court that class or collective action is necessary if their statutory employment rights are to be vindicated. He or she cannot be disciplined or discharged for exercising rights under Section 7 by attempting to pursue a class action claim. Rather, the employer's recourse in such situations is to present to the court the individual *Gilmer* waivers as a defense to the class action claim.

II. INSTRUCTIONS FOR PROCESSING CHARGES INVOLVING EMPLOYER AGREEMENTS THAT DENY EMPLOYEES THEIR SECTION 7 RIGHT TO FILE A CLASS ACTION LAWSUIT

In investigating this type of charge, the Regional Offices should examine the wording of all employer documents distributed to and/or signed by employees relating to the employer's mandatory arbitration programs. The Region should carefully investigate whether the activity engaged in by any employee covered by the agreement meets the *Meyers* test for concerted activity. The Region should further investigate whether the employer took action against employees that might be deemed a threat or discipline, and whether the employer discharged or constructively discharged any employee.

To summarize, in cases raising these issues, the following principles are applicable:

1. The concerted filing of a class action lawsuit or arbitral claim is protected activity and if an employer threatens, disciplines or discharges an employee for such concerted activity, the employer violates Section 8(a)(l) of the NLRA.

2. A mandatory arbitration agreement that could reasonably be read by an employee as prohibiting him or her from joining with other employees to file a class action lawsuit is unlawful.

3. Employers, nonetheless, may require individual employees to sign a *Gilmer* waiver of their right to file a class or collective claim without *per se* violating the Act. So long as the wording of these agreements makes clear to employees that their right to act concertedly to challenge these agreements by pursuing class and collective claims will not be subject to discipline or retaliation by the employer, and that those rights—consistent with Section 7—are preserved, no violation of the Act will be found.

4. Even if an employee is covered by an arrangement lawful under *Gilmer,* the employee is still protected by Section 7 of the Act if he or she concertedly files an employment-related class action lawsuit in the face of that agreement and may not be threatened or disciplined for doing so. The employer, however, may lawfully seek to have a class action complaint dismissed by the court on the ground that each purported class member is bound by his or her signing of a lawful *Gilmer* agreement/waiver.

/s/
R.M.