

NLRB Reinstates Former Legal Standard for Deferral to Arbitration

On December 23, the National Labor Relations Board reversed its 2014 decision in *Babcock & Wilcox Construction Co, Inc.*, and reinstated the legal standard for deferring to the arbitration process that had existed prior to the *Babcock* decision. The *Babcock* decision created an extremely stringent standard for deferral which made it more likely that an employee who had been disciplined or discharged would be able to litigate an unfair labor practice charge even after losing an arbitration proceeding. In *United Parcel Service, Inc.*, the NLRB held that the arbitration process collectively bargained by the parties should be accorded more deference in unfair labor practice cases in which an employee alleges that discipline or discharge violated Sections 8(a)(3) and 8(a)(1) of the National Labor Relations Act.

The *Babcock* Standards for Deferral

In the 2014 *Babcock* decision, the NLRB held that deferral to an arbitration award that has already been issued (post-arbitration deferral) is only appropriate if: (1) the arbitrator was explicitly authorized to decide the unfair labor practice issue; (2) the arbitrator was presented with and considered the statutory issue under the Act or was prevented from doing so by the party opposing deferral; and (3) NLRB law reasonably permits the award.

The NLRB also held in *Babcock* that deferral to pending grievance arbitration procedures (pre-arbitration deferral) would not be appropriate unless the arbitrator was explicitly authorized to decide the unfair labor practice issue.

Pre-arbitration grievance settlements also were not accorded much deference under the *Babcock* decision. In order for the NLRB to defer to a pre-arbitration grievance settlement under the standards articulated in *Babcock*, the party seeking deferral must demonstrate that: (1) the parties intended to settle the unfair labor practice issue; (2) they addressed it in the settlement agreement; and (3) NLRB law reasonably permits the settlement agreement.

In addition, under the *Babcock* standard, the party seeking deferral has the burden to prove that the substantive requirements for deferral have been met.

The *United Parcel Service* Standards for Deferral

In *United Parcel Service*, the NLRB overruled *Babcock* and restored the standards for deferral that had existed for many years prior to the *Babcock* decision. The NLRB held that the *Babcock* decision encouraged duplicative litigation of a single contested discharge or disciplinary decision and failed to accord proper deference to the parties' contractually negotiated process for resolving disputes regarding discharge and discipline.

The NLRB held that it will defer to an arbitration award if: (1) the arbitration proceedings were fair and regular; (2) the parties agreed to be bound by the arbitration award; (3) the contractual issue was factually parallel to the unfair labor practice issue; (4) the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice; and (5) the arbitration award was not clearly repugnant to the purposes and policies of the Act.

The NLRB also held that the only burden of proof placed on the party seeking deferral is to demonstrate the existence of an arbitration award. Once that burden is met, the burden of proof shifts to the party opposing deferral to demonstrate defects in the arbitration process or award that should result in the NLRB permitting litigation of the unfair labor practice charge.

In addition, although the particular facts at issue in *United Parcel Service* involved post-arbitration deferral and resulted in the dismissal of an unfair labor practice charge after the charging party had already lost an arbitration proceeding, the NLRB also restored the legal standards for pre-arbitration deferral and deferral to grievance settlement agreements that had existed prior to the *Babcock* decision. Accordingly, the NLRB will give more deference to the parties' collectively bargained arbitration procedure even before an arbitration award has been issued.

If you have any questions about this Information Memo, please contact [Subhash Viswanathan](#), any of the [attorneys](#) in our [Labor and Employment Law Practice](#), or the attorney in the firm with whom you are regularly in contact.



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