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Navigating the Complexities of Preserving Confidentiality of Employment-Related Claims

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This article discusses a recent decision by an administrative law judge—holding that a confidentiality clause included in an arbitration agreement violated the National Labor Relations Act—revisits the issue of confidentiality in internal investigations and settlement agreements, and makes recommendations to assist employers in navigating these issues.

Issues involving confidentiality and nondisclosure of employment-related claims, proceedings, and settlements have taken center stage over the past several years. Topping that list have been rapid developments regarding confidentiality of sexual harassment claims, as many state and municipal legislatures have acted quickly in response to the #MeToo movement. This also has been a fertile area for federal regulatory activity, where such agencies as the Equal Employment Opportunity Commission (EEOC) and the Securities and Exchange Commission (SEC) have issued decisions, opinions, and guidance on this subject. Now, in the wake of a recent decision by an administrative law judge (ALJ), the National Labor Relations Board (NLRB or Board) will address this critical topic in a case that should be closely monitored by employers.

On March 21, 2019, an ALJ held that a confidentiality clause included in an arbitration agreement that Pfizer, Inc. (Pfizer) presented to its

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employees as a condition of continued employment violated Section 8(a)(1) of the National Labor Relations Act (NLRA) (the *Pfizer* Decision).[1] The *Pfizer* Decision, if upheld by the Board, may impact a significant number of employers and their ability to enforce confidentiality provisions vis-a-vis employment-related claims in arbitration, as more than half of non-union private sector employers impose mandatory arbitration agreements.[2] This article discusses the *Pfizer* Decision, revisits the issue of confidentiality in internal investigations and settlement agreements, and makes recommendations to assist employers in navigating these issues.

THE *PFIZER* DECISION

The confidentiality clause in Pfizer required parties to maintain the arbitration proceeding and award as confidential, including "all disclosures in discovery, submissions to the arbitrator, the hearing, and the contents of the arbitrator's award." Pfizer argued that the U.S. Supreme Court's 2018 decision in *Epic Systems Corp. v. Lewis*[3] supported the enforceability of its confidentiality provision. In *Epic Systems*, the Court upheld mandatory class-action waivers in individual arbitration agreements under the NLRA. According to Pfizer, *Epic Systems* was not limited to class-action waivers. Rather, the Supreme Court found that because the rules governing the arbitration of employment-related disputes typically do not implicate Section 7 rights, the NLRA does not supersede the Federal Arbitration Act to invalidate procedures set forth in arbitration agreements. The ALJ, however, distinguished *Epic Systems*, in part, because the Supreme Court "considered, and rejected, a claim that Section 7 of the NLRA entitled employees to use class action *procedures*." By contrast, in *Pfizer*, the employees sought to enforce "the [substantive] right to engage in *activity*"— specifically, the right to discuss the terms and conditions of their employment, including any employment-related arbitrations.

The ALJ then analyzed the confidentiality clause under the Board's recent standard for evaluating whether work rules or policies violate Section 8(a)(1). Under *Boeing*, the Board now evaluates both "(i) the nature and extent of the potential impact on NLRA rights, *and* (ii) legitimate justifications associated with the requirement(s)."[4] The ALJ concluded that the confidentiality clause interfered with substantive rights under Section 7 of the NLRA, namely the employees' right to discuss the terms or conditions of their employment. Notably, the limiting provision of the confidentiality clause did not save the restriction. The clause caveated that: "Nothing in this Confidentiality provision shall prohibit employees from engaging in protected discussions or activity relating to the workplace, such as discussions of wages, hours, or other terms and conditions of employment." The ALJ found that, notwithstanding this language, employees would still reasonably conclude that they could not discuss any aspect of the arbitration or its outcome. Under the second prong of *Boeing*, Pfizer cited (i) the "legitimate interest in fostering trust

and confidence in the arbitration process as an alternative dispute resolution procedure," and (ii) its position that confidentiality is a "fundamental attribute" of arbitration. The ALJ rejected both justifications.

Ultimately, the ALJ found that Pfizer's confidentiality clause violated Section 8(a)(1) of the NLRA. He stated, however, that an arbitrator still may order that certain testimony or evidence remain confidential "where essential to protect proprietary or trade secrets or personal privacy."[5]

Pfizer and the Counsel for the General Counsel of the Board's Region 10 Birmingham Resident Office (Counsel) each filed exceptions to the ALJ's decision. The Counsel took a position not often advocated by Board counsel, namely that Pfizer's confidentiality provision did not impact employees' Section 7 rights because employees were permitted to discuss (i) the fact of the arbitration, (ii) their claims against Pfizer, (iii) the legal issues, and (iv) information related to the terms and conditions of their employment that they learned outside of the arbitration.[6] Pfizer also argued a more fundamental point, that although what happens in an arbitration and the ultimate award may "pertain to" terms and conditions of employment, that does not render the arbitration proceeding itself, or the award, a term or condition of employment under the NLRA.[7]

Typically, a three-member panel of the NLRB will review exceptions to an ALJ's decision. The current composition of the Board that may review the *Pfizer* Decision (issued by an ALJ appointed during the Clinton administration) includes three members appointed by President Trump and one member appointed by President Obama, whose five-year term ends in December 2019. Although there are likely to be additional chapters to this saga, employers should review their policies and practices with regard to confidentiality in the wake of *Pfizer*.[8]

CONFIDENTIALITY IN INTERNAL INVESTIGATIONS

In the wake of *Pfizer*, employers should at least evaluate to what extent and under what circumstances they can require employees to keep confidential the underlying facts, discussions, negotiations, and any resolution of a dispute with an employee. Even if the final bell of *Pfizer* has not yet been rung, employers should seek guidance from prior Board precedent, as well as the EEOC's guidance *in favor* of confidentiality, in assessing their legitimate business justifications for imposing confidentiality in connection with internal investigations.

In *Pfizer*, the ALJ cited a 2011 NLRB decision, *Hyundai American Shipping Agency*,[9] where the company maintained a rule prohibiting employees from discussing matters under investigation, and which the Board concluded was overbroad.[10] In reviewing the Board's findings in *Hyundai*, the U.S. Court of Appeals for the D.C. Circuit cited 1999 guidelines from the EEOC which "suggest that information about sexual harassment allegations, as well as records related to investigations of those allegations, *should be kept confidential*."[11] While the D.C. Circuit agreed that Hyundai's

confidentiality rule was overbroad, it nevertheless recognized that employers' obligation to comply with EEOC guidelines "may often constitute a legitimate business justification for requiring confidentiality in the context of a particular investigation or particular types of investigations."[12] The court also expressly declined to endorse the "ALJ's novel view that in order to demonstrate a legitimate and substantial justification for confidentiality, an employer must 'determine whether in any give [sic] investigation witnesses need protection, evidence is in danger of being destroyed, testimony is in danger of being fabricated, and there is a need to prevent a cover up.'"[13] The Board, however, continues to maintain in certain cases that such evidence is required to support a claim of confidentiality.[14]

Although the EEOC has held for more than 20 years that an employer may not interfere with an employee's right to file a charge or participate in an EEOC investigation, hearing, or proceeding,[15] it has likewise maintained, as the D.C. Circuit in *Hyundai* explained, that employers should protect the confidentiality of allegations of harassment and subsequent investigations to the extent possible.[16] The EEOC reiterated this position in a June 2016 report of the EEOC Co-Chairs on the Study of Harassment in the Workplace, recommending, in the context of harassment prevention policies and procedures, that employers keep investigations "as confidential as possible."[17] Recognizing the potential for conflict with the NLRB on this issue, the EEOC also recommended that the two agencies "confer, consult, and attempt to jointly clarify and harmonize the interplay of the National Labor Relations Act and federal EEO statutes with regard to the permissible confidentiality of workplace investigations."[18] In January 2017, the EEOC announced that it was seeking public comment on its proposed enforcement guidance on harassment,[19] which contained similar proposals with regard to the confidentiality of internal investigations.[20] As of August 2018, the EEOC and the NLRB had "at least preliminary talks about threading a needle between their competing positions."[21]

Pending further guidance on the apparent conflict between the NLRB and the EEOC on the subject, employers, when determining whether to issue a confidentiality instruction, should consider the factors delineated by the Board as potential legitimate business interests—such as the risk that testimony is in danger of being fabricated—and any supporting evidence for those interests in a particular investigation.[22] In investigations that involve allegations of sexual harassment, employers may be able to draw additional support from the EEOC's guidance that such investigations should be kept confidential to the extent possible; though as discussed below, employers should continue to bear in mind state and municipal legislation that continues to migrate towards greater transparency of sexual harassment claims.

CONFIDENTIALITY IN SETTLEMENT AGREEMENTS

When an arbitration, internal investigation, or other employment-related claim ultimately leads to a settlement, the NLRB has advised that

"an employer may condition a settlement on an employee's waiver of Section 7 rights if the waiver is narrowly tailored to the facts giving rise to the settlement and the employee receives some benefit in return for the waiver."[23] However, if the Board extends the analysis in *Pfizer* to settlement agreements, the scope of permissible confidentiality restrictions will likely depend on the employer's justification for such a provision.

Employers must always be mindful of employees' NLRA rights from the outset of settlement negotiations and the first settlement offer, because the Board has held that an NLRA violation can arise from the mere *offering* of a settlement agreement with an overly broad confidentiality clause. In a case where Baylor University offered a separation agreement that a former employee[24] never signed, but still challenged, the Board noted that "violations flow from offering invalid severance agreements, irrespective of whether they are signed."[25] This is consistent with the *Pfizer* Decision, in which the ALJ stated that an NLRA violation occurs "at the moment an employer informs the employee that he must waive the Section 7 right to remain employed." The violation does not depend on whether an employer ever seeks to enforce the arbitration agreement, or even whether the agreement is enforceable.

Following recent action by state and municipal legislatures in response to the #MeToo movement, employee rights under the NLRA is just one more consideration for employers to address when seeking to include a confidentiality clause in a settlement agreement. For example, in 2018, New York and California enacted legislation restricting employers' ability to require confidentiality when employees settle sexual harassment claims. In New York, in order to include a nondisclosure obligation concerning the underlying facts in "any settlement, agreement or other resolution of any claim, the factual foundation for which involves sexual harassment," the employer must, among other requirements, establish that confidentiality is the complainant's preference.[26] Similarly, California prohibits provisions in settlement agreements preventing the disclosure of "factual information related to a claim" of "workplace harassment or discrimination based on sex," failure to prevent such conduct, or retaliation against an individual for reporting such conduct.[27] California's legislation, however, expressly excludes from its prohibition an employer's ability to enter into settlement agreements that prevent the disclosure of the settlement amount.[28] Employers should seek guidance from counsel in navigating these and other complex issues that arise in seeking to resolve any claim related to sexual harassment or discrimination based on sex.

CONCLUSION

All employers—as the NLRA applies to both unionized and non-unionized workforces—should keep the issues discussed in this article top of mind when proposing, revising, or instituting an arbitration or mediation

agreement, a confidentiality instruction in an internal investigation, or a confidentiality provision in a settlement agreement. Just as courts and legislatures require employers to narrowly tailor postemployment restrictive covenants to legitimate interests they seek to protect, employers should similarly tailor any confidentiality obligations or instructions they seek to impose on employees. Employers should also monitor the Board's decision in *Pfizer* (including any extensions of the *Pfizer* ALJ's analysis to circumstances beyond mandatory arbitration agreements) and, if needed, seek counsel on any implications for an organization's agreements and practices.

NOTES

1. Pfizer, Inc., 2019 WL 1314927 (Mar. 21, 2019).

2. Economic Policy Institute, A. Colvin, The Growing Use of Mandatory Arbitration 5 (April 6, 2018), *available at https://www.epi.org/files/pdf/144131.pdf.*

3. Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612 (2018).

4. The Boeing Co., 365 NLRB No. 154, 2017 WL 6403495, at *8, *15 (Dec. 14, 2017).

5. The ALJ also left open the possibility for employers to argue for more confidentiality in mediation than in mandatory arbitration, explaining that "arbitration differs materially from mediation both in goals and methods." However, the confidentiality of documents exchanged in, statements made at, or any other conduct in a mediation is not guaranteed, and employers should continue to take steps to reduce the risk of such communications or conduct being used in a subsequent legal proceeding.

6. Counsel for the General Counsel's Br. in Supp. of Exceptions 13-14, *available at https://www.nlrb.gov/case/10-CA-175850* (last visited June 7, 2019).

7. Pfizer Inc.'s Br. in Supp. of Its Exceptions to the Supplemental Decision of the Administrative Law Judge 13-14, *available at https://www.nlrb.gov/case/10-CA-175850* (last visited June 7, 2019).

8. The Board is also expected to decide a similar issue in a case involving Dish Network, L.L.C. In July 2018, the U.S. Court of Appeal for the Fifth Circuit remanded the NLRB's decision that the confidentiality agreement contained in the company's arbitration agreement violated Section 8(a)(1) of the NLRA by unlawfully limiting employees' ability to discuss the terms and conditions of their employment so that the Board could apply the new *Boeing* analysis to this question. Dish Network, L.L.C. v. Nat'l Labor Relations Bd., 731 F. App'x 368, 369 (5th Cir. 2018). The docket for this action is *available at https://www.nlrb.gov/case/27-CA-158916* (last visited June 7, 2019).

9. 357 NLRB 860, 2011 WL 4830117 (Aug. 26, 2011), rev'd in part on other grounds, 805 F.3d 309 (D.C. Cir. 2015).

10. 2011 WL 4830117, at *1.

11. *Hyundai*, 805 F.3d 309 at 314 (emphasis added).

12. *Id.*

13. *Id.*

14. *See* Costco Wholesale Corp., 366 NLRB No. 9, 2018 WL 721397 (Feb. 2, 2018) ("Here, Respondent did not offer any evidence to support a claim of confidentiality, or as the Board requires in such instances, evidence that witnesses needed protection, evidence might be destroyed, testimony was in 'danger of being fabricated' and 'there was a need to prevent a cover up.'").

15. *See* EEOC Notice, No. 915.002 (April 10, 1997), *available at https://www.eeoc.gov/policy/docs/waiver.html.*

16. U.S. Equal Employment Opportunity Commission, Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors, No. 915.002 (June 18, 1999), *available at https://www.eeoc.gov/policy/docs/harassment.html.*

17. U.S. Equal Employment Opportunity Commission, Select Task Force on the Study of Harassment in the Workplace 5, Report of Co-Chairs Chai R. Feldblum & Victoria A. Lipnic: Executive Summary & Recommendations (June 2016), *available at http://src.bna.com/AZz.*

18. *Id.*

19. Press Release, U.S. Equal Employment Opportunity Commission, EEOC Seeks Public Input on Proposed Enforcement Guidance on Harassment (Jan. 10, 2017), *available at https://www.eeoc.gov/eeoc/newsroom/release/1-10-17a.cfm.*

20. U.S. Equal Employment Opportunity Commission, Proposed Enforcement Guidance on Unlawful Harassment 48, 70-71 (Jan. 10, 2017), *available at https://www.regulations.gov/document?D=EEOC-2016-0009-0001* (last visited June 7, 2019) (stating that "[t]o be effective, a complaint process should … provide[] adequate confidentiality protections," and that a comprehensive harassment policy includes a statement that "the identity of individuals who report harassment, alleged victims, witnesses, and alleged harassers will be kept confidential to the extent possible, consistent with a thorough and impartial investigation and with relevant legal requirements").

21. Chris Opfer, Agencies Clash Over Sex Harassment Investigations, BLOOMBERG BNA, Aug. 8, 2018, *available at https://news.bloomberglaw.com/daily-labor-report/agenciesclash-over-sex-harassment-investigations.*

22. *See* Banner Health Sys. v. Nat'l Labor Relations Bd., 851 F.3d 35, 43 (D.C. Cir. 2017) (noting the Board's focus on its precedent requiring that an employer determine, "on a 'case-by-case' basis, that confidentiality is necessary 'based on objectively reasonable grounds for believing that the integrity of the investigation will be compromised without confidentiality'").

23. S. Freedman & Sons, Inc., 364 NLRB No. 82, 2016 WL 4492371, at *2 (Aug. 25, 2016).

24. The NLRB has held that "fired employees remain statutory employees covered by the Act." Baylor Univ. Med. Ctr., 2018 WL 835368, at n.8 (Feb. 12, 2018).

25. Baylor Univ. Med. Ctr., 2018 WL 835368, at n.8 (Feb. 12, 2018).

26. N.Y. GEN. OBLIG. LAW § 5-336; N.Y. C.P.L.R. 5003-b.

27. CAL. CIV. PROC. CODE § 1001(a).

28. CAL. CIV. PROC. CODE § 1001(e).