Employer Update

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Liquidated Damages Clauses in Restrictive Covenant Agreements

*By Jeffrey S. Klein, Nicholas J. Pappas, and Daniel Richards**

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Employers frequently face challenges in quantifying (and proving) the damages associated with enforcing violations of restrictive covenants by former employees. One strategy some employers have tried is the use of liquidated damages clauses. The advantage of using a liquidated damages clause is that employers have certitude in the damages amount they would be paid in the event of breach by the employee. Employers thus avoid the challenges of proving damages where damages may be in dispute or are inherently difficult to ascertain or quantify. Employers should, however, be aware of the consequences associated with using liquidated damages clauses. For example, by including liquidated damages provisions, employers should consider whether they undermine their right to seek actual damages, such as lost profits due to loss of client revenue. Similarly, employers should consider whether the availability of a liquidated damages remedy adversely affects their right to obtain injunctive relief that would be needed to prevent irreparable harm to the employer. In this article, we analyze how employers who opt to include liquidated damages clauses in restrictive covenant agreements might draft such provisions most effectively.

Background

Liquidated damages are "an estimate, made by the parties at the time they enter into their agreement, of the extent of the injury that would be sustained as a result of breach of the agreement." *Truck Rent-A-Center, Inc. v. Puritan Farms 2nd, Inc.*, 41 N.Y.2d 420, 424 (1977). Liquidated damages clauses serve as courts' recognition that "the award of a court or jury is no more likely to be exact compensation than is the advance estimate of the parties." *Beacon Plastic & Metal Prods., Inc. v. Corn Prods. Co.*, 293 N.Y.S.2d 429, 433 (1st Dept. 1968).

New York courts enforce liquidated damages clauses only where damages are not readily ascertainable at the time when the parties entered into the agreement and the fixed sum is reasonably proportionate to the probable loss. *JMD Holding Corp. v. Cong. Fin. Corp.*, 4 N.Y.3d 373, 380 (2005). Courts will interfere only if the fixed damages are plainly or grossly disproportionate to the probable loss. *Id.* at 381. A liquidated damages clause "designed to induce performance, rather than . . . to provide 'just compensation' for losses" constitutes an unenforceable penalty and will not be enforced. *Ryan v. Orris*, 95 A.D.2d 879, 881 (3d Dept. 1983). In addition,

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"[w]here the court has sustained a liquidated damages clause the measure of damages for a breach will be the sum in the clause, no more, no less." *JMD Holding*, 4 N.Y.3d at 380 (quoting *Brecher v. Laikin*, 430 F. Supp. 103, 106 (S.D.N.Y. 1977)).

Mutual Exclusivity

Employers choosing to include a liquidated damages clause preclude themselves from obtaining actual damages in the event of a breach. *See United States Fid. & Guar. Co. v. Braspetro Oil Servs. Co.*, 369 F.3d 34, 71 (2d Cir. 2004). In *Franklin First Fin., Ltd. v. Contour Mortg. Corp.*, 62 Misc. 3d 1220(A) (Suffolk Cty. Feb. 19, 2019), the court held that employers cannot recover both liquidated and actual damages because recovery of one precludes the other. Plaintiff Franklin First Ltd. ("Franklin First") employed defendant Arthur W. Most II ("Most") as its Chief Financial Officer. Most's employment agreement prohibited him from disclosing confidential information and soliciting fellow employees. Most left to work for a competitor and Franklin First sued alleging, *inter alia*, that he misappropriated and used its confidential information.

The court held that Most breached his agreement as he refused to return more than 100,000 computer files in violation of a provision requiring him to return all documentation containing confidential information within five days of his termination. The agreement provided that such a breach would result in liquidated damages of $100 daily. The court held that Most failed to prove the liquidated damages clause was unenforceable either by demonstrating that damages were readily ascertainable at the time of contracting or by demonstrating that the penalty was disproportionate to Franklin First's losses. The court also held that Franklin First failed to meet its burden to enforce the liquidated damages provision, because the agreement provided that Most was responsible for "actual damages incurred by Franklin First due to the loss, dissemination and/or non-return of its Confidential Information." *Id*. at *5. The court refused to enforce the liquidated damages provision because the contract already provided "for the full recovery of actual damages," because liquidated damages and actual damages must be mutually exclusive remedies under New York law. *Id.*

Actual Damages

Courts do not require evidence of actual damages or specific revenue loss for the enforcement of a liquidated damages clause. In *Mathew v. Slocum-Dickson Med. Grp., PLLC,* 160 A.D.3d 1500 (4th Dept. 2018), the court encountered a liquidated damages provision in the context of non-compete provisions in cardiologists' employment agreements with a large medical practice. The plaintiff-doctors sought a declaration that the liquidated damages clause was unenforceable, and the medical group counterclaimed alleging breach and seeking liquidated damages. The court granted the defendant's motion for summary judgment that the liquidated damages clause was enforceable and the plaintiffs appealed.

The Fourth Department began by noting that in-house referral is an important part of the defendant's business model, that the plaintiffs had no patients before their employment with the defendant, and that they were treating approximately 12,000 of the defendant's patients before leaving its employ. The court held that the liquidated damages clause was a reasonable measure of anticipated probable harm because damages flowing from a breach of the non-compete were not readily ascertainable when the parties entered into the agreement. Though there was no specific evidence of harm sustained by the defendant, the plaintiffs failed to account for "potential damages caused by the loss of intra-organizational referrals, the loss of goodwill caused by the departure of critical members of its professional staff, the investment made by defendant in the development of plaintiffs' practices and the cost associated with the recruitment of replacement physicians and the development of those new practices." *Id.* at 1503.

The court did not require the defendant to submit evidence of specific revenue loss to its cardiology department resulting from plaintiffs' breach of the employment agreements as proving actual damages was unnecessary so long as the liquidated damages provision was valid and enforceable. Additionally, the

court held that the attorney fee clause in the agreement was not duplicative of the liquidated damages clause. Ultimately, the defendant received liquidated damages and reasonable attorney's fees and costs.

Practice Suggestions

Liquidated damages are particularly valuable in situations where actual damages are difficult or impossible to prove and estimate. In those cases, employers should consider fixing damages with a liquidated damages provision as a way to enforce restrictive covenants. Employers also should consider the following measures to increase the likelihood that courts will allow them to recover when employees breach their post-employment restrictions.

Certainty

Liquidated damages clauses may decrease the uncertainty of proving damages. They are useful in restrictive covenant cases in circumstances where the computation of actual damages for the competition of a departing employee is often difficult. Such clauses provide a degree of assurance to the employer that, in the event of a breach, the employer would have a remedy even if the employee has not poached a client or solicited coworkers. Furthermore, the burdensome cost of litigation can be reduced as employers are still able to provide for the recovery of reasonable attorney's fees and costs in addition to a liquidated damages provision. *See Mathew*, 160 A.D.3d 1504; *Markham Gardens, L.P. v 511 9th, LLC*, 143 A.D.3d 949, 951-52 (2d Dept. 2016).

Injunctive Relief

Consider liquidated damages as a complementary remedy to injunctive relief, as the two types of remedies are not mutually exclusive. *Crown IT Servs. v. Koval-Olsen*, 11 A.D.3d 263, 266 (1st Dept. 2004). However, the presence of a liquidated damages clause could weaken an employer's claim of irreparable harm in the context of injunctive relief, because the employee could argue that money damages serve as an adequate remedy for the employee's harm. *See Long Is. Conservatory, Ltd. v. Jaisook Jin*, 14 Misc. 3d 1219(A) (Nassau Cty. Jan. 19, 2007) (denying motion for preliminary injunction as employer had included a liquidated damages provision in non-compete). However, the presence of a liquidated damages clause is not dispositive of the issue of entitlement to injunctive relief, and employers can mitigate this argument by providing in the parties' agreement that liquidated damages will have no impact on the employer's ability to seek injunctive relief. *See UMS Solutions, Inc. v Biosound Esaote, Inc.*, 2010 NY Slip Op 34038(U) (Westchester Cty. July 15, 2010). Nonetheless, should the court ultimately grant injunctive relief, that may weaken the chances that it also enforces a liquidated damages clause. *See Gismondi, Paglia, Sherling, M.D., P.C. v. Franco*, 104 F. Supp. 2d 223, 236 (S.D.N.Y 2000) *overruled on other grounds*, *Gismondi, Paglia, Sherling, M.D., P.C. v. Franco,* 206 F. Supp. 2d 597, 601 (S.D.N.Y 2002) (awarding liquidated damages in addition to injunctive relief would be so disproportionate to plaintiff's loss as to render such damages an "unenforceable penalty.").

Confidentiality and Non-Disparagement Agreements

Employers should also be aware that liquidated damages can be an effective enforcement mechanism in the context of confidentiality or non-disparagement agreements. Notably, a former Trump Campaign staffer was recently ordered to pay nearly $50,000 to the Campaign after violating her non-disclosure agreement. Zoe Tillman, *A Former Trump Staffer Filed a Class Action to Invalidate All of the Campaign's Nondisclosure Agreements*, *available at* https://www.buzzfeednews.com/article/zoetillman/trump-campaign-nondisclosure-agreements-class-action-lawsuit (last visited May 28, 2019). However, she has filed a class action that seeks to invalidate all nondisclosure and non-disparagement agreements staffers signed with the Trump Campaign. The lawsuit contends that the non-disclosure and confidentiality clauses are unlawful because they illegally penalize employees for exercising their right to sue to redress important wrongs, such as workplace discrimination and harassment, unpaid wages, and violations of workplace safety laws. Additionally, the New York State legislature is currently considering a bill to

curtail the use of such clauses in harassment settlements. *See* 2019 NY Senate Bill S5469 *available at* https://www.nysenate.gov/legislation/bills/2019/s5469 (last visited May 28, 2019).

Additional Remedies

As in *Franklin First*, a court will refuse to enforce a liquidated damages provision if the contract already provides for the full recovery of actual damages. However, employers can provide for additional remedies under New York State law beyond actual damages. For instance, by noting that the contract preserves "all other remedies available" to the employer, an employer would have the right to seek other remedies such as specific performance or actual damages for breaches of other parts of the employment agreement. *GFI Brokers, LLC v. Santana*, 2008 WL 3166972, *11-12 (S.D.N.Y 2008).

Navigating the Complexities of Preserving Confidentiality of Employment-Related Claims

By Gary D. Friedman, Celine Chan, and Larsa K. Ramsini

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.[1] 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 employees as a condition of continued employment violated Section 8(a)(1) of the National Labor Relations Act ("NLRA") (the "*Pfizer* Decision").[2] 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.[3] In this article, we discuss the *Pfizer* Decision, revisit the issue of confidentiality in internal investigations and settlement agreements, and make 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*[4] 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)."[5] 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."[6]

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.[7] 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.[8]

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*.[9]

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*,[10] where the company maintained a rule prohibiting employees from discussing matters under investigation, and which the Board concluded was overbroad.[11] In reviewing the Board's findings in *Hyundai*, 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*."[12] 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."[13] 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.'"[14] The Board, however, continues to maintain in certain cases that such evidence is required to support a claim of confidentiality.[15]

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,[16] 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.[17] 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."[18] 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."[19] In January 2017, the EEOC announced that it was seeking public comment on its proposed enforcement guidance on harassment,[20] which contained similar proposals with regard to the confidentiality of internal investigations.[21] As of August 2018, the EEOC and the NLRB had "at least preliminary talks about threading a needle between their competing positions."[22]

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.[23] 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."[24] 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[25] never signed, but still challenged, the Board noted that "violations flow from offering invalid severance agreements, irrespective of whether they are signed."[26] 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.[27] 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.[28] 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*.[29] 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 post-employment 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.

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[1] We have addressed several of these topics in our newsletters over the past year. Gary D. Friedman, Samantha Caesar & Isabelle Sun, *Legislating #MeToo: Turning a Hashtag into Law*, Weil Employer Update, July 2018, *available at* https://www.weil.com/~/media/mailings/2018/q3/july_2018_employer_update.pdf; Summary of *Joint Senate and Assembly Public Hearing: Sexual Harassment in the Workplace* (N.Y. 2019) (testimony of Gary D. Friedman, Weil, Gotshal & Manges LLP), *available at* https://www.weil.com/articles/ny-state-legislative-hearing-on-sexual-harassment-in-the-workplace; Weil, Gotshal & Mange's Employment Litigation Practice Group, *2019 Trends Assessment: What to Expect in Employment Law*, Jan. 2019, *available at* https://www.weil.com/~/media/files/pdfs/2019/employer-update-jan-2019_013019.pdf.

[2] *Pfizer, Inc.*, 2019 WL 1314927 (Mar. 21, 2019).

[3] 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.

[4] *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612 (2018).

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

[6] 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, as we have previously advised, 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. Gary D. Friedman & Celine Chan, *Proceed with Caution: Traps for the Unwary in Mediation or Other Settlement Discussions*, Weil Employer Update, July 2017, https://www.weil.com/~/media/files/pdfs/2017/proceed-with-caution.pdf.

[7] 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).

[8] 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).

[9] The Board is also expected to decide a similar issue in a case involving Dish Network, L.L.C. In July 2018, 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).

[10] 357 NLRB 860, 2011 WL 4830117 (Aug. 26, 2011), *rev'd in part on other grounds*, 805 F.3d 309 (D.C. Cir. 2015).

[11] 2011 WL 4830117, at *1.

[12] *Hyundai*, 805 F.3d 309 at 314 (emphasis added).

[13] *Id.*

[14] *Id.*

[15] *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.'").

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

[17] 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.

[18] 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.

[19] *Id.*

[20] 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.

[21] 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").

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

[23] *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'").

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

[25] 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).

[26] *Baylor Univ. Med. Ctr.*, 2018 WL 835368, at n.8 (Feb. 12, 2018).

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

[28] CAL. CIV. PROC. CODE § 1001(a).

[29] CAL. CIV. PROC. CODE § 1001(e).

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