Legal Update Article

# Employee Arbitration Agreements Can Include Some Confidentiality Provisions, NLRB Holds

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Labor Relations

The National Labor Relations Board (NLRB) has held an employer lawfully included confidentiality language in an arbitration agreement its employees were required to sign as a condition of employment. *California Commerce Club, Inc.*, 369 NLRB No. 106 (June 19, 2020).

The ruling also makes clear there are limits to such confidentiality restrictions and employers may not discharge or discipline an employee for violating such a provision if the violation involves discussing terms and conditions of employment protected under Section 7 of the National Labor Relations Act (NLRA).

### Confidentiality Provision Background

The employer and its employees individually entered into an Arbitration Agreement and Mandatory Dispute Resolution Process (Agreement). Among others, the Agreement included the following confidentiality provision:

> The arbitration shall be conducted on a confidential basis and there shall be no disclosure of evidence or award/decision beyond the arbitration proceeding.

An employee filed an unfair labor practice charge alleging, among other things, that the confidentiality provision violated the NLRA.

After an investigation, the NLRB's General Counsel (GC) issued an unfair labor practice complaint alleging the confidentiality provision violated the NLRA. In particular, the GC alleged the confidentiality provision violated the NLRA because "employees would reasonably conclude that [it] interfere[s] with employees' ability to discuss topics protected by Section 7 of the Act ...."

### Procedural Background

In 2016, an NLRB Administrative Law Judge (ALJ) decided the confidentiality provision was unlawful, comparing it to confidentiality rules prohibiting the discussion of wages and working conditions, which the NLRB routinely determines to be unlawful. The ALJ applied *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), which set forth the standard for reviewing the legality of employer rules, including confidentiality rules.

The employer appealed and the NLRB adopted the ALJ's decision. In relevant part, the NLRB determined the confidentiality provision was unlawful because a "workplace rule that prohibits the discussion of terms and conditions of employment ... is unlawfully overbroad." The employer filed a petition for review (appeal) of the NLRB's decision in the U.S. Court of Appeals for the D.C. Circuit.

While the appeal was pending, the NLRB issued *Boeing Co.*, 365 NLRB No. 154 (2017), in which it adopted a new employer-friendly standard for determining whether a facially neutral work rule (like the confidentiality provision) violated the NLRA. The NLRB decided

the new standard would apply retroactively, and therefore, it was applicable to this case. As a result, the Court of Appeals remanded the allegations concerning the confidentiality provision to the NLRB for further proceedings.

### Confidentiality Language Is Lawful

In the usual case, because the ALJ's decision was a victory for the GC, he would have argued to the NLRB in favor of finding the confidentiality provision unlawful. However, a new GC sided with the employer, arguing that the confidentiality provision was lawful under *Boeing.* They also argued that the purpose of the FAA is to enforce arbitration agreements according to their terms and that, under *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018), the concept of protected concerted activity should not be applied broadly to invalidate arbitration agreements.

On remand, the NLRB held the confidentiality provision was lawful.

### *Boeing*

Regarding *Boeing*, which requires the NLRB to "balance the impact of the challenged rule on Section 7 rights against any legitimate employer interests served by the rule," it assumed, "without deciding," that the employer's interests in maintaining the confidentiality provision did not outweigh the impact of the provision on employees' exercise of Section 7 rights. It did so "because the disposition of this case turns on the FAA, not on a balancing of Sec. 7 rights and employer interests."

### FAA and Supreme Court Precedent

While citing several U.S. Supreme Court precedents, the NLRB noted that the FAA "requires that the confidentiality provision be enforced according to its terms absent a contrary congressional command" and that, in *Epic Systems*, the Supreme Court decided the guarantee in Section 7 of the right to engage in protected concerted activity "does not qualify as a contrary congressional command." The NLRB also held the FAA "gives parties the discretion to design their own dispute-resolution procedures, tailored to the type of dispute, including that arbitral proceedings be kept confidential if the parties so choose."

Finally, based on the guidance in *Epic Systems*, the NLRB observed that the confidentiality provision at issue did not restrict "things employees just do for themselves in the course of exercising their right to free association in the workplace," which are protected under the NLRA. "[D]isclosing an arbitral award, or disseminating evidence or information obtained solely through participating as a party in an arbitral proceeding," the NLRB explained, "are not things that employees 'just do.'" "On one side of the line, the FAA prevails; on the other, the NLRA." Here, the arbitration agreement "falls on the side of the line governed by the FAA" and must be enforced "as written." For all these reasons, the NLRB decided the provision was lawful.

### Limitations

The NLRB noted that its decision should not be interpreted as meaning the inclusion of any confidentiality provision in an arbitration agreement automatically makes it lawful. The specific provision at issue was lawful because it related to the arbitration proceeding itself. In contrast, the NLRB explained, "[p]rovisions that impose confidentiality requirements beyond the scope of the arbitration proceeding and 'the rules under which the arbitration will be conducted' receive no protection from the FAA," and therefore,

would be unlawful under the NLRA, even if contained in an arbitration agreement. For example, "any provision that purports to impose confidentiality requirements on unfair labor practice proceedings before the Board would violate the Act."

The NLRB further cautioned that, although it is lawful to maintain this provision in the Agreement, an employer "would *not* be entitled to discharge or discipline an employee for a Section 7-protected disclosure of information even if the disclosure violated that provision." (Emphasis added.) An employer would be required, instead, to seek to enforce the confidentiality provision from an arbitrator or a court.

Please contact a Jackson Lewis attorney with any questions about this development or the NLRB.

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