In many private arbitration agreements entered into in the non-union context, employers and employees agree that the proceedings shall remain confidential. On June 19, 2020, the Board addressed whether a confidentiality provision that arguably restricted an employee participating in the arbitration process from disclosing terms and conditions of employment violates the NLRA.

The Board held, in *California Commerce Club, Inc.*, 369 N.L.R.B. No. 106 (2020), that a narrowly-tailored confidentiality provision in an arbitration agreement prohibiting employees from disclosing evidence obtained during the arbitration or the award/decision itself did not violate the NLRA. Significantly, the Board also held that such agreements should not be evaluated under the *Boeing* standard, which applies to employer policies and work rules, but instead must be considered under the Federal Arbitration Act (“FAA”) and should be enforced pursuant to the strong body of federal precedent enforcing arbitration agreements.

**Factual Background and the ALJ Decision Below**
Since early 2015 the employer entered into individual arbitration agreements (the “Arbitration Agreement”) with each of its non-union employees. In particular, the Arbitration Agreement provided that arbitration would be the exclusive dispute resolution process for employment-related claims and that all such “arbitration[s] shall be conducted on a confidential basis and there shall be no disclosure of evidence or award/decision beyond the arbitration proceeding.”

The General Counsel alleged, and the Administrative Law Judge agreed, that this confidentiality provision in the Arbitration Agreement was unlawful because it could be applied to restrict employees in the exercise of their Section 7 right to discuss their terms and conditions of employment. The ALJ likened the confidentiality provision to other workplace confidentiality rules that the Board has found unlawful in other cases.

The Board adopted the ALJ decision and the employer filed a petition for review with the D.C. Circuit. While the petition was pending, however, the Board issued its Boeing Co. decision, which retroactively applied a new standard for all pending work-rule interpretation cases. Based on this intervening precedent, the D.C. Circuit remanded the case back to the Board to consider the legality of the confidentiality provision in light of Boeing.

The Board Reverses its Decision and Declines to Consider Boeing

On remand, the Board reversed its prior decision, holding that the employer did not violate the NLRA by maintaining the confidentiality provision in the Arbitration Agreement. The Board balanced the scope of the disputed confidentiality provision, the parties’ interests implicated by the provision, and the policies of the NLRA. Taking all into account, the Board found that the confidentiality provision was valid because, when reasonably read, it did not prohibit employees from discussing their claims against the employer, the legal issues central to the arbitration, or the events, facts, and circumstances that gave rise to the claim, as long as the employee possessed that information independently from the arbitration proceedings.

However, the Board also acknowledged that the confidentiality provision would restrict employees’ ability to discuss terms and conditions of employment to some extent—for instance, the provision would prohibit an employee from telling coworkers that he or she prevailed in arbitration. While the Board would typically need to balance the impact of a confidentiality work rule on Section 7 rights against the employer’s legitimate interests in preserving the rule under Boeing, the Board here determined that the Arbitration Agreement was not an employer-promulgated work rule subject to the Boeing analysis. Rather, it was part of a larger arbitration agreement whose enforceability is governed by the FAA.

Consistent with Supreme Court precedent interpreting and applying the FAA, the Board held that it was required to enforce the confidentiality provision in the Arbitration Agreement in light of the strong federal policy favoring arbitration, unless there was some congressional mandate to the contrary. In interpreting the Supreme Court’s decision in Epic Systems Corp. v. Lewis, 138 S. Ct. 1612 (2018), the
Board held that there is no such congressional mandate in the NLRA that precludes enforcement of the Arbitration Agreement’s confidentiality provision:

“the confidentiality provision at issue here is part and parcel of the rules under which the parties have agreed to conduct arbitration. It would be contrary to Epic Systems and to decades of Supreme Court precedent interpreting the FAA to find a contrary congressional command on these facts. To the contrary, 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.”

**Takeaways**

*First*, the Board chose not to apply the Boeing balancing test when considering the legality of the Arbitration Agreement, distinguishing arbitration agreements from employer-promulgated work rules. Even though the case was remanded back to the Board in light of Boeing, the Board chose to ignore the Boeing test. The Board’s method of analysis significantly affected its ultimate finding because the Board relied heavily on FAA principles and the strong federal policy in favor of enforcing arbitration agreements, as best exemplified in the Supreme Court’s recent Epic Systems decision. This aspect of the holding is important for any future Board cases involving the legality of arbitration agreements.

*Second*, the Board’s decision to find the confidentiality provision here lawful was due in large measure to the fact that the clause was narrowly tailored to evidence uncovered during arbitration discovery and the contents of the arbitration award. Broader clauses that seek to proscribe employees from discussing additional terms and conditions of employment—e.g., the underlying facts of the case—may very well be deemed unlawful, even if part of an arbitration agreement. As such, while narrower confidentiality provisions may escape scrutiny by the Board, expanding the breadth of confidential matters to go beyond what is uncovered during arbitration may prove problematic and unlawful under the Act.

*Finally*, this decision is consistent with the Board’s decisions, including those involving rules governing the confidentiality of workplace investigations, in that it attempts to harmonize the NLRA with the myriad other federal laws governing employment.

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