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ACT NOW ADVISORY

The NLRB Is Looking at Confidentiality, Non-Disclosure, and Non-Disparagement Provisions in Your Agreements

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Another decision has been issued by a National Labor Relations Board ("NLRB" or "Board") administrative law judge ("ALJ") striking down a non-union employer's confidentiality and proprietary information and non-disparagement provisions. While there is nothing new about the Board extending its reach into the world of non-unionized workplaces, this case demonstrates that the Board's Acting General Counsel ("AGC") continues to expand his view, with the Board's continuing agreement, as to what types of traditionally lawful and routine policies, practices, and agreements "reasonable employees" would believe interfere with their exercise of their right to engage in concerted action with respect to the terms and conditions of their employment. This decision, *Quicken Loans, Inc.*, Case No. 28-CA-75857 (Jan. 8, 2013), represents yet another expansion of the Board's view as to the types of provisions that the NLRB is likely to find overbroad and unlawful when it comes to confidentiality, the protection of proprietary information, and the protection of a company's business and reputation through the use and enforcement of non-disparagement provisions.

In recent years, the Board and its General Counsel have made it clear that, despite whether a workplace is unionized or non-unionized, the NLRB is prepared to review employers' policies and procedures to ensure that they do not contain any provisions that could impinge or hinder employees' exercise of their rights under Section 7 of the National Labor Relations Act ("Act"). These cases are being brought before the Board by the AGC, who investigates unfair labor practices and decides which ones, in his opinion, have merit and should be brought to trial before an ALJ and, ultimately, to the Board and the federal courts for enforcement. What is new is that the Board is not simply looking at provisions in handbooks or other policies; it is also reviewing employment agreements of highly compensated individuals.

The *Quicken Loans* Decision

In the *Quicken Loans* decision, ALJ Joel Biblowitz found that Quicken Loans, Inc. ("Quicken"), violated the Act by maintaining "overly broad and discriminatory rules" in its Mortgage Banker Employment Agreement ("Agreement"). According to testimony adduced at an unfair labor practice hearing by the Board's General Counsel, all employees employed as mortgage brokers in the relevant location were required to sign the Agreement as a condition of employment.

The Unfair Labor Practice Charge Was Filed in Response to a Raiding Lawsuit

The decision arose out of an unfair labor practice charge filed by Lydia Garza. Ms. Garza, a non-union employee who had been employed by Quicken as a mortgage banker until she resigned, filed the unfair labor practice charge only after Quicken took action to enforce certain contractual restrictive covenants against her.

After Ms. Garza left Quicken, the company notified her of continuing obligations pursuant to the Agreement, including those based on the confidentiality, non-competition, and employee and client no-contact/no-solicitation provisions. Subsequently, Quicken filed a lawsuit against Ms. Garza and five other former employees. The lawsuit alleged that they had violated the Agreement's no-contact/no-solicitation and non-compete provisions.

After investigating the unfair labor practice charge filed by Ms. Garza, the AGC issued a complaint and the case proceeded to a hearing before ALJ Biblowitz.

The ALJ's Findings

In his decision, ALJ Biblowitz considered the lawfulness of two provisions contained in the Agreement entitled (i) "Proprietary/Confidential Information," and (ii) "Non-Disparagement." The Agreement's Proprietary/Confidential Information provision required an employee to "hold and maintain all Proprietary/Confidential Information in the strictest of confidence" and further provided that an employee "shall not disclose, reveal or expose any Proprietary/Confidential Information to any person, business or entity." The Agreement contained a definition of "Proprietary/Confidential Information," which included any "non-public information relating to or regarding the Company's . . . personnel," including "personal information of co-workers . . . such as home phone numbers, cell phone numbers, addresses, and email addresses." The Agreement's Non-Disparagement clause prohibited employees from publicly criticizing, ridiculing, disparaging, or defaming Quicken or its products, services, policies, directors, officers, shareholders, or employees, with or through any written or oral communication or image.

While acknowledging that there is a thin line between lawful and unlawful restrictions, the ALJ found that the two provisions in the Agreement violated the Act because they "would reasonably tend to chill employees in the exercise of their Section 7 rights." In reaching this conclusion, the ALJ reasoned that an employee, in complying with the restrictions of the Proprietary/Confidential Information section, would believe that he or she was prohibited from discussing his or her own wages and benefits, or the names, wages, benefits, addresses, or telephone numbers of his or her co-workers, with fellow employees or union representatives. For this reason, the ALJ concluded that the terms of the Agreement would substantially restrain employees from engaging in concerted activities permitted under the Act. The ALJ further reasoned that the Non-Disparagement provision could reasonably be read by an employee to restrict his or her right to engage in protected activities because "employees are allowed to criticize their employer and its products as part of their Section 7 rights, and employees sometimes do so in appealing to the public, or to their fellow employees, in order to gain their support."

History of Non-Enforcement Was Inconsequential

The evidence produced to the ALJ was that no Quicken employee had been disciplined for violating the provisions at issue. This fact was of no consequence to the ALJ who reasoned that, based on Board cases, maintaining rules that are likely to have a chilling effect on Section 7 rights may be an unfair labor practice even in the absence of any enforcement action. It also did not matter that the enforcement of the rules in the case at hand was with respect to former, as opposed to current, employees.

The Remedy

The ALJ ordered that Quicken cease and desist from maintaining the "overly broad rules" and notify all mortgage bankers that the Proprietary/Confidential Information and Non-Disparagement provisions would be rescinded and not enforced. As of this date, Quicken's time to file "exceptions" to the ALJ's decision to request a review of the decision and the proposed remedy has not yet run.

The NLRB's Focus on Broad Enforcement of All Employees' Section 7 Rights

The *Quicken Loans* decision must be seen in the context of several other recent Board decisions and actions, such as the Board's adoption of its NLRB Notice Posting Rule, which is currently the subject of federal litigation in the District of Columbia and District of South Carolina; the Board's controversial social media cases; and the Board's stance against class and collective action waivers. NLRB Chairman Mark Gaston Pearce has stated that the Board's initiatives are intended to "bring the Board out of the attic and into the kitchen" and are aimed at reaching all employees, including those working in non-unionized workplaces.

What Employers Should Do Now

Employers must take notice of the NLRB's focus on broad enforcement of employees' rights under the Act, particularly in non-unionized workplaces. We previously advised employers to review their policies and potential actions to apply such policies, in accordance with NLRB decisions and guidance. See NLRB Acting General Counsel Issues Follow-Up Report on Social Media Cases and NLRB's Scrutiny of Employment-at-Will Disclaimers Signals a Trend to Employers. In light of this recent ALJ decision and in addition to reviewing their written policies, whether stand-alone or contained in employment handbooks, employers are encouraged to:

- **Review agreements**. Review offer letters, employment agreements, confidentiality provisions, and restrictive covenants to ensure that they do not include:
    - any express or implied prohibitions on employees discussing their terms and conditions of employment, including prohibitions on discussing wages and benefits, or the names, wages, benefits, or contact information of their co-workers, which the Board believes would infringe on employees' rights to act collectively; or

- broad or vague prohibitions against employee conduct, including the use of social media or other public channels of communication, that could be reasonably interpreted to prohibit discussion of terms and conditions of employment.

- **Consider including disclaimers and examples**. Employers may want to add appropriate disclaimers to employment agreements. Any disclaimer should be in plain English and clearly explain any exceptions to the specific prohibitions of confidentiality, non-disparagement, and social media provisions. However, in the area of social media policies, the AGC has firmly stated that disclaimers will not in and of themselves cure policies and practices that he and the Board would otherwise find chilling and coercive. Rather, in the AGC's view, such language should be tempered with specific examples, limiting language, and explanations of the interests that an employer is legitimately trying to protect. By such examples, the AGC has indicated that an employer can educate employees in a way that makes clear that it will not interfere with their right to engage in concerted protected activity.

- **Think before suing**. The charge against Quicken was filed *after* the company filed a lawsuit against former employees for violating the no-contact/no-solicitation and non-compete provisions in their employment agreements. Prior to bringing a claim to enforce restrictive covenants or confidentiality provisions, employers should review their own provisions to assess whether their agreements will hold up if scrutinized by the NLRB.

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