UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 10

PFIZER, INC.

and **Cases 10-CA-175850**
07-CA-176035

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and

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

SECONDARY MATERIALS

I. INTRODUCTION AND STATEMENT OF THE CASE

This brief is submitted in support of Counsel for the General Counsel's Exceptions to the Administrative Law Judge's Supplemental Decision in the instant case. See JD-30-19 (March 21, 2019) (hereinafter "ALJD").

The case involves the confidentiality clause of a class waiver and arbitration agreement e-mailed by Respondent, Pfizer, Inc. ("Pfizer"), to its employees on May 5, 2016. The clause at issue states:

> e. Confidentiality: The parties shall maintain the confidential nature of the arbitration proceeding and the award, including all disclosures in discovery, submissions to the arbitrator, the hearing, and the contents of the arbitrator's award, except as may be necessary in connection with a court application for a temporary or preliminary injunction in aid of arbitration or for the maintenance of the status quo pending arbitration or for the maintenance of the status quo pending arbitration, a judicial action to review the award on the grounds set forth in the FAA, or unless otherwise required or protected by law or allowed by prior written consent of both parties. This provision shall not prevent either party from communicating with witnesses or seeking evidence to assist in arbitrating the proceeding. [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.] In all proceedings to confirm or vacate an award, the parties will cooperate in preserving the confidentiality of the arbitration proceeding and the award to the greatest extent allowed by applicable law.

Respondent's e-mail instructed employees that they must review and acknowledge the class waiver and arbitration agreement and that employees would be "bound by the agreement as part of their continued employment at Pfizer." Employees are not allowed to opt out of the agreement.

In his supplemental decision, the judge erred by finding that Respondent violated Section 8(a)(1) of the National Labor Relations Act ("NLRA" or "the Act") by maintaining the foregoing confidentiality clause. ALJD 14:1-2, 11-12.

In particular, the judge erred by failing to consider properly the effect of the United States Supreme Court decision in *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018) and by mistakenly characterizing the procedural issue of the confidentiality of information in arbitration proceedings, including arbitration awards, as unlawfully interfering with a substantive Section 7 right. ALJD 9:20. In light of the clear import of the Court's decision in *Epic,* the Board should find that Pfizer's confidentiality provision is lawful.

In *Epic*, the United States Supreme Court enforced an employment arbitration agreement requiring individualized, rather than collective, arbitration of employment disputes. In so doing, the *Epic* majority applied the provisions of the Federal Arbitration Act (FAA) to find that covered employment arbitration agreements should generally be enforced as written and that a provision precluding collective arbitration did not violate any substantive employee right or interest under the Act.

For the reasons that follow, the Supreme Court's decision in *Epic* and the Board's decision in *The Boeing Co.*, 365 NLRB No. 154, slip op. at 4 (Dec. 14, 2017),[1] compel the conclusion that Pfizer's arbitration confidentiality provision is lawful. Accordingly, the Board should find that the judge erred in his Supplemental Decision to the contrary, and the Board should dismiss the Complaint.[2]

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[1] Although the Court in *Epic* addressed voluntary agreements between an employer and employee, and *Boeing* (and previously *Lutheran Heritage*) expressly applies to employer-implemented handbook rules and not voluntary agreements, the analysis in *Boeing* regarding how employees would interpret ambiguous language and how to balance the impact on Section 7 rights with legitimate employer business interests is an appropriate framework for determining whether an arbitration provision interferes with Section 7 rights.

[2] While we agree with Pfizer that the Complaint here should be dismissed because the confidentiality provision at issue is lawful, we agree with the judge that the Board has the authority to determine the issue by applying *Epic* and *Boeing*. See ALJD, slip op. at 4, n.3.

II. ISSUES PRESENTED

A. Whether the judge erred in his decision when he did not defer to the parties' bilateral agreement, despite deferral to the agreement being required by the Supreme Court's decision in *Epic?*

B. Whether the judge erred when he misinterpreted the scope of Section 7 rights as they relate to arbitration procedures?

C. Whether the judge erred when he expanded Respondent's confidentiality provision beyond its actual meaning?

D. Whether the judge erred when he found Respondent's confidentiality provision to be in violation of the Act and recommended remedies and a notice posting?

III. ARGUMENT

A. The Judge Erred by Not Deferring to the Parties' Bilateral Agreement, As Required by the Supreme Court's Decision in *Epic* (GC Exceptions 2, 11, 12).

A proper analysis of *Epic* and its application here is essential because the provision at issue here, unlike those in *Boeing*, is part of an arbitration *agreement*. In *Epic*, the Court addressed the question: "Should employees and employers be allowed to agree that any disputes between them will be resolved through one-on-one arbitration? Or should employees always be permitted to bring their claims in class or collective actions, no matter what they agreed with their employers?" *Epic*, 138 S. Ct. at 1619. Although the Court did not address the type of arbitration provision specifically presented in the instant case, *Epic* included broad analysis of arbitration provisions that may affect NLRA-protected rights. In particular, the Court stated that Section 7 protects unionization and collective bargaining and "other concerted activities" that "employees 'just do'

for themselves in the course of exercising their right to free association in the workplace," rather than the procedural formalisms of the courtroom or of arbitration. Id. at 1625.

The Court further highlighted that federal statutes in seeming tension must be read to give effect to both laws and that courts are not at "liberty to pick and choose among congressional enactments." Id. at 1624 (citation omitted). Thus, the National Labor Relations Act and the FAA should be read in harmony and without hostility to arbitration and the arbitration agreements entered into by the parties. If the statutes cannot be harmonized, one statute can displace the other only if there is "'a clearly expressed congressional intention'" to do so. Given no congressional indication that the NLRA supplants the FAA, the Court directed that FAA covered arbitration agreements are to be enforced as they are written, unless clearly unlawful. As to interpretation of the NLRA's Section 7 provisions, "... a statute's meaning does not always 'turn solely' on the broadest imaginable 'definitions of its component words,'" Id. at 1631 (citation omitted). The NLRA should therefore not be read in its broadest possible interpretation if that would conflict with and essentially negate the parties' agreements under the FAA, and the parties' agreed-to language is entitled to greater deference than unilaterally-issued policies. In sum, if the agreement's provisions, when reasonably interpreted, do not interfere with Section 7 rights, or interfere only marginally with Section 7 rights, the provisions should be deemed lawful and all inquiry should end there.

The judge in the instant case erred by not giving sufficient weight to the fact that the parties here *agreed* to this confidentiality provision in their arbitration agreement, even though the employees may have done so as a condition of employment. It is clear that the judge's analysis is based upon a perspective that is in significant tension with what the Court explicitly expressed in *Epic* and its other decisions applying the FAA. In particular, by characterizing bilateral arbitration

agreements as "not fully, truly voluntary," ALJD 6:40-41, and questioning the Supreme Court for being "indifferent to the values which Congress infused into the NLRA" when it enforced the FAA in *Epic*, ALJD, slip op. at 33, the judge demonstrated precisely the kind of hostility to arbitration that the FAA was intended to curtail. While it could have been argued that this kind of agreement was unlawful prior to *Epic* (and Counsel for the General Counsel so argued at that time), the Supreme Court has since explicitly decided this issue, and has undeniably authorized such agreements. Therefore, under the clear mandate of the Court in *Epic*, the judge erred when he mistakenly characterized the provision at issue as an "employment policy and work rule." ALJD 19:23-35; 35:40-43.[3] Rather, as a matter of law, it is a provision in a lawful bilateral *agreement* between an employer and an employee, and therefore it should be enforced as written unless it clearly interferes with or prohibits NLRA-protected activities.

B. The Judge Erred by Misinterpreting *Epic* Regarding the Scope of Section 7 Rights as They Relate to Arbitration Procedures (GC Exceptions 1, 3 through 9, 11, 14 through 20).

In order to determine whether a confidentiality provision in an arbitration agreement interferes with NLRA-protected activities and does so to an extent that outweighs legitimate business interests, the Board should apply the *Boeing* test. Under that test, these rules should be

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[3] In deciding that this agreement was a "work rule," the judge relied in part on the fact that the arbitration agreement was not effective until 60 days after it was received by the employee; he concluded that, for the period of time before the agreement's effective date, it must be considered an "employment policy and work rule" rather than an "agreement." Id. at 20. The judge cites nothing in support of this conclusion. Contrary to the judge's erroneous supposition, it is clear from the express language of the provision and the only reasonable interpretation of it that, during the initial 60-day period, the agreement was simply not yet in effect and, as a result, it had no impact on employees at that time whatsoever -- not as an agreement, and certainly not as an "employment policy and work rule."

characterized as Category 2 rules, because it is unclear whether or to what extent they may interfere with the Section 7 right of employees to discuss their terms and conditions of employment. It is well established that employees have a Section 7 right to discuss and share information regarding their terms and conditions of employment. See, e.g., *Boeing*, 365 NLRB No. 154, slip op. at 16. For that reason, even in the arbitration context, confidentiality clauses that reach beyond the arbitral proceedings into the traditional sphere of Section 7 activities should be unlawful under *Epic* and *Boeing*. On the other hand, the Board should find that confidentiality provisions in arbitration agreements that are strictly limited to matters inherent to the arbitration process generally do not significantly impact Section 7 rights because they do not prevent employees from discussing terms and conditions of employment, the fact of the arbitration, and/or their claims. Rather, such provisions only address the confidentiality of matters that arise in the arbitration proceedings themselves -- proceedings created and governed by the arbitration agreement -- matters that would not exist but for the agreement itself.

Drawing a distinction between the matters at issue in an arbitration and the arbitration proceedings themselves accommodates both the important principles of the FAA and the rights protected by the NLRA. Although the American Arbitration Association ("AAA") rules governing arbitration generally require only that the arbitrator maintain the confidentiality of proceedings,[4]

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[4] *See, e.g.,* Christopher R. Drahozal, *Confidentiality In Consumer and Employment Arbitration*, 7 Y.B. ON ARBITRATION AND MEDIATION 28, 30-31 (2016); Ronald Ravikoff, *Your Arbitration is Private, but is it Confidential*, Daily Business Review, May 26, 2015 ("[w]hile the obligation of the arbitrator [and administrator] to maintain confidentiality is usually clear, generally no such obligation is imposed on the parties"); *AAA Statement of Ethical Principles* ("the AAA takes no position on whether parties should or should not agree to keep the proceeding and award confidential between themselves. The parties always have a right to disclose details of the proceeding, unless they have a separate confidentiality agreement. Where public agencies are involved in disputes, these public agencies routinely make the award public").

confidentiality has long been recognized as an issue in arbitration proceedings, and specifically is part of the arbitration procedure determined by the parties. Thus, parties often agree that they will not disclose information pertaining to the proceedings, including the evidence/argument presented in hearing, information obtained in discovery, settlement offers and agreements, and arbitral awards.

As noted above, *Epic* holds that the procedures to which the parties agree in arbitration should be enforced unless clearly violative of the Act. Confidentiality provisions that confine themselves to information concerning matters disclosed in the arbitration hearing and relating to the arbitration do not significantly implicate Section 7 rights, and therefore, in conformity with *Epic,* such agreements should be enforced as written. This includes agreements requiring confidentiality of documents and information produced in connection with an arbitral hearing (other than documents and information that have become known outside of the arbitration) as well as any settlements and awards, as long as they do not prohibit discussion of the fact of the arbitration, or the claims made in the arbitration, or other work-related matters outside the scope of the arbitration itself.[5] Thus, while *Epic* did not address confidentiality, its holding would compel the conclusion that a confidentiality provision within an arbitration agreement concerning the arbitration is lawful.

Finding such agreements lawful is consistent with Board precedent holding that parties may lawfully enter into confidential settlement agreements. See, e.g., *S. Freedman & Sons, Inc.*, 364 NLRB No. 82, slip op. at 2 (Aug. 25, 2016). If the parties can lawfully agree to settle an arbitration confidentially, there is no reason why the parties cannot agree to a confidential

[5] See *Epic,* 138 S. Ct. at 1625 (stating that Section 7 does not speak to "the procedures judges or arbitrators must apply in disputes that leave the workplace and enter the courtroom or arbitral forum").

resolution of an arbitration through a confidential arbitration award. After all, arbitration itself is a voluntary procedure for resolving disputes. Thus, an arbitration agreement requiring confidentiality of settlements and awards does not impact or unduly interfere with any Section 7 rights. Under the *Boeing* Category 2 analysis, such arbitration agreements should be considered lawful since "the risk of intruding on NLRA rights is 'comparatively slight.'" *Boeing*, 365 NLRB No. 154, slip op. at 16.

Similarly, confidentiality provisions that provide that the arbitration shall be conducted on a confidential basis or that the arbitration proceedings shall be confidential do not, on their face, "when reasonably interpreted," interfere with Section 7 rights. Such provisions merely require that the content of the arbitration proceedings not be publicized. They do not interfere with employees' rights to share information concerning wages and terms and conditions of employment.

Moreover, an arbitration agreement that unlawfully requires blanket confidentiality but contains a sufficient disclaimer or other savings clause that is proximate to the confidentiality clause should be considered lawful. For example, an arbitration agreement with an unlawful confidentiality requirement could, depending on the language of that requirement, be made lawful by including language such as "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."

C. The Judge Erred by Expanding the Confidentiality Provision Beyond Its Actual Meaning (GC Exceptions 5, 7, 8, 13, and 22).

The judge erred in interpreting the confidentiality provision as prohibiting employees from talking about the arbitration. This interpretation is incorrect. The provision does not prohibit

employees from talking about the arbitration, but only from disclosing information obtained through the arbitration. This is no different from prohibiting the disclosure of confidential business or personal information an employee may obtain by virtue of his or her position at the company, even though such information might relate to conditions of employment. The judge therefore also erred in finding that the confidentiality provision prohibits discussion of terms and conditions of employment in violation of Section 7.

The confidentiality provision in the arbitration agreement at issue in this case provides that the parties "shall maintain the confidential nature of the arbitration proceeding and the award, including all disclosures in discovery, submissions to the arbitrator, the hearing, and the contents of the arbitrator's award," except to enforce the award, if required or protected by law, or if allowed by the parties' consent. There is also a savings clause that provides 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." This confidentiality provision does not limit an employee's ability to discuss terms and conditions of employment. Rather, it requires both parties to keep confidential the content of the arbitral proceedings, including the information and documents that are disclosed pursuant to the arbitral process, and any settlement or award. It explicitly does not limit an employee's ability to discuss his or her terms and conditions of employment, the circumstances and reasons for discipline, or any facts or evidence of which the employee became aware outside of the arbitral process. Therefore, on its face, the provision contains no unlawful limitation on employees' Section 7 rights.

As discussed above, the Court in *Epic* emphasized that the NLRA does not include procedural aspects of arbitration in the rights protected by Section 7. 138 S. Ct. at 1624-26. The

judge in the instant case repeatedly erred by conflating procedural rules of arbitration and substantive Section 7 rights, ignoring the significant distinction between the two by constantly referring to both as conditions of employment. For example, the judge mischaracterized the confidentiality provision at issue here as a prohibition that restricted employees' "right to discuss conditions of employment." ALJD, slip op. at 11. But, in fact, the language of the provision expressly states the opposite: "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." Instead of the assault on employee rights described by the judge, the actual effect of the provision is merely to protect matters inherent to the arbitral process from unwarranted disclosure, to permit the parties to take advantage of the benefits of arbitration free from the concern that otherwise private matters that arise in arbitration will be made public, and to foster trust and confidence in the arbitration process as an alternative dispute resolution procedure that can protect the parties' interests, including their interest in confidentiality of privileged matters. This is consistent with the Supreme Court's longstanding enforcement of the FAA, which has made it abundantly clear that the procedures attendant to arbitration may properly be the subject of lawful arbitration agreements.

In this regard, it is significant that while the judge quoted the Court's statement in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985), in support of the proposition that by agreeing "to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute, it only submits to their resolution in an arbitral, rather than a judicial, forum," (ALJD, slip op. at 8), the judge completely failed to acknowledge the Court's emphasis elsewhere in that opinion on the lawful procedural differences that attend arbitration. Those differences provide the very advantages offered by arbitration, i.e., by agreeing

to arbitrate a statutory claim, a party "trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration." *Mitsubishi,* 473 U.S. at 628.[6] An agreement to make arbitral proceedings confidential furthers the goals of simplicity, informality, and expedition, and thus parties often impose confidentiality for these and other reasons. Keeping the proceedings confidential may indeed benefit employees as much as employers, particularly in cases where the arbitrator upholds an employee's discharge or otherwise addresses matters that the employee does not want generally made public.

D. The Judge Erred by Finding that the Confidentiality Provision Here Interferes with Employees Section 7 rights, and by Recommending Any Remedies or Notice Posting in this Matter (GC Exceptions 10, 21, 23, and 24).

As long as arbitral confidentiality provisions do not interfere with the type of Section 7 activities that "employees 'just do' for themselves," but rather are confined to arbitration-related matters, as is the provision at issue in the instant case, such provisions should not be interpreted as interfering with Section 7 rights.[7] In other words, as long as employees are permitted to discuss the fact of the arbitration, the employees' claims against the employer, the legal issues involved,

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[6] Similarly, the judge discounted the Court's mandate to vindicate the FAA's principal purpose of ensuring that arbitration agreements are enforced as written to facilitate parties availing themselves of the informal "efficient, streamlined procedures" offered by arbitration, including the option of confidentiality. ALJD 17: fn. 9 (quoting *AT&T Mobility LLC v. Concepcion*, 563 U.S. at 344-45). While the judge is correct that the quoted Supreme Court case itself involved a business contract not directly implicating NLRA employee rights, he ignores the significant FAA interests set forth by the Court there.

[7] The judge erroneously characterized all the procedures attendant to, and matters inherent in, arbitration as "a well-established substantive right" and protected activity that employees "just do." ALJD 9:20. But he cited no precedent involving an arbitral confidentiality provision, and he misread the clear statement of the Court in *Epic* that "no language in Section 7 'speaks to the procedures judges or arbitrators must apply in disputes that leave the workplace and enter the courtroom or arbitral forum.'" ALJD 9:9-10 (quoting *Epic*, 138 S. Ct. at 1625).

and information related to terms and conditions of employment obtained outside of the arbitration, as employees are permitted here, such an agreement does not interfere with Section 7 rights and should be found lawful.

Although Counsel for the General Counsel urges the Board to find the confidentiality clause at issue here lawful as written under *Boeing*, we note that injudicious use of the provision could render its *application* unlawful. For instance, were this confidentiality provision to be applied to matters outside of the confines of the arbitral process to gag employees' discussion of terms and conditions of employment, then under *Boeing* and consistent with *Epic*, such *application* of the confidentiality clause would be unlawful under the Act. Under Section 7 of the Act, employees have a right to discuss and share information regarding their terms and conditions of employment. See, e.g., *Boeing*, 365 NLRB No. 154, slip op. at 16. Likewise, if an employer disciplined an employee for discussing matters revealed during the arbitration of which the employee otherwise had knowledge outside of the arbitration, such application of the provision would be unlawful.

Similarly, the confidentiality provision must be applied evenhandedly. An employer may not require an employee's strict adherence to a confidentiality provision and not itself comply with its strictures. If an employer were to use, disclose or refer to a confidential arbitration award in a later litigation or hearing, while holding employees to the silence of confidentiality, such application of the confidentiality agreement would be unlawful. In other words, to be lawful in application, a confidentiality requirement imposed on an employee must be equally borne by the employer.

But there is no evidence of either improper application or breach of this provision by Pfizer. Accordingly, Counsel for the General Counsel urges the Board to find that the confidentiality

provision in the arbitration agreement at issue in the instant case contains no unlawful limitation on employees' Section 7 rights and is lawful as written, and to dismiss the Complaint allegation that the provision unlawfully interferes with employees' Section 7 right to discuss their terms and conditions of employment (as set forth in paragraph 7 of the Complaint).

DATED, this 15th day of May, 2019.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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