UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Pfizer, Inc.

and

10-CA-175850
07-CA-176035

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**BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE***

The American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO") is a federation of 55 national and international labor unions representing over 12 million working men and women. The AFL-CIO files this brief as *amicus curiae* to address whether a broadly-worded confidentiality provision in a mandatory arbitration policy violates Section 8(a)(1) of the National Labor Relations Act by interfering with employees' exercise of their protected rights under Section 7 of the Act.

It hardly bears stating that the right of employees to communicate with one another about their working conditions lies at the core of Section 7. The right to self-organization and to engage in other concerted activities for mutual aid and protection depends on this predicate act. A confidentiality provision that prohibits employees from talking about an arbitration proceeding that deals with some term or condition of employment, or about the award in a proceeding that determines an

employee's working conditions, thus directly interferes with employees' exercise of their Section 7 rights.

As a practical matter, it is difficult to conceive of a legitimate employer need for a broadly-worded confidentiality policy in the vast majority of employment arbitrations, and certainly not with regard to the arbitration award itself. The civil litigation system functions effectively without a blanket confidentiality rule. And, to the extent that a sensitive piece of evidence becomes relevant in any particular proceeding – *e.g.*, a customer list that the employer considers a trade secret or an employee's medical records – the parties' legitimate interests can be preserved by allowing the arbitrator to issue discrete non-disclosure rulings akin to protective orders under the federal rules.

The confidentiality provision at issue in this case is plainly unlawful insofar as it categorically prohibits employees from discussing any matter concerning "the arbitration proceeding and the award" in employment-related arbitrations. Apparently aware that this policy constitutes an unfair labor practice, Pfizer inserted a clause addressing employees' right to engage in protected discussion and activity. That clause only addresses such discussion as it relates to the workplace generally, however, and does not state clearly whether discussion also related to an arbitration proceeding or award is protected. A reasonable employee would thus understand the confidentiality provision taken as a whole to bar any discussion of

an arbitration proceeding or award dealing with a workplace issue, thus rendering the policy unlawful under *Boeing Co.*, 365 NLRB No. 154 (2017).

## STATEMENT

This case concerns the confidentiality provision of a mandatory class action waiver and arbitration policy emailed by Pfizer, Inc. to its employees in May 2016. The email instructed employees to review and acknowledge the policy and stated that employees would be "bound by the agreement as part of their continued employment at Pfizer." *Pfizer, Inc.*, JD-30-19, 2 n.1 (March 21, 2019) (Supplemental Decision).

The confidentiality provision 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, 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." Stipulation of Facts ("SOF") 7 (brackets and bracketed language in original).

Two employees filed unfair labor practice charges challenging the arbitration agreement, including its confidentiality provision. The General Counsel issued a complaint. An administrative law judge (ALJ) determined that the confidentiality clause violated Section 8(a)(1) of the Act. *Pfizer*, JD-30-19, at 50. Pfizer now excepts to that determination.

## ARGUMENT

1. Section 7 of the Act guarantees the right of employees "to self-organization, to form, join or assist labor organizations, . . . and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. § 157. "[T]he right of employees to self-organize and bargain collectively established by § 7 of the NLRA necessarily encompasses the right [of employees] effectively to communicate with one another regarding self-organization . . . ." *Beth Israel Hospital v. NLRB*, 437 U.S. 483, 491 (1978). An

employer rule that constitutes "an unreasonable impediment" to employees' ability to effectively communicate with one another about working conditions thus violates Section 8(a)(1). *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 802 n.8 (1945) (citation omitted).

In its most basic terms, Pfizer's confidentiality rule prohibits employees from discussing among themselves "the arbitration proceeding and the award" and requires individual employees to "cooperate in preserving the confidentiality of the arbitration proceeding and the award to the greatest extent allowed by applicable law." SOF 7. It is well settled that an arbitration provision of this sort, that "prohibit[s] employees from discussing 'all arbitration proceedings, including but not limited to hearings, discovery, settlements, and awards,' is unlawfully overbroad." *Dish Network, LLC*, 365 NLRB No. 47, slip op. 2 (2017). *See also California Commerce Club, Inc.*, 364 NLRB No. 31, slip op. 1 (2016); *Ralph's Grocery Co.*, 363 NLRB No. 128, slip op. 3 (2016); *Century Fast Foods, Inc.*, 363 NLRB No. 97, slip op. 1-2 & n.4 (2016); *Professional Janitorial Service of Houston, Inc.*, 363 NLRB No. 35, slip op. 1 (2015).[1] That is because a

[1] Member Miscimarra, who disagreed with the then-Board-majority's approach to evaluating mandatory arbitration policies generally, agreed with the Board's evaluation of the confidentiality provisions contained in these agreements. *See, e.g., Dish Network,* 365 NLRB No. 47, slip op. 5 (Acting Chairman Miscimarra, concurring); *California Commerce Club*, 364 NLRB No. 31, slip op. 3 n.8 (Member Miscimarra, concurring in part and dissenting in part); *Ralph's Grocery*, 363 NLRB No. 128, slip op. 8 (Member Miscimarra, concurring in part and dissenting in part); *Century Fast Foods*, 363 NLRB No. 97, slip op. 5 n.13 (Member Miscimarra,

requirement that "'the arbitration shall be conducted on a confidential basis and there shall be no disclosure of evidence or award/decision beyond the arbitration proceeding'" interferes with "a central aspect of protected concerted activity under the NLRA," namely "discussions and coordination between or among two or more employees regarding employment-related disputes, including those that may be resolved in arbitration." *California Commerce Club*, 364 NLRB No. 31, slip op. 3 n.8 (Member Miscimarra, concurring in part and dissenting in part).

That conclusion, that employees' right to communicate about employment-related disputes is "central" to the enforcement of Section 7, is undoubtedly correct. That conclusion matters because "the FAA's requirement that arbitration agreements be enforced according to their terms may be 'overridden by a contrary congressional command.'" *Prime Healthcare Paradise Valley, LLC*, 368 NLRB No. 10, slip op. 5 (2019) (quoting *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 226 (1987)). "[T]he protection NLRA Sec. 7 affords to concerted activities undertaken for the purpose of mutual aid or protection constitutes a 'contrary Congressional command' with respect to confidentiality provisions that are stated . . . broadly . . . , particularly absent a countervailing employer justification that outweighs the potential adverse impact on NLRA-protected

concurring in part and dissenting in part); *Professional Janitorial Service*, 363 NLRB No. 35, slip op. 5 n.7 (Member Miscimarra, concurring in part and dissenting in part).

activities." *Dish Network*, 365 NLRB No. 47, at slip op. 5 n.2 (Acting Chairman Miscimarra, concurring).

Nothing in *Epic Systems v. Lewis*, 138 S. Ct. 1612 (2018), undermines this conclusion. When employees engage in concerted activity that involves information derived from an arbitration proceeding, it frequently not only *relates* to "self-organization" and "form[ing], join[ing], or assist[ing] labor organizations," it often involves the *actual process* of "self-organization" and "form[ing] . . . [a] labor organization[]," 29 U.S.C. § 157, such as when employees use information they discover in arbitration, problems they have experienced in the arbitration process, or the inadequacy of an arbitration award to convince their co-workers that they should form or join a union. That is, arbitration of employment matters under the Federal Arbitration Act takes place against the backdrop of a different federal law that "serve[s] to protect things employees 'just do' for themselves in the course of exercising their right to free association in the workplace." *Epic Systems*, 138 S. Ct. at 1625. Whereas broad confidentiality agreements may not trench on other federally-protected interests in the arbitration of commercial disputes, the NLRA requires a more tailored approach to confidentiality in the employment setting.

Indeed, it is difficult to imagine *any* legitimate justification for a blanket confidentiality requirement in employment-related arbitration proceedings,

especially one, like that at issue here, that reaches not only the proceeding itself but also the award. Certainly, such blanket confidentiality requirements are not "a fundamental attribute of arbitration." *Epic Systems*, 138 S. Ct. at 1622-23 (discussing *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011)). As the American Arbitration Association's standing rules make clear, it is only "[t]he *arbitrator*" who is required to "maintain the confidentiality of the arbitration and shall have the authority to make appropriate rulings to safeguard that confidentiality, unless the parties agree otherwise or the law provides to the contrary." American Arbitration Association, *Employment Arbitration Rules and Mediation Procedures* ¶ 23 ("Confidentiality") (emphasis added). *Accord JAMS Comprehensive Arbitration Rules & Procedures* Rule 26(a) ("Confidentiality and Privacy") ("the Arbitrator shall maintain the confidential nature of the Arbitration proceeding and the Award, including the Hearing . . . ."). In contrast, "the AAA takes no position on whether parties should or should not agree to keep the proceeding and award confidential between themselves." American Arbitration Association, *AAA Statement of Ethical Principles*, available at www.adr.org/StatementofEthicalPrinciples (last visited July 19, 2019). For that reason, absent "a separate confidentiality agreement," "[t]he parties always have a right to disclose details of the proceeding." *Ibid.*

Pfizer does, of course, include a separate confidentiality provision in its arbitration policy. The relevant point for present purposes, however, is that because confidentiality is not a "fundamental attribute of arbitration," *Epic Systems*, 138 S. Ct. at 1622, the NLRB may properly consider whether Pfizer's "confidentiality provision unlawfully interferes with NLRA Sec. 7 rights," *Dish Network*, 365 NLRB No. 47, slip op. 5 n.2 (Acting Chairman Miscimarra, concurring).

2. In undertaking this analysis with regard to "a facially neutral policy," such as the confidentiality provision at issue here, "that, when reasonably interpreted, would potentially interfere with the exercise of NLRA rights, the Board will evaluate two things: (i) the nature and extent of the potential impact on NLRA rights, *and* (ii) legitimate justifications associated with the rule." *Boeing*, 365 NLRB No. 154, slip op. 3. Thus, the specific terms of the policy at issue matter a great deal, as does the employer's asserted justification for the policy.

Applying *Boeing*, the General Counsel reasonably states 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." GC Br. 8 (emphasis added). In contrast, "confidentiality clauses that reach beyond the arbitral

proceedings into the traditional sphere of Section 7 activities should be unlawful under *Epic* and *Boeing*." *Ibid.*

There is a basic logic to this distinction, but it requires more elucidation than the General Counsel provides. It is true that a confidentiality provision "strictly limited to matters inherent to the arbitration process," *ibid.*, such as a provision that delegates to the arbitrator authority to "issue orders to protect the confidentiality of proprietary information, trade secrets or other sensitive information," *JAMS Comprehensive Arbitration Rules & Procedures* Rule 26(b), is less likely to interfere with employees' Section 7 rights than a blanket confidentiality requirement. That is because, as with the analogous federal rule, such a policy requires the arbitrator to make a fact-specific decision whether a confidentiality order is necessary "to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense" based on a showing of "good cause." Fed. R. Civ. P. 26(c)(1). By requiring a party asserting the need for confidentiality to show "a countervailing . . . justification that outweighs the potential adverse impact on NLRA-protected activities," *Dish Network*, 365 NLRB No. 47, slip op. 5 n.2 (Acting Chairman Miscimarra, concurring), such a policy ensures that the arbitrator will take both specific privacy and Section 7 considerations into account

when determining whether a confidentiality order is necessary.[2] *See generally Boeing*, 365 NLRB No. 154, slip op. 15-16 & n.79 (emphasizing importance of taking into account "different work settings" and the concomitant need to consider "evidence regarding a particular rule's impact on protected rights or the work-related justifications for the rule").

A confidentiality provision that "reach[es] beyond the arbitral proceedings into the traditional sphere of Section 7 activities," GC. Br. 8, on the other hand, is unlawfully overbroad. The General Counsel acknowledges that a confidentiality provision that "prohibit[s] discussion of the fact of the arbitration, or the claims made in the arbitration, or other work-related matters outside of the scope of the arbitration itself" would significantly impinge on employees' Section 7 rights. GC Br. 9. More generally, absent a demonstrated confidentiality interest relating to a particular piece of evidence, "[e]mployees are entitled to discuss their terms of employment whether these terms are common knowledge, are set forth in a contract, or were discovered in an arbitration proceeding." *Professional Janitorial Service*, 363 NLRB No. 35, slip op. 9 (ALJ Decision). A blanket rule that,

[2] The General Counsel contends that finding a broad confidentiality provision in a mandatory arbitration policy lawful "is consistent with Board precedent holding that parties may lawfully enter into confidential settlement agreements." GC Br. 9. Confidentiality with respect to settlement is an entirely different matter from arbitration of a claim. Federal policy broadly bars use of a settlement offer as evidence in determining the merits of a claim, *see* Fed. R. Evid. 408; Fed. R. Civ. P. 68, in order to encourage parties to engage in frank settlement discussions and thereby "promot[e] . . . the public policy favoring the compromise and settlement of disputes," Fed. R. Evid. 408 Advisory Committee Notes (quoting McCormick §§ 76, 251).

reasonably read, prohibits employees from discussing "employment-related disputes, including those that may be resolved in arbitration," *California Commerce Club*, 364 NLRB No. 31, slip op. 3 n.8 (Member Miscimarra, concurring in part and dissenting in part), therefore, is unlawful.

Consider a situation in which several employees seek to bring a collective action under the Fair Labor Standards Act to challenge the employer's practice of not paying for time spent in training sessions, but are forced by the employer to pursue their claims instead through the individualized arbitration process. It is beyond cavil that Section 7 protects the employees' right to discuss the evidence and arguments presented by the employer in the arbitration of each employee's identical claim, as well as the award ultimately issued by the arbitrator in each case. A contrary rule would permit an employer to wield a broad confidentiality provision as a sword to discipline employees who engage in core protected activity, including such activities as using information obtained in the arbitration to help other employees succeed in their own subsequent arbitration hearings or persuading co-workers that forming a union would be a better means of addressing the underlying workplace issue than arbitration.

3. In this case, Pfizer appears to have recognized that its confidentiality provision, by its basic terms, constitutes an unfair labor practice under the Act because that provision prevents employees from engaging in protected discussions

or activity relating to "the arbitration proceeding and the award." SOF 7. Pfizer thus inserted a boilerplate savings clause into its confidentiality policy stating that "nothing in this Confidentiality agreement shall prohibit . . . protected discussions or activity *relating to the workplace*." *Ibid.* (brackets omitted; emphasis added). That savings clause does *not* make clear, however, whether employees may discuss information relating to the workplace *that arises from an arbitration proceeding*. As a result, a reasonable employee reading Pfizer's confidentiality provision as a whole would conclude that employment-related disputes that are subject to an arbitration proceeding, and the awards resulting thereof, remain confidential, thus rendering the confidentiality provision as a whole unlawful under *Boeing*.

"[W]hen the Board interprets any rule's impact on employees, the focus should rightfully be on the employees' perspective," an approach that "is especially important when evaluating questions regarding alleged interference with protected rights in violation of Section 8(a)(1)." *Boeing*, 365 NLRB No. 154, slip op. 16. "Section 8(a)(1) legality turns on 'whether the employer engaged in conduct, which, it may reasonably be said, *tends to interfere with the free exercise of employee rights under the Act*.'" *Ibid.* (quoting *Cooper Thermometer Co.*, 154 NLRB 502, 503 n.2 (1965) (emphasis in *Boeing*)). That is, what is at issue in a Section 8(a)(1) case is whether a reasonable employee would believe that the employer's policy "interfere[s] with [his or her exercise of] protected rights." *Ibid.*

Pfizer and the General Counsel claim that the confidentiality provision at issue in this case "explicitly recognizes employees' right to discuss wages, hours, or other terms and conditions of employment that may be at issue in an arbitration proceeding," leaning heavily on the inclusion of the savings clause. Pfizer Reply 7. *See also* GC Br. 13-14 (stating that "employees are permitted here" "to discuss the fact of the arbitration, the employees' claims against the employer, the legal issues involved, and information related to terms and conditions of employment obtained outside of the arbitration"). However, neither seeks to explain – nor could they – how a reasonable rank-and-file employee could reach this conclusion based on a reading of the plain language of the confidentiality provision taken as a whole.

That provision broadly makes confidential "*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" and requires an individual employee to "cooperate in preserving the confidentiality of *the arbitration proceeding and the award* to the greatest extent allowed by applicable law." SOF 7 (emphases added). In contrast to a confidentiality provision that delegates authority to the arbitrator to make confidentiality rulings in reference to a specific arbitration proceeding based on a party's showing of need – or even a unilaterally-imposed confidentiality requirement applicable to specific categories of sensitive

evidence, *e.g.*, trade secrets or medical records – Pfizer's provision makes confidential *all* aspects of "the arbitration proceeding and the award," *ibid.*, and does so *ex ante*, before any claim has ever been filed and before any party has attempted to show "a . . . justification [that would] outweigh[] the potential adverse impact on NLRA-protected activities," *Dish Network*, 365 NLRB No. 47, slip op. 5 n.2 (Acting Chairman Miscimarra, concurring).

The savings clause does not clarify matters. That clause contains only boilerplate stating that "[n]othing in this Confidentiality provision shall prohibit employees from engaging in protected discussions or activity related to the workplace, such as discussions of wages, hours, or other terms and conditions of employment." SOF 7. The clause thus notably does not address the key issue of whether discussion of an employment matter that is also the subject of an "arbitration proceeding [or] award" remains "protected." *Ibid.* As the ALJ in this case explained, it is highly "[s]ignificant[]" that "the disclaimer language does not include the word 'arbitration,' and does not appear to concern information related to arbitration," but "[i]nstead . . . refers to 'protected discussions or activity relating to the workplace.'" *Pfizer, Inc.*, JD-01-17, 5 (Jan. 10, 2017) (Bench Decision and Certification). As a result, "the way a nonlawyer reasonably would interpret the confidentiality provision would be to assume that the prohibitory language at the top of the paragraph referred to information about arbitration, and that the later

disclaimer language did not concern arbitration but rather everyday work matters." *Ibid.* *See also ibid.* (explaining that the two sentences "appear to refer to different matters").

To illustrate the interpretive conundrum faced by employees, recall the hypothetical referenced in the previous section regarding a group of employees who seek to file an FLSA collective action challenging an employer practice of not paying for training time but are forced instead into individual arbitrations. Suppose that, in one employee's arbitration, the employer produces a written policy stating that the training at issue is mandatory, leading the arbitrator to conclude that the training time is compensable under the FLSA. In a different employee's arbitration proceeding, the employer does not produce the document and a company manager testifies that he is aware of no such policy, leading the arbitrator to rule against the employee. Are the two employees permitted to speak to each other about the written policy and the contrary witness testimony – clearly "protected discussion[] . . . relating to . . . wages," SOF 7, under the NLRA – or can the employer discipline the employees for violating the confidentiality provision's bar on revealing "disclosures in discovery[ and] submissions to the arbitrator," *ibid.*? And, if the employee cannot reveal her knowledge of the employer's written policy itself, can she still state the fact that the training is mandatory in a petition circulated to co-workers urging the employer to adopt a

policy requiring payment for training time or would such a statement of fact also be considered a breach of her duty to "preserv[e] the confidentiality of the arbitration proceeding . . . to the greatest extent allowed by applicable law," *ibid.*?

The answers to these questions – which matter greatly to employees covered by the confidentiality provision and thus subject to discipline for violations – are unclear, even to lawyers. *Compare generally California Commerce Club*, 364 NLRB No. 31, slip op. 3 n.8 (Member Miscimarra, concurring in part and dissenting in part) (concluding that NLRA-protected discussion "would appear to be precluded by 'confidential' arbitration" required by provision similar to that at issue here and thus concurring in finding that it was unlawful), *with* GC Br. 13 (stating that the provision in this case is "confined to arbitration-related matters" and, therefore, does not "interfere[e] with Section 7 rights"). "'Rank-and-file employees do not generally carry lawbooks to work or apply legal analysis to company rules as do lawyers, and cannot be expected to have the expertise to examine company rules from a legal standpoint.'" *Prime Healthcare*, 368 NLRB No. 10, slip op. 6 n.12 (quoting *Ingram Book Co.*, 315 NLRB 515, 516 n.2 (1994)). Pfizer's confidentiality provision, therefore, viewed from "the employees' perspective," "may reasonably be said[ to] tend[] to interfere with the free exercise of employee rights under the Act," *Boeing*, 365 NLRB No. 154, slip op.16 (citation, quotation marks, and emphasis omitted), and thus is unlawful.

## CONCLUSION

The Board should affirm the ALJ's Supplemental Decision.

Dated: July 19, 2019

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that on July 19, 2019, the foregoing Brief of the American Federation of Labor and Congress of Industrial Organizations as *Amicus Curiae* was electronically filed via the NLRB E-Filing System with the National Labor Relations Board and served on the following in the manner specified below:

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