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NLRB Continues Focus on Confidentiality and Non-Disparagement Provisions

By Matthew J. Feery

As we have written about previously in this space, the National Labor Relations Board ("NLRB") has in recent years taken an aggressive approach to certain employer policies, such as social media policies. But as demonstrated by the recent NLRB decision *Quicken Loans, Inc. and Lydia E. Garza*, this scrutiny extends to a number of other standard provisions that employers use in their handbooks or employment agreements.

Lydia Garza was employed by Quicken Loans, Inc. in Arizona as a mortgage banker from 2006 until 2011. As a condition of her employment, Garza entered into a "Mortgage Banker Employment Agreement," ("Agreement") which contained, among other clauses, no-raiding, non-compete, confidentiality, and non-disparagement provisions. The confidentiality provision in the Agreement required employees to maintain "in the strictest of confidence" the company's proprietary and confidential information and prohibited disclosure of such information "to any person, business, or entity." The Agreement defined proprietary and confidential information as "non-public information relating to . . . the Company's business, personnel . . . all personnel lists, personal information of co-workers, managers, executives and officers; handbooks, personnel files, personnel information such as home phone numbers, cell phone numbers, addresses and email addresses."

For its part, the non-disparagement provision at issue stated in part:

> The Company has internal procedures for complaints and disputes to be addressed and resolved. You agree that you will not (nor will you cause or cooperate with others to) publicly criticize, ridicule, disparage or defame the Company or its products, services, policies, directors, officers, shareholders, or employees, with or through any written or oral statement or image (including, but not limited to, any statements made via websites, blogs, postings to the internet, or emails and whether or not they are made anonymously or through use of a pseudonym).

Quicken Loans required all its mortgage bankers to be bound by the Agreement. After Garza resigned in October 2011, Quicken Loans sent her a letter reminding her of her "continuing obligations" under the Agreement. Quicken Loans subsequently sued Garza and five other former employees, alleging that they violated the "no raiding" and non-competition provisions of the Agreement. Garza, in turn, filed an unfair labor practice charge against Quicken Loans alleging that the confidentiality and non-disparagement provisions in the Agreement violated the National Labor Relations Act. The NLRB investigated.

A hearing was conducted, and in January 2013, an administrative law judge ("ALJ") found that portions of the Agreement violated employees' rights under Sections 7 and 8(a)(1) of the National Labor Relations Act. During the hearing on the matter, Quicken Loans presented testimony that no employee had ever been subject to discipline for violating the Agreement, but the ALJ found that to be of no matter. In regards to the confidentiality provision, the ALJ found that it violated Section 7 of the National Labor Relations Act because "[i]n complying with these restrictions, employees would not be permitted to discuss with others, including their fellow employees or union representatives, the wages and other benefits they receive, the names, wages, benefits addresses or telephone numbers of other employees."

The ALJ also found the non-disparagement provision to be in violation of the National Labor Relations Act because "[w]ithin certain limits, employees are allowed to criticize their employer and its products as part of their Section 7 rights, and employees sometime do so in appealing to the public, or to their fellow employees, in order to gain their support." The ALJ found that employees would reasonably construe the non-disparagement provision to prohibit them from engaging in these protected activities, thus causing the provision to run afoul of the National Labor Relations Act.

Quicken Loans subsequently appealed the decision, but on June 21, 2013, it was upheld by the NLRB.

For employers, this decision is the latest example of the need to closely examine the policies in place in any document applying to employees - whether it be a non-compete, a handbook, or an employment agreement. The NLRB applies this analysis regardless of the unionized status of the workforce. Thus, as with social media policies, confidentiality and non-disparagement provisions should be carefully drafted to ensure that they cover particular information or comments and do not cast an overly wide net that encompasses protected activities.