A Heads-Up on Employment Issues Confronting the Hedge Fund and Private Equity Industries

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Special Report: The NLRB's Complaint Against Bridgewater and What It Means for Investment Managers

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Key Points

- The National Labor Relations Board has filed a complaint against Bridgewater Associates, challenging contractual provisions of a type that are commonplace at hedge funds and private equity firms.
- Firms should review their own policies and contract templates, and should consider steps to minimize their own risk.

Background

Bridgewater Associates, LP has received significant publicity over the past several weeks, following a *New York Times* report of a sexual harassment complaint filed by one of its employees with the Connecticut Commission on Human Rights.

Below the attention-grabbing headlines, however, was a legal development potentially far more significant to investment managers: the National Labor Relations Board (NLRB or "Labor Board") has filed a complaint against Bridgewater challenging various provisions in the firm's standard employment agreement. The provisions being challenged are remarkable only in how "garden variety" they are. Indeed, if Bridgewater's provisions violate the law, then the same arguably is true of similar provisions contained in the form agreements of many other investment managers.

Among the provisions challenged by the NLRB are the following:

- *Confidentiality of Terms of Employment:* The complaint challenges a provision stating: "You agree that the terms of your employment with Bridgewater are confidential."
- *Protection of Confidential Information:* The complaint takes issue with the scope of Bridgewater's definition of "Confidential Information," which includes, *inter alia*, "any non-public information . . . relating to the business or affairs of Bridgewater or its affiliates, or any existing or former officer, director, employee or shareholder of

Bridgewater"; employee "compensation" information; and information regarding "Bridgewater's organizational structure (including the allocation of responsibilities and general construction of Bridgewater's departments, businesses, subsidiaries and employees …)."

- *Non-Publicity:* The NLRB challenges a provision barring employees from disclosing Confidential Information to "any media business, outlets, or other endeavors that publish, broadcast, distribute, or otherwise disseminate information in any format, including but not limited to books, newspapers, magazines, journals, websites, blogs, social media outlets, television and radio stations, and streaming media outlets."
- *Non-Disparagement:* The NLRB also takes aim at a clause stating that employees "may not disparage Bridgewater and/or its present or former affiliates, directors, officers, shareholders, employees or clients, whether directly or indirectly, in any manner whatsoever . . . except as required by law."
- *Barring of Class Actions:* Consistent with the position the NLRB has taken elsewhere, the complaint also challenges a contractual provision that bars class or collective actions, and instead requires employees to pursue any disputes with Bridgewater in "arbitration on an individual basis."

Legal Framework

The NLRB's legal theory is rooted in Section 7 of the National Labor Relations Act (the NLRA or the "Act"), which grants non-supervisory employees with "the right to self-organization, to form, join, or assist labor organizations . . . and to engage in other concerted activities for the purpose of mutual aid or protection." According to the Labor Board, the contractual provisions cited above run afoul of the NLRA by "interfering with, restraining, and coercing employees" in the exercise of their Section 7 rights. The Board likely views these clauses as overly broad in scope, as they do not carve out activities protected by the NLRA, such as a concerted employee protest of a company's wages or working conditions. The clauses thus arguably "chill" employees from engaging in activities protected by the Act.

On one level, the NLRB's complaint against Bridgewater is unsurprising. For years, the Obama Labor Board has taken an extremely aggressive (and, indeed, highly counter-intuitive) positon regarding employer policies and decisions that seem commonsensical. For example, the Board routinely has struck down company "courtesy" policies, which require employees to be respectful, courteous, and polite; policies prohibiting employees from speaking with the media; policies prohibiting employees from disparaging their employer; and policies prohibiting employees from using a company's logo, trademarks, or copyrights. According to the Board, such policies all are overly broad in scope, as read literally, they would proscribe certain activities protected by the NLRA, such as coordinated efforts to protest an employer's treatment of employees or a media strategy in furtherance of a workplace dispute. In a recent decision upheld by the 2nd Circuit Court of Appeals, the NLRB went so far as to require the reinstatement of an employee who called his employer's owner an "asshole" on Facebook, finding the comment both sufficiently related to an employment-related dispute to be protected under the NLRA and insufficiently "malicious" to "lose the protection" of the Act.

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On another level, however, the complaint against Bridgewater is a watershed event. To our knowledge, it is the first time the NLRB has targeted a hedge fund with respect to these issues, and the complaint serves as a shot across the bow to firms with similar policies and provisions. While the theoretical risk of the NLRB challenging an investment manager's policies or practices has been present for years, the Bridgewater complaint makes the risk far more "real," particularly as news of the matter spreads and employees in the hedge fund and private equity industries become more knowledgeable of their right to file complaints with the Labor Board.

What You Should Do

Investment managers should review their existing policies, contractual provisions, and disciplinary protocols to ensure that they remain defensible in light of the developing case law. Even the NLRB would acknowledge that firms have a right to protect their legitimate interests; the key is crafting provisions that achieve this objective while also not assuming undue risk under the NLRA.

Managers should expect employees to be increasingly aware of their rights under the NLRA, and employees' resort to the NLRB to become more common. While the recovery available in an NLRB action often is relatively limited e.g., backpay, reinstatement and other equitable remedies, NLRB orders (and settlements) almost invariably contain posting requirements. Such postings draw further attention to the NLRA and the nature of a company's infractions, and thus often educate recalcitrant employees of the extent of their rights–and the corresponding limits of their employer's disciplinary authority–under the law.

As noted above, the NLRA's proscriptions apply only to non-supervisory level employees. At the same time, new state laws proscribe some of the same practices for supervisory employees. For example, as reported in our October 26, 2015 alert, a new New York statute restricts firms' ability to prevent employees—supervisory and non-supervisory—from discussing wage information. Firms should remain abreast of the mounting developments in the labor and employment law, so that they can effectively navigate the increasingly choppy waters.

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