

From: (b) (6), (b) (7)(C)
To: Lomax, Matthew S.; Alam, Noor I.; SM-Region 27, Denver; Sutcliff, Neale K.; Montes, Landon O.
Cc: Compton, Kayce R.; Lussier, Richard; Dodds, Amy L.; Walters, Kimberly; Shorter, LaDonna
Subject: BAYADA Home Health Care, 27-CA-341402 (case closing email)
Date: Thursday, December 18, 2025 1:55:57 PM

The Region submitted this case for advice on whether the maintenance of a non-solicitation of employees provision and a cooperation clause in a separation agreement violates Section 8(a)(1). We conclude that both provisions are lawful, and therefore the Region should dismiss these allegations, absent withdrawal.

The Charging Party was laid off from employment in (b) (6), (b) (7)(C) 2024, at which point (b) (6) signed a "Release and Separation Agreement" (Agreement). The Charging Party contends that other laid off employees were likewise presented with the same Agreement around that time.

Section 8 of the Agreement states, in relevant part:

Non-Solicitation of BAYADA's Employees, Clients, or Business Relationships.

[EMPLOYEE] realizes BAYADA's core business resources are its employees, clients, and business/referral relationships, meaning the company has significant economic interest in all. [EMPLOYEE] agrees not to contact or to solicit, directly or indirectly, any of BAYADA's current or former employees, clients, or business partners and/or referral or payor sources, to request he/she/they leave BAYADA or to encourage or request he/she/they work for, receive services from, or become affiliated with any other company or organization that provides services similar to or in direct competition with any of BAYADA's business lines of work.

We conclude that the above solicitation provision is not facially overbroad. An employer's proffer of a separation-agreement provision that requires the forfeiture of rights is unlawful where its language has the reasonable tendency to interfere with, restrain, or coerce employees' exercise of their Section 7 rights. *McLaren Macomb*, 372 NLRB No. 58, slip op. at 4 (2023). The Board has long distinguished the act of abandoning employment, i.e., voluntarily resigning from an employer, from a conditional threat to resign in the future if certain conditions are not met by the employer. *See Crescent Wharf & Warehouse Co.*, 104 NLRB 860, 861-62 & n.4 (1953) (the act of resigning is unprotected whereas the threat to quit could be protected); *see also Technicolor Services*, 276 NLRB 383, 385-89 (1985) (union steward's efforts to have his coworkers fill out applications for other companies was protected as it was in the interest of better job security for the employees and not intended to undermine or harm the employer), *enforced*, 795 F.2d 916 (11th Cir. 1986). Inasmuch as the instant provision is contained in a separation Agreement rather than an employment agreement, it only applies after the Charging Party and other employees affected by the layoff have concluded their employment with the Employer. Accordingly, it does not prohibit conduct that the Board has found to be protected, such as employees assisting each other in furtherance of job security and improved benefits vis-a-vis their employer. *See id.*¹

Section 9 of the Agreement states, in relevant part:

Cooperation Clause. After separation, [EMPLOYEE] agrees to fully cooperate with any outstanding legal, regulatory, or investigative matters [EMPLOYEE] may have

knowledge about or may have been involved in while working for BAYADA. If needed, [EMPLOYEE] agrees to provide information, attend meetings, or otherwise cooperate with BAYADA in an effort to resolve any incident, claim, or other matter where BAYADA may need [EMPLOYEE]'s help, time, or knowledge.

Here, the Agreement's cooperation clause does not reasonably tend to interfere with, restrain, or coerce employees' exercise of Section 7 rights. The Board has never found unlawful a provision requiring a former employee to cooperate with the employer regarding company investigations or legal matters. Although the Board has held that employees have a Section 7 right to refrain from responding to employer questioning that unduly pries into protected employee conduct, *see Stoner Lumber, Inc.*, 187 NLRB 923, 929-30 (1971), *enforced mem. in rel. part*, No. 71-1820, 1972 WL 3035 (6th Cir. May 26, 1972), the questioning envisioned in the instant cooperation clause would occur after the employment relationship had ended. Therefore, any such prying would only affect the Employer's remaining employees, rather than the Charging Party and others affected by the layoff. Further, although employees have the right to refrain from submitting to employer questioning in preparation for unfair-labor-practice proceedings, *see A.S.V., Inc.*, 366 NLRB No. 162, slip op. at 2-4, 50-52 (2018) (citing *Johnnie's Poultry Co.*, 146 NLRB 770 (1964), *enforcement denied*, 344 F.2d 617 (8th Cir. 1965)), we are unaware of Board decisions holding that this right applies to former employees generally. Additionally, although the Board has held that the Act protects "an employee who, without malice, refuses to give testimony, voluntarily, against a fellow employee" in an unfair labor practice proceeding, *Retail Store Employees Union, Local 876*, 219 NLRB 1188, 1188-89 (1975), *enforced*, 570 F.2d 586 (6th Cir. 1978), the cooperation clause here would be reasonably construed as applying merely to *pre-trial* matters given the references to "provid[ing] information" and "attend[ing] meetings," which provide context for interpreting what "fully cooperate" means.

Accordingly, the Region should dismiss these aspects of the charge, absent withdrawal. Please contact us with any questions.

¹ Likewise, we note that the non-solicitation of customers provision does not infringe on protected appeals to third parties given that it only applies post-employment. *See Northeastern Supply, Inc.*, Case 04-CA-351328, Case Closing Email dated June 30, 2025.

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