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Expert Analysis

Balancing Employee Rights and Confidentiality

Employers have long maintained confidentiality policies to restrict employees from disseminating classified company information. The need for confidentiality is imperative today in light of the widespread use of social media and recent online security breaches. However, employees have the right under the National Labor Relations Act (NLRA) to discuss their terms and conditions of employment, and the National Labor Relations Board has thus wrestled with protecting company confidentiality and preserving employee rights. This month's column will describe the board's recent decisions regarding when employers' confidentiality policies violate or are valid under the NLRA.

By John P. Furfaro And Risa M. Salins

'Noel Canning'

As a preliminary matter, it is important to note that the Supreme Court's ruling in *NLRB v. Noel Canning*, 134 S.Ct. 2550 (2014), may have a significant impact in the area of employment confidentiality. In *Noel Canning*, the court held that President Barack Obama did not have authority to make three recess appointments to the board in January 2012. Decisions issued by the board from January 2012 to mid-2013 thus lacked the required three-member quorum and became invalid.

At least three major employee confidentiality cases, *Banner Health System d/b/a Banner Estrella Medical Center*, 358 NLRB No. 93 (July 30, 2012) (discussing prohibition on employee discussion of ongoing internal investigations), *Flex Frac Logistics*, 358 NLRB No. 127 (Sept. 11, 2012) (discussing confidentiality prohibiting disclosure of personnel information), and *Directtv U.S. Directv Holdings*, 359 NLRB No. 54 (Jan. 25, 2013)(discussing employer's confidentiality and work rules restricting communications with the media), were issued by the quorum-less board. *Banner Health* and *Directtv* were pending appeal and have now been remanded to the board for further consideration. *Flex Frac*, on the other hand, was affirmed by the U.S. Court of Appeals for the Fifth Circuit, and it remains to be seen whether the decision will be collaterally attacked.

Applicable Standard

Lafayette Park Hotel, 326 NLRB No. 69 (Aug. 27, 1998), is the seminal decision where the board held an employer violates Section 8(a)(1) of the NLRA where it maintains a rule that "reasonably tends to chill employees in the exercise of their Section 7 rights" to discuss terms and conditions of employment. In determining whether a rule violates the NLRA, the board must give the rule a "reasonable reading…refrain from reading particular phrases in isolation, and must not presume improper interference with employee rights."

In *Lafayette*, a hotel implemented a rule prohibiting employees from "divulging Hotel-private information." The board found this did not chill employees' rights because employees would reasonably read the rule as protecting trade secrets and guest information, not as prohibiting employee discussion of wage information.

The board applied and further explained the holding of *Lafayette* in *Lutheran Heritage Village-Livonia*, 343 NLRB No. 75 (Nov. 19, 2004). In *Lutheran Heritage*, the board declared a two-step inquiry in determining whether an employment rule reasonably tends to chill the exercise of employees' rights to discuss terms and conditions of employment. The board must first determine whether the rule explicitly restricts employees' rights. If it does, the rule is unlawful. Second, the board must inquire whether employees would reasonably construe the language to restrict employees' rights, whether the rule was promulgated in

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response to union activity, or if the rule was applied to restrict employees' rights. The rule is unlawful if any of these factors are satisfied.

Confidentiality Upheld

A number of cases have followed the reasoning in *Lafayette* and *Lutheran Heritage* and found the confidentiality policies at issue did not violate the NLRA.

For example, in a 2-1 decision, the board in *K-Mart*, 330 NLRB No. 29 (Nov. 30, 1999), ruled that K-Mart's policy prohibiting discussion of "company business and documents" was lawful, finding such a restriction was similar to the prohibition in *Lafayette* on disclosing "hotel private information." The board stated employees would reasonably read the rule as protecting private business information and not prohibiting discussion of terms and conditions of employment.

Similarly, in a 2-1 decision, the board in *Mediaone of Greater Fla.*, 340 NLRB No. 39 (Sept. 19, 2003), found a confidentiality policy that prohibited employees from disclosing "employee information" did not violate the NLRA. The provision was included in a broader section of the employee handbook prohibiting disclosure of proprietary information and intellectual property. The board found a reasonable employee would read the rule as a whole and understand it prohibited disclosing classified company information, not employee terms and conditions of employment. See also *Echostar Technologies*, Case No. 27-CA-066726 (NLRB Div. of Judges Sept. 20, 2012) (upholding confidentiality policy where prohibition on disclosing employee information was included in broader prohibition regarding company intellectual property); *Burndy, LLC*, 34-CA-65746 (NLRB Div. of Judges July 31, 2013) (same).

Violations Found

Several other cases following the board's reasoning in *Lafayette* and *Lutheran Heritage*, have, on the other hand, found the confidentiality policies at issue violated the NLRA. These cases typically involved explicit prohibitions on discussing terms or conditions of employment or overly broad prohibitions on discussing personnel and company information.

For example, in *NLRB v. Northeastern Land Services*, 645 F.3d 475 (1st Cir. 2011), the U.S. Court of Appeals for the First Circuit upheld the board's finding that a confidentiality policy was unlawful because employees would reasonably construe the language of the policy to restrict employees' rights. The confidentiality policy stated employees' terms of employment, "including compensation," were confidential and disclosure of such terms could serve as grounds for dismissal.

> The National Labor Relations Board has wrestled with protecting company confidentiality and preserving employee rights.

The board found an employee reasonably could believe the policy prohibited disclosure of terms of employment to third parties such as union representatives. See also *Security Walls*, 356 NLRB No. 87 (Feb. 2, 2011) (finding confidentiality rules forbidding employees from disclosing salary, benefits, and disciplinary actions violated NLRA).

Also, in *Flex Frac Logistics v. NLRB*, 746 F.3d 205 (5th Cir. 2014), the Fifth Circuit held a confidentiality policy that prohibited employees from disclosing "company financial information" and "personnel information" violated the NLRA because the policy could reasonably be interpreted as prohibiting discussion of wages. The Fifth Circuit distinguished *Lafayette* and *K-Mart*, discussed above, stating there was a "substantial difference" between prohibiting disclosure of "hotel private information" in *Lafayette*, or "company business and documents" in *K-Mart*, and broadly prohibiting disclosure of "personnel information" in the case at hand. The Fifth Circuit held that "personnel information…implicitly included wage information."

Distinguishing *Mediaone*, the Fifth Circuit in *Flex Frac* found that the prohibition at issue on disclosing "employee information" was listed as a subset of intellectual property. The court stated employees would not reasonably understand their wages to be a form of intellectual property, but found that Flex Frac's confidentiality provision, on the other hand, contained no similar limitation on the type of personnel information that was prohibited.

Similarly, the board distinguished *Mediaone* in *Fresh & Easy Neighborhood Market*, 361 NLRB No. 8 (July 31, 2014), in which the board held an employer's confidentiality policy in a Code of Business Conduct was unlawful where it instructed employees, "Keep customer and employee information secure. Information must be used… only for the purpose for which it was obtained." The board held that unlike the provision in *Mediaone*, which was limited by a section referencing intellectual property assets, the provision was not adequately limited by context.

Recently, the board released an advice memorandum finding a company's rule against sharing "sensitive, proprietary, confidential, or financial information," when read in tandem with another confidentiality rule referencing personnel records, was overbroad. See *U.S. Security Assocs.*, No. 04-CA-66069 (NLRB Div. of Advice Aug. 13, 2012, released Sept. 19, 2014) (stating employees could reasonably construe confidentiality rule as prohibiting discussion of terms and conditions of employment).

Third-Party Communications

Confidentiality policies forbidding employees from communicating with the media or discussing employee investigations likewise may not withstand board scrutiny. In *Directv U.S. Directv Holdings*, 359 NLRB No. 54

(Jan. 25, 2013), a unanimous board ruled that a policy expressly instructing employees, "do not contact the media," violated the NLRA. The board held employees would reasonably construe the rule as prohibiting protected communications to the media regarding a labor dispute. However, this case has been remanded to the board in light of *Noel Canning* and it remains to be seen whether the current board will uphold the decision on remand.

Several board decisions indicate that employers may not be able to broadly prohibit employees from discussing company investigations without providing justification. In *Hyundai America Shipping Agency*, 357 NLRB No. 80 (Aug. 26, 2011), the board unanimously held it was unlawful for a company to forbid employees from discussing employee investigations. In *Hyundai*, the company regularly instructed employees involved in investigations not to talk with other employees about the subject matter. This reportedly was done "without any individual review to determine whether such confidentiality [was] truly necessary."

Such blanket instruction was not permitted, and the board held the company needed to determine whether there was a substantial justification for prohibiting employees from discussing matters under investigation such as "whether in any given investigation witnesses need protection [or] evidence is in danger of being destroyed." Since the company did not engage in this process, its rule was found to be overbroad and interfered with employees' rights.

Likewise, in *Banner Health System d/b/a Banner Estrella Medical Center*, 358 NLRB No. 93 (July 30, 2012), the board held in a 2-1 decision that a company's practice of routinely asking employees making a complaint not to discuss the matter with their co-workers violated the NLRA. In that case, a hospital technician was reprimanded for questioning and failing to follow the instructions of a supervisor to maintain confidentiality while an investigation was underway. Like in *Hyundai*, the board held the company had not shown a substantial justification for prohibiting the employee from discussing the investigation, and the company's concern with "protecting the integrity of its investigations" was not sufficient to outweigh employees' rights. However, this case also has been remanded to the board following *Noel Canning*. It remains to be seen whether it will be upheld on remand.

In 'Flex Frac Logistics,' the Fifth Circuit held a confidentiality policy that prohibited employees from disclosing "company financial information" and "personnel information" violated the NLRA because the policy could reasonably be interpreted as prohibiting discussion of wages.

Savings Clauses

Employers have inserted "savings clauses" into their confidentiality policies in an attempt to not run afoul of employees' rights, but the board generally has not viewed such clauses favorably. For example, in *Am. Red Cross Blood Servs.*, Case No. 08-CA-090132 (NLRB Div. of Judges June 4, 2013), the employer's Confidential Information and Intellectual Property Agreement stated, "This Agreement does not deny any rights provided under the National Labor Relations Act to engage in concerted activity, including but not limited to collective bargaining." The administrative law judge (ALJ) held such clause did not make the overly broad confidentiality policy lawful, reasoning that it would cancel the unlawfully broad language only if employees are knowledgeable enough to know that the NLRA permits employees to discuss terms and conditions of employment.

The ALJ cited to the board's ruling in *Allied Mechanical*, 349 NLRB 1077 (2007), where the board found "an employer may not specifically prohibit employee activity protected by the Act and then seek to escape the consequences of the specific prohibition by a general reference to rights protected by law." On the other hand, in *Tiffany and Co.*, Case No. 01-CA-111287 (NLRB Div. of Judges Aug. 5, 2014), the ALJ found a savings clause effectively canceled an employer's unlawful rule prohibiting disclosure of wage, salary and benefit information where the savings clause appeared immediately following the unlawful prohibition and stated explicitly that the policy "does not apply to employees who speak, write or communicate with fellow employees or others about their wages, benefits or other terms of employment."

Conclusion

The discussion above demonstrates the unsettled application of the law in the area of confidentiality policies and the uncertainty employees and employers face. Perhaps some of the uncertainty will be eliminated through the promulgation of model confidentiality policies, as the NLRB's General Counsel, Richard F. Griffin Jr., is contemplating a memorandum analyzing legality of various policies in employee handbooks. See Ben James, "NLRB Sets Sights on Work Rules Banning Wage Discussions," Law360 (June 6, 2014), http://www.law360.com/articles/545722/nlrb-sets-sights-on-work-rules-banning-wage-discussions.

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