# Balancing Protection of Information With Employee Rights in Confidentiality Policies

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The developing law on employer confidentiality policies underscores the tension between an employer's ever-increasing need to protect confidential information and an employee's established right to discuss terms and conditions of employment. With the exponential growth of social media, instant communication and theft of confidential information, employers are erecting stronger firewalls and more restrictive employment policies to protect their and their clients' information. These are worthy goals from a business perspective, but they potentially conflict with the legal right of employees to discuss information relating to their wages, hours and working conditions.

The National Labor Relations Board (NLRB) is scrutinizing employers' workplace rules and policies, including those pertaining to confidentiality. In doing so, the NLRB has turned to its well-established principle that an employer violates the National Labor Relations Act (NLRA) by maintaining a rule that "reasonably tends to chill employees in the exercise of their Section 7 rights" under the NLRA to discuss terms and conditions of employment. In this regard, the NLRB first determines whether the rule at issue explicitly restricts employees' rights; if it does, the rule is unlawful and the analysis ends. If the rule survives the first part of the test, the NLRB goes on to determine whether employees would reasonably construe the rule to restrict employee rights, whether the rule was promulgated in response to union activity, or if the rule was applied to restrict employee rights. The rule is unlawful if any of these factors are satisfied. *See Martin Luther Mem'l Home, Inc.*, 343 N.L.R.B. 646 (Case 7-CA-44877 2004).

## Lawful vs. Unlawful

A number of NLRB cases following the reasoning above have found confidentiality policies did not violate the NLRA. For example, the NLRB in *K-Mart*, 330 N.L.R.B. 263 (Case 32-CA-15575 et al. 1999), ruled K-Mart's policy prohibiting discussion of "company business and documents" was lawful because employees would reasonably read the rule as protecting private business information rather than prohibiting discussion of terms and conditions of employment. Similarly, in *Burndy, LLC*, 34-CA-65746 (N.L.R.B. July 31, 2013), the NLRB found a rule prohibiting employees from disclosing "employee information" was *not* unlawful because it was included in a broader section of a policy restricting disclosure of intellectual property. The NLRB found a reasonable employee would construe such a rule as prohibiting disclosure of classified company information, not terms and conditions of employment.

In contrast, several cases over the last year have shown that confidentiality policies involving explicit prohibitions on discussing terms or conditions of employment or overly broad prohibitions on discussing personnel and company information may be found to be unlawful. For example, in *Flex Frac Logistics, LLC v. N.L.R.B.*, 746 F.3d 205 (5th Cir. 2014), the Fifth Circuit held a confidentiality policy prohibiting employees from disclosing "company financial information" and "personnel information" violated the NLRA because such information implicitly included wages. Further, in *Fresh & Easy Neighborhood Market*, 361

N.L.R.B. No. 8 (31-CA-077074, 31-CA-080734 July 31, 2014), the NLRB held an employer's confidentiality policy was unlawful where it prohibited disclosure of "customer and employee information" and the provision was not adequately limited by context.

### Media Statements and Company Investigations

With respect to media policies, in *DirecTV U.S. DirecTV Holdings, LLC*, 359 N.L.R.B. No. 54 (21-CA-039546 2013), a policy expressly instructing employees not to contact the media was unlawful because such policy could encompass protected communications regarding a labor dispute. To withstand scrutiny, media policies must be tailored to protect the employer's legitimate interest in not having employees hold themselves out as speaking for the company.

Policies forbidding employees from communicating about company investigations also must be carefully drafted and applied. In *Hyundai America Shipping Agency, Inc.* 357 N.L.R.B. No. 80 (28-CA-22892 Aug. 26, 2011), the NLRB held a company's policy broadly barring employees from discussing employee investigations was unlawful because the company failed to engage in individualized reviews of each situation to determine whether there was a substantial justification for prohibiting employees' discussion of investigatory matters, such as the protection of witnesses or evidence. And in *Banner Health System*, 358 N.L.R.B. No. 93 (28-CA-023438 2012), the NLRB held it was unlawful for a company to routinely ask employees making a complaint not to discuss the matter with their coworkers. Both cases demonstrate the employer's need to analyze each situation; proper consideration of factors such as safety, harassment or spoliation of evidence could and should result in a reasonable restriction on communications about the investigation.

### 'Savings Clauses'

Employers should be aware that a "savings clause" may not cure a defective policy. According to an administrative law judge (ALJ) decision in *American Red Cross Blood Services*, No. 08-CA-090132 (N.L.R.B. June 4, 2013), a clause providing an agreement "does not deny any rights provided under the [NLRA] to engage in concerted activity, including but not limited to collective bargaining" will not make an overly broad confidentiality policy lawful. The ALJ held such a clause would cancel unlawfully broad language only if employees are savvy enough to know the NLRA permits employees to discuss terms and conditions of employment. On the other hand, *Tiffany Co.*, (01-CA-111287 N.L.R.B. Aug. 5, 2014), upheld a savings clause that appeared immediately following an unlawful prohibition on disclosure of compensation information and explicitly provided 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."

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As demonstrated by these cases, the application of the law in the area of confidentiality policies is unsettled, and employees and employers face uncertainty as a result. Perhaps some of the uncertainty will be eliminated through the promulgation of model confidentiality

policies, as NLRB General Counsel Richard F. Griffin Jr. contemplated in a memorandum analyzing the legality of various policies in employee handbooks. See "NLRB Sets Sights on Work Rules Banning Wage Discussions," *Law360* (June 6, 2014). In addition, due to procedural issues relating to President Obama's recess appointments to the NLRB in January 2012, there is a chance certain of these decisions may be changed in the near term. It remains important, however, for employers to take a reasoned approach to confidentiality and protect important business information without overreaching.