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PERSPECTIVES

# EMPLOYER CONFIDENTIALITY POLICIES

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Employer confidentiality policies underscore the tension between an employer's need to protect confidential information and an employee's right to discuss terms and conditions of employment. The issue has received increased attention recently 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 information and that of their clients and customers. 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. Although the law in this area is developing, there seem to be some 'rules of the road' shaping up and this article will discuss these parameters. The topic also has applicability to employers outside the US who may be facing similar issues, but perhaps with even more protective laws.

In the US, the National Labor Relations Board (NLRB), which administers enforcement of the National Labor Relations Act (NLRA), has set forth the standard governing the legality of employer confidentiality policies. The NLRB has held an employer violates the law 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 uses a two-part test. First, it

must determine whether the rule at issue explicitly restricts employees' rights; if it does, the rule is unlawful and the analysis ends. Second, 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 employer rule is unlawful if any of these factors are satisfied.

A number of NLRB cases have followed the reasoning above and found confidentiality policies did not violate the NLRA. For example, the NLRB in *K-Mart*, 330 NLRB No. 29 (30 November 1999), ruled that 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 each *Mediaone of Greater Florida., Inc*., 340 NLRB No. 39 (19 September 2003), *Burndy, LLC* 34-CA-65746 (NLRB Div. of Judges 31 July 2013), and *Echostar Technologies, LLC*, Case No. 27-CA-066726 (NLRB Div. of Judges 20 September 2012), the NLRB found that 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.

**"Employers have inserted 'savings clauses' into their confidentiality policies to protect themselves, in effect stating nothing in the policy is intended to curtail protected employee rights."**

## Improper policies

In contrast, confidentiality policies involving explicit prohibitions on discussing terms or conditions of employment or overly broad prohibitions on discussing personnel and company information have been found to be unlawful.

For example, the confidentiality policies at issue in *NLRB v. Northeastern Land Services*, 645 F.3d 475 (1st Cir. 2011), and *Security Walls*, 356 NLRB No. 87 (2 February 2011), were found to be unlawful on the basis that an employee reasonably could believe the policy prohibited disclosure of terms of employment, such as compensation, benefits and disciplinary actions. In addition, in *Flex Frac Logistics, LLC v. NLRB*, 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. Furthermore, in *Fresh & Easy Neighborhood Market,* 361 NLRB No. 8 (31 July 2014), the NLRB held that 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

Confidentiality policies forbidding employee communication with third parties have also been

found unlawful. In *DirecTV U.S. DirecTV Holdings, LLC*, 359 NLRB No. 54 (25 January 2013), a policy expressly instructing employees not to contact the media was unlawful because such policy could encompass protected communications regarding a labour 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.

Confidentiality policies forbidding employees from communicating about company investigations also must be carefully drafted and applied. In *Hyundai America Shipping Agency*, 357 NLRB No. 80 (26 August 2011), the NLRB held a company's policy broadly barring employees from discussing employee investigations was unlawful because the company failed to engage in individualised reviews of each situation to determine whether confidentiality was truly necessary. In particular, the NLRB held the company did not engage in a process 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 d/b/a Banner Estrella Medical Center*, 358 NLRB No. 93 (30 July 2012), the NLRB held it was unlawful for a company to routinely ask employees making a complaint not to discuss the matter with their co-workers.

Both cases demonstrate the employer's need to take a 'step back' and analyse each situation; proper analysis of factors such as safety, harassment, spoliation of evidence, etc., could and should result in a reasonable restriction on communications about the investigation the employee can be made to follow.

## Savings clauses

Employers have inserted 'savings clauses' into their confidentiality policies to protect themselves, in effect stating nothing in the policy is intended to curtail protected employee rights. These clauses may work around the fringes of a problematic policy, but may not save a hopelessly defective one. According to an administrative law judge (ALJ) decision in A*m. Red Cross Blood Servs.*, Case No. 08-CA-090132 (NLRB Div. of Judges 4 June 2013), inserting clauses providing that an 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", will not make an overly-broad confidentiality policy lawful. The ALJ in *Am. Red Cross Blood Servs*. held that such a clause would cancel the unlawfully broad language only if employees are savvy enough to know that the NLRA permits employees to discuss terms and conditions of employment. On the other hand, in *Tiffany and Co*., Case No. 01-CA-111287 (NLRB Div. of Judges 5 August 2014), the ALJ upheld a savings clause that appeared immediately following an unlawful prohibition on disclosure of compensation information and explicitly provided 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

Due to procedural issues relating to President Obama's recess appointments to the NLRB in January 2012, there is a chance certain of the decisions we discussed 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. RC

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