And The Beat Goes On... The NLRB's Attack on Confidentiality Continues

Insights
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Many employers believe they have the absolute right to prohibit their workers from disclosing "confidential" information to coworkers and third parties. They are dead wrong. The National Labor Relations Board (NLRB) has consistently restricted employer rights in this area, and some recent decisions and guidelines from the current Board have accelerated the erosion of these employer rights.

This article outlines eight things that, unbeknownst to many employers, must be permitted under the National Labor Relations Act (NLRA).

1. Discussing Pay And Benefits
For about 50 years, employees have enjoyed a clear-cut right to discuss wages, hours, and other terms and conditions of employment with fellow employees, as well as with nonemployees (such as union representatives). Nonetheless, many employers continue to have confidentiality policies which specifically prohibit employee discussions of terms and conditions of employment, such as pay or benefits. Such policies are unlawful and you should immediately excise them from company handbooks.

2. Disclosing Employee, Personnel Or Confidential Information
Ten years ago, the Board ruled that a broad policy prohibiting release of "any confidential information" is unlawful. About the same time, the Board held that an employer policy prohibiting the release of any and all information regarding business conducted in the office is also unlawful. Both of those cases were subsequently enforced by federal circuit courts of appeal. These rulings form the basis for some of the expansive guidelines issued by the Board's current General Counsel (GC) in March 2015.

According to the GC, a confidentiality rule that broadly prohibits disclosure of "employee" or "personnel" information, without further clarification, will be viewed by the Board to be unlawful. Thus, the following policies would be unlawful:

- "Do not discuss customer or employee information outside of work, including phone numbers and addresses."
- "Never publish or disclose the Company's or another employee's confidential or other proprietary information. Never publish or report on conversations that are meant to be private or

proprietary information. Never publish or report on conversations that are meant to be private or internal to the Company."

- "You cannot disclose details about the Company."
- "Sharing of overheard conversations at the work site with your coworkers, the public, or anyone outside of your immediate work group is strictly prohibited."
- "Discuss work matters only with other Company employees who have a specific business reason to know or have access to such information. Do not discuss work matters in public places."
- "If something is not public information, you must not share it."

3. Discussing A Company Investigation

In the course of an employer's investigation into allegations of employee misconduct, such as theft, drug/alcohol use, workplace bullying or violence, or racial or sexual harassment, employers typically instruct those employees who are interviewed as witnesses not to discuss the investigation with anyone. Some employers even threaten interviewees with termination if they breach this confidentiality admonition. Employers generally believe that such admonitions help to maintain the integrity of the investigation process so that the employer can ferret out the truth without the interference of other employees.

In 2012, the Board ruled that such admonitions are unlawful—unless you can justify the prohibition by showing that your interests outweigh employee rights. In this regard, a general concern that the investigation will be compromised by employee discussion is not sufficient to outweigh employee rights and interests.

4. Witness Statements

Another common practice by employers in investigating employee misconduct is to ask employees to provide signed written statements. However, a 2015 Board ruling held that an employer cannot keep those statements confidential and that it must provide them to the union representative upon request. That ruling overturned precedent that had been in effect since 1978 and will make it more difficult for you to convince employees to serve as witnesses to coworker misconduct.

5. Disclosures To The Media, Government Agencies Or Other Third Parties

Employees have well-established rights under the Act to communicate with the news media, government agencies, and other third parties about their complaints, wages, benefits, and other terms and conditions of employment. Thus, policies that restrict employee communications with government agencies or the media under the guise of "confidentiality" can be unlawful. Specifically, in his April 2015 guidelines, the Board's GC found the following rules to be unlawful:

- "Employees are not authorized to speak to any representatives of the print and/or electronic media about company matters unless designated to do so by HR, and must refer all media inquiries to the company media hotline."
- "Employees are not authorized to answer questions from the news media. When approached for information, you should refer the person to the Company's Media Relations Department."

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- "If you are contacted by any government agency, you should contact the Law Department immediately for assistance."

Despite these rules, you may still lawfully adopt policies that control who is authorized to make "official" statements on your behalf.

6. Using Company Logos, Copyrights Or Trademarks

Employers do not have unfettered rights to prohibit use or disclosure of their logos, trademarks, or copyrights. For years, Board cases have consistently held that employees have a right to use their employer's name and logo on picket signs, leaflets, and other protest material, and that company proprietary interests are not implicated by these noncommercial uses. Thus, a broad ban on such use without any clarification will generally be found unlawful. This continues to be the case as the battle lines are being drawn in the social media arena.

The GC found the following rules to be unlawful:

- "Company logos and trademarks may not be used without the Company's written consent."
- "Do not use any Company logos, trademarks, graphics, or advertising materials on social media."
- "Use of the Company name, address or other information in your personal social media profile is banned."

7. Taking Photographs Or Making Recordings

According to Board decisions, employees also have the right to photograph and make recordings in furtherance of their protected concerted activity, including the right to use personal devices to take such pictures and recordings. Thus, rules placing a total ban on such photography or recordings, or banning the use or possession of personal cameras or recording devices, are unlawfully overbroad. In this regard, the GC found the following rules to be unlawful:

- "Taking unauthorized pictures or video on company property is prohibited."
- "No employee shall use any recording device including but not limited to, audio, video, or digital for the purpose of recording any employee or Company operation."
- "Use or possession of personal electronic equipment on Company property is absolutely prohibited."

8. Being Seen In Company Uniforms

In addition to prohibiting employees from using their logos or trademarks, some employer policies also prohibit employees from being seen in their uniforms, either in person or in photographs and other recorded images. For the same reasons that employees have a protected right to use and disclose their employers' logos in photographs or social media, they also have the right to be seen in their uniforms. As such, rules restricting those employee rights will also be held to be unlawful.

Conclusion

Employees have significant rights to engage in concerted action for their mutual aid and protection under the Act. Among other things, these rights include the right to use or disclose information or images that many employers would consider "confidential." We hope that this article has alerted you to the problems with overbroad prohibitions on use or disclosure of such information or images so that you can revise your policies and comply with existing law and legal guidance.

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