The NLRB Takes Another Cut at Non-disclosure Agreements

Insights
3.29.16

In recent years, the National Labor Relations Board has increased its scrutiny of various employer practices, including those of non-unionized employers. Among the areas of scrutiny have been non-disclosure of confidential information provisions, which the NLRB has ruled can be in violation of Section 7 of the National Labor Relations Act, specifically the provision that protects employees' rights to engage in concerted activities for the purpose of mutual aid and protection." A recent example of the NLRB's stance on non-disclosure provisions - as well as other, seemingly anodyne employment documents - can be found in the matter of Quicken Loans and Austin Laff, decided by Administrative Law Judge Dickie Montemayor.

The Facts
The Laff decision arises out of that most mundane of situations: two coworkers having a discussion while using urinals. The version of this conversation between mortgage bankers Laff and Michael Woods that was credited by ALJ Montemayor was as follows (from Laff):

I cross path with Woods on the way to the restroom. He looked kind of upset so I said something to the effect of, "Hey Mike, Smile." And he proceeded to tell me that he had a client who had been dropped in his pipeline who had refinanced about four years ago and had been trying to get in touch with a Client Specialist for over a week, and that client should get in touch with a "fucking Client Care Specialist and quit wasting his fucking time." [Laff] then testified that he responded to Wood's by telling him he "understood why he was frustrated."

The conversation was overheard by a third coworker, who reported what he heard to management. After investigating the situation, management at Quicken Loans chose to terminate Laff's employment for not being truthful in addressing what was said. Management also sent a warning letter to Woods about the incident. Finally, Executing Solutions Consultant Jorge Mendez sent out an email in large font stating the following:

Under no circumstances should we be discussing the pay we receive, in an area that a client or potential client could ever hear us. This goes along with discussion specific clients, client profiles, credit costs and rates that we have given to clients.

The Holding
The NLRB found that the conversation between Laff and Woods amounted to protected activity pursuant to Section 7 of the NLRA because they were discussing common concerns regarding the

Copyright © 2025 Fisher Phillips LLP. All Rights Reserved.

terms and conditions of their employment and that Woods' intentiom was to improve the terms and conditions of employment. ALJ Montemayor found an adverse inference against Quicken Loans for not producing Woods to testify at the hearing and this was central to the finding of protected activity.

Based on the conclusion that Laff and Woods were engaged in protected activity, ALJ Montemayor found that Quicken Loans' discharge of Laff and discipline of Woods were in violation of the NLRA. However, the findings went on to address a number of aspects of Quickenm Loans normal business practices that have implications for all employers that take basic steps to protect their confidential information. Those findings are as follows:

- ALJ Montemayor found that the Mendez email contained rules that were unlawful on their face because they "specifically prohibited employees from discussing their terms and conditions of employment and their pay," incuding the "discussion of specific clients, client profiles, credit, costs and rates that are given to clients." This finding has implications for work rules that employers impose to prevent employees from discussing confidential information unless the employees have a need to know that information. As such, the finding could be argued to be at odds with one of the basic ways that employers take reasonable means to protect their trade secrets.
- He found that basic non-disclosure of confidential information in Laff's separation agreement covering "client information, employee information, financial information, or any other internal information about Quicken Loans" violated Section 7 by chilling Laff's ability to talk to Quicken Loans employees about the terms and conditions of their employment. Again, this holding implicates another of the basic means that employers use to protect trade secrets: agreements with out-going employees regarding the use or disclosure of confidential information. ALJ Montemayor also found that the return of property provision of the agreement violated Section 7 because it did not have a carve-out for the disclosure of handbooks to government agencies and the prohibition on contacting customers or employees violated Section 7 because it pertained "for any reason."
- ALJ Montemayor found that the questioning of Laff regarding the bathroom conversation amounted to a coercive interrogation about the work rules in question. This holding has implications for workplace investigations that employers may perform regarding the potential mishandling of confidential information. Additionally, he found that Quicken Loans "created the impression of surveillance" by inquiring into a bathroom conversation, a holding that could have implications for investigations into communications made on an employer's computer system, another area where the NLRB could find that employees would have some expectation of privacy.

In the end, ALJ Montemayor ordered (among other things) that Quicken Loans reinstate Laff with backpay, remove any reference to the discipline of Laff or Woods, end its practices held in violation of the NLRA, and make a posting in its Scottsdale facility regarding the NLRA and the changes to its work rules.

Copyright © 2025 Fisher Phillips LLP. All Rights Reserved.

The Upshot

Now, there are several caveats to be mentioned with this ruling. Section 7 does not apply to management-level employees, so many (most?) of the personnel whom employers would worry most about in competition are not covered. The Laff ruling is only the opinion of one ALJ (and from a region noted to be pro-employee). And given the available remedies, it's generally true that the worst an employer will face from running afoul of the rules will be injunctive relief in the form of changing its practices. However, the ruling serves as an important reminder that the NLRB is taking a close interest in employment practices that are relevant for employers that take reasonable means to protect their trade secrets. An employer should consider whether its agreements with non-management employees, its handbook policies, its exit documents, and ther practices of its managers all acknowledge the stance taken by the NLRB concerning concerted activity.

Laff v. Quicken Loans (NLRB).pdf (236.87 kb)

Related People

Michael P. Elkon
Partner
404.240.5849
Email

Copyright © 2025 Fisher Phillips LLP. All Rights Reserved.