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The National Labor Relations Board ruled that a staffing agency's confidentiality policy regarding compensation and terms of employment violates the NLRA. The Board's newest case is crucial to staffing agencies, but relevant to all employers. Confidentiality policies containing provisions used by many employers continue to be under attack by employees and unions.

Littler Mendelson is the largest law firm in the United States devoted exclusively to representing management in employment and labor law matters.

Labor Management | A Littler Mendelson Newsletter

NLRB Again Finds Confidentiality Policies Unlawful

By Andrew P. Marks and Hans Tor Christensen

Staffing companies typically seek to limit their employees from addressing pay and benefit issues to the client company. Among other reasons, staffing companies may feel that clients do not want to hear compensation complaints from temporary workers, nor do clients want such workers sharing salary information with the client's regular employees. The NLS Group was trying to accomplish these purposes by including the following clause in its Temporary Employment Agreement:

> Employee understands that Employee will have direct access to and contact with NLS' various clients as Employee performs services hereunder and Employee agrees to keep all information obtained or utilized in the course of performing its services strictly confidential. Employee agrees not to solicit work or accept assignments from any of NLS's clients directly while engaged in services hereunder, or for a period of six (6) months after the termination of this agreement. *Employee also understands that the terms of this employment, including compensation, are confidential to Employee and the NLS Group. Disclosure of these terms to other parties may constitute grounds for dismissal.*

Reasonable? Yes. But unlawful, says the National Labor Relations Board in *Northeastern Land Services, Ltd. d/b/a The NLS Group*, 352 NLRB No. 89 (June 27, 2008), and the employee fired in 2001 for violating this policy is now entitled to reinstatement with years of back pay.

The fact that NLS employees were not represented by a union is irrelevant to this situation. Confidentiality concerns under the National Labor Relations Act (NLRA) can arise in any workplace. Here, the NLRB held that employees of the staffing company would reasonably understand the above clause to prohibit them from discussing the terms and conditions of their employment with a union organizer – conversations that are protected by the NLRA. Because the NLS rule was unlawfully overbroad, the termination pursuant to the rule was also unlawful, even though there was no evidence that the terminated employee actually sought to discuss his wages with a union or even with his coworkers.

The Administrative Law Judge who initially decided the case in 2002 concluded that the contract clause did not prohibit employees from discussing their contract terms with one another. While it did prohibit such discussions with clients, that limitation was justified because temporary staffing is "a very competitive industry, and the wages and reimbursements that [NLS] provides to its employees comprise a significant portion of the bids that it submits to potential clients." The ALJ found this to be a legitimate and substantial business justification that outweighed the possible restriction on employee rights. Now, six years later, the current two-member Board overruled the ALJ concluding that the Temporary Employment Agreement's prohibition on the discussion of compensation with "other parties" would reasonably be read by employees to include a "union organizer" and, therefore, was impermissibly overbroad. Perhaps, had the employer substituted "NLS clients" for "other parties" – rather than rely on the context of the entire paragraph - it would not now be facing six years of back pay.

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A Continuing Trend

In *Martin Luther Memorial Home d/b/a Lutheran Heritage Village-Livonia*, 343 NLRB No. 75 (2004), the Board articulated a standard for determining whether an employer's handbook or work rule violates the NLRA: If the rule explicitly restricts protected activity, it is unlawful. If the rule does not explicitly restrict protected activity, it is nonetheless unlawful if: (1) employees would reasonably construe the language of the rule to prohibit protected activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of rights guaranteed by the NLRA.

Since *Lutheran*, the NLRB has heard several other cases challenging handbook policies and work rules. See, for example, *Claremont Resort and Spa*, 344 NLRB No. 105 (2005) (employees would reasonably read employer's rule prohibiting "negative conversations" about their managers as an unlawful prohibition on voicing complaints) and *Longs Drug Stores California, Inc.*, 347 NLRB No. 45 (2006) (work rules against disclosure of confidential information deemed unlawful because employees would reasonably believe such work rules prohibit disclosure of employee wage rates).

Last year, the U.S. Court of Appeals for the D.C. Circuit examined employer policies prohibiting coworker fraternization in *Guardsmark LLC v. NLRB*, 475 F.3d 369 (D.C. Cir. 2007). The work rule at issue in *Guardsmark* directed employees not to "fraternize on duty or off duty, date or become overly friendly with the client's employees or with co-employees." The court held that Guardsmark employees would reasonably believe that the work rule prohibited employees from more than simply dating a coworker. Because it would prohibit their discussing the terms and conditions of their employment, the work rule violated the employees' rights under Section 7 of the NLRA. See Littler's March 2007 ASAP, *The Dangers of Overbroad Work Rules: Union-Free and Unionized Employers Beware.*

Immediately after the decision in *Guardsmark* , the D.C. Circuit issued a follow-up decision, *Cintas Corporation v. NLRB* , 482 F.3d 463 (D.C. Cir. 2007), which turned on a handbook containing the following confidentiality provision:

> "We honor confidentiality. We recognize and protect the confidentiality of any information concerning the company, its business plans, its [employees], new business efforts, customers, accounting and financial matters."

Cintas defended the policy by arguing that the confidentiality language in the handbook does not explicitly prohibit protected employee activity, there is no evidence that employees interpreted the language to prohibit protected activity, and they never interpreted or applied the language to prohibit protected activity. The Court found that these facts, even if proven, were irrelevant. A company violates the NLRA if employees "would reasonably construe the language" to prohibit protected activity — even if the policy does not specifically prohibit protected activity and even if there is no evidence that the employees or employer ever actually interpreted or enforced it.

Confidentiality Policies Are a Major Problem for Non-Unionized Employers under the NLRA

Employers often have a legitimate interest in keeping information concerning employee wages and benefits confidential. And very often, employee handbooks and work rules include provisions designed to keep this information secret. But while this desire for confidentiality is often well intentioned, without careful drafting and review, these provisions can be framed in ways that are overbroad and may lead to legal exposure for non-union employers under the NLRA. In fact, with respect to communications among coworkers, a confidentiality provision must be quite limited to avoid a likely NLRA violation.

Disgruntled employees and unions are becomingly increasingly aware of the availability of the NLRA to put pressure on employers. In the vast majority of circumstances, the employer had no intention of restricting employee rights protected by the NLRA. However, good intentions are not a defense against an aggressive union or former employee. Therefore, we recommend that employers take precautions to ensure that their handbooks and work rules do not create a vulnerability that could result in significant cost or the reinstatement of a disgruntled employee.

We suggest that employers consider the following practical recommendations.

- Perform an annual review of your work rules to ensure legal compliance with all federal and state laws. A proactive, careful review of a company's policies *before* a challenge is lodged may eliminate the expense and time involved with defending a legal challenge to an overbroad work rule.
- Talk with experienced labor counsel about confidentiality policies in particular. As the above cases suggest, these policies are difficult to enforce and are very easy to overstate.
- Realize that some things can be kept more confidential than others. Company proprietary information, for example, is subject to confidentiality rules that are reasonable under state law. Rules regarding employee confidentiality related to wages, benefits, grievances and other work concerns are very difficult to enforce. If you have such a rule, have it reviewed by counsel.
- Use plain language. If your employees might misinterpret a word in your policy, don't use it. If a large portion of the workforce speaks a language other than English, rules should be translated. Translating work rules into multiple languages will result in better compliance and boost employee morale due to the efforts to communicate with employees in their native languages.

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