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## U.S. Court of Appeals Finds Confidentiality Policy in Employee Handbook Violates National Labor Relations Act

The United States Court of Appeals for the D.C. Circuit has held that confidentiality provisions in an employee handbook violated the National Labor Relations Act (NLRA) because employees could “reasonably construe” the provisions to prohibit them from discussing the terms and conditions of their employment with other employees, even though the provision did not expressly prohibit such discussions. *N.L.R.B. v. Cintas Corp.*, 2007 U.S. App. LEXIS 6075 (D.C. Cir. 2007). Significantly, this decision applies to non-unionized employers as well as unionized employers.

### The NLRB Ruling

Cintas Corporation’s employee handbook stated:

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.

Confidentiality language also appeared in its “Discipline Policy” in which Cintas warned employees that they may be sanctioned “for violating a confidence or [for the] unauthorized release of confidential information.”

The Union of Needletrades, Industrial and Textile Employees (“the Union”) filed unfair labor practice charges with the National Labor Relations Board (NLRB), alleging that Cintas was in violation of Section 8(a)(1) of the NLRA, 29 U.S.C. § 158(a)(1), which prohibits employer interference with an employee’s right to discuss the terms

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and conditions of his or her employment with others. The NLRB's general counsel agreed that the handbook provision prohibited the disclosure of "any information concerning . . . [employees]" and therefore unlawfully restricted employees from exercising their right to self-organize and bargain collectively, as established in Section 7 of the NLRA, 29 U.S.C. § 157. The general counsel issued a complaint against Cintas. At a hearing before an Administrative Law Judge (ALJ), Cintas provided evidence that the general counsel's reading of the language was overbroad in that employee information was discussed among employees without disciplinary action being taken. Nonetheless, the ALJ held against Cintas, finding that the "mere existence" of a rule whose plain language could be construed as interfering with employees' Section 7 rights violates the NLRA.

The NLRB upheld the ALJ's decision unanimously, stating that the handbook created an "unqualified prohibition" on discussion of any information regarding employees and that employees could reasonably construe the provision to restrict discussion of wages and other terms and conditions of employment with coworkers and the Union. The NLRB ordered Cintas to remove the language and provide employees with substituted, lawful language.

#### **D.C. Circuit Decision**

The D.C. Circuit upheld and enforced in full the NLRB's order. The court rejected all of Cintas' defenses including that:

- the confidentiality language does not explicitly prohibit Section 7 activity;
- nothing in the record indicated any employees actually interpreted the provisions to prohibit discussions among themselves about their working conditions or terms of employment; and
- Cintas never disciplined any employees under the confidentiality rule in the manner feared by the Union.

The court also affirmed the NLRB's interpretation of Section 8(a)(1) as an unqualified prohibition and said that a more narrowly tailored rule that does not interfere with employee-protected activity is sufficient to address a company's interest in protecting confidential information. *Id.* at \*18–19. The court held that the standard is not whether an employee has interpreted the provision as such, but whether an employee reasonably would. *Id.* at \*9. Moreover, the court found that the NLRB does not need to consider whether the disputed restriction has ever been enforced by the employer in making this determination. *Id.*

### Important Points for All Employers

- This decision serves as a reminder that the NLRA applies to unionized and non-unionized employers alike. Employers unfamiliar with the NLRA should discuss with counsel how the NLRA may affect them.
- All employers should review with counsel confidentiality provisions and similar language contained in their employee handbooks and other company documents to ensure that they cannot reasonably be construed to restrict employees' rights to discuss with coworkers employment terms and working conditions.

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*If you would like further information on any subject covered in this Advisory, please contact an attorney listed below, a member of Mintz Levin's [Employment, Labor and Benefits Section](#), or the Mintz Levin attorney who ordinarily handles your legal affairs.*

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