

Confidentiality Rule In Handbook Violated NLRA

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A confidentiality provision in an employee handbook prohibiting employees from disclosing any information regarding its employees interfered with employee rights to engage in “concerted activity,” which included the right to discuss terms and conditions of employment with co-workers and union representatives, in violation of Section 7 of the National Labor Relations Act, held the United States Court of Appeals for the District of Columbia Circuit in affirming a decision of the National Labor Relations Board. *Cintas Corp. v. National Labor Relations Board*, – F.3d –, Nos. 05-1305, 05-1340 (D.C. Cir. March 16, 2007). This case serves as a reminder to employers that the National Labor Relations Act (“NLRA”) provides protections to non-union employees as well as to union employees.

The employer, Cintas Corporation, issued an employee handbook which discussed the use and disclosure of confidential information. Specifically, the handbook stated:

We honor confidentiality. We recognize and protect the confidentiality of any information concerning the company, its business plans, its partners [Cintas referred to its employees as “partners”], new business efforts, customers, accounting and financial matters.

The handbook warned employees that they could be sanctioned for “violating a confidence or [for the] unauthorized release of confidential information.”

The Union of Needletrades, Industrial and Textile Employees, which had made attempts to organize Cintas’ employees, objected to the policy, and filed an

unfair labor practice charge against Cintas with the Board, claiming that the confidentiality policy violated the NLRA because it interfered with the employees’ rights to discuss the terms and conditions of their employment with one another and the union representatives.

The NLRB affirmed the Administrative Law Judge’s finding of an unfair labor practice, and determined that the handbook language created an “unqualified prohibition of the release of ‘any information’ regarding ‘its partners’” and could reasonably be construed by employees to restrict discussion of wages and other terms and conditions of employment with their fellow employees and the union.

The United States Court of Appeals for the District of Columbia Circuit affirmed. The Appeals Court reasoned that Section 7 of the NLRA guarantees employees the right to engage in “other concerted activities for the purpose of collective bargaining or other mutual aid or protection,” that this right includes the right to discuss terms and conditions of employment with other employees and with non-employees, and that the disputed language interfered with that right and therefore violated the NLRA.

The Court rejected Cintas’ argument that the language did not expressly prohibit Section 7 activity, holding that the important factor was not the express language in the handbook, but rather how that language could be construed by employees. The Court also rejected Cintas’ argument that there was no evidence that any employee had actually been restrained from exercising his or her Section 7 rights due to the language,

observing that the proper question is whether an employee *would reasonably* construe the language to restrict Section 7 rights, not whether an employee *had* in fact construed it as such. Finally, the Court rejected Cintas' argument that it had never applied the confidentiality rule in the manner feared by the union, noting that the mere maintenance of the rule likely to chill Section 7 activity violated the NLRA, even absent evidence that the employer enforced the rule against protected concerted activity. The Court noted that the rule's prohibition against discussing any information "concerning...its partners" distinguished it from other cases where non-disclosure provisions were found not to violate the NLRA. The Court indicated that, had the rule been more narrowly tailored to only prohibit disclosure of "confidential" information regarding employees, it likely would not have violated the NLRA.

Employers should review confidentiality provisions in their employee handbooks to make sure that their policies for non-union employees are narrowly tailored and do not prohibit employees from discussing terms and conditions of employment in violation of Section 7 of the NLRA.

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