Beware: Your Employee Handbook May Be Hazardous Under the NLRA

The D.C. Circuit Court of Appeals recently affirmed the decision of the National Labor Relations Board which found that the confidentiality provision in the employee handbook of a non-unionized employer violated the National Labor Relations Act. In light of this decision, employers – particularly non-unionized employers – should review their confidentiality and communication policies, in handbooks and/or employment agreements, and determine whether they need to be revised. This alert reviews the court's decision and provides practical guidance for employers in revising their policies.

3/27/2007

A recent federal appeals court decision highlights a potentially treacherous problem: the possibility that an employee handbook creates terms that violate the National Labor Relations Act (NLRA). The decision, focusing on a seemingly non-controversial policy concerning the confidentiality of employer records in a non-unionized setting, is of serious concern to both non-unionized and unionized employees alike.

The policy at issue in Cintas Corp. v NLRB, 2007 U.S. App. Lexis 6075 (D.C. Cir. Mar. 16, 2007), was found in a section of Cintas's handbook, titled "Cintas Culture," which describes its "principles and values." It included the following discussion of how employees (referred to by Cintas as "partners") are expected to treat confidential information:

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

The handbook further stated, in another section, titled "Discipline Policy," that employees could be sanctioned for "violating a confidence or [for the] unauthorized release of confidential information."

The United States Court of Appeals for the District of Columbia Circuit affirmed a decision of the National Labor Relations Board (NLRB), which held that the policy violated Section 8 of the NLRA. Section 8 prohibits employers from "interfere[ing] with, restrain[ing], or coerce[ing] employees," 29 U.S.C. § 158(a)(1), in the exercise of their Section 7 rights "to self-organization, to form, join or assist labor organizations … and to engage in other concerted activities for … mutual aid or protection." 29 U.S.C. § 157.

The court agreed with the NLRB, even though the confidentiality provision did not specifically restrict Section 7 activity (e.g., by instructing employees not to discuss wages or other terms and

conditions of employment with each other). Disturbingly, the court held that the provision violated the NLRA because "employees would reasonably construe the language to prohibit Section 7 activity."

The court, and the board, based this finding on the breadth of the confidentiality provision – specifically the "all-encompassing phrase 'any information concerning … its partners'" – which made no effort to distinguish Section 7 activity from violations of company policy. Moreover, the court agreed with the NLRB that whether anyone had actually been disciplined under the policy for sharing wage information was irrelevant, because the "mere maintenance of a rule likely to chill Section 7 activity, whether explicitly or through reasonable interpretation, can amount to an unfair labor practice."

In light of this decision, employers – even non-union employers – should review their confidentiality and communication policies, in handbooks and/or employment agreements, and determine whether employees could reasonably construe such policies to restrict them in their discussion of wages or other terms and conditions of employment with other employees (or union representatives). If so, employers should consider revising them as soon as possible and, in doing so, should be guided by the court's admonition that "[a] more narrowly tailored rule that does not interfere with protected employee activity would be sufficient to accomplish the Company's presumed interest in protecting confidentiality."

Accordingly, employers should consider taking one or more of the following steps in revising their policies.

> Define confidential information as narrowly as possible with respect to information about employees (e.g., wages). Avoid sweeping and broad definitions of confidential information that include "all information regarding employees" or "all information regarding employees' wages." Remove any language that specifically prohibits employees from discussing their wages or other terms and conditions of employment.
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> Narrowly define those individuals to whom confidential information may not be disclosed. For example, provide that employees may not disclose confidential information to any competitors of the company or to any other employers upon leaving employment with the company.
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> Add a "savings" clause, which makes clear that the confidentiality provision is not meant to restrict employees' Section 7 rights, such as, "This policy is not intended, and should not be construed, to limit or prevent an employee from exercising rights under the National Labor Relations Act."

Of course, after revising their policies, employers must ensure that such policies are distributed and/or communicated to all employees.