PLUNKETT COONEY

Confidentiality Policy Violates Federal Labor Law

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The National Labor Relations Board (NLRB) recently struck an employer's confidentiality policy because it was overly broad and intruded the right of its employees to engage in concerted activity, as protected by the National Labor Relations Act (NLRA).

Jason Galanter was employed MCPc, Inc., a company headquartered in Cleveland, Ohio, that provides technology products and services. At one point, Galanter complained to the company's director of engineering about being short staffed and having to work too many hours. Galanter then mentioned that the company could have hired several engineers for the $400,000 salary that it was paying to a newly-hired executive.

The director of engineering forwarded Galanter's comments to the CEO who had the company's IT manager review Galanter's access to the computer network. He was advised that Galanter had full access to all files and systems. The CEO met with Galanter who admitted that he disclosed the salary amount but insisted that his computer network access was authorized in accordance with a project to which he was assigned and denied any wrongdoing. The CEO indicated that the damage was done, and Galanter was discharged for disclosing salary information in violation of the company's confidentiality policy. Later, Galanter testified that he obtained the information through employee rumors and an estimate he derived from Internet research concerning comparable salaries for similar positions.

Galanter, like other employees, received a copy of the employee handbook which contained the company's confidentiality policy. The policy stated:

"[The Company] is engaged in sales, service and distribution, which requires that a strict code of confidentiality be maintained. No employee will store information outside of [the Company] (either written or electronic form) about any matter pertaining to the conduct of [the Company's] business. No information regarding [the Company's] purchase prices or processes shall be given to anybody without permission of senior management. Conversations regarding prices, service, problems, or other information specifically about one vendor or customer to another are prohibited. Any employee who compromises information may be subject to disciplinary action or possible dismissal. *In addition, idle gossip or dissemination of confidential information within [the Company], such as personal or financial information, etc. will subject the responsible employee to disciplinary action or possible*

termination." (emphasis in original)

The issues the NLRB was charged with resolving were whether the italicized language in the confidentiality policy was overly broad in violation of the NLRA and whether Galanter was discharged for engaging in protected concerted activity under the Act.

The NLRB rejected the company's arguments that: (1) its policy did not violate the NLRA; (2) Galanter was not engaged in protected concerted activity; and (3) even if he was engaged in protected concerted activity, the company still had the right to discharge Galanter for improperly obtaining and disclosing another employee's confidential wage information.

According to the NLRB, the confidentiality policy was overly broad, because employees could reasonably construe the language to prohibit Section 7 activity. The NLRB noted that although the company's policy was facially neutral (insofar as it did not inherently condemn conduct that is protected by Section 7), employees could reasonably interpret the prohibition of disclosing "personal or financial information" as prohibiting protected activities (i.e., restricting their discussion of wages). Thus, the company's employees may be deterred from engaging in legally protected discussions concerning wages and other terms and conditions of employment with fellow employees or the union.

The NLRB further found that Galanter *was* discharged for engaging in protected concerted activity because, *inter alia*, his comments expressed shared concerns about the staffing shortage, and were raised at a group meeting called by the employer. "[T]he Board has long held that concerted activities include 'individual employees bringing truly group complaints to the attention of management.'" And, even though Galanter's complaint about the executive's compensation had nothing to do with the company's ability to find and hire engineers, the NLRB noted that concerted activities are protected even where they are "unnecessary and unwise."

In conclusion, the NLRB found that the company had violated the act by maintaining an overly broad confidentiality policy, by discharging Galanter because he engaged in concerted activity and by discharging Galanter because he violated the overly broad confidentiality policy. The company was ordered to reinstate Galanter with back pay and benefits and to post a notice of rights and rescind the overly broad confidentiality policy.

In recent years, the NLRB has struck many social media policies as being in violation of Section 7 rights, but now it has struck a confidentiality policy. Many, if not most, employee handbooks address the confidentiality of company records. These policies should now be reviewed in light of this decision. If you have any questions about the lawfulness of your policy, contact the author at 313-983-4863 or your Plunkett Cooney labor/employment attorney.

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