Employers: Take Care In Crafting Confidentiality Clauses

Law360, New York (April 17, 2014, 5:45 PM ET) -- Employers are often surprised to learn that policies that explicitly prohibit employees from discussing their salaries or bonuses are in violation of Section 7 of the National Labor Relations Act. After all, employers often have good reasons for implementing such policies. Open discussion of salaries and bonuses can often result in serious morale problems, and employees often fail to appreciate the legitimate reasons for salary differences. But the National Labor Relations Board has made it clear for some time that such policies interfere with an employee’s right to engage in concerted activity. This applies to all employees, regardless of whether or not they are represented by a union.

Moreover, the prohibition against these discussions does not have to be explicit. In Flex Frac Logistics LLC v. NLRB (2014), a nonunionized trucking company in Fort Worth, Texas, required each of its employees to sign a document containing a confidentiality clause prohibiting all employees from sharing its confidential information, including the company’s “financial information, including costs,” as well as its “personnel information and documents.” After a discharged employee filed an unfair labor charge with the NLRB, the board issued a complaint alleging that Flex Frac promulgated and maintained a rule prohibiting discussions regarding employee wages.

In addressing the merits of the NLRB’s claim, the Fifth Circuit explained that any “workplace rule that forbids the discussion of confidential wage information between employees ... patently violate[s] Section 8(a)(1).” Although Flex Frac’s confidentiality rule did not explicitly restrict wage discussions, the circuit court explained that the rule’s express prohibition of discussions concerning “financial information, including costs” and “personnel information” could be reasonably construed to include preclusions against employee wages discussions outside of the company.

By specifically identifying “personnel information” as a category of information, without any limitations as to the type of information included within this definition, employees were implicitly prohibited from discussing or disclosing wage information in violation of Section 8(a)(1). In holding that confidentiality policies that apply to “personnel information” violate the NLRA, the Fifth Circuit joins other courts of
appeals that have reached the same conclusion. For example, in Cintas Corp v. NLRB (2007), the D.C. Circuit upheld an NLRB decision that an employer rescind a policy prohibiting disclosure of confidential information about the company's business even though there was no specific mention of personnel information.

Some employers may think that amending their confidentiality policies is unnecessary because, despite the policy’s express terms, in practice it is not enforced against or intended to prohibit employee wage discussions. The reality of how a policy is actually enforced, however, may not be enough to overcome how it is written. The Flex Frac court, for example, dismissed the employer’s evidence that its employees discussed wages amongst themselves and did not interpret the confidentiality provision to restrict their Section 7 rights, explaining that neither actual employee practice nor the employer’s enforcement of the rule was determinative. Instead, the focus will be on whether the express terms of the policy, as written, could be reasonably construed to prohibit protected concerted activity. It is important, therefore, that employers pay specific attention to how their policies are actually worded— not just how they are enforced.

In addition to running afoul of Section 7 of the NLRA, employers need to beware that some states have passed their own state statutes prohibiting employers from placing restrictions on employee discussions regarding wages and compensation. For example, Michigan’s Payment of Wages and Fringe Benefits Act prohibits an employer from discharging, formally disciplining or otherwise discriminating against an employee who discloses the amount of the his own wages.[1] Similarly, New Jersey recently amended its state discrimination statute to prohibit employers from retaliating against employees who request information about or discuss their coworkers’ salary, benefits or other job information for the purpose of uncovering potential pay discrimination.[2]

Employers with overly broad or ambiguous confidentiality policies, therefore, not only face the risk of potential backlash from the NLRB but may also be exposed to state law liability. Finally, earlier this month President Obama signed an executive order prohibiting employers from retaliating against employees who discuss their compensation.[3] Although the order currently only applies to companies with federal contracts, these rights could be extended to all workers in the near future.

In light of the increased scrutiny of employer confidentiality policies and other policies prohibiting the discussion of personnel information, employers and attorneys alike should keep the following in mind when reviewing or drafting such policies.

**Stay Away From Specific Prohibitions Against Employees Disclosing or Discussing Their Wages**

It has long been held that any employer work rule that specifically forbids employee discussions regarding their wages or compensation is a blatant violation of the NLRA. Despite the NLRB's long-time stance on this issue, it is not uncommon for employers to still have policies that specifically prohibit employees from discussing or disclosing their salary or rate of compensation. These policies explicitly restrict activities protected by Section 7 and make an employer susceptible to an unfair labor charge. In light of the NLRB’s increased efforts to challenge and scrutinize employer confidentiality policies, it is
especially important that employers with a policy or practice of prohibiting employee wage discussions amend their policies immediately and refrain from such practice.

**Provide Specific, Concrete Examples of the Types of Confidential Information the Policy Intends to Protect**

As the Flex Frac decision demonstrates, the use of broad and ambiguous descriptions or categories of information protected under a confidentiality or nondisclosure policy is problematic. Sweeping definitions of confidential information or the use of general categories of information may encompass information that could reasonably be construed to include wages, compensation and other terms of employment.

Employers should determine exactly what types of information and communications they are intending to prohibit the disclosure of and draft a policy that clearly identifies that intended information. Stay away from broad terms such as “personnel information,” “information about the company” or “company costs.”

Instead, provide specific examples of the types of information that the employee is prohibited from disclosing. The more clear and detailed the description of the information protected by and communications prohibited under the policy, the less likely the policy could be construed to reach protected communications about wages, compensation or other terms and conditions of employment.

**Distinguish Between an Employee’s Own Personnel Information and Information About Other Employees**

While employers may not prohibit employees from discussing their own salaries or bonuses, employees may prohibit employees from discussing information about other employees that employees may be privy to because of their jobs. For example, employees who work in the human resources, payroll or accounting departments can be prohibited from sharing salary data that they access as part of their jobs.

Similarly, supervisors and managers may be prohibited from sharing salary information of the people that they supervise. While employers often address these particular situations in their general confidentiality policies, some employers choose to develop policies for specific groups of employees.

**Distinguish Between Information Shared With Other Employees and Information Shared With Third Parties**

The NLRB’s concern about confidentiality policies is that they will interfere with employees’ rights to engage in “concerted activities for the purpose of collective bargaining or other mutual aid or protection.” In order for an activity to be concerted it must be undertaken by two or more employees or undertaken by one on behalf of others. Hence, an employer certainly can prohibit employees from sharing salary information with third parties, such as competitors.
While employers may be discouraged by the NLRB’s recent challenges of these policies, they should keep in mind that they are entitled to take precautions in order to protect their confidential information and trade secrets.[4] The NLRB has recognized that businesses have a “substantial and legitimate interest” in protecting and maintaining the confidentiality of certain proprietary information and trade secrets.[5] Likewise, the NLRB has also recently made clear that employees do not have a protected right to disclose an employer’s trade secrets. An unambiguous and well-drafted confidentiality policy will not draw any negative attention or consequences from the NLRB.

**Consider Including a “Savings Clause” or Specific Carve-Out for NLRA Rights**

Make it clear that the policy or agreement is not intended to prohibit employee wage discussions. The best way to do so is by adding a savings clause to the policy or agreement that specifically provides that employees are not prohibited from discussing or disclosing information regarding their wages, compensation or other terms and conditions of employment.

Some employers have opted for including in their confidentiality policies a specific carve-out for Section 7 Rights under the NLRA, as in: “To the extent that any personnel information is shared in connection with protected activities under Section 7 of the National Labor Relations Act, you will not face disciplinary action.”

Putting aside the fact that many employers would rather not draw attention to the NLRA in their policies, the NLRB’s current stance is that such a disclaimer alone does not make lawful an otherwise unlawful provision prohibiting Section 7 activity.[6] Employers are probably better served by having policies that specifically allow employees to share their own salary information with others, so long as they do not share information of other employees that they obtain as a result of their position.

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