

## The NLRB invalidates employer's confidentiality rule

Employers have long believed that they could restrict access to information about wages and benefits so employees couldn't discuss pay rates, raises and so on. The idea was that how much any individual is paid is between him and the employer.

Many employee handbooks even contain specific rules against sharing wage and benefits information, even among co-workers.

If that's the case at your workplace, check with your attorney. The prohibition may run afoul of the National Labor Relations Act (NLRA), which covers the right to unionize.

### Concerted activity protected

The National Labor Relations Board (NLRB) administers the NLRA and has been coming down hard on employer rules restricting what employees can and cannot say about working conditions, including salaries. What's more, their rulings don't just apply to unionized employers, but to nonunion workplaces, too.

The NLRB believes that employees should be free to discuss their working conditions.

This is what the NLRA refers to as engaging in "concerted activity" to change those working conditions, either through direct talks with managers and supervisors or through union drives aimed at electing a union to represent workers and negotiate wages and benefits.

Because rules against discussing salaries restrict the ability to share information with other employees and union representatives, this chills their concerted activity rights, according to the NLRB.

### Recent NLRB rulings

Recently, in a case involving Quicken Loans, the NLRB turned its attention to employers' confidentiality rules.

It affirmed an administrative law judge's decision invalidating a rule that prohibiting nonunion employees from disclosing personal informa-

tion about themselves or their co-workers.

Essentially, employees were told not to pass on home phone numbers, cellphone numbers, addresses and email addresses to outsiders.

Quicken's "Proprietary/Confidential Information" rule was included in certain employment agreements. It prohibited employees from disclosing nonpublic information relating to company personnel, including "all personnel lists, rosters, personal information of co-workers, managers, executives and officers; handbooks, personnel files, personnel information such as home phone numbers, cellphone numbers, addresses and email addresses" to any person, business or entity.

In affirming the administrative law judge's decision, the NLRB held that "there can be no doubt that these restrictions would substantially hinder employees in the exercise of their Section 7 rights."

### Impossible to organize

In other words, if employees couldn't share contact information with union representatives, it would be next to impossible to organize the employees.

Quicken defended the rule as necessary to protect the time and expense invested in its employees, as well as the confidential and proprietary information entrusted to the company.

The NLRB rejected that defense, and agreed with the administrative law judge. It ruled that complying with Quicken's rule would prohibit employees from discussing with union representatives or their co-workers their own wages and benefits, or the names, wages, benefits, addresses, or telephone numbers of other employees.

The NLRB said "this would substantially curtail their Section 7 protected concerted activities."

### But wait, there's more

Quicken also had a rule that required employees to keep any criticism of the company to themselves.

The NLRB also affirmed the administrative law judge's invalidation of Quicken's "nondisparagement" provision. It stated that employees would not "publicly criticize, ridicule, disparage or defame the Company or its products, services, policies, directors, officers, shareholders, or employees ...."

The rule presumably prevented employees from going online to gripe about the company, its policies or products or even placing bumper stickers on their cars, handing out fliers or any of the many other techniques unions have traditionally used to call attention to a particular employer's policies or practices.

The NLRB concluded that an employee would reasonably construe this provision as restricting his or her rights to engage in protected concerted activities.

### What employers should do

In the wake of this decision—and considering the fact that the NLRB is now comprised of a liberal majority—expect continued close scrutiny of confidentiality policies.

Carefully review your confidentiality rules to ensure that they do not prohibit employees from discussing wages, benefits or other terms and conditions of employment, either with their co-workers or with union representatives.

Also, consider including specific examples of prohibited disclosures, as well as a clause specifically providing that the rule is not intended to prohibit an employee's exercise of rights protected by Section 7 of the NLRA.

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