Client Alert

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Given Recent NLRB Decisions Finding Standard Confidentiality Policies Unlawful, Employers Should Review and Update Their Policies

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On January 8, 2013, a National Labor Relations Board ("NLRB") administrative law judge ruled that a proprietary/confidential information provision in Quicken Loan's employment agreement with its mortgage banker employees violated federal law. This ruling was the latest in a series of recent rulings on the legality of employer confidentiality policies under the National Labor Relations Act ("NLRA"). These rulings are significant for all employers – not just those with unionized workforces – because they provide key guidance on how employers should draft or revise their confidentiality policies to ensure enforceability and compliance with the NLRA. In holding unlawful the kinds of provisions that many employers adopt as standard practice, these decisions serve as a caution to employers to draft their policies carefully.

As discussed in our October 2012 Client Alert "First NLRB Decisions on Social Media Give Employers Cause to Update Policies, Practices," the NLRA in Section 7 protects employees' rights to engage in "concerted activity" for the purpose of collective bargaining, or for other mutual aid and protection, and in Section 8 prohibits employers from interfering with, restraining, or coercing employers who are exercising rights guaranteed under Section 7. Many employers assume – mistakenly – that the NLRA and NLRB are relevant only if their workforce is unionized. To the contrary, the NLRA covers all private employers that have an impact on interstate commerce (with certain exceptions, such as public employers and railways) – approximately six million private employers nationwide.

Since June 2012, the NLRB itself and NLRB administrative law judges have issued five rulings regarding the legality of employers' confidentiality policies, ruling that three of the policies at issue violated the NLRA.

In each case, the focus was on whether the policy could be read to prohibit employees from discussing wages, benefits, or other terms and conditions of employment with their colleagues or union representatives. Taken together, these five cases provide some broad parameters for assessing the permissible scope of confidentiality policies.

The *MCPc, Inc.* Decision, Case No. 6-CA-063690 (June 7, 2012)

In the *MCPc, Inc*. case, the fact pattern involved a discussion about heavy workloads in a group meeting, during which an employee noted that the company should hire additional engineers. He mentioned that the company could have hired several engineers for the $400,000 that it was to pay a newly hired executive. MCPc terminated that employee for disclosing the executive's salary information to other employees in violation of its confidential information rule. The confidential information rule stated in relevant part:

> 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.

The NLRB administrative law judge explained that where a challenged rule or policy does not explicitly restrict Section 7 rights (as was the case here), the violation is dependent upon a showing of one of the following: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights.

The administrative law judge found this portion of MCPc's confidentiality rule overbroad because it specifically identified "personal or financial information" as confidential information that cannot be disclosed and, therefore, "might reasonably deter employees from engaging in legally protected activities such as discussing the terms or conditions of their employment or raising complaints about their working conditions." Additionally, MCPc failed to show that it had a legitimate business interest in the type of wage information at issue.

The administrative law judge also ruled that MCPc violated the NLRA by discharging the employee for engaging in protected activity and violating MCPc's unlawfully overbroad confidentiality rule.

The *TT&W Farm Products, Inc.* Decision, Case 26-CA-023722 (Sept. 11, 2012)

In *TT&W Farm Products, Inc*., the NLRB adopted an administrative law judge's dismissal of claims based on the employer's handbook rules that prohibited the disclosure of confidential or proprietary information.

One section of the handbook contained a list of "intolerable offenses" that would be considered cause for immediate discharge, including:

> a. Removing from the plant or revealing to an unauthorized person classified or proprietary information without approval.

The Board agreed with the administrative law judge's decision that this rule by its terms did not prohibit the discussion of wages and other terms and conditions of employment. Cases finding confidentiality provisions overbroad have involved rules that focused on employee information that might be interpreted to include wages and benefits. Here, however, the language of the rule focused on classified or proprietary

information and did not specify whether it related to employee information. Though broad, the language was not so ambiguous as to create a violation of Section 8 of the NLRA.

The *Flex Frac Logistics, LLC* Decision, 358 NLRB No. 127 (Sept. 11, 2012)

In *Flex Frac Logistics, LLC*, the NLRB adopted the decision of an administrative law judge finding the confidential information provision in Flex Frac's employment agreement to be unlawful. The employment agreement stated that no employee was permitted to share confidential information outside the organization. Confidential information was defined to include:

> information that is related to: our customers, suppliers, distributors; [our] organization management and marketing processes, plans and ideas, processes and plans; our financial information, including costs, prices; current and future business plans, our computer and software systems and processes; personnel information and documents, and our logos, and art work.

Flex Frac argued that the rule was proper because it only prohibited disclosure outside the company. The Board held that a rule prohibiting disclosure to anyone outside the company "necessarily prohibits employees from exercising their Section 7 rights to discuss their terms and conditions of employment with union representatives." The rule was "broadly written with sweeping, nonexhaustive categories that encompass nearly any information related to" the company. Nothing in the rule suggested that "personnel information" excluded wages, and "financial information, including costs" would necessarily include wages. Furthermore, the Board found no legitimate business interest in a rule prohibiting these discussions.

The administrative law judge had also found that the charging party – whom Flex Frac had terminated for violating the confidentiality rule after she disclosed the company's profit margin by revealing its delivery rates as compared to the compensation of its drivers – had been terminated in violation of Section 8 because she was discharged pursuant to the unlawful confidentiality rule. The Board, however, remanded the termination claim clarifying that "for discipline to be unlawful, the employee must have 'violated the unlawful rule by (1) engaging in protected conduct or (2) engaging in conduct that otherwise implicates the concerns underlying Section 7 of the Act.'"

The *EchoStar Technologies, L.L.C.* Decision, Case No. 27-CA-066726 (Sept. 20, 2012)

The *EchoStar Technologies, L.L.C*. case examined many aspects of EchoStar's employee handbook, including a section on confidential information. The confidential information section of the handbook informed employees that they "must not discuss [confidential information] with or disclose it to outsiders without the prior written authorization of duly authorized Company personnel." Employees were also cautioned against using the information for their own benefit, engaging in securities transactions based on the information, and using or disclosing trade secrets or confidential business information.

Confidential or proprietary information was described as one of EchoStar's most valuable assets, encompassing trademarks, service marks, patents, and copyrighted material. Confidential information also included:

> confidential, proprietary information such as trade secrets, satellite technology, customer lists, vendor lists, pricing lists, computer systems technology, employee information, sales and profit data, and strategic and business plans (for instance, possible mergers and acquisitions).

An NLRB administrative law judge found that the "clear purpose and direction" of this provision was to address proprietary and business information. He further found that a reasonable employee would understand that the rule did not address the kind of personal information "that must be disclosable if Section 7 activities are to be allowed without improper fetter." The mere inclusion of the phrase "employee information" in the definition of confidential information was not deemed to chill employees' Section 7 rights.

The *Quicken Loans, Inc.* Decision, Case No. 28-CA-75857 (Jan. 8, 2013)

In *Quicken Loans, Inc.*, an employee who had been sued by the company for an alleged violation of the no contact/no raiding and the non-compete provisions of her employment agreement filed an unfair labor practice charge based on the proprietary/confidential information and non-disparagement provisions in the same agreement. Quicken Loans defended these provisions as necessary to both protect its investment – time and expense – in educating and training its mortgage bankers and protect the confidential and proprietary information with which such employees are entrusted. The agreement provided in relevant part:

> You agree that: (a) You shall hold and maintain all Proprietary/Confidential Information in the strictest of confidence and that you shall preserve and protect the confidentiality, privacy and secrecy of all Proprietary/Confidential Information; (b) You shall not disclose, reveal or expose any Proprietary/Confidential Information to any person, business or entity . . . .

Proprietary/confidential information was defined, in part, as:

> non-public information relating to or regarding the Company's business, personnel . . . all personnel lists, personal information of co-workers . . . [and] personnel information such as home phone numbers, cell phone numbers, addresses and email addresses.

Though the provision did not explicitly restrict Section 7 activity, the administrative law judge found "no doubt" that the restrictions would "substantially hinder" the exercise of Section 7 rights. Employees would be unable to discuss either their own wages and benefits or the personal information of other employees with coworkers or with union representatives.

The judge also found that the non-disparagement provision, which barred employees from publicly criticizing, ridiculing, disparaging, or defaming the company, violated the NLRA because employees could reasonably construe this provision as restricting their rights to engage in protected concerted activities.

Best Practices

In light of these NLRB rulings, employers are well-advised to follow these best practices for drafting and enforcing confidentiality policies:

1. Avoid broadly written proprietary and confidential information policies and instead draft policies that are narrowly tailored to the organization's specific confidentiality needs and concerns and provide examples to help give context.

2. Confidentiality provisions should not prohibit the discussion of wages, benefits, or other terms and conditions of employment either inside or outside the workplace unless there is some legitimate business justification for doing so.

3. Clearly state that the policy is not intended to discourage concerted activity, i.e., discussion of or efforts to change working conditions and terms of employment.

4. Before terminating an employee for violating the policy consider:

    a. Whether the employee's disclosure in violation of the policy falls within NLRA protections;

    b. Whether the employee holds a non-supervisory position subject to the NLRA's protections.

5. Stay abreast of changes in the legal landscape and consult with counsel when implementing or revising such policies and when possible violations of the policies arise.

If you have any questions about the content of this alert, please contact the Pillsbury attorney with whom you regularly work, or the authors below.

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