



LABOR & EMPLOYMENT DEPARTMENT

ALERT

CONFIDENTIALITY RULE IN EMPLOYEE HANDBOOK VIOLATES FEDERAL LAW

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Employee handbooks and other statements of employment policy often require that employees treat as confidential, and not discuss other than for business purposes, any information concerning the employer or its business. For example, Cintas Corporation (which refers to its employees as “partners”) maintains a “Partner Reference Guide” that contained the following confidentiality rule:

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

Cintas also maintains a disciplinary policy in their Partner Reference Guide that provides for sanctions for violating a confidence or for the unauthorized release of confidential information. Seems pretty straightforward and reasonable, doesn't it?

Not to the National Labor Relations Board (the “NLRB”). In a very recent decision, the U.S. Court of Appeals upheld the NLRB's decision that Cintas's confidentiality rule violated federal labor law because it could be read to limit employees' exercise of their “Section 7 rights.” At this point most employers would ask two questions: what are “Section 7 rights” anyway and why do I care, my employees don't belong to a union?

Many employers assume that the National Labor Relations Act (the “Act”) applies only to unionized employers or employers involved in an active union

organizing campaign. Like so many other assumptions, this one is both incorrect and the source of potential legal difficulty. With a few specific exceptions, the Act applies to all private sector employers. Similarly, the NLRB has long held that all employees – whether or not unionized or attempting to unionize – enjoy Section 7 rights.

So what are they? Section 7 of the Act guarantees employees the right to organize unions and engage in collective bargaining. No surprise there. However, Section 7 also protects employees' right “to engage in other concerted activities for the purposes of . . . other mutual aid or protection.” Not surprisingly, then, the NLRB has long held that the employer commits an unfair labor practice where it maintains a work rule or policy which 1) employees would reasonably construe to prohibit Section 7 activity; 2) was promulgated in response to union activity; or 3) has been applied to restrict the exercise of Section 7 rights. It is essential to understand that a rule can be held unlawful for any one of these three reasons. That is, an otherwise perfectly lawful rule becomes unlawful if it is first implemented to respond to union activity or is actually enforced to restrict Section 7 rights. The real difficulty arises in determining whether employees “would reasonably construe” a particular rule as prohibiting them from doing something protected by Section 7 even if such was not its intent and it had never been so applied.

In the specific case of “confidentiality” rules, the problem arises where employees could reasonably construe the rule as precluding them from discussing

their terms and conditions of employment with other employees or a union, which, after all, is the whole point of union organizing and collective bargaining in the first place.

In the Cintas case, it was undisputed that the confidentiality rule in the Partner Reference Guide had neither been promulgated in response to union organizing nor ever enforced against actual Section 7 activity. Nevertheless, the NLRB concluded, and the court of appeals agreed, that the rule violated the Act, because a Cintas employee could reasonably interpret the rule's very general language to restrict his or her Section 7 right to discuss wages and other terms and conditions of employment with other employees or with a union. Cintas was ordered to remove the offending rule.

Okay, an employer might ask, that sounds like an interesting game for the lawyers, but why do I care if, ultimately, I have to change a rule or policy I never enforced anyway? Good question. The answer is that a claim like this rarely occurs in isolation. In the Cintas case, it was one of several unfair labor practice charges brought simultaneously by a union seeking to organize Cintas' employees, sort of a "and look what else they did" approach. More importantly, otherwise innocuous violations like this can provide a union with a basis to prolong an election campaign in which it is behind (a so-called "blocking charge") or to overturn an election it has already lost. In other words, maintaining such a rule puts another arrow in the union's quiver which, in the right circumstances, can be a very powerful weapon.

So how does an employer take that arrow away? Try this. Place yourself in the shoes of your employees and

read your handbook. If you even slightly pause to consider whether a rule or policy you just read would prohibit you from discussing wages or terms and conditions of employment, chances are that your employees – and the NLRB – would pause even longer. As the Cintas court itself discussed, the problem with these rules is their generality or ambiguity and rules which are carefully crafted to protect legitimate employer interests without unnecessary impact on employees' Section 7 rights are perfectly lawful. Any of our Labor and Employment attorneys would be happy to work with you in crafting such a rule before your employees visit the NLRB or a union.

Handbooks and the rules or policies they contain are an invaluable tool to the effective operation of any business. However, those that are not reviewed for compliance with federal and state laws can bring outright disruption to the workplace and cause unnecessary costs. A simple upfront review of your handbook and periodic updates will pay substantial dividends in the long run.

For more information regarding this alert please contact your Fox Rothschild labor attorney or visit us at **www.foxrothschild.com**

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