



The GSH 60-Second Memo

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"Don't Ask About Wages - Don't Tell?"

By Kathleen M. Paustian, Esq.

In an effort to help maintain workplace morale, employers often believe it wise to prohibit the discussion of salary and other benefits among co-workers. To accomplish this goal, it is not uncommon to see employers include a confidentiality clause, such as the following in the employee handbook:

Employees are exposed daily to large amounts of confidential information. Such information, including particulars regarding salaries and benefits, may not be discussed among co-workers or outside the Company, except as necessary to complete daily business.

It is also common to include a non-solicitation clause in an attempt to control any efforts at unionization. Such a provision may be written something like this:

Solicitation and distribution of literature not pertaining to job duties is prohibited at all times and any known or suspected violation of this policy can lead to discipline, up to and including termination.

Under Section 8 of the National Labor Relations Act (NLRA or the Act), employees, whether unionized or not, can bring an

unfair labor charge alleging that an employer's policies violate the employees' Section 7 rights to "self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection" Are the above handbook provisions an unfair labor charge waiting to happen?

In two relatively recent cases, *Guardsmark LLC v. NLRB*^[1] and *Cintas Corp. v. NLRB*^[2] the U.S. Court of Appeals for the D.C. Circuit addressed the issue of what is and is not acceptable handbook language under the NLRA. To do so, the court invoked the standard of whether a "reasonable employee" would read a rule as prohibiting activity protected by Section 7 of the Act.

The *Guardsmark* case was brought as a result of unfair labor charges filed by the Service Employees International Union with the National Labor Relations Board (NLRB or the Board) based on events that occurred in the San Francisco office of Guardsmark. The company had a non-solicitation policy similar to the one above. It also had a strict chain-of-command rule for reporting complaints and a strict rule against fraternization among employees while on, or off, duty.

The D.C. Circuit found that the Board "faithfully applied its case law" to the chain-of-command and solicitation rules and affirmed the Board's holding that the rules were unlawful. The court also confirmed the Board's holding that a reasonable employee could read the solicitation rule to prohibit off-duty union solicitation while in uniform, and that this was sufficient, despite no evidence of specific enforcement against Section 7 activity, to constitute a violation of the Act. The Court also agreed with the Board that the no-fraternization rule could be interpreted by a reasonable employee to restrict Section 7 activity, and thus was unlawful.

In *Cintas*, the D.C. Circuit affirmed the Board's conclusion that the Cintas' "confidentiality rule" violated its employees' rights under the NLRA. Applying the same "reasonable employee" test as was applied in *Guardsmark*, the court confirmed that, although the Cintas' employee handbook did not expressly forbid employee discussions of wages and other terms and conditions of employment, an employee would reasonably construe it to do so. The confidentiality language as set forth in the Cintas' employee handbook provided:

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

Another section, titled "Discipline Policy," warned Cintas' employees that they may be sanctioned for "violating a confidence or unauthorized release of confidential information".

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The *Cintas* case arose as a result of an unfair labor charge filed by the Union of Needletrades, Industrial and Textile Employees (UNITE) alleging that the language in the employee handbook violated Section 8(a)(1) of the NLRA by restricting employees' Section 7 right to discuss the terms and conditions of their employment with others.

The NLRB unanimously concluded the language in the Cintas' confidentiality clause violated Section 8(a)(1), because a Cintas employee could reasonably interpret the clause to restrict his or her Section 7 right to discuss wages and working conditions with other employees or with the union.

The D.C. Circuit affirmed the NLRB's decision, holding the Board's determination was reasonable and consistent with controlling precedent. The court did not find it dispositive that "[n]owhere in the employee handbook is there any language that, by its terms, expressly instructs employees not to discuss their wages and other terms and conditions of employment with each other".

The *Cintas* and *Guardsmark* decisions both indicate that the NLRB continues to maintain its long held basic position that all employers, union and non-union, must be careful to not interfere with employees' rights to discuss salaries, benefits and other topics which could potentially fall under collective bargaining protection. Does this mean employers must eliminate non-solicitation policies commonly found in handbooks? No. However, it does mean employers would be wise to ensure the policies are limited to on duty solicitation.

As to confidentiality provisions commonly found in employee manuals, it is important that they be limited to proprietary company information and personnel information that is not protected under the NLRA. Also, under the American with Disabilities Act, the Family Medical Leave Act and the Health Insurance Portability and Accountability Act, employee medical information and medical records must be kept confidential, with information being shared with supervisors only on a strict "need to know" basis. However, information regarding work conditions, duty assignments, salaries and other topics which are open to collective bargaining interpretation should not be specifically protected under confidentiality policies. In other words, when it comes to certain topics in the workplace, employers would be wise to drop overly restrictive "Don't Ask - Don't Tell" policies.

[\[1\]](#) 475 F.3d 369 (C.A.D.C. 2007)

[\[2\]](#) 482 F. 3d 463 (C.A.D.C. 2007)

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