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The NLRB's Continuing Scrutiny of Confidentiality Policies

By Matthew J. Feery

As we have written about before, the National Labor Relations Board (the "Board") has, in recent years, focused on common employer policies, including the policies of employers without unionized workforces. For employers, these actions by the Board reflect the difficulty in balancing the employers' interests in protecting company information and the difficulty in drafting policies that can clear the review of governmental agencies tasked with protecting and broadening employees' rights. This past March brought yet another example when the United States Court of Appeals for the Fifth Circuit upheld a decision of the Board that found an employer's confidentiality-information policy violated the National Labor Relations Act (the "Act"), despite no evidence that the employer - or any employee - saw the policy as prohibiting the same things that the Board said it prohibited.

In *Flex Frac Logistics, L.L.C., et al. v. National Labor Relations Board*, Case No. 12-60752 (March 24, 2012), the Fifth Circuit heard dueling petitions from the parties regarding the confidentiality clause that Flex Frac, a non-union trucking company based in Fort Worth, Texas, required each of its employees to sign. The pertinent parts of the clause read as follows:

> **Confidential Information**
> Employees deal with and have access to information that must stay within the Organization. Confidential Information includes, but is not limited to, information that is related to: our

> customers, suppliers, distributors; . . . our financial information, including costs, prices; . . . personnel information and documents, and our logos, and art work. No employee is permitted to share this Confidential Information outside the organization, or to remove or make copies of any . . . records, reports or documents in any form, without prior management approval. Disclosure of Confidential Information could lead to termination, as well as other possible legal action.

After Flex Frac fired an employee in 2010, the employee filed a charge with the Board. An administrative law judge subsequently found that Flex Frac's confidentiality clause violated Section 8(a)(1) of the Act, and the Board affirmed the decision. Flex Frac petitioned the Fifth Circuit to review and overturn the decision, while the Board petitioned for enforcement of its decision.

The Fifth Circuit affirmed the NLRB's decision finding that the confidentiality clause violated the Section 8(a)(1) of the Act. As a refresher and as relevant here, Section 8(a)(1) prohibits employers from interfering with, restraining, or coercing employees in the exercise of their right to engage in concerted activities under the Act.

The Board has long held that workplace rules forbidding employees from discussing confidential wage information "patently violate" the Act. Where an employer's policy does not explicitly restrict activities protected under the Act, the analysis of whether a particular provision is improper under the Act turns on, among other things, whether the employer's workplace rule has been applied to restrict employees' exercise of their rights or whether it would be "reasonably construed" by employees to prohibit them from exercising their rights under the Act.

Here, however, there was no evidence before the court that any employee believed that the confidentiality language prohibited them from discussing their wages. There was also no evidence either that Flex Frac believed that the confidentiality language prohibited employees from discussing wages or that the company had disciplined any employee for violation of the confidentiality provision. Nevertheless, the Court rejected Flex Frac's arguments and found the provision to violate the Act.

The reasons for the court's decision turn on the standard for the court's analysis of the language, and it is this standard that is of particular importance for employers reviewing their own policies. The issue is not whether employers *had* interpreted an employer's policy to prohibit them from engaging in concerted activity; it is whether employees *would* reasonably construe the language to prohibit them from doing so. The lack of disciplinary actions from an employer with respect to the policy does not save the policy. Here,

the court focused on the broadness of the confidentiality policy, which prohibited employees from discussing "financial information," which under the terms of the policy included "costs." The court found that the Board's interpretation of this language as including costs to pass muster. Further, the policy included "personnel information," reinforcing that interpretation and "implicitly include[ing] wage information" in the list of information employees were prohibited from disclosing.

So what can employers take away from Flex Frac? Perhaps first and foremost, employers must, if they have not already, review any confidentiality policies in their handbooks and employment agreements to make sure that the language in those policies is narrowly crafted. Not only may this improve the effectiveness of the policy should the company seek to enforce it, but it will also mitigate against the possibility of the policy running afoul of the Act. After all, the recent trend of the Board and other governmental agencies, such as the Equal Employment Opportunity Commission, reviewing standard policy and contract language is not abating any time soon, and companies should be proactive. The time to review policies is not after a disgruntled employee files a charge with the National Labor Relations Board. Any review of policy language should be reviewed with an approach similar to what the court did in *Flex Frac* - how would (or could) the language be seen by a reviewing agency? Just because you do not think the policy is in violation of the Act, or just because you have never disciplined anyone for violating the policy, that alone will not save the policy or make it any more permissible under the Act.

The decision is also another reminder of the reality of regulation in almost all aspects of the workplace. Some employers wish to prohibit their employees from sharing any information on the company, including information on how much employees earn. But the recent string of the cases about workplace confidentiality policies and workplace communication policies shows that these sorts of broad prohibitions are problematic, with overreaching policies resulting in underwhelming, or non-existent, enforceability.

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