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NLRB Overturns ALJ Decision; Finds Confidentiality Agreement Violated Employee Rights

On Feb. 24, 2015, the National Labor Relations Board (NLRB) held that a Washington transportation company's Confidentiality Agreement violated the National Labor Relations Act (NLRA). The case was titled, *Battle's Transp., Inc.*, 362 N.L.R.B. No. 17, 2/24/15. While the Administrative Law Judge (ALJ) had previously held the policies were lawful, the NLRB made the controversial decision to overturn that finding. The policy, in the eyes of the NLRB, was sufficiently vague that an employee could, according to the NLRB, interpret it as violating Section 7 of the National Labor Relations Act. Section 7 applies to unionized and nonunionized employees. All employers, whether union or nonunion, should consider revisiting their confidentiality policies in light of this decision.

Section 7 of the NLRA guarantees employees "the right 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," as well as the right "to refrain from any or all such activities." One type of policy forbidden by Section 7 is a policy that prohibits employees from discussing wages amongst themselves. Even where a policy does not explicitly prohibit this type of discussion, a vague policy can be held violative if, in the NLRB's estimation, employees could reasonably construe it as prohibiting such discussions.

In this recent decision, *Battle's Transportation, Inc.*, the NLRB took issue with two of the employer's confidentiality policies.

"Human Resources Related Information"

The first policy was a confidentiality agreement. It contained a provision prohibiting disclosure of confidential information, to include human resources related information, drug and alcohol screening results, personal/bereavement/family leave information, insurance/worker's compensation, customer lists, investigations by outside agencies, financial, supplier lists and prices, fee/pricing schedules, methods, and processes or marketing plans.

While the ALJ found that employees would not reasonably construe the confidentiality agreement as restricting Section 7 rights, the NLRB disagreed, holding that barring employees from discussing "human resources related information" and "investigations by outside agencies" could reasonably be construed by employees to restrict them from discussing protected activity, such as wages. Additionally, a clause in the confidentiality agreement that prohibited employees from using confidential information for "his or her own benefit or the benefit of others" was also interpreted as unlawful.

"Any Company Business"

The second policy was a memo that the company had issued about a contract that was ending. In that memo, the company advised employees not to discuss company business with company clients.

The ALJ had also found this memo lawful. As the ALJ noted, it addressed a specific recent problem and did not implicate Section 7 rights.

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Again, though, the NLRB disagreed. The board found the prohibition against employees discussing *any* company business with clients, without qualification, as unlawfully vague and overbroad. Therefore, the clause, according to the board, could be reasonably construed as prohibiting discussion about union-related matters.

Battle's Transportation will be seen as a controversial decision. It follows on the heels of similar rulings that have held confidentiality policies unlawful where they:

- instructed employees to keep customer and employee information secure and required that information could only be used "fairly," lawfully and only for the purpose for which it was obtained,
- prohibited the dissemination of confidential information within the company, such as personal or financial information, and
- prohibited disclosure of information from an employee's personnel file and also an oral rule prohibiting discussion about any matters under investigation by the employer's human resources department.

It is not known if the company will appeal the NLRB's decision in *Battle's Transportation*. However, given the decision's controversial extension of prior NLRB law, an appeal is not unlikely.

In the meantime, employers should revisit their confidentiality policies, with a particularly keen eye to language that might be construed as restricting Section 7 rights.

This document is intended to provide you with general information regarding the NLRB's decision on Battle's Transportation, Inc. The contents of this document are not intended to provide specific legal advice. If you have any questions about the contents of this document or if you need legal advice as to an issue, please contact the attorney listed or your regular Brownstein Hyatt Farber Schreck, LLP attorney. This communication may be considered advertising in some jurisdictions.

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