

Employee Handbook Alert: Confidentiality Policy Found Overbroad

Q: *Our company has a confidentiality policy that, among other things, prohibits employees from discussing their pay with other employees. Is such a policy lawful?*

A: Probably not. Most employers have policies in their employee handbooks or otherwise concerning the business need to keep certain information “confidential.” A recent federal appeals court decision, however, found that one company’s policy was overbroad and unlawful.

Cintas Corporation published the following policy in its employee handbook:

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

Employees could be disciplined for violating this policy.

The DC Court of Appeals recently affirmed a decision from the National Labor Relations Board that this policy violated the National Labor Relations Act (the “NLRA”). Cintas v. NLRB, 2007 U.S. App. Lexis 6075 (D.C. Cir. Mar. 16, 2007).

Although the NLRA is better known for its regulation of matters involving labor unions, it contains certain provisions that apply to all workplaces. For example, Section 7 of the NLRA provides that employees have the right to “engage in other concerted activities for the purpose of...mutual aid or protection.” 29 USC Section 157. The Courts and Labor Board have consistently held that an employee has a right under Section 7 to discuss his wages and other terms and conditions of employment with other employees.

In the Cintas case, the Appeals Court concluded that the Cintas confidentiality policy violated the NLRA because “employees would reasonably construe the language to prohibit Section 7 activity.” Specifically, the Court focused on the language that prohibited the discussion of “any information concerning...employees” and found that such language was overbroad. Moreover, the Court concluded that the fact that no employee had been disciplined under the policy was irrelevant.

Practical Recommendations for Employers: As a result of this decision, all employers should review the language in their confidentiality policies. Employers should avoid sweeping definitions of confidential information that could preclude employees from discussing “any information regarding employees” or “all information concerning the Company.” Policies should be narrowly tailored so that they will not prohibit employees from discussing their wages or other terms and conditions of employment.

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Please contact the employment lawyers at Gentry Locke Rakes & Moore if your business has questions concerning its workplace policies.



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