

Labor Board Affirms Ruling that Employer Confidentiality Provision Violates National Labor Relations Act (NLRA)

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On June 21, 2013, The **National Labor Relations Board (NLRB)** issued an order affirming and modifying an earlier decision by an administrative law judge that invalidated the confidentiality provision in an employer's employment contract. In the case of *Quicken Loans, Inc.*, the NLRB held that the "Proprietary/Confidentiality" provision in the contract contained language that unlawfully interfered with employees' rights to engage in "protected concerted activities" under Section 7 of the National Labor Relations Act (NLRA).¹ However, this case leaves questions for employers which utilize confidentiality policies and agreements in an effort to protect employee private information.

Section 7 of the NLRA specifically protects employees who engage in "concerted activities for the purpose of collective bargaining or other mutual aid or protection" This statutory provision has been interpreted by the NLRB and the courts to mean that employees have the right to act together to improve wages and other terms and conditions of their employment. Significantly, this right applies to both union and non-union employees. Consequently, the NLRB may issue a complaint against any employer that restricts Section 7 rights or otherwise imposes rules that have the effect of chilling the exercise of those rights.

Quicken Loans had to defend against such a complaint here. The company included in its mortgage banker employment contracts a confidentiality provision that precluded those employees from disclosing certain personnel information including "personal information of coworkers," "home phone numbers, cell numbers, addresses, and email addresses." In reviewing the language, the administrative law judge concluded as follows:

"There can be no doubt that these restrictions [contained in Quicken Loan's confidentiality provision] would substantially hinder employees in their Section 7 rights. In complying with these restrictions, employees would not be permitted to discuss with others, including their fellow employees or union representatives, the wages and other benefits that they receive, the names, wages, benefits, addresses or telephone numbers of other employees. This would substantially curtail their Section 7 protected concerted activities. The [confidentiality provision] contained in the Agreement violates Section 8(a)(1) of the Act."

The NLRB affirmed this aspect of the ALJ's decision and ordered Quicken Loans to rescind the unlawful language regarding nondisclosure of personnel information from the confidentiality provision of the employment contract.

Of course, employers in the past have routinely placed this type of confidentiality language in their handbooks, employment agreements, covenants not to compete, and other employee documents. In many instances, such provisions are rightly intended to protect sensitive personal identity information such as social security numbers and bank account numbers, medical information, credit information, passwords, and other private information of employees. Even though confidentiality provisions governing personnel information are now potentially subject to challenge by the NLRB, an important question remains: does the NLRA and Section 7 automatically trump these legitimate privacy concerns?

The short answer is no. Indeed, various federal and state laws specifically require employers to protect the confidentiality of employee medical information, genetic information, credit information, and other forms of personal information. Nevertheless, in their effort to safeguard these privacy rights, it is now clear that employers must give careful attention to the development, implementation, and enforcement of any work rule or policy that could be construed to restrict or interfere with the right of an employee to engage in concerted activity. Therefore, all employee confidentiality rules should be reviewed with that important legal requirement in mind.

¹ The Board also affirmed the ALJ's finding that a "non-disparagement" provision contained in the employment contract violated Section 8(a)(1) of the NLRA. The non-disparagement provision precluded employees from criticizing or disparaging the company or its products, services, policies, directors, officers, shareholders, or employees. The ALJ invalidated this provision on the grounds that "within certain limits, employees are allowed to criticize their employer and its products as part of their Section 7 rights."

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