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Employers May Wish to Consider Additional Language When Drafting Confidentiality Agreements

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A well-drafted employee confidentiality and non-disclosure agreement can protect confidential information from flying out the door with current and former employees. Employers should, however, carefully define the "confidential information" sought to protect. A boilerplate definition of "confidential information" may risk a seemingly routine agreement invalidated for chilling discussions of wages and other protected activities under the ***National Labor Relations Act***—even for non-union employers.

Take the 2014 case of ***Flex Frac Logistics, LLC v. NLRB*** from the ***Fifth Circuit*** Court of Appeals. Flex Frac—a non-union employer—required employees to sign confidentiality agreements that prohibited the dissemination of "Confidential Information" outside of the company. Flex Frac's agreement defined its "Confidential Information" to include "our financial information, including costs, prices; current and future business plans, our computer and software systems and processes; personnel information and documents, and our logos, and art work."

A former Flex Frac employee filed a charge with the National Labor Relations Board, alleging that the company agreement violated the NLRA because it prohibited employees from discussing wages. An administrative law judge and the NLRB found that Flex Frac's confidentiality agreement violated the NLRA, despite the fact that the agreement contained no direct reference to wages or other terms and conditions of employment. The agreement was deemed "overly broad" for including language that an employee could reasonably interpret as restricting the exercise of Section 7 rights, which include discussions of wages with other employees and third parties to concertedly seek higher wages.

In enforcing the Board's order, the Fifth Circuit reasoned that, by including such phrases as "financial information" and "costs," the confidentiality clause necessarily included wages, which created the inference that the agreement prohibited wage discussion with outsiders. Further, the agreement gave no indication that some personnel information, including wages, were outside its scope, and that by specifically identifying "personnel information" as a prohibited category, Flex Frac **implicitly** included wage information within the ambit of the restrictions. Importantly, the Fifth Circuit stated that the outcome might have been different if Flex Frac had included a disclaimer noting explicitly that the prohibitions of the agreement were not intended to prohibit the employee form discussing information pertaining to the terms, conditions, wages, and benefits of her employment with other employees or third parties.

Ultimately, employers should consider some type of disclaimer language in confidentiality policies and agreements to avoid the risk of those agreements being deemed unlawful. Indeed, even confidentiality agreements that do not expressly prohibit discussing the terms and conditions of employment may run afoul of the NLRA and create liability. Such disclaimer language should take heed of the Fifth Circuit's reasoning, and note that the definition of "confidential information" is not meant to include discussions of the terms, conditions, and benefits of their employment.

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