

# Court Rules Compensation Disclosure Prohibition Violates National Labor Relations Act

August 2, 2011

Although employers don't like employees to discuss their wages amongst themselves because it may cause resentment between employees, prohibiting such discussions violates the Michigan Wages and Fringe Benefits Act, MCL 408.483a. And, as one employer just discovered, prohibiting employees from disclosing compensation to anyone may also violate the National Labor Relations Act, even in a non-union setting.

In *NLRB v Northeastern Land Services, Ltd.* (NLS), the employer in this case, required all employees to sign an employment agreement that states, in relevant part, "Employee ... understands that the terms of this employment, including compensation, are confidential to Employee and the NLS Group. Disclosure of these terms to other parties may constitute grounds for dismissal."

NLS is a temporary agency that places employees in the natural gas and telecommunications industries, but pays such workers directly. When a dispute arose between NLS and one of its employees concerning the timeliness of payments, the employee disclosed information concerning the dispute to a client of NLS. As a result, the employee was discharged.

The employee filed an unfair labor practice charge with the National Labor Relations Board (NLRB), claiming the confidentiality requirement discouraged employees from engaging in "concerted activities." The NLRB ruled in his favor and issued an order requiring NLS to (1) rescind the confidentiality provision in the agreement; (2) notify all current and former employees of this action; and (3) reinstate the charging party with back pay and other damages resulting from the discharge. The NLRB then filed an action in federal court to enforce its order. The U.S. Court of Appeals for the First Circuit directed entry of judgment, thereby enforcing the NLRB order.

In issuing its opinion, the court reviewed the confidentiality provision at the heart of the case, and the NLRB's interpretation of Section 7 of the National Labor Relations Act (NLRA). Section 7 guarantees employees the right to engage in "concerted activities for the purpose of collective bargaining or other mutual aid or protection."

Section 8(a)(1) has been interpreted to prohibit an employer from interfering with an employee's "right to discuss the terms and conditions of their employment with others under section 7 of the NLRA." When an employer "maintains a work rule that 'would reasonably tend to chill employees in the exercise of their Section 7 rights'," the NLRB may find that its "maintenance is an unfair labor practice, even

absent evidence of enforcement” of that rule.

In reaching such a finding, the NLRB applies a two step analysis:

First, if the rule explicitly restricts section 7 activity, it is unlawful. ... Second, even if the rule does not explicitly restrict section 7 activity, it is nonetheless unlawful if “(1) employees would reasonably construe the language [of the rule] to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights.”

In this case, the NLRB found that, while the rule did not explicitly restrict Section 7 rights, employees would reasonably construe it to do so since the “forbidden disclosure – terms of employment, including compensation – went to a prime area of concern under section 7.” The court found this interpretation consistent with prior case law.

In its defense, NLS argued that it had legitimate business reasons for the prohibition and that the NLRB should have balanced its interests against the employee’s right. However, the appellate court differed to the NLRB’s decision not to do so.

Finally, NLS argued that, even if termination for violating the confidentiality provision was unlawful, it had other lawful reasons for discharging the employee. The court rejected this argument under NLRB precedent, stating “where the Board finds an employer rule is invalid, discharge for violating that rule is invalid.” The court further noted that, simply because one reason for an employee’s discharge was lawful, does not diminish the fact that the other reason was unlawful.

While the opinion was issued by the First Circuit Court of Appeals (and not the U.S. Court of Appeals for the Sixth Circuit, which reviews cases originating in Michigan), it is likely the Sixth Circuit would have reached the same conclusion given its ruling in *Jolliff v National Labor Relations Board*. In *Jolliff*, the Sixth Circuit upheld an employee’s right under the NLRA to complain to customers concerning the terms and conditions of employment as long as the employee did not knowingly make untruthful statements in bad faith.

While employers have legitimate reasons for seeking to maintain the confidentiality of wage rates, they must proceed with caution in restricting their employees’ disclosure of such information. If you have concerns about your company’s employment agreements or policies, contact the author or any Plunkett Cooney attorney who is experienced in labor and employment laws.