Spring Cleaning For Your Confidentiality Agreements and Policies

Labor & Employment Law Update

By Beverly Alfon on April 1, 2014

This should be an easy one to cross off your to-do list. Dust off the confidentiality and non-disclosure language that you require your non-supervisory employees to adhere to – whether through a specific agreement, employee handbook or general company policy. Last week, the U.S. Court of Appeals for the Fifth Circuit served up a reminder that what used to be considered standard language regarding an employer's expectation of confidentiality, now opens the door to potential liability under federal labor law, for both union and non-union employers.

In *Flex Frac Logistics, LLC v. NLRB*, 5th Cir., No. 12-60752, 3/24/14, a non-union trucking company required its employees to sign a document acknowledging the following:

"***Confidential Information***. Employees deal with and have access to information that must stay within the Organization. Confidential Information includes, but is not limited to, information that is related to…our financial information, including costs, prices; current and business plans, our computer and software systems and processes; personnel information and documents, and our logos and art work. No employee is permitted to share this Confidential Information outside the organization, or to remove or make copies of any [Organization] records, reports or documents in any form, without prior management approval. Disclosure of Confidential Information could lead to termination, as well as other possible legal action."

Many of you reading this undoubtedly have similar language in your new hire materials and employee handbooks. *What could be unlawful about this language?* Certainly, an employer has the right to protect its confidential information. However, the National Labor Relations Board (NLRB) found that this company's rule unlawfully interfered with the right of employees "to engage in concerted activity for their mutual aid or protection" because of its reference to "personnel information." 385 N.L.R.B. No. 127 (2012). The NLRB found that the company's employees could reasonably interpret the confidentiality restrictions on "personnel information" to encompass wage information – typically, a primary subject of discussion between employees and unions. Based on this tendency to restrain or interfere with non-supervisory employees' rights to discuss their work

terms and conditions, the NLRB held that the rule violated federal labor law. The employer appealed the decision, but the Fifth Circuit Court of Appeals agreed with the NLRB.

Bottom line: Your confidentiality/non-disclosure agreements and policies should be reviewed for potential liability. The law on this issue continues to develop, but what is clear is that even seemingly innocuous confidentiality language can result in a finding of a violation of the National Labor Relations Act. Carefully crafted language can protect your company's interests while avoiding potential liability under federal labor law.