

“We Recommend Keeping This Confidential” Still Violates the Law According to the NLRB

Labor & Employment Law Update

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Over the last few years the National Labor Relations Board (“NLRB”) has been cracking down on employee confidentiality mandates. An employer can legally require employees to keep trade secrets and legally protected information confidential, but according to the NLRB’s most recent ruling on August 27, 2015 an employer cannot even “recommend” that employees keep internal investigations confidential (*Boeing Co.*, 362 N.L.R.B. No. 195, 8/27/2015). The Board ruled that Boeing Company’s revised policy that “recommends” employees refrain from discussing HR investigations was unlawful as it violates employee’s rights to engage in concerted activity under Section 7 of the National Labor Relations Act (“NLRA”).

The Board explained that although employers may “legitimately require confidentiality in appropriate circumstances” the impact of any confidentiality policy must be limited. Essentially, the Board created an individualized balancing approach that requires an employer to weigh its interests in confidentiality against employees’ Section 7 rights. Although it laid out examples of what situations would tip the scales, the Board did not set a clear standard. The examples provided include instances of likely witness intimidation or harassment, destruction of evidence or other misconduct that could jeopardize the investigation’s integrity. However, no specific examples were provided as to when these issues can occur. This standard imparts on employers a requirement to tailor-fit their confidentiality policies to be enforced on a case-by-case basis. As the Board explained, “generalized concern” about the integrity of all investigations is “insufficient to justify [a] sweeping policy,” including one that simply “recommends” confidentiality.

This new individualized balancing standard is a bit of a head scratcher. However, the Board did identify some bad practices that would not pass muster. It expressly pointed out Boeing’s requirement to have employees sign a policy notice without a Section 7 disclaimer in the policy or notice that the employee could disregard the confidentiality recommendation. The Board held that this clearly communicated Boeing’s improper desire for confidentiality.

So what is a best practice in light of this decision? Remove sweeping confidentiality policies pertaining to internal investigations and eliminate requirements that when employees sign notices they understand the confidentiality recommended. Instead, discuss with the employee during an investigation the desire for confidentiality based on the facts of the specific investigation. Remember this ruling only applies to what limits can be placed on employees with knowledge of the investigation. It has no bearing on a company's approach or handling of an investigation – meaning the company can and should still clearly reiterate in its policies that it will handle all investigations with discretion and will preserve the confidentiality of all involved persons to the extent possible. Essentially, an employer can still control the information it relays, just not what other involved employees communicate.

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