

PUBLICATION

NLRB Continues Defense of Employees Discussing Wages and Hours [Ober|Kaler]

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Many employers today are concerned about employees discussing their wages and hours, fearing that similarly situated individuals will discover discrepancies. With an eye toward curbing such topics of conversation, employers often implement policies banning employees from disclosing their compensation and other terms of employment. While employers are justified in their concerns, it may surprise many that the National Labor Relations Board has ruled that such pay secrecy policies, whether explicit or implicit, are illegal. What may be even more surprising to employers is the fact that the NLRB's rulings on this matter apply to both union and non-union employers.

The National Labor Relations Act (the "Act") is designed to protect employees' rights to engage in concerted activities for their mutual aid or protection. The NLRB consistently has interpreted this protection to include employees' rights to talk about their wages and other terms and conditions of employment, but the Board historically showed little interest in pursuing employers who were in violation.

The shift in NLRB's focus on this issue came last spring when the Board's general counsel issued a 30-page report to address the intersection between employer policies and the Act. At the forefront of the report's focus were employer confidentiality policies that contained explicit or implicit pay secrecy provisions. The report repeatedly describes such rules as unlawful, not only when they reasonably would be read to prohibit protected activities, but even when the rules seem ambiguous. The general counsel clearly signaled NLRB's intentions to vigorously pursue such violations.

Simultaneous with the issuance of this report came an unprecedented ruling in *T-Mobile US*, NLRB 14-CA-106906 (2015). The administrative law judge in that case held that T-Mobile's email policy, confidentiality policy, and wage and hour complaint procedure, along with the threat of discipline for failing to adhere to any of those policies and procedures, were illegal under the Act because they restricted employees' ability to disclose or discuss basic workplace issues, such as wages and hours. Similarly, the judge held that T-Mobile's media policy restricting employees' communications with the media was illegal because it prohibited employees from disclosing wage and hour complaints.

A year after the issuance of the general counsel's report and the T-Mobile decision, the Board has shown no signs that it intends to ease pressure on employers on this issue. In April, a three-member Board panel upheld the T-Mobile decision and issued an even more strongly worded ruling against confidentiality policies and agreements and their stifling effect on employees discussing wages in *Victory Casino Cruises II*, 363 NLRB 167 (2016).

In *Victory II*, the employer published a "confidentiality/non-disclosure" policy in its employee handbook which defined "confidential business information" as "compensation data," "personnel information," and "compensation and bonus" [sic]. The policy further stated that employees "who improperly use or disclose

confidential business information will be subject to disciplinary action, up to and including termination and legal action, even if they do not actually benefit from the disclosed information.”

In ruling that the “confidentiality/non-disclosure” policy violated the Act, the Board held that a plain reading of the language in the policy shows that it expressly prohibits the exercise of an employee’s rights under the Act. Specifically, the examples of “compensation data,” “compensation and bonus,” and “disciplinary actions” included in the policy encompass terms and conditions of employment as identified in the Act. Moreover, the Board held that the policy explicitly prohibited the disclosure of “personnel information,” which reasonably includes protected discussion of wages and other employment terms.

The NLRB’s decision in *Victory II* is not singular. Similar rulings include:

- A dental practice’s policy stating that “salaries and wages are a private matter” was found to be an unlawful restriction on employees’ rights under the Act.
- A weatherizing contractor’s decision to terminate an employee for discussing wages with his co-workers was ruled illegal.
- A fast-food restaurant owner’s warning to an employee who participated in a \$15-per-hour wage campaign was found unlawful.
- A restaurant operator’s rule prohibiting waitresses from discussing their tips with each other was illegal.

Employers must take note that employees have a legal right under the Act to talk about their pay and their hours with co-workers and with others outside the company. Furthermore, employers must be cognizant of the effects that their policies, whether vague or otherwise, might have on employees. As the NLRB’s general counsel noted, “even well-intentioned rules” can violate the Act when in the Board’s estimation they “would inhibit employees from engaging in [protected] activities.” With those words in mind, all employers, both union and non-union, should review their policies and handbooks with an eye toward complying with the Act.