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# New Challenges To Pay Confidentiality Policies

*Law360, New York (June 23, 2014, 1:51 PM ET)* In the interest of maintaining pay flexibility and incentivizing superior performance but without diminishing coworker morale, many employers maintain policies or practices that prohibit employees from discussing their wages, benefits or other compensation with coworkers. These policies have recently come under attack from the National Labor Relations Board and are also under challenge in efforts to combat claimed gender pay disparities. This relatively new regulatory environment suggests employers may need to review, and possibly revise, their policies.

**Developments Under the National Labor Relations Act**

Employer policies that prevent employees from communicating with each other with respect to pay and working conditions have generally been found by the NLRB to be unlawful interference with employee concerted activity in violation of the National Labor Relations Act.[1] The NLRA applies to both unionized and non-unionized employers. Section 7 of the NLRA protects the rights of employees to engage in concerted activity for the purpose of collective bargaining or for other mutual aid or protection.[2] The NLRB, with judicial support, has determined that employee discussions of the terms and conditions of employment, including wages, benefits and other compensation, constitute protected concerted activity. An employer who interferes with, restrains or coerces employees exercising Section 7 rights is in violation of Section 8 of the NLRA.[3]

Standard confidentiality policies may be subject to NLRB challenge even if they do not specifically mention compensation. In Flex Frac Logistics LLC[4], a company required employees to sign agreements containing the following "Confidential Information" provision:

> Confidential Information includes, but is not limited to, information that is related to: our customers, suppliers, distributors; [company] organization management and marketing processes, plans and ideas, processes and plans, 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. No employee is permitted to share this Confidential Information outside the organization, or to remove or make copies of any [company] 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.[5]

An employee who disclosed pay given to other employees and client rates charged by her employer was discharged for violation of this provision and filed a charge with the board. The agency's general counsel filed a complaint alleging that the company rule prohibited employee wage discussion, and the board agreed. Even though the provision's only reference to employee compensation was the term "personnel

information," the board ruled that it effectively barred employee discussion of wage information.[6] The Fifth Circuit enforced the NLRB's order, stating that the provision "implicitly included wage information,"[7] and concurred that even if a provision is not explicit, it is a violation of Section 8(a)(1) if employees would "reasonably construe" the policy language to limit or prohibit the exercise of their Section 7 rights.[8]

The NLRB issued similar decisions in Quicken Loans Inc. and MCPc Inc.[9] In Quicken Loans, an employee filed a charge against his employer based on confidentiality provisions in his employment contract, which prohibited disclosure of "non-public information relating to or regarding the Company's business, personnel … all personnel lists, personal information of co-workers [and] personnel information such as home phone numbers, cell phone numbers, addresses and email addresses."[10] The NLRB determined that the provision would effectively prohibit employees from discussing compensation with each other and union representatives and, accordingly, that it violated the NLRA.[11] In MCPc, a company terminated an employee for disclosing the compensation of a newly hired executive in violation of the company's confidentiality policy, which provided that the disclosure of "personal or financial information, etc." would be grounds for disciplinary action, including termination.[12] The NLRB ruled that the confidentiality policy was "overly broad" and that "employees might reasonably construe [the policy] to prohibit discussion of wages or other terms and conditions of employment with their coworkers."[13]

Even where an employer takes no adverse action against employees for violating these confidentiality policies, the board is willing to entertain facial challenges to their legality under the NLRA. For example, in DirectTV,[14] the NLRB considered five workplace rules. Among them were confidentiality policies from DirectTV's employee handbook and intranet page that directed employees to "[n]ever give out information about customers or DirectTV employees" and restricted them from disclosing "company information," including "employee records."[15] DirectTV's confidentiality policies provided:

> Company information can consist of information such as contract terms, marketing plans, financial information, details about our technology, employee records and customer account information. Information that can be used to identify specific employees and customers, or that is considered private (such as our customers' bank and credit card information) is particularly sensitive. Remember that unless expressly approved for external release, all company information is for internal use only and must be carefully stored, transmitted and (when necessary) destroyed … Never discuss details about your job, company business or work projects with anyone outside the company, especially in public venues, such as seminars and conferences, or via online posting or information-sharing forums, such as mailing lists, websites, blogs and chat rooms … Never give out information about customers or DirectTV employees.[16]

The NLRB held that DirectTV's policies infringed upon employees' Section 7 rights, because the policies "would reasonably be understood by employees to restrict discussion of their wages and other terms and conditions of employment."[17] As these recent decisions indicate, even generalized confidentiality provisions may be held to violate the NLRA if they are deemed to be "reasonably understood" to restrict wage discussion among employees.

It should be noted that NLRB rulings do not directly affect managerial and supervisory employees who are excluded from the NLRA's protections. Special provisions for such employees should be considered in drafting employee policies and employment agreements.

**Obama Executive Order Targeting Pay Secrecy Practices of Federal Contractors**

Pay confidentiality policies have specifically been targeted by recent efforts to narrow the purported wage gap between men and women. On April 8, 2014, President Obama signed Executive Order No. 13665 ("EO 13665"), which makes it unlawful for federal contractors (and subcontractors) to discharge, discriminate or take disciplinary action against employees or applicants who have "inquired about, discussed, or disclosed the compensation of the employee or applicant or another employee or applicant."[18] EO 13665 is enforced by the U.S. Department of Labor's Office of Federal Contract Compliance Programs (OFCCP). The executive order applies to all employees of federal contractors and is in that respect broader than the NLRA, which does not apply to employees classified as supervisors or management. The DOL's spring 2014 regulatory agenda, released on May 23, 2014, indicates that the OFCCP expects to issue new sex discrimination guidelines and proposed rules implementing EO 13665 by September 2014.[19]

Federal contractors may also soon be required to report compensation data by gender and race to the DOL. On April 8, 2014, President Obama also issued a presidential memorandum to the DOL directing it to propose "a rule that would require Federal contractors and subcontractors to submit to DOL summary data on the compensation paid their employees, including data by sex and race."[20] The memorandum also encourages the DOL to "direct[ ] its enforcement resources toward entities for which reported data suggest potential discrepancies in worker compensation."[21] According to the DOL's regulatory agenda, the OFCCP expects to issue proposed rules implementing President Obama's pay data directive by August 2014.[22]

**Pending Proposed "Paycheck Fairness" Legislation**

The president's executive actions mirror the terms of a bill still pending in Congress — the proposed Paycheck Fairness Act ("PFA") — which would promote pay transparency and create additional obligations for all employers (not just federal contractors).[23] The PFA would amend the Equal Pay Act of 1963 and the Fair Labor Standards Act of 1938 as part of an effort to address gender income disparity.[24] Notably, the PFA strengthens anti-retaliation regulations, by specifically prohibiting retaliation against an employee who has "inquired about, discussed, or disclosed the wages of the employee or another employee."[25] This enhanced prohibition would not apply to employees with access to wage information as part of their job functions who disclose such information to other employees without the same access, unless the disclosure is in response to a complaint or in furtherance of an investigation or legal proceeding.[26]

The PFA would also revise sex discrimination laws by requiring employers to demonstrate that pay disparities are due to certain bona fide "factors other than sex" ("FOTS"), such as "education, training, and experience."[27] The proposed legislation goes beyond the EPA and Title VII, where the FOTS defense is presently available, by requiring that any pay disparity be related to the job in question and consistent with "business necessity."[28] This defense, however, will not apply where an employee can demonstrate that an "alternative employment practice exists that would serve the same business purpose without producing such [pay] differential" and that the employer refused to adopt it.[29] The PFA also provides enhanced penalties for violations, including compensatory and punitive damages and would permit an "opt out" class action under Rule 23 of the Federal Rules of Civil Procedure.[30]

Finally, the PFA would lead to public availability of comparative pay data. The PFA directs the Equal Employment Opportunity Commission to collect all currently available pay information and issue proposed regulations "to provide for the collection of pay information from employers as described by the sex, race, and national origin of employees."[31] The proposed measure also directs the DOL to "make readily available … accurate information on compensation discrimination, including statistics, explanations of employee rights, historical analyses of such discrimination, instructions for employers on compliance, and any other

information that will assist the public in understanding and addressing such discrimination."[32] Thus, the PFA may lead to new requirements regarding the maintenance and reporting of compensation data.[33]

**Conclusion**

Pay confidentiality is under renewed attack from the NLRB and by recently introduced regulatory initiatives intended to combat wage discrimination. Employers should review their policies for compliance with the NLRA and consider the potential new regulations. Employers should take a proactive approach to reviewing well-founded claims of compensation discrepancies and making adjustments where necessary.

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[1] National Labor Relations Act of 1935, 29 U.S.C. § 151-169 (2012). See, e.g., NLRB v. Main Street Terrace Care Center, 218 F.3d 531, 534, 538 (6th Cir. 2000) (employer violated NLRA by ordering employee "not to tell anyone [her compensation], because it caused hard feelings, and the management did not want it known"); NLRB v. Brookshire Grocery Co., 919 F.2d 359 (5th Cir. 1990) (workplace rule forbidding discussion of employee wages violated NLRA); Fredericksburg Glass and Mirror, Inc., 323 NLRB 165 (1997) ("no-discussion" rule in employee manual defining wage information as "a confidential matter between the employee and his earnings supervisor" violated NLRA); see also Medeco Sec. Locks, Inc. v. NLRB, 142 F.3d 733, 745 (4th Cir. 1998).

[2] National Labor Relations Act of 1935 § 7, 29 U.S.C. § 157 (2012).

[3] 29 U.S.C. § 158 (2012).

[4] Flex Frac Logistics, LLC, and Silver Eagle Logistics, LLC, Joint Employers and Kathy Lopez, 358 N.L.R.B. No. 127, at *1 (2012).

[5] Id. at *1-2.

[6] Id. However, the Board severed and remanded the issue of whether the employee's termination was unlawful to the Administrative Law Judge. Id. at *2. In a Supplemental Decision, the NLRB upheld the Judge's determination that the termination was lawful even though the confidentiality provision violated the NLRA, based on a finding that the employee was terminated for disclosing client rates (not for disclosing employee pay). 360 N.L.R.B. No. 120, at *1-2 (2014).

[7] Flex Frac Logistics, LLC v. NLRB, 746 F.3d 205, 210 (5th Cir. 2014).

[8] Id. at 209 (citing Lutheran Heritage Village-Livonia, 343 N.L.R.B. 646 (Nov. 29, 2004)).

[9] Quicken Loans, Inc. and Lydia E. Garza, 359 N.L.R.B. No. 141 (2013); MCPc, Inc. and Jason Galanter, 360 N.L.R.B. No. 39 (2014).

[10] Quicken Loans, Inc., 359 N.L.R.B. No. 141, at * 1.

[11] Id.

[12] MCPc, Inc., 360 N.L.R.B. No. 39, at *1 (2014).

[13] Id. But see EchoStar Tech., L.L.C., Administrative Law Judge's Decision, Case No. 27-CA-066726 (Sept. 20, 2012) (prohibition on disclosure of "employee information" did not violate NLRA because the "clear purpose and direction" of the prohibition was to protect business information, and a reasonable employee would understand that the prohibition did not limit or restrict exercise of Section 7 rights).

[14] DirectTV U.S. DirectTV Holdings, LLC and Int'l Assoc. of Machinists and Aerospace Workers, District Lodge 947, AFL-CIO, 359 N.L.R.B. No. 54 (2013).

[15] Id. at *3. In DirectTV, the NLRB also considered an Administrative Law Judge's decision that an employee's discharge was unlawful, but the discharge was a result of the employee's pro-union activities and was unrelated to DirectTV's confidentiality policies.

[16] Id. at *10-11 & Appendix D.

[17] Id. (citing Cintas Corp. v. NLRB, 482 F.3d 463, 468-469 (D.C. Cir. Mar. 16, 2007) (noting that confidentiality policies that forbid disclosure of "information concerning employees" are unlawful)).

[18] Exec. Order No. 13665, 79 Fed. Reg. 20749 (April 8, 2014) (amending Exec. Order No. 11246, 30 Fed. Reg. 12319 (Sept. 28, 1965)).

[19] Semiannual Agenda of Regulations, U.S. Department of Labor, Office of the Secretary (May 23, 2014), "Sex Discrimination Guidelines," RIN: 1250-AA05 and "Non-Retaliation for Disclosure of Compensation Information," RIN: 1250-AA06.

[20] Barack H. Obama, "Advancing Pay Equality Through Compensation Data Collection," Presidential Memorandum, 79 F.R. 20751 (April 8, 2014). Of course, employers are generally obligated to preserve payroll information under state law (e.g., New York Labor Law § 195.4, which requires employees in the State of New York to "establish, maintain and preserve for not less than three years payroll records showing the hours worked, gross wages, deductions and net wages for each employee").

[21] Barack H. Obama, "Advancing Pay Equality Through Compensation Data Collection," Presidential Memorandum, 79 F.R. 20751 (April 8, 2014).

[22] Semiannual Agenda of Regulations, U.S. Department of Labor, Office of the Secretary (May 23, 2014), "Requirement to Report Summary Data on Employee Compensation (Compensation Data Collection)," RIN: 1250-AA03.

[23] S. 2199, 113th Cong (2014).

[24] Id.; Equal Pay Act of 1963, 29 U.S.C. § 206(d) (2012); Fair Labor Standards Act of 1938, 29 U.S.C. § 201-219 (2012).

[25] S. 2199, 113th Cong. § 3(b)(1).

[26] Id. at § 3(b)(2) (more fully, this exception provides, "unless such disclosure is in response to a complaint or charge or in furtherance of an investigation, proceeding, hearing, or action under section 6(d), including an investigation conducted by the employer").

[27] S. 2199, 113th Cong. § 3(a)(2).

[28] Id. at § 3(a)(3); Equal Pay Act of 1963 § 6(d)(1), 29 U.S.C. § 206(d) (2012); Civil Rights Act of 1964 § 703(h), 42 U.S.C. § 2000e-2(h) (2012).

[29] S. 2199, 113th Cong. § 3(a)(3).

[30] Id. at § 3(c)(3)-(4); accord FED. R. CIV. P. 23.

[31] S. 2199, 113th Cong. at § 8.

[32] Id. at § 9(c).

[33] The PFA was approved by the House of Representatives in January 2009 during the 111th session of Congress, but the House will need to vote on the bill again. The PFA is still pending in the Senate and has never reached a vote.

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