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Confidentiality clause found to be overbroad

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A temporary employment agency could not enforce a confidentiality provision barring workers from disclosing the terms of their employment to "other parties," the 1st U.S. Circuit Court of Appeals has decided.

The National Labor Relations Board found that the confidentiality clause was unlawful because employees reasonably would construe it to prohibit activity — including discussions of their compensation with union representatives — protected by federal law.

The 1st Circuit affirmed.

"The precise subject matter of the forbidden disclosure — terms of employment, including compensation — went to a prime area of concern under Section 7 [of the National Labor Relations Act]," Chief Judge Sandra L. Lynch wrote for the unanimous panel.

The 1st Circuit went on to uphold the board's finding that the employment agency violated the National Labor Relations Act by discharging an employee for violating the confidentiality provision.

"The Board supportably relied on its own precedents to determine that any discharge pursuant to an unlawful rule is itself unlawful," Lynch said.

The 18-page decision is *National Labor Relations Board v. Northeastern Land Services, LTD., et al.,* Lawyers Weekly No. 01-146-11. The full text of the ruling can be found by clicking here.

'A line in the sand'

Richard D. Wayne of Hinckley, Allen & Snyder in Boston represented respondent Northeastern Land Services. He said the decision expands the NLRB's power and significantly lowers the standard of proof for Section 7 violations of the National Labor Relations Act.

"It's a confirmation that the standard of judging the legality of work rules and policies is not going to be [based] upon a balancing test, but instead is going to be decided upon the 'informed decision' of the National Labor Relations Board," he said.

The fact that the temporary employee in the case was not involved in concerted activity and yet afforded protection under Section 7 is a troubling development for employers, he said.

"I think it is a line in the sand. Even a person engaged in self help could have a remedy with NLRB," Wayne said. "All they really have to do is say, 'We believe the rule is overly broad and we believe it chills employee conversation.'"

Mary T. Sullivan, a labor attorney at Segal Roitman in Boston who was not involved in the case, disagreed that the decision represents a substantial break with past practice, noting that the NLRB has long applied a per se rule to overbroad provisions.

"I suspect what's a surprise to people is that this statute isn't just about unions, it's about workers and their right to talk to each other," she said. "I think a lot of lawyers don't think about that."

While the issue was not raised in the case, the business relationship between the temporary

employment agency and its customer likely qualified under the joint employer doctrine, Sullivan added.

"This case, to me, is a recipe for what employers and companies don't ever want to do," she said.

Nancy S. Shilepsky, an employment lawyer in Boston, said the decision also appears to have relevance under G.L.c. 151B, §4 (4A), which prohibits employers from interfering with a worker's rights under state discrimination laws.

"Arguably, preventing people from talking to each other about salaries does that because it prevents them from determining whether or not their salaries are illegally, discriminatorily set," said Shilepsky, who practices at Shilepsky, Hartley, Robb, Casey, Michon.

According to Wayne, the 1st Circuit was too deferential to the NLRB and left some important issues on the table, such as the reason for the rule change and, in cases in which a worker violated an overbroad provision due to concerted though not union activity, whether the mere presence of an overbroad provision entitles that employee to protection under the act.

But Sullivan maintained that the court clearly answered those questions, holding that the complaint by a non-union worker was sufficient. She also said the court merely followed its prescribed role under the National Labor Relations Act, which was carefully written by Congress in 1935 to give the NLRB exclusive jurisdiction over certain cases and sharply limit judicial review.

"The board is an agency with special expertise, and the circuit courts are supposed to defer to that expertise," she said.

Meanwhile, Russell Beck, a Boston lawyer who specializes in restrictive covenant litigation, said the ruling has far-reaching ramifications for both employers and employees.

Employers will still be able to require employees to keep the terms of employment or compensation confidential, but they will need to ensure the provisions do not violate the National Labor Relations Act, a relatively easy task that is made more complicated by "ambiguity" in Massachusetts law, Beck said.

"The real issue will be what the consideration is for the agreement," he said, noting that continued employment is not always viewed by the courts as sufficient to justify changes to agreements with restrictive covenants and can open the door to an "under duress" defense.

The court and the NLRB have not changed from applying a balancing test to a rule of law test; they have simply applied a reasonableness test, which is consistent with pre-existing law, Beck said.

A spokeswoman for the NLRB declined Lawyers Weekly's request to speak to attorneys involved in the suit.

Grounds for dismissal

Respondent Northeastern Land Services, Ltd., doing business as The NLS Group, operates a temporary employment agency in East Providence, R.I., that provides employees to businesses in the natural gas and telecommunications industries, but pays the workers directly.

Jamison Dupuy was employed by NLS as an agent assisting clients in acquiring land rights. His position required that he sign a temporary employment contract that included a homespun confidentiality provision, which barred him from sharing with others the terms of his employment, including his compensation.

"Disclosure of these terms to other parties may constitute grounds for dismissal," the clause read in relevant part.

Dupuy went on to express dissatisfaction over the company's failure to pay him in a timely fashion and its reimbursement practices, and he subsequently sought direct employment from an NLS client.

NLS then terminated him.

A company executive later testified that Dupuy's failure to adhere to the confidentiality clause was the reason for his dismissal.

Dupuy, an attorney, filed an unfair labor practice charge, alleging in a January 2002 complaint that NLS violated Section 8(a)(1) of the National Labor Relations Act by maintaining and enforcing an unlawful confidentiality clause in the employment agreement and by firing him for violating the terms of that clause.

NLS maintained the discharge was lawful because Dupuy was not engaged in union or concerted protected activity. The company contended that he would have been terminated even in the absence of the provision.

An administrative law judge found that although the provision did restrict Dupuy's right to discuss his employment terms with others, the clause did not violate Section 8(a)(1) because the company did not prohibit talk among fellow employees.

But in September 2010, the NLRB determined that the confidentiality clause was overbroad and indeed unlawful because workers could reasonably construe it to prohibit Section 7 activity.

The board ordered NLS to rescind the provision; notify present and past employees subject to the temporary employment agreement of the board's decision; reinstate Dupuy to his old job or a substantially similar one; make Dupuy whole for lost earnings and benefits; and remove references to the discharge from his personnel file.

NLS challenged the ruling, saying it failed to consider the legitimate business justification for the provision and was inconsistent with prior caselaw.

'Unattractive' result

The employer contended that the board failed to consider the legitimate justification it had for the confidentiality provision: labor costs were a key component of its bids to clients, and the employer did not want its employees jeopardizing its bids.

That argument, the 1st Circuit found, was at odds with NLRB precedent, particularly its 2004 *Lutheran Heritage* ruling.

Under that precedent, an employer's work rule that does not explicitly restrict Section 7 activity is nonetheless unlawful if employees would reasonably construe the language of the rule to prohibit Section 7 activity, Lynch said.

The plain language of the employer's confidentiality provision provided: "Disclosure of these terms [of employment] to other parties may constitute grounds for dismissal."

The NLRB's finding — that the language could be fairly read to extend to disclosure of terms of employment to union representatives — was "supportable," Lynch said.

"While the Board could have chosen to structure its rule differently and engage in a balancing analysis, we owe deference to its decision not to do so," she added. "Some may think this result unattractive, but the Board's rule is intended to be prophylactic and in any event is subject to deference."

For JUMPBOX

CASE: *National Labor Relations Board v. Northeastern Land Services, LTD., et al.*, Lawyers Weekly No.

COURT: 1st U.S. Circuit Court of Appeals

ISSUE: Could a temp agency enforce a confidentiality provision barring workers from disclosing the terms of their employment to "other parties"?

DECISION: NO

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