Employment Law Advisory for 8/3/2011

Be Careful Not To Overreach in Your Confidentiality Agreements And Policies

A recent federal appellate decision serves as a cautionary tale against overbroad confidentiality agreements or policies. In *NLRB v. Northeastern Land Services*, the employer was in the business of placing temporary employees with companies and, as a part of that business process, required placed employees to sign an employment contract that provided, in part:

"Employee…understands that the *terms of this employment, including compensation*, are confidential to Employee and the NLS Group. Disclosure of these terms to other parties may constitute grounds for dismissal."

In this case, the employee at issue ultimately discussed his compensation terms with management of the company where he had been placed and his employer, the temp agency that placed him with that company, terminated his employment as a result.

The appellate court had no difficulty upholding the NLRB's conclusion that the confidentiality provision at issue was overbroad and violated section 8(a)(1) because employees "would reasonably understand the language as prohibiting discussions of their compensation with union representatives." The court rejected the employer's argument that it had legitimate business reasons for such a confidentiality provision. The court gave deference to the NLRB's view that the confidentiality provision, by its clear terms, precluded employees from discussing compensation and other terms of employment with "other parties" and that employees would reasonably understand such language as prohibiting discussion of their compensation with union representatives. The fact that the provision was not enforced by the employer in a context involving a union was deemed unpersuasive by the NLRB because the provision on its face was overbroad and therefore unlawful. The federal appellate court gave deference to the NLRB's interpretation of the law and upheld it.

In California, the provision at issue would also violate Labor Code section 232, which specifically prohibits an employer from restricting an employee's ability to disclose his or her compensation and makes it illegal for an employer to terminate, discipline or otherwise discriminate against an employee for disclosing compensation information.

In light of Labor Code section 232, most employers in California do not have specific provisions in either their employment agreements or their policies which preclude employees from disclosing compensation information. However, given the NLRB's view that an employer violates the NLRA by using any language that could *reasonably be construed by an employee* to prohibit discussion of terms and conditions of employment with other employees or with union representatives, employers would be well-served to review the language in their confidentiality policies and their employment agreements to make sure the language does not run afoul of the NLRB's view. Because most employers prefer a broad definition of confidential information, one method for mitigating against the risk created by the NLRB's view is to include language that specifically states the provision is not

intended to prohibit employees from discussing their terms and conditions of employment with other employees or with union representatives. If you have any questions regarding how the NLRB's view affects your policies or employment agreements, or any other issue relating to employment law, please contact one of our attorneys:

Daniel F. Pyne, III	DPyne@hopkinscarley.com
Richard M. Noack	RNoack@hopkinscarley.com
Ernest M. Malaspina	EMalaspina@hopkinscarley.com
Karen Reinhold	KReinhold@hopkinscarley.com
Erik P. Khoobyarian	EKhoobyarian@hopkinscarley.com
Shirley E. Jackson	SJackson@hopkinscarley.com