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RETAIN THE LUSTER ON YOUR CONFIDENTIAL INFORMATION POLICIES

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Design your employee policies carefully, or follow in Tiffany's less than platinum path. An Administrative Law Judge recently found multiple violations of the National Labor Relations Act in the multinational jewelry retailer's confidential information policy, largely because Tiffany failed to highlight effectively the line between proprietary company information that may be safeguarded and information its employees are entitled to use while engaging in protected "concerted activity." *Tiffany & Co. v. Shaun Deacon*, 01-CA-111287, National Labor Relations Board (August 5, 2014).

THE FACTS

Shaun Deacon filed a charge and amended charge on August 15, 2013 and February 27, 2014, respectively, with the National Labor Relations Board against his employer Tiffany and Company and Tiffany & Co. (collectively "Tiffany"). Deacon claimed that certain portions of Tiffany's *Policy for the Protection of Confidential Information* (the "Policy") were overbroad and violated the National Labor Relations Act.

Tiffany creates and provides its employees with a *Business*

Conduct Policy, which includes a section on the company's protection of its own confidential information. Employees review the Policy when they are hired, and every year thereafter. Thus, employees receive notice of the Policy and have access to it on the company intranet at all times.

Although Deacon's original charge claimed that the entire Policy was illegal, the NLRB General Counsel chose the following three rules to prosecute its claim that the Policy's terms were overbroad. The three rules prohibited employees' release of the following information without Tiffany's approval:

1. Non-company names, addresses, phone numbers, email addresses of employees, and employee lists,
2. Responses to all requests or questions by any media representative for information regarding Tiffany, and
3. Information concerning wages, benefits, or other terms of employment paid by Tiffany to employees in general, or with respect to specific positions or individuals.

Administrative Law Judge Steven Davis denied a motion to dismiss by Tiffany, who maintained that the Policy's savings clause was an affirmative defense requiring dismissal. Judge Davis held a hearing on June 10, 2014, and subsequently made the findings detailed below.

ANALYSIS AND OUTCOME

Under Section 7 of the NLRA, employees have the right "to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." Section 8(a)(1) of the NLRA specifically restrains employers from acting in such a way as to interfere with employees' exercise of their Section 7 right to engage in concerted activities.

Judge Davis examined Tiffany's Policy terms individually using the test of "reasonable construction" to determine whether Tiffany's employees could reasonably construe the Policy language as restricting their Section 7 rights. First, Judge Davis found that the Policy's prohibition on disclosing employee information and lists failed to state a distinction based upon *how* such employee information was obtained. Such information could be obtained through an employee's normal work routine or it could be obtained through

access to confidential files and records. Because the source of the information is crucial, Judge Davis found this rule to be overbroad.

Second, the Policy's rule prohibiting response to media requests about company information was overbroad largely because it too failed to make the crucial distinction between protected statements and unprotected statements (such as maliciously false statements). Judge Davis also noted that the rule too broadly disallowed all statements to the media about the company, which could be construed by employees to include employee information and concerns, which are protected under the NLRA.

Third, the Policy's prohibition on disclosure of information about wages, benefits, and other employment terms was overbroad because it could be reasonably construed as prohibiting discussions about such topics with union representatives. As that discussion is protected activity, the company's Policy may not restrict it.

Judge Davis next turned to the Policy's savings clause, which excepted certain employee actions from Policy coverage. Judge Davis found that only the rule concerning disclosure of wages, benefits, and terms of employment was saved. The language of the savings clause in fact tracked the language of this particular rule. The savings clause was placed immediately after this rule within the Policy, and made explicit reference to the rule as well. The very fact that the savings clause was so specific about this rule, made it even less clear to the reasonable employee that the clause applied to the other rules as well. Judge Davis noted that the responsibility to make clear what is covered or not covered by each rule rests with the employer.

Finally, Judge Davis addressed Tiffany's arguments that the company clearly was trying to protect proprietary information, and that its employees would understand that such information was different than that protected by their Section 7 rights. Judge Davis found that it was unfair to expect employees to differentiate between harmful disclosures and protected disclosures. He also noted that the Policy failed to adequately state Tiffany's "legitimate business reason" for the Policy's restrictions.

Judge Davis ordered Tiffany to cease and desist from maintaining policies with the two rules that violate the NLRA. Tiffany must rescind and revise those rules, provide the new rules to all employees, and post and distribute an NLRB notice that references the above rulings and remedies.

The findings have not yet been ratified by the NLRB. However, at least for now, they suggest that employers must be careful about what they prohibit their employees from communicating.

WHAT SHOULD EMPLOYERS DO TO PROTECT THEIR CONFIDENTIAL INFORMATION POLICIES?

Despite his findings, Judge Davis acknowledged that employers can have legitimate interests in keeping proprietary information safe. Thus, for your confidentiality policies:

- Be very specific about what information you are barring from disclosure. The goal is to make sure that employees (and the courts) can distinguish between what may and may not be disclosed.
    - Be specific in your prohibition about *where* confidential information is obtained - distinguish between information obtained during employees' normal work routines and through other methods.
    - Be specific in excluding protected activity and discussion from the prohibitions.
- A savings clause may be useful to immunize rules from complaint; however ensure that it explicitly references each rule to which you wish it to apply and tracks the language of each such rule within the savings clause itself (perhaps even consider tacking on savings clause language to each rule where Section 7 claims may be a concern).
- Persuasively state your business purposes in prohibiting discussion about certain topics. Make it clear how the proprietary information differs from what employees should expect to be able to use in exercising their Section 7 rights.
- Always consider what your average employee might think when reading the policy. If one would reasonably have difficulty making choices about what can be communicated, and when discipline will be imposed, clarify and make a distinction.
