APRIL 29, 2013

CONFIDENTIAL INVESTIGATIONS – WHAT CAN YOUR POLICY SAY?

CONFIDENTIALITY REQUIREMENTS CHALLENGED BY THE NLRB

Last summer, the NLRB created another stir among private employers when it found that an employer's form used during confidential investigations of workplace issues was unlawfully broad and interfered with employee rights. We wrote about this development in our August 7, 2012 **HR Insights** article *Confidential Investigations – Challenged by the NLRB*. After that ruling, employers were left to guess as to what they could say about the confidentiality of workplace investigations in their policies and other documents. Now there is some guidance, thanks to the NLRB's Division of Advice, which released a Memorandum on April 16, 2013, suggesting policy language that would withstand NLRB scrutiny.

ADVICE AND GUIDANCE ON LAWFUL LANGUAGE

The NLRB's Advice Memorandum arose out of a case in January 2013 where the employer was found to have a "Code of Conduct" that was unlawfully broad because it required employees to acknowledge that they might be subject to discharge or discipline if they violated the employer's strict blanket confidentiality directive. According to the NLRB, blanket rules or policies requiring confidentiality of investigations are unlawful – unless the employer can demonstrate the need for confidentiality on a case-by-case basis. The employer's Code of Conduct was too broad because it didn't allow for case-by-case analysis. The NLRB cited the employer's Code of Conduct and suggested language that would be lawful. Although this Advice Memorandum does not have the force of law, it does indicate what the NLRB would do if confronted with a similar policy or Code of Conduct.

APPROVED POLICY LANGUAGE

Here is the employer's Code of Conduct that employees were asked to sign. The NLRB concluded that the first two sentences were lawful statements setting forth the employer's legitimate interest in protecting confidentiality. The unlawfully broad language is shown below with a ~~strike through~~. The NLRB's new "approved" replacement language follows it.

> [Employer] has a compelling interest in protecting the integrity of its investigations. In every investigation, [Employer] has a strong desire to protect witnesses from harassment, intimidation and retaliation, to keep evidence from being destroyed, to ensure that testimony is not fabricated, and to prevent a cover-up. ~~To assist Verso in achieving these objectives, we must maintain the investigation and our role in it in strict confidence. If we do not maintain such confidentiality, we may be subject to disciplinary action up to and including immediate termination.~~ [Employer] may decide in some circumstances that in order to achieve these objectives, we must maintain the investigation and our role in it in strict confidence. If [Employer] reasonably imposes such a requirement and we do not maintain such confidentiality, we may be subject to disciplinary action up to and including immediate termination.

THE BOTTOM LINE FOR PRIVATE EMPLOYERS

Frankly, it is difficult to see much difference between the unlawful and the "approved" language. Nevertheless, the NLRB will continue to make these very fine distinctions in its effort to protect employee rights. With this advice and direction from the NLRB, private employers would be wise to review their own polices and Codes of Conduct to ensure that they comply with this "approved" language and avoid unfair labor practice charges later.

If you have any questions, please contact Steve Lyman at slyman@hallrender.com or your regular Hall Render attorney.