



In The Trenches

Practical Answers to Your HR Questions

By Daniel C. Carr

Q *Our company's employment manual has a section on salary confidentiality that says that employees are not allowed to discuss their salary or other compensation with other employees. Is this restriction on employees allowable?*

A In short, no. At one time, it may have been considered taboo for employees to discuss salaries with colleagues, and many companies had policies explicitly banning employees from discussing pay. However, salary discussions among employees is protected by the National Labor Relations Act (NLRA), and recent decisions by the National Labor Relations Board (NLRB) reiterate the NLRB's continued protection of employees who discuss compensation with their fellow employees.

Some employers may mistakenly believe that the NLRA applies only to unionized employees. However, various provisions, including the prohibition on employer rules that forbid employees from discussing salary, apply equally to union and non-union employees. Therefore, companies that prohibit employees from discussing salaries may find themselves defendants in an NLRA action. For instance, one bank that took action against employees for discussing salaries was required to reinstate the affected workers and was held liable for back pay and attorneys' fees. The bank was also required to post a notice to all employees disclosing the unfair labor practices charge and the rescission of the policy. In addition, companies that foster a culture of secrecy and non-disclosure may be susceptible to pay discrimination charges brought by the Equal Employment Opportunity Commission (EEOC). If the EEOC believes a company is discouraging employees from talking about salaries because similarly-qualified employees of a particular race, nationality, gender, or other protected class are paid less than their peers, the company may find itself defending a costly and embarrassing lawsuit. In short, a company's best bet may be to educate employees about its compensation system and salary ranges for different jobs, rather than to try to prevent inevitable disclosures from occurring.

Q *I read some time ago that employees have the right to have a coworker present at a meeting where they may be disciplined or terminated. Is this correct?*

A The right of an employee to have a coworker present at an interview that the employee reasonably believes may lead to discipline is commonly known as the "Weingarten" right. This right was established for union employees in 1975. From 2000 to 2004, the NLRB held that both union and non-union employees alike had Weingarten rights. However, in a 2004 decision, the NLRB reversed its stance and held that the Weingarten right does not extend to non-union employees. The NLRB reasoned that in a non-union workplace, coworkers do not represent the interests of the entire workforce in the way they do in a unionized workplace. In addition, in contrast to a union representative, a coworker in a non-union workplace is generally unskilled in labor matters, and likely will be chosen due to a personal relationship with the other employee, which may impede the investigation, frustrating the purposes of the NLRA.

Companies that employ both union and non-union employees, however, should remember that union employees still have a Weingarten right to have union representation during any investigatory interview where a supervisor asks an employee for information which could be used as a basis for discipline or asks an employee to defend his or her conduct. Although management is not required to inform the employee of his or her Weingarten rights, once an employee asserts this right, the employer has three options: (1) Stop the questioning until the representative arrives; (2) Call off the interview; or, (3) Tell the employee that it will call off the interview unless the employee voluntarily gives up his/her rights to a union representative. A violation of an employee's Weingarten rights could subject a company to action by the NLRB.

Because the NLRB's 2004 reversal represents the fourth time since 1975 that the NLRB has changed its opinion on the applicability of Weingarten rights to non-union employees, employers should continue to monitor this area for future changes. ■



In the Trenches is provided courtesy of the Labor and Employment Law Group of Van Cott, Bagley, Cornwall & McCarthy, P.C., and is authored this month by Daniel C. Carr, who is a member of the firm's Labor and Employment Law Group. You can reach Mr. Carr at 801.532.3333. If you have questions you would like considered for publication in future issues of *HR Views*, please send them to pam.gunnell@pdqx.net.