

Key Employment Documents: Are They Under Attack?

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Key Employment Documents

- ✦ Severance Agreements
 - ▶ Confidentiality Provisions
- ✦ Handbook/Policy Manual/Code of Conduct
 - ▶ Social Media Policy
 - ▶ Leave of Absence policy
 - ▶ Confidentiality in Internal Investigation procedures
- ✦ Executive Employment Contracts

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Severance Agreements

- ✦ Discussion of confidentiality provisions globally applicable
- ✦ Confidentiality under scrutiny from governmental enforcement agencies
 - ▶ Equal Employment Opportunity Commission
 - ▶ Securities and Exchange Commission
 - ▶ National Labor Relations Board
 - ▶ Office of Inspector General

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Confidentiality Provisions

- ✦ Provisions seen in various settings
- ✦ All are under scrutiny
 - ▶ Employment Handbook
 - ▶ Code of Conduct
 - ▶ Severance Agreements
 - ▶ Internal Investigation Policies/Procedures/Practices

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Confidentiality Provisions

- ✦ EEOC v. CVS Pharmacy
 - ▶ Claimed separation agreement violated Title VII
 - ▶ Did have “carve-out” informing employees had right to file charge
 - ▶ But, EEOC claimed still had a “chilling effect”
 - On employee’s right to file charge
 - On employee’s right to cooperate in investigation

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Confidentiality (cont’d)

- ✦ State Department OIG Report (March 30)
 - ▶ Conducted evaluation of confidentiality policies of federal contractors
 - ▶ At least 13 in violation of Federal Acquisition Guidelines
- ✦ Concerning provisions
 - ▶ No discussion of confidential information
 - ▶ Contact company if contacted by government
 - ▶ Or, instructions to explain must consult with Company counsel before responding
 - ▶ Non-disparagement

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Confidentiality (cont'd)

✦ Recent SEC Settlement – KBR, Inc.

- ▶ Fine and required amendment
- ▶ SEC has issued numerous document requests
- ▶ Seeking severance agreements, codes of conduct, executive agreements, standard confidentiality provisions

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Confidentiality (cont'd)

✦ Internal Company Investigation

✦ Required Employees to Sign Confidentiality Agreement

- ▶ So restrictive that violated whistleblower protections of Dodd-Frank Act
- ▶ No examples of employees actually being discouraged from going to SEC
- ▶ \$130,000 penalty
- ▶ Revise agreement

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Confidentiality (cont'd)

✦ National Labor Relations Act - Macy's Inc.

✦ In midst of organizing effort, Union filed ULP charge

✦ NLRB found confidentiality policies had "chilling" effect on Section 7 rights

- ▶ Employees cannot divulge
 - personal information of other employees or of customers or,
 - Any information not generally known to the public about the Company or its employees

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Confidentiality (cont')

- ✦ NLRA – Cellco Partnership (Sept 2015)
 - ▶ ULP Charge over Code of Conduct provisions
 - ▶ Including solicitation over company email
 - ▶ Language prohibited email use on behalf of outside organization that might cause the company “embarrassment”
 - ▶ Interpreted as “chilling” Section 7 rights

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Confidentiality (cont'd)

- ✦ These agencies will evaluate for “chilling effect” on lawful activity
 - ▶ Whistleblowing
 - ▶ Cooperating in investigation
 - ▶ Filing charge
 - ▶ Protected concerted activity (Section 7 rights)
- ✦ Will evaluate if undermines agency's enforcement efforts
- ✦ Will engage broad reading to find violation

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Recommendations

- ✦ Review these agreements, policies and practices
- ✦ Provide internal hotlines with anonymous reporting procedure
- ✦ Severance/Settlement Agreements
 - ▶ Include that Employee has made company aware in writing before signing agreement
 - ▶ Other governmental agencies (not just EEOC) in carve-out
 - ▶ Not a waiver of right to file charge as to matters not released
 - ▶ Not a waiver of right to participate in government investigation

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Recommendations (cont'd)

✦ Internal Investigation

- ▶ Case-by-case analysis of level of confidentiality needed
- ▶ Distinguish between management and non-management persons in process
- ▶ If give confidentiality instruction, explain why

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Handbook/Code of Conduct

✦ Leave Policy

- ▶ No automatic disqualifier
- ▶ Leave as accommodation
- ▶ EEOC says leave as an accommodation is "job protected"
- ▶ Will engage interactive process
 - "Will consider employee's condition and employer's operational needs"

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Handbook (cont'd)

✦ Social Media Policy

- ▶ Be specific
- ▶ Protected Activity Concerns
- ▶ "Notice" concerns

✦ Social media leads to several issues, including:

- ▶ Unlawful discrimination, harassment, and bullying
- ▶ Section 7 claims
- ▶ Employee productivity declines
- ▶ Disclosure of confidential information and trade secrets
- ▶ Disparagement claims
- ▶ Privacy issues

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Social Media (cont'd)

- ✦ Section 7 of the NLRA
 - ▶ NLRA applies to non-union as well as unionized workforces.
 - ▶ Section 7 gives employees the right to self-organize, to form or join a union, to bargain collectively, and to engage in other concerted activities for the purpose of mutual aid or protection.

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Protected Activity

- ✦ Distinguish between individual gripes and initiation of group activity.
- ✦ Comments to posts and ensuing discussion may convert initial post into protected activity.
- ✦ Specific workplace complaints will be given more protection than general statements.
- ✦ Expletives do not necessarily cause posts to lose protection.
- ✦ Personal attacks on supervisors and management will likely lose protection, but criticisms of management style will not.
- ✦ If conduct happens on the clock, it is entitled to less protection.

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Social Media Policies

- ✦ NLRB Limitations to Policies
 - ▶ Keep in mind that potential Section 7 issues arise whenever drafting social media policies
 - ▶ Written policies must not unlawfully restrict employees' Section 7 rights to engage in protected, concerted activity
 - ▶ "[T]he law does not allow even well-intentioned rules that would inhibit employees from engaging in activities protected by the Act." Report of the General Counsel 2015

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NLRB Policy Review Takeaways

- + Encourage employees to report online misconduct.
- + Avoid prohibiting joint criticism of employer or criticism in public forum.
- + Be careful banning all false statements
 - Only **maliciously** false statements are prohibited.
- + Avoid overbroad anti-harassment rules.
- + For "courtesy rules," avoid references to the employer, supervisors, or management.
- + When in doubt, clarify with examples.
- + Although not a perfect cure, use a savings clause.
- + Remember that employees have a right to use the company's name and logo for their protests (fair use).

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Executive Employment Contracts

- + Include both for cause/not for cause termination provisions
 - Consider "cure period" if "cause" involves breach of agreement
 - If "without cause" includes severance pay provision, require release to obtain
- + Arbitration
 - Consider Mediation as prelude to Arbitration
 - Recognize continued NLRB scrutiny (if for all employees)
 - Consider as alternative a jury trial waiver

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Executive Contract (cont'd)

- + Restrictive covenants
- + Non-competition/Non-solicitation
 - What is employer to protect?
 - Non-solicitation
 - Of customers
 - Of employees
 - Of vendors/suppliers
 - What is "reasonable"?
 - Geographic scope
 - Time limitations
 - Special rules for physicians
 - Consideration issues

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