

Red Cross Confidentiality Policies Fail To Pass Muster With The NLRB

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Confidential

An NLRB Administrative Law Judge has determined that the confidentiality-related policies of the American Red Cross were overbroad and could be read to chill the exercise of employee rights under the National Labor Relations Act.

The ALJ's decision in [American Red Cross Blood Services, Case No. 08-CA-090132](#), underscores two key points: (1) handbooks, codes of conduct and independent confidentiality agreements with personnel will be read together to discern the intent behind policies and whether restrictions on dissemination of confidential information are sufficiently narrowly tailored to prevent the chilling of Section 7 rights; and (2) despite the Board's initial indication that savings clauses might help, this ALJ found no savings in the savings clause.

The agency maintained a Confidential Information and Intellectual Property Agreement with its employees which stated that employees could not disclose information related to "personnel," "employees," and "all information not generally known outside of Red Cross regarding its business." The Red Cross also disseminated to employees a Code of Conduct and an Employee handbook, both of which prohibited the release of confidential information and neither of which referenced information about "personnel" or "employees" as being confidential. When read together, the ALJ concluded, the policies could in fact restrict or chill employee speech on protected topics.

In addition, a savings clause contained in the policies by the Red Cross was found not to be specific enough to erase the alleged chill. The savings clause said: "[T]his Agreement does not deny any rights provided under the National Labor Relations Act to engage in concerted activity, including but not limited to collective bargaining." Yet, the ALJ said this savings clause could only be effective if the employees knew that the Act permitted them to discuss terms and conditions of employment. The ALJ determined that in his estimation employees would merely comply with the "unlawfully broad restriction" on their Section 7 rights, rather than "undertaking the task of determining the exact nature of those rights and then attempting to assert those rights under the savings clause."

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