

Second Circuit Affirms NLRB Position On Broad Confidentiality Agreements

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**Gerald F.
Lutkus**

Of Counsel
(Retired)

You can't force employees to sign confidentiality agreements that prohibit them from disclosing "non-public information intended for internal purposes" or that bar them from speaking with any "media source" without the employer's permission. The NLRB decided that issue on June 14, 2016, and the U.S. Court of Appeals for the Second Circuit [affirmed the NLRB's decision](#) on Aug. 31. The employer, Long Island Association for AIDS Care Inc. (LIAAC), is a not-for-profit, non-union organization that provides services for HIV/AIDS prevention and treatment. LIAAC had confidentiality agreements that included those provisions noted above. The employee, Marcus Acosta, had signed such an agreement upon employment, but when he was asked to sign a new copy later in his employment, he balked. According to the court's opinion, Acosta was then told to "sign it or get fired." In response, Acosta signed the agreement, but also wrote that he did so "under duress" three times at the bottom of the sheet. Upon seeing that, the director of human resources, according to the decision, informed Acosta that "you just terminated yourself." Acosta filed an unfair labor practice charge with the NLRB alleging that LIAAC had "unlawfully prohibited employees from talking about their wages, hours, terms[,] and conditions of employment" and that LIAAC had "discharged [Acosta] because he asserted his Section 7 rights and because he engaged in protected concerted activities." The NLRB found the employer's actions were unlawful and ordered LIAAC to eliminate the policy provisions and reinstate Acosta with back pay. On review, the Second Circuit said that the employee should not have been terminated: "We hold that the NLRB was correct in deciding that an employer violates Section 8(a)(1) of the NLRA, 29 U.S.C. § 158(a)(1), when an employer terminates an employee for refusing to agree to an unlawful confidentiality agreement. An employer may not require even one individual employee to agree to abide by unlawful restrictions as a condition of employment. That the employees have not yet organized in order to protest the unlawful nature of the restriction at issue does not make it any less unlawful. . . . We see no reason to judge the effect of an unlawful requirement on an employee's termination based solely on whether the employee acted in concert or alone."

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