NLRB, Fifth Circuit Sacrifice Employee Privacy for Speculation

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Jackie Ford, a partner in the Vorys Houston and Columbus offices, authored an article for *Texas Lawyer* titled "NLRB, Fifth Circuit Sacrifice Employee Privacy for Speculation." The article was about the U.S. Court of Appeals for the Fifth Circuit's decision to uphold the National Labor Relations Board finding in *Flex Frac Logistics v. NLRB*. According to Ford, Flex Frac employees signed a confidentiality clause requiring that they avoid unauthorized disclosure to third parties of the company's confidential information, including financial information and personnel information/documents. An NLRB administrative law judge held that those two provisions violated National Labor Relations Act and the U.S. Court of Appeals for the Fifth Circuit upheld the decision.

The article states:

> *"The ALJ found the confidentiality policy was illegal on its face because employees could 'reasonably interpret' the prohibition on disclosing 'personnel information' as a bar to discussing wages and because it is well-settled that forbidding 'the discussion of confidential wage information between employees' violates §7. The NLRB affirmed that decision in 2013. Flex Frac appealed to the Fifth Circuit, and the NLRB cross-appealed for enforcement.*
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> *On appeal, Flex Frac made a constitutional challenge to the NLRB's authority to have rendered a decision in the case, based on President Barack Obama's recess appointment of two members of the panel. But the court found that Flex Frac had failed to raise this argument in its initial brief and so waived it. The U.S. Supreme Court has since invalidated Obama's recess appointments to the NLRB in NLRB v. Noel Canning, issued on June 26.*
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> *Turning to the merits, the Fifth Circuit noted, '[T]he ALJ found, and the parties do not dispute, that the rule does not explicitly restrict Section 7 activities.' But a policy can violate §7 by implying that protected activity may result in disciplinary action. Thus, it is an*

> *unfair labor practice for an employer to adopt policies that employees 'would reasonably construe' to prohibit protected concerted activity. And therein lies the judicial rub: How to conjecture what employees would do absent evidence of what they did do?"*

To read the entire article, visit the *Texas Lawyer* website. (Subscription may be required).