Confidentiality in Workplace Investigations

by Beth P. Zoller and Katie Ann Insinga

Confidentiality concerns are often top of mind for employers and investigators when conducting workplace investigations. This is particularly true when the investigation concerns a sensitive issue such as harassment and/or discrimination. While confidentiality protections are a high priority in these investigations, employers and investigators should take note of recent legal developments in this area and be mindful of balancing confidentiality concerns in harassment cases with legal protection for both complainants and witnesses.

Usachenok v. State of New Jersey, Department of Treasury

On May 6, 2024, in *Usachenok*,[1] the New Jersey Supreme Court evaluated the confidentiality provision in the civil service regulations, N.J.A.C. 4A:7-3.1(j), in the context of a workplace investigation.

By way of background, in *Usachenok*, the plaintiff filed an internal complaint with the New Jersey Department of Treasury, alleging sexual harassment and a hostile work environment against her supervisor.[2] During the investigation of the complaint, the Equal Employment Opportunity/Affirmative Action investigator directed the plaintiff to keep the investigation confidential and asked her to sign a form acknowledging the directive.[3] Before signing the form, the plaintiff discussed the form with her husband, an attorney, who advised her not to sign it.[4] According to the plaintiff, the investigator "then accused her of violating the confidentiality directive and threatened that she could be fired."[5]

The plaintiff sued, challenging the confidentiality directive of N.J.A.C. 4A:7-3.1(j).[6] Subsection (j) of the regulation originally directed state investigators to require anyone interviewed in a harassment and discrimination investigation to maintain confidentiality by refraining from discussing any aspect of the investigation.[7] While *Usachenok* was pending in the Appellate Division, subsection (j) was amended, on March 12, 2020, by the Civil Service Commission (CSC) – specifically, the confidentiality provision was changed from a directive to a request.[8]

However, the plaintiff claimed that N.J.A.C. 4A:7-3.1(j), even as amended, was invalid on its face and that the regulation created "an unconstitutional prior restraint of state employees' First Amendment right to freedom of speech and violate[d] the legislative policies behind [the New Jersey Law Against Discrimination], specifically LAD's provisions regarding retaliation."[9] The plaintiff also contended that paragraph (k) of the regulation imposed penalties for breaches of confidentiality.[10] The plaintiff sought to have the confidentiality directive in subsection (j) of the regulation declared "null and void as contrary to law, specifically [as to] the LAD, and public policy."[11]

The Appellate Division reasoned that the CSC's intent in amending the regulation "was to eliminate a confidentiality requirement and its potential chilling effect rather than create one."[12] Moreover, the court agreed with the CSC that the confidentiality request is meant to "'ensure the personal and/or privacy interests of the complainant and/or witnesses…[and to] maintain the integrity of the investigation.'"[13] The court found that the plain language of subsection (j), as amended, neither restricted speech nor constituted "an improper prior restraint of speech."[14] Additionally, the court stated that instead of violating the LAD, the regulation actually supported it because confidentiality is an important aspect of a policy implemented to optimize sexual harassment reporting and investigations.[15] Notably, the court mentioned, in support of the amended regulation, the importance of a fair and impartial investigation: a person accused of misconduct must be treated in a fair and impartial manner.[16] Accordingly, a confidentiality request promotes a fair investigation in which both the accuser and the accused are protected, while the free speech rights of those participating in the investigation are protected.[17]

Thus, the Appellate Division rejected the plaintiff's challenge, holding that the amended regulation was enforceable.[18] The court did not make findings as to subsection (k), stating that the plaintiff did not challenge this subsection in her amended complaint.[19]

However, the court mentioned that even if she had challenged it, the policy in that section did not impose sanctions for breaches of confidentiality as the plaintiff had argued, and, instead, clearly referred to New Jersey's policy of providing an environment at work that is free from discrimination and/or harassment.[20]

On review, the New Jersey Supreme Court considered the constitutionality of the regulation in *Usachenok*.[21] The Court reversed the Appellate Division's decision, finding that the confidentiality request of the regulation was overbroad and unconstitutional as it infringed on free speech.[22] Thus, the Court struck down the last sentence of the regulation, which read in part, "[T]he EEO/AA Officer/investigator shall request that all persons interviewed, including witnesses, not discuss any aspect of the investigation with others."[23]

In evaluating the regulation at issue, the Court noted that the New Jersey Constitution provides broader protection for free speech than the U.S. Constitution; however, the regulation directs state actors to ask victims to give up their constitutionally protected right to free speech and commands investigators to request complete confidentiality.[24] Asking witnesses to maintain confidentiality during an investigation into harassment or discrimination involves "a great deal of protected speech."[25] The regulation was overbroad because there was no time limit, as the request appeared to extend indefinitely – past the conclusion of an investigation.[26]

While the Court noted that there was an exception to the regulation that victims and witnesses could disclose confidential information if there was "'a legitimate business reason to[,]'" the Court found this exception to be vague, undefined, and difficult to understand, as victims were not told they were free to decline the confidentiality request or consult with an attorney or that they would not face repercussions if they exercised their constitutionally protected right of free speech.[27] Citing the National Labor Relations Board's decision in *Stericycle*,[28] the Court also noted that there was an inherent imbalance of power between an investigator and witness that could further intimidate a witness or victim in a harassment or discrimination investigation to remain silent.[29]

Further, the Court found that while the regulation attempted to foster legitimate principles (*i.e.*, protecting integrity of investigation, minimizing risk of retaliation during or after an investigation, and protecting important privacy interests), state investigators should instead simply explain the benefits of confidentiality to victims and witnesses in investigations and provide them with the right to disagree and speak freely.[30]

NLRB Memo

On Jan. 16, 2025, the then-General Counsel of the NLRB issued a memorandum entitled *Harmonization of the NLRA and EEO Laws* (the memo), seeking to provide guidance on ways to simultaneously address "the requirements of the National Labor Relations Act (NLRA) and the Federal Equal Employment Opportunity Laws (EEO Laws)."[31] The memo was issued right before President Joseph Biden left office in January 2025.[32] While the memo was rescinded pending further guidance in February 2025 by the Trump administration, it still provides critical guidance with respect to these issues and a valuable framework for investigators. The memo places importance on compliance "with all requirements of the NLRA and the EEO laws" as well as "offers suggestions in certain key areas on how to effectuate compliance and ensure that employees receive full protections under the laws."[33] The memo specifically addresses harmonizing NLRA and EEO laws when employers require confidentiality during "workplace investigations into alleged harassment based on EEO-protected characteristics."[34] The memo suggests that such "investigative confidentiality rules are neither always required for EEO purposes nor always prohibited by the NLRA."[35]

EEO laws, including the Age Discrimination in Employment Act, the Americans with Disabilities Act, and Title VII, are aimed at preventing discrimination and harassment based on race, sex, and other protected characteristics in the workplace.[36] The NLRA empowers employees to speak up and act together to improve working conditions.[37] EEO goals are "advanced by the NLRA's protection of employees' right to discuss terms and conditions of employment with each other or third parties," including coworkers, unions, government agencies, the media, and the public.[38] Discussions of workplace investigations are encompassed in this employee right and employers should remind investigation participants of the right.[39] Specifically, "such protected communications can include discussions of the discipline threatened or imposed as a result of the investigation, the fairness or effectiveness of the investigation, and the underlying subject of the investigation."[40] According to the memo, through these NLRA-protected conversations, discrimination and/or harassment

victims can ascertain whether colleagues have suffered the same harm as them.[41]

The memo provides that when investigation confidentiality rules are broadly and generally worded, they may interfere with and violate employees' rights under the NLRA.[42] Examples of broadly and generally worded confidentiality rules that would be problematic include "rules that preclude any communication about the allegations and investigation or that are applicable to any employee—victim, witness[,] or third party."[43] Further, mandating, as opposed to requesting, such confidentiality "may improperly restrict employees from exercising their rights or engaging in protected activity under the NLRA or the EEO laws."[44] Such overbroad confidentiality rules can also act as a deterrent for employees by preventing them from reporting future unlawful conduct to the NLRB out of "fear of violating their employer's instruction to keep the matter confidential."[45] Deterring reporting would inhibit the NLRB from investigating unfair labor practices, as it relies on private parties to open such proceedings.[46]

The memo states that neither the NLRA nor EEO laws are absolute in requiring confidentiality but, rather, that confidentiality acts as a way to ensure fair and accurate investigations.[47] Thus, the memo advises that employers can design investigations to satisfy both the NLRA and EEO laws "without imposing broad-based confidentiality rules on employees" by "maintaining strong anti-retaliation policies and ensuring that employees are aware of them."[48] According to the memo, employers should also "advise interviewees of the specifics of its anti-retaliation policy and make clear the steps that it will take should it determine that there has been retaliation, and thus a violation of that policy."[49] Employers should also review their own actions to "ensure that employment decisions affecting the reporting employee or other interviewees during and after the investigation are not based on retaliatory motives."[50]

Moreover, the memo notes that "[e]mployers should consider the context of the particular investigation before requesting or requiring confidentiality...."[51] Further, employers can maintain confidentiality by requiring supervisors and management, who are "not typically covered by the NLRA," to remain confidential.[52] Employers can also reassure a reporting employee that information pertaining to the investigation will only be shared with other interviewees as needed.[53]

Confidentiality is flexible, as employers have the ability "to request confidentiality in a tailored manner when it is truly needed, and employees should retain their right to discuss workplace investigations when it is not."[54] When confidentiality is needed in an investigation, employers investigating discrimination and/or harassment should "clearly identify the scope of the confidentiality requirement to interviewees, including the information and matters it covers and how long it lasts, so that employees do not misunderstand the breadth of information covered and the applicable length of time."[55] Employers should consider reminding investigation participants throughout the process (*e.g.*, while scheduling interviews, after interviews have been conducted, and when concluding statements or affidavits with witnesses) "that their participation in the investigation" will not prevent "them from: contacting or filing a charge with the EEOC or NLRB; filing a lawsuit under the federal EEO laws; or seeking outside legal or medical assistance (such as mental health treatment for emotional distress or medical assistance for victims of sexual assault)."[56]

Confidentiality rules that are overly broad "can compromise the efficacy or legitimacy of an investigation."[57] Therefore, the memo states that employers and investigators can craft narrowly tailored, precise, and focused confidentiality rules, as opposed to overly broad rules, to "minimize any potential conflict between the NLRA and the EEO laws."[58]

Takeaways and Best Practices

Both the New Jersey Supreme Court's decision in *Usachenok* and the NLRB memo provide some important insights regarding confidentiality instructions. While the Court's ruling in *Usachenok* is limited to the New Jersey state regulation at issue, there are some broad takeaways to keep in mind when it comes to confidentiality instructions in harassment and discrimination investigations. As cited by the Court in *Usachenok*, the NLRB's decision in *Stericycle* should remind investigators to be aware of the unequal bargaining power between employer and/or investigator and the employee and/or witness, as there can be intimidation within this dynamic that may lead employees and/or witnesses to remain silent simply out of fear of retaliation or other detrimental consequences.[59] Moreover, the Court's decision in *Usachenok* affirms the recent New Jersey LAD amendment[60] that protects the rights of employees and witnesses to speak openly and freely about discrimina-

tion, harassment, and retaliation in the workplace.[61] Further, the Court, as aforementioned, suggested alternative ways to encourage confidentiality, such as through explaining its benefits.[62]

The memo expands on similar concepts in the context of harassment and/or discrimination investigations, where a victim/employee's freedom of speech, including the right to discuss the terms and conditions of their workplace, is as high of a priority as confidentiality.[63] The memo also clarifies that employers and investigators can comply with both NLRA and EEO laws when conducting workplace investigations, as confidentiality is a means to an end in successful harassment and discrimination investigations as opposed to a standalone goal.[64] As a result, employers should make sure that their workplace confidentiality rules are narrowly tailored and consider the context of the investigation before imposing such confidentiality rules. Also, employers should maintain strong anti-retaliation policies and communicate these policies to employees and witnesses.

The *Usachenok* case and the NLRB memo, although rescinded pending further guidance, both shed light on the critical issue of confidentiality in investigations and provide significant insight. In light of these developments, it is best practice for all employers to revisit their investigative confidentiality instructions and revise overly broad and/or restrictive policies that place unnecessary restrictions on employee speech, particularly in the context of harassment and discrimination investigations as discussed herein. Finally, investigators should also make sure to explain to employees the importance of discretion and confidentiality when it comes to workplace investigations while highlighting the exceptions. ■

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Endnotes

1. *Usachenok v. Dep't of the Treasury*, 257 N.J. 184 (2024).
2. *Id.* at 189.
3. *Id.* at 190.
4. *Id.*
5. *Id.*
6. *Id.*
7. N.J.A.C. 4A:7-3.1(j) (2007).
8. *See Usachenok*, *supra* n.1, at 191-92; *see also* N.J.A.C. 4A:7-3.1(j) (eff. Apr. 20, 2020).
9. *Usachenok v. Dep't of the Treasury*, No. A-456718, 2022 N.J. Super. Unpub. LEXIS 308 at *8 (App. Div. Feb. 28, 2022).
10. *Id.* at *11.
11. *Id.* at *5.
12. *Id.* at *10.
13. *Id.* at *13 (quoting 51 N.J.R. 1311(a) (Aug. 19, 2019)).
14. *Id.*
15. *Id.*
16. *Id.* at *14.
17. *Id.*
18. *Id.* at *16.
19. *Id.* at *11.
20. *Id.*
21. *Usachenok*, *supra* n.1, at 188.
22. *Id.* at 189.
23. *Id.* at 201; *see also* N.J.A.C. 4A:7-3.1(j).
24. *Usachenok*, *supra* n.1, at 194.
25. *Id.* at 199.

26. *Id.*
27. *Id.* at 199-200 (quoting N.J.A.C. 4A:7-3.1(j)).
28. *Stericycle, Inc.*, 372 NLRB 113 (2023).
29. *Usachenok*, *supra* n.1, at 200.
30. *Id.* at 203.
31. Jennifer A. Abruzzo, *Harmonization of the NLRA and EEO Laws,* NLRB Memorandum GC 25-04 (Jan. 16, 2025) (rescinded Feb. 14, 2025 by NLRB Memorandum GC 25-05).
32. *Id.*
33. *Id.* at 1.
34. *Id.* at 6.
35. *Id.*
36. *Id.* at 1.
37. *Id.*; *see also* 29 U.S.C. §§ 151-169 (NLRA).
38. *Id.* at 3.
39. *Id.* at 6.
40. *Id.* (citing *Inova Health Sys.*, 360 NLRB 1223, 1228 (2014), enforced, 795 F.3d 68 (D.C. Cir. 2015)) (NLRB's cross-application for enforcement was granted by the court, determining that the nurses at issue were unlawfully disciplined, failed to be promoted, and/or were discharged due to the fact that they engaged in protected NLRA activities.)
41. *Id.* at 6-7.
42. *Id.* at 6-7.
43. *Id.* at 6-7.
44. *Id.* at 7.
45. *Id.*
46. *Id.*
47. *Id.*
48. *Id.*
49. *Id.*
50. *Id.*
51. *Id.*
52. *Id.*
53. *Id.*
54. *Id.*
55. *Id.* at 9.
56. *Id.*
57. *Id.*
58. *Id.* at 10.
59. *See Usachenok*, *supra* n.1, at 194.
60. The amendment to the LAD changed interview instructions from mandating that interviewees remain confidential to requesting that interviewees remain confidential. Additionally, the amendment removed the disciplinary action that was previously imposed for violating the confidentiality directive.
61. *See* N.J.S.A. 10:5-12.8(b).
62. *Usachenok*, *supra* n.1, at 203.
63. Abruzzo, *supra* n.31, at 11.
64. *Id.* at 7-10.