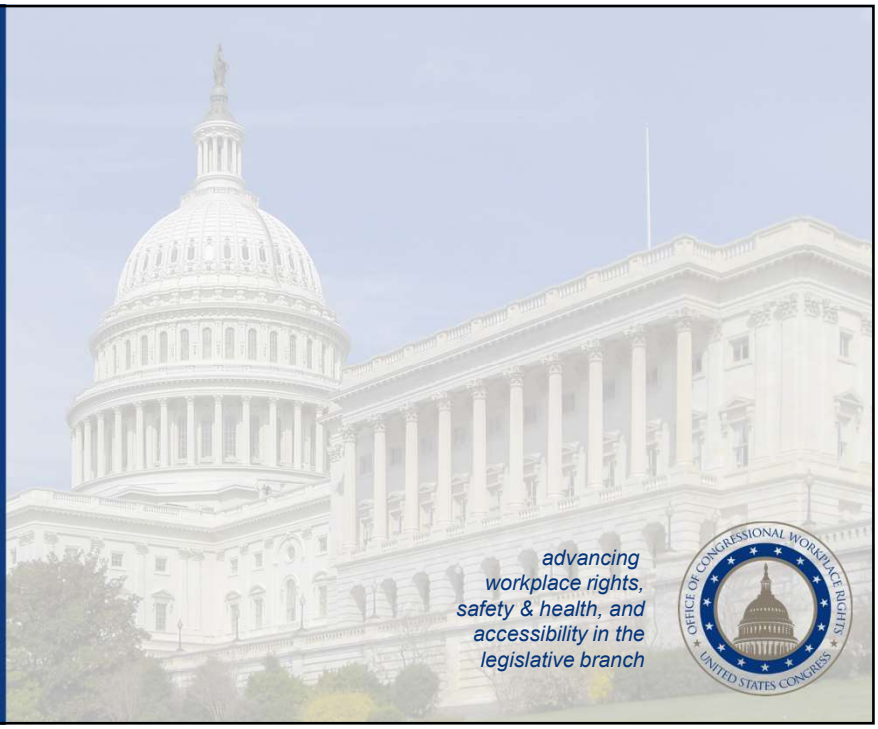
Confidentiality in Unfair Labor Practice Cases



Office of Congressional Workplace Rights

Office of the General Counsel

Labor-Management Forum
October 2024

advancing workplace rights, safety & health, and accessibility in the legislative branch

Welcome

John Mickley, Associate General Counsel

- john.mickley@ocwr.gov
- (202) 579-5040

Overview

- CAA's Confidentiality Provisions
- Confidentiality in OCWR Procedural Rules
- What does this mean for ULP Investigations?
- What does this mean for ULP Litigation?
- ULPs about Confidentiality – Rules, Bargaining, and EEO Cases

What is confidentiality?

- The practice of keeping information secret and protected from improper disclosure.

CAA's Confidentiality Provisions

CAA § 416(b)

- Except as provided in subsections (c), (d), and (e), all proceedings and deliberations of hearing officers and the Board, including any related records, shall be confidential. This subsection shall not apply to proceedings under section 1341 of this title, but shall apply to the deliberations of hearing officers and the Board under that section. The Executive Director shall notify each person participating in a proceeding or deliberation to which this subsection applies of the requirements of this subsection and of the sanctions applicable to any person who violates the requirements of this subsection.
  - 416(c) states that the records of hearing officers and the Board may be made public if required for judicial review.
  - 416(d) allows access to records by Ethics Committees, but does not apply to ULPs.

CAA § 416(e)

- A final decision entered under section 1405(g) or 1406(e) of this title shall be made public if it is in favor of the complaining covered employee, or in favor of the charging party under section 1331 of this title, or if the decision reverses a decision of a hearing officer which had been in favor of the covered employee or charging party. The Board may make public any other decision at its discretion.
  - 1405(g) – hearing officer decision which has not been appealed is a final decision.
  - 1406(e) – decision of OCWR Board that requires no further proceedings before a hearing officer is a final decision.

CAA § 416(f)

- Nothing in this section may be construed to prohibit a covered employee from disclosing the factual allegations underlying the covered employee's claim, or to prohibit an employing office from disclosing the factual allegations underlying the employing office's defense to the claim, in the course of any proceeding under this subchapter.

OCWR Procedural Rules

§ 1.08(a) - Policy

- Except as provided in sections 302(d) and 416(c), (d), and (e) of the Act, the Office shall maintain confidentiality in the confidential advising process, mediation, and the proceedings and deliberations of Hearing Officers and the Board in accordance with sections 302(d)(2)(B) and 416(a)-(b) of the Act.
  - 302(d) – Confidential Advisor
  - 416(c) – Judicial Review
  - 416(d) – Referral to Congressional Ethics Committee for certain violations
  - 416(e) – Final decisions by the Board may be published

§1.08 (b) – Participant

- For the purposes of this rule, “participant” means an individual or entity who takes part as either a covered employee, party, witness, or designated representative in confidential advising under section 302(d) of the Act, mediation under section 404, the claim and hearing process under section 405, an appeal to the Board under section 406 of the Act, or any related proceeding which is expressly or by necessity deemed confidential under the Act or these Rules.

§1.08(c) – Prohibition

- Unless specifically authorized by the provisions of the Act or by these Rules, no participant in the confidential advising process, mediation, or other proceedings made confidential under section 416 of the Act may disclose a written or an oral communication that is prepared for the purpose of or that occurs during the confidential advising process, mediation, or the proceedings or deliberations of Hearing Officers or the Board.

§1.08(d) – Exceptions

- Nothing in these Rules prohibits a party or its representative from disclosing information obtained in mediation or hearings when reasonably necessary to investigate claims, ensure compliance with the Act, or prepare its prosecution or defense.
- However, the party making the disclosure shall take all reasonably appropriate steps to ensure that persons to whom the information is disclosed maintain the confidentiality of such information.
- These Rules do not preclude disclosures between a party and that party's designated representative, provided that the party or designated representative to whom the information is disclosed maintains the confidentiality of such information.
- These Rules do not preclude a Mediator from consulting with the Office, except that when the covered employee is an employee of the Office, a Mediator shall not consult with any individual within the Office who is or who might be a party or witness.
- These Rules do not preclude the Office from reporting information to the Senate and House of Representatives as required by the Act.

§1.08(f) – Sanctions

- The Executive Director will advise all participants in the mediation and hearing at the time they became participants of the confidentiality requirements of section 416 of the Act and that sanctions may be imposed by a Hearing Officer for a violation of those requirements. No sanctions may be imposed except for good cause, the particulars of which must be stated in the sanction order.

§5.04 – General Counsel Complaints

- Pursuant to section 416(b) of the Act, except as provided in subsections 416(c) and (f), all proceedings and deliberations of Merits Hearing Officers and the Board, including any related records, shall be confidential. Section 416(b) does not apply to proceedings under section 215 of the Act, but does apply to the deliberations of Merits Hearing Officers and the Board under section 215. A violation of the confidentiality requirements of the Act and these Rules may result in the imposition of procedural or evidentiary sanctions. See also sections 1.08 and 7.12 of these Rules.

§7.02(b)(5) Failure to Maintain Confidentiality

- An allegation regarding a violation of the confidentiality provisions contained in the Act, these Rules, or an order of a Merits Hearing Officer may be made to a Merits Hearing Officer in proceedings under section 405 of the Act. If, after notice and hearing, the Merits Hearing Officer determines that a party has violated confidentiality, the Merits Hearing Officer may:

  (A) direct that the matters related to the breach of confidentiality or other designated facts be taken as established for purposes of the action, as the prevailing party contends;

  (B) prohibit the party breaching confidentiality from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence;

  (C) strike the pleadings in whole or in part;

  (D) stay further proceedings until the breach of confidentiality is resolved to the extent possible;

  (E) dismiss the action or proceeding in whole or in part; or

  (F) render a default judgment against the party breaching confidentiality.

What does this mean for ULP investigations?

Before an investigation begins anyone can contact our Confidential Advisor or me to discuss a potential violation. These discussions will remain confidential.

- Confidential Advisor – confidentialadvisor@ocwr.gov, (202) 724-9250
- John Mickley – john.mickley@ocwr.gov, (202) 579-5040

Goals for all ULP investigations:

1. **Promoting full cooperation with OCWR requests**
2. **Promoting stable, productive, good faith labor relations through prompt resolution and avoiding litigation where possible**

Goal 1: Promoting full cooperation with OCWR requests

During an investigation, parties can protect the identity of their witnesses or maintain the confidentiality of documents and other submissions by submitting evidence directly to the General Counsel's office.

- When filing the charge, §2423.4(c) of the Substantive Regulations states the charging party must submit any supporting evidence and documents to the General Counsel, but there is no requirement that that evidence be sent to the charged party.
- If the supporting evidence contains sensitive information which the charging party prefers not to share, the charging party may send the supporting evidence to the General Counsel under separate cover.
- The charging party still has an obligation to serve the charged party with the charge itself.

Goal 1: Promoting full cooperation with OCWR requests

Our office may take sworn declarations during an investigation, which will remain confidential until the witness testifies before a hearing officer. These declarations assist our investigation and record the witness' recollection at that moment in time. To maintain the statement's confidentiality, it is crucial that witnesses do not share their declaration with anyone other than their attorney or their party's attorney.

Goal 2: Promoting good faith collective bargaining

During an investigation, information sent from one party (e.g., a union or an employee) to another (e.g., the employing office) is not confidential. The triggering event for confidentiality is the issuance of a complaint by the General Counsel. This means:

- The filing and contents of an unfair labor practice charge are not confidential;
- The facts that support the charge are not confidential, nor are the facts that support a defense to the charge;
- Documents or other information sent from one party to another are not confidential.

Goal 2: Promoting good faith collective bargaining

Therefore, in cases alleging bargaining or information request violations, parties should consider sending the evidence and position statements directly to the other party to promote resolution of the case. In these cases, the parties generally already possess all relevant evidence and the key witnesses are no secret to the other side.

What does this mean for ULP litigation?

Once the General Counsel issues a complaint, the case becomes a "proceeding before a hearing officer" and information exchanged by the parties must remain confidential. This means:

- The complaint itself must remain confidential; and
- Parties may not share or distribute any written or oral statements prepared for the case.

But remember the exceptions. Parties have the right to use information from litigation to:

- Investigate claims;
- Ensure compliance with the CAA;
- Prepare their prosecution or defense; and
- Communicate between the party and the party's designated representative.
- However, the party making the disclosure must take all reasonably appropriate steps to ensure that persons to whom the information is disclosed maintain the confidentiality of such information.

When settling a case, parties may agree that certain aspects of the case, including the settlement agreement or its substance, will remain confidential. There is no statutory requirement that settlements be confidential, however.

Confidentiality may be temporary. If a decision of the Board is appealed to the Federal Circuit, some or all of the record may be made public in the appendix.

ULPs about Confidentiality

Employing office confidentiality rules can be "facially unlawful" if employees could reasonably construe the rule to limit union activity.

- In *Inter-Disciplinary Advantage, Inc.*, 349 NLRB 480 (2007), the employer required all employees to sign a "confidentiality statement," in which they agreed that "any and all information" relating to the employer, its employees, or its customers was "strictly confidential." Violations could include discipline, up to termination. The rule contained no exceptions. NLRB found this rule to be unlawful because employees could read this to limit their ability to talk about their wages, benefits, or unionization.

Employing office confidentiality rules can be facially lawful, but unlawfully applied.

- For example, an employing office may violate the CAA by maintaining a narrowly tailored confidentiality provision that requires employees to keep certain information secret and then allows all employees to break the rule except union supporters.

Rules can also be facially lawful, but unlawfully promulgated.

- For example, an employing office may violate the CAA by issuing a new confidentiality rule that is lawful on its face, but is only issued in response to a union organizing campaign for the purpose of limiting employee discussion about the conditions of employment.

Employing offices may also violate the CAA by telling employees to keep employment-related conversations confidential.

- In *3484, Inc.*, 373 NLRB No. 28 (Mar. 7, 2024), a supervisor unlawfully interrogated an employee about the union sympathies of her coworkers. At the end of the conversation, the supervisor told the employee, "please don't say anything I just said." The NLRB found this instruction to be a separate ULP because it infringed on the employee's "right to discuss the union-related conversation with other employees." Moreover, the instruction interfered with the employee's right to discuss the incident with the NLRB.

Labor and management can agree on confidentiality during bargaining as a part of their "ground rules." Violating that confidentiality can be evidence of broader unfair labor practices.

- In *Hydrotherm, Inc.*, 302 NLRB 990 (1991), the employer and union agreed that their bargaining discussions would remain confidential. As a part of a larger scheme to undermine the union and resist good faith bargaining, the employer printed out the union's bargaining proposals and left them in the employee break room. The NLRB relied on this violation of the parties' agreement as evidence of the employer's bad faith bargaining.

In certain cases, employee confidentiality concerns may supersede Union's right to be present at formal discussions.

- The D.C. Circuit has held that "in the case of grievances arising out of alleged discrimination on the basis of race, religion, sex or national origin, Congress has explicitly decided that a conflict between the rights of identifiable victims of discrimination and the interests of the bargaining unit must be resolved in favor of the former." *N.T.E.U. v. F.L.R.A.*, 774 F.2d 1181, n.12 (D.C. Cir. 1985).

In certain cases, employee confidentiality concerns may supersede Union's right to be present at formal discussions.

- The D.C. Circuit elaborated that the employing office must demonstrate a "direct conflict" between the rights of an employee who was the victim of discrimination and the union's right to be present for formal discussions. *Dover Air Force Base v. F.L.R.A.*, 316 F.3d 280, 286 (D.C. Cir. 2003)
- In *Davis-Monthan Air Force Base*, 64 F.L.R.A. 845 (2010), an employee entering an EEO mediation checked a box stating that he did not want the union present and told the employer that the "Union's presence would be a waste of time." This evidence did not support the employer denying union's attendance. Notably, the employee testified that he objected to the union's presence because "he was curious to see how the Respondent would react to his objection."

Questions?

www.ocwr.gov

(202) 724-9250

110 2nd Street SE
Room LA-200
Washington, DC 20540