A FEW THOUGHTS ON COLLECTIVE BARGAINING AND
THE PROTECTION AND DISCLOSURE OF AN EMPLOYER’S
CONFIDENTIAL OR PROPRIETARY INFORMATION

Most litigation relating to the protection and disclosure of proprietary or otherwise confidential employer information arises from individual employment relationships. Nevertheless, there are many industries where unions represent employees who have routine access to proprietary formulas, production methods and other information that the employer deems confidential in the ordinary course of performing their jobs.

This paper does not pretend to be an exhaustive analysis of the issues that are presented in such circumstances. Instead it briefly addresses several issues that both unions and employers should be addressing in circumstances where bargaining unit members have access to or knowledge of confidential or proprietary information. It is intended to stimulate thought rather than to provide answers.
1. Protections for Confidential or Proprietary Information are Mandatory Subjects of Negotiation.

While an employer may have the right to unilaterally determine what information it considers to be confidential or proprietary, the manner in which it protects that information and the consequences faced by the employee or former employee who breaches those protections must be negotiated. Limitations on an employee’s ability to use and disseminate information that an employer considers to be confidential or proprietary are basically work rules. Like all other work rules, they are therefore subject to mandatory bargaining, particularly if the employer wishes to have the right to discipline or otherwise sanction employees or former employees who it views as having violated its trust.¹

Simply put, the employee’s duty to maintain the confidential nature of information is a term and condition of employment and must therefore be negotiated.

2. Common Law and State Law Protections of Confidential and Proprietary Information Are Likely Preempted by Section 301.  

In *Allis-Chalmers v. Lueck* the Supreme Court held that “when resolution of a state-law claim is substantially dependent upon analysis of the terms of an agreement made between the parties in a labor contract, that claim must either be treated as a § 301 claim . . . or dismissed as preempted by federal labor-contract law.”  

It is only when a “state law claim does not require construing the collective bargaining agreement” that it is sufficiently “independent” to avoid preemption.

Any court considering a case alleging an employee or former employee’s breach of confidentiality would necessarily have to construe the collective bargaining agreement in order to determine such matters as what duties of confidentiality or loyalty, if any, were a part of the employment relationship and what consequences the parties had agreed upon for the breach of such duties. Thus, any cause of action that is not based in the collective bargaining agreement should be preempted.

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It therefore behooves any employer that wishes to impose duties of confidentiality and loyalty upon its represented employees to negotiate those protections, including issues of obtaining relief, with the union. Otherwise, it may find itself left without any remedy, as the members of a collective bargaining unit should only be bound to respective the employer’s confidentiality if their union contract expressly or implicitly incorporates and defines those protections and provides a vehicle for relief. Common law protections of employer confidentiality, such as the duty of loyalty or trade secret principles will be preempted unless they are incorporated into the contract.

While a discussion of the terms of such protection are beyond the scope of this paper, it would be ill-advised for either the employer or the union to depend upon the implications of a past practices or a management rights clause to address the issues that are likely to arise. While the question of whether an employee who has been terminated or otherwise disciplined for breaching these duties may fairly easily fit the typical just cause analysis of grievance arbitration, issues such as whether a confidentiality dispute between the employer and a former employee should be addressed in arbitration or state court and whether injunctive relief and/or monetary damages are available should not be left to the interstices of the collective bargaining agreement.
3. Collective Bargaining Should Address the Former Employee.

Litigation over confidential or proprietary information often involves former employees. Where that employee has previously been a bargaining unit member, the collective bargaining agreement is the contract that sets forth the former employee’s obligation to preserve the former employer’s secrets and it will, therefore, govern the result.

Accordingly, the union has a stake in how and by whom that agreement will be interpreted even when a former employee is the one accused of breaching it through post-employment conduct. The union also has a stake in the degree to which its collective bargaining agreement limits its bargaining unit members’ activities after they have moved on or seek to move on to other employment.

There is also the not insignificant question of whether the union has a duty of fair representation to the former employee who has allegedly breached the duties of confidentiality and/or loyalty created by the collective bargaining agreement.

These questions are best addressed by negotiation over such matters as whether the employer is restricted to arbitration of
what amounts to an employer’s grievance under the contract and whether injunctive relief and/or money damages are available against the former employee. Perhaps a form of agreement to be signed by each individual employee that the employer wishes to bind could be negotiated as an appropriate vehicle for insuring post-employment confidentiality.

The contract should also address the union’s role with regard to claims against former employees. Should the union simply be provided with notice of all such claims with a right to intervene in any litigation if it chooses to do so or should it assume the full duty of representing the former employee as if he or she were still a member of the bargaining unit?

4. The Union Itself Should Be a Party to a Confidentiality Agreement With the Employer.

An employee’s disclosure of confidential employer information to a lay union representative in the course of discussing a disciplinary or other grievance will almost certainly be privileged to the same extent as if it were to be disclosed to the employee’s personal attorney. In *Cook Paint &...*  

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5 A discussion of the law relating to a lay union representative’s privilege is beyond the scope of this article. Those interested should read the thorough treatment of the breadth of and authority for this privilege by Mitchell H.

APPENDIX

Sample Confidentiality Agreement Between Union and Employer

Dear [Union Official],

In connection with the Collective Bargaining Agreement (the “Agreement”) between [Company] and [Union], [Company] has agreed to disclose certain Confidential Information (as hereinafter defined) to [Union]. As a condition of such disclosure, [Union] has agreed to maintain the confidentiality of such Confidential Information pursuant to the terms of this letter agreement.

As used herein, “Confidential Information” means all data, reports, interpretations, forecasts, or records, in whatever form, containing or otherwise reflecting information concerning [Company], its affiliates, or subsidiaries that [Company] has provided, or will provide, to [Union], or its representatives, agents, attorneys, consultants, directors, officers, or employees in the course of fulfilling [Company’s] obligations under the Agreement, together with analyses, compilations, studies, or other documents, in whatever form, whether prepared by [Union] or its representatives, agents, attorneys, consultants, directors, officers, or employees, which contain or otherwise reflect such information. For purposes of this letter agreement, such “Confidential Information” shall include (but shall not be limited to) (i) profitability, scheduling, and traffic information related to [Company’s] international routes or code-sharing agreements or any other profitability, scheduling or traffic information regarding [Company], its affiliates, its subsidiaries or any air carriers with whom [Company] has a code-sharing agreement, (ii) information regarding the weighted average cost of capital calculation for [Company], its affiliates, or subsidiaries, (iii) information regarding changes in flying by any air carrier, (iv) information regarding any measure or statistic concerning the operation of any air carrier, (v) information regarding any business arrangement contemplated by [Company], its affiliates, or subsidiaries with any other entity and (vi) any information [Company] has expressly identified as “confidential” or “confidential information” (although [Company] shall have no obligation to identify Confidential Information as such).

Notwithstanding the foregoing, the following will NOT constitute “Confidential Information” for purposes of this letter agreement: the final baseline numbers calculated by [Company] for
purposes of Sections ___ and____ of the Agreement.

In consideration of [Company] providing [Union] or its representatives, agents, attorneys, consultants, directors, officers, or employees with Confidential Information, [Union] agrees that all Confidential Information will be held and treated by [Union], its representatives, agents, attorneys, consultants, directors, officers, or employees in confidence and will not, except as hereinafter provided or with the prior written consent of [Company], be disclosed by [Union] or its representatives, agents, attorneys, consultants, directors, officers, or employees in any manner whatsoever, in whole or in part, and will not be used by [Union] or its representatives, agents, attorneys, consultants, directors, officers, or employees other than in connection with providing representation to [Company] employees, provided that [Union] further agrees to disclose the Confidential Information only to those of [Union’s] representatives, agents, attorneys, consultants, directors, officers, or employees who are working on or are consulted with respect to the interpretation or enforcement of the Agreement and only on a need-to-know basis (“Designees”). [Union] will require that each [Union] Designee execute and deliver an individual confirmation in the form of Exhibit A hereto, and [Union] will deliver an executed copy of each such agreement to [Company].

Any written Confidential Information (including all copies), except for that portion of the Confidential Information that may be found in analyses, compilations, studies, or other documents prepared by [Union], its representatives, agents, attorneys, consultants, directors, officers, or employees will be returned to [Company] promptly upon [Company’s] request consistent with [Union’s] obligations under the Agreement. That portion of the Confidential Information that may be found in analyses, compilations, studies, or other documents prepared by [Union], its representatives, agents, attorneys, consultants, directors, officers, or employees, oral Confidential Information and any written Confidential Information not returned to [Company] will be held by [Union] and protected by it from any disclosure in accordance with, and otherwise kept subject to, the terms of this letter agreement or destroyed. [Company] agrees that any Confidential Information that it requests [Union] to return and that [Company] provided to [Union] pursuant to [Company’s] obligations under the Agreement shall not thereafter be introduced by [Company] in any form for any reason in any proceeding involving the Agreement, including, without limitation, any arbitration
under the Agreement, any court proceeding to enforce an arbitration award concerning the Agreement, or any court supervised mediation, arbitration, or alternative dispute resolution procedure, unless [Company] provides a copy of any such information to [Union] thirty days before introducing it into the proceeding, whether or not the proceeding involves a hearing; provided that, if the scheduled date of the proceeding is less than thirty days after the date on which the schedule is set, [Company] shall provide the copies to [Union] as soon as possible after the scheduled date for the proceeding is known to [Company] and [Union].

If [Union], its representatives, agents, attorneys, consultants, directors, officers, or employees are requested or required by (by the interrogatory, request for information or documents, subpoena, deposition, civil investigative demand, or other legal process) to disclose any Confidential Information, [Union] will provide [Company] with prompt notice of any such request or requirement so that [Company] may seek an appropriate protective order or decide whether to waive [Union’s] compliance with the provisions of this letter agreement as to the requested information. If, failing the entry of a protective order or the receipt of a waiver hereunder, [Union] is, in the opinion of [Union’s] counsel, compelled by law to disclose any Confidential Information, [Union] will promptly notify [Company] of that opinion and the reasons for such opinion and, not earlier than ten (10) days thereafter (unless required by law to do so sooner, which shorter period also shall be described to [Company] in the same notice), may disclose, consistent with the law, that portion of the Confidential Information that [Union] is compelled by law to disclose. In any event, [Union] will not oppose any action by [Company] to obtain an appropriate protective order or other reasonable assurance that confidential treatment will be accorded to the Confidential Information.

[Union] understands [Company’s] position that money damages would not be a sufficient remedy for a breach of any provision of this letter agreement and that, in addition to all other remedies [Company] may have, [Company] will seek specific performance and injunctive or other equitable relief as a remedy for any such breach.

The signatory [Union] designee further acknowledges that the Union States securities laws prohibit any person who has received non-public information about [Company] from purchasing or selling
securities of [Company] and/or from communicating such information to any other person if such other person may purchase or sell such securities.

This letter agreement shall be governed by and construed in accordance with the law of the State of [insert] without regard to conflict of laws principles.

If the foregoing accurately reflects our agreement, please countersign and return the duplicate copy of this letter agreement to us.

Sincerely,

By: [name and signature of Company official]
   [title]

AGREED (as of the date first written above):

By: [name and signature of Union official]
   [title]
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Exhibit A

Individual Confirmation

Date: ____________________

[Company addressee]
[mailing address]

[Union addressee]
[mailing address]

Ladies and Gentlemen:

I am a [Union] Designee as defined in that certain letter agreement (the “letter agreement”), dated ______________ between [Company] and [Union], and as such may receive Confidential Information (as defined in the letter agreement) in connection with my work related to the Collective Bargaining Agreement, dated __________, between [Company] and [Union]. I agree to be bound by and to comply with all of the terms and provisions of the letter agreement. I also acknowledge that I have received a copy of the letter agreement and understand its terms.

Very truly yours,

________________________________
(Signature)

________________________________
(Print Name)