# PAY SECRECY/CONFIDENTIALITY RULES AND THE NATIONAL LABOR RELATIONS ACT

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## I. INTRODUCTION

> For the kingdom of heaven is like a landowner who went out early in the morning to hire men to work in his vineyard. He agreed to pay them a denarius for the day and sent them into his vineyard. About the third hour he went out and saw others standing in the marketplace doing nothing. He told them, "You also go and work in my vineyard, and I will pay you whatever is right." So they went. He went out again about the sixth hour and the ninth hour and did the same thing. About the eleventh hour he went out and found still others standing around. He asked them, "Why have you been standing here all day long doing nothing?" "Because no one has hired us," they answered. He said to them, "You also go and work in my vineyard." *When evening came, the owner of the vineyard said to his foreman, "Call the workers and pay them their wages, beginning with the last ones hired and going on to the first." The workers who were hired about the eleventh hour came and each received a denarius. So when those came who were hired first, they expected to receive more. But each one of them also received a denarius. When they received it, they began to grumble against the landowner. "These men who were hired last worked only one hour," they said, "and you have made them equal to us who have borne the burden of the work and the heat of the day." But he answered one of them, "Friend, I am not being unfair to you. Didn't you agree to work for a denarius? Take your pay and go; I want to give to the man who was hired last the same as I gave you. Don't I have the right to do what I want with my own money? Or are you envious because I am generous?" So the last will be first, and the first will be last.*[1]

As was apparently the case at the time the parable takes place, the practice of pay secrecy or pay confidentiality continues to be a contentious issue in today's workplace. For many years, as illustrated in the parable, employers have been confronted with the issue of whether to allow employees to openly discuss their pay, or keep their compensation information confidential. Survey data indicates that a significant number of private sector employers in the United States have formal rules prohibiting employees from discussing their pay with others.[2] Furthermore, survey

1. Matthew 20:1-16 (New International Version).
2. Mary Williams Walsh, *Workers Challenge Employer Policies on Pay*

data also suggests that although a majority of companies have no formal policy prohibiting such discussion, more than one-third of them still maintain such policies.[3]

Interestingly, these rules continue to be quite prevalent despite the fact that they have consistently been held by both the National Labor Relations Board ("NLRB" or "Board"),[4] and the federal courts as *illegal* under the National Labor Relations Act[5] ("NLRA" or "Act").[6] This rather anomalous situation has also recently caught the attention of the United States Congress.[7]

This article seeks to provide a comprehensive account of doctrinal issues related to the use of pay secrecy/confidentiality rules ("PSC rules") under the NLRA. In Part II, we describe what pay secrecy/confidentiality is and discuss recent survey evidence of their presence in workplaces across the United States.[8] In Part III, we describe the current legal framework under which PSC rules are evaluated under the NLRA,[9] while in Parts IV and V, we explore various doctrinal issues related to these rules

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*Confidentiality*, N.Y. TIMES July 28, 2000, *available at http://www.nytimes.com/library/financial/072800discuss-pay.html* (discussing wrongful termination actions brought by employees who violated employer wage confidentiality policies); *see* HRnext, *More Employers Ducking Pay Confidentiality Issue: HRnext Survey Shows Many View it As Hot Potato, at http://www2.hrnext.com/*about/pr/pay_survey.cfm (Apr. 4, 2001) [hereinafter HRnext survey] (concluding that because of: 1) open compensation systems; 2) younger employees; and 3) legal problems, less employers prohibit employee wage discussions).

3. *See* Sacha Cohen, *Don't Ask, Don't Tell: Pay Confidentiality in the Workplace, at* http://www.cen-chemjobs.org/jobseeker/articles/print/payconfidentiality.html (explaining the effects of wage confidentiality policies and arguing for open compensation systems).

4. *See infra* notes 26-58 and accompanying text (explaining the treatment of wage secrecy under Section 8 of the NLRA and in federal court cases).

5. 29 U.S.C. §§ 151-59.

6. *Id.*

7. *See generally*, Paycheck Fairness Act, H.R. 541, 106th Cong. (1999) (amending the Fair Labor Standards Act anti-retaliation provisions and enhancing penalties for wage disparities); Paycheck Fairness Act, S. 74, 106th Cong. (1999) (amending the Fair Labor Standards Act to include an affirmative defense for wage discrimination actions); Wage Awareness Protection Act, S. 2966, 106th Cong. (2000) (amending the Fair Labor Standards Act to include a retaliation provision); Paycheck Fairness Act, H.R. 781, 107th Cong. (2001) (amending the Fair Labor Standards Act affirmative defense requirements); Paycheck Fairness Act, S. 77, 107th Cong. (2001) (amending the Fair Labor Standards Act to enhance enforcement of equal pay requirements); Fair Pay Act of 2001, H.R. 1362, 107th Cong. (2001) (amending the Fair Labor Standards Act to require equal pay for equivalent jobs); Fair Pay Act of 2001, S. 684, 107th Cong. (2001) (amending the Fair Labor Standards Act to enhance remedies for wage discrimination and prohibit discharge for discussing employee wages); Paycheck Fairness Act, S. 76, 108th Cong. (2003) (amending the Fair Labor Standards Act to enhance enforcement of equal pay requirements and allow the Equal Employment Opportunity Commission to collect pay information).

8. *See infra* notes 14-26 and accompanying text.

9. *See infra* notes 27-65 and accompanying text.

in more detail.[10] This leads us to Part VI, where we ponder the future of PSC rules under the NLRA given current trends in the American workplace,[11] and Part VII, where we discuss alternative recent legislative proposals in this area.[12] Part VIII summarizes and concludes our work.[13]

## II. THE PROBLEM OF PAY CONFIDENTIALITY

### A. *What are Pay Secrecy/Pay Confidentiality Rules?*

Pay secrecy or pay confidentiality rules ("PSC rules") are workplace rules prohibiting employees from discussing their wages with coworkers.[14] PSC rules are commonly found in employment manuals,[15] or are orally conveyed to employees at the time of hiring or at some later point in the employment relationship.[16] There are also variants of the PSC rules that only apply to confidential information. One example of this is when a payroll department employee is prohibited from disclosing information obtained in the course of his or her employment.[17]

PSC rules are a subset of a larger set of rules involving prohibitions imposed by employers on employees' speech.[18] For example, with judicial approval employers for many years have prohibited employees from engaging in union solicitation.[19] Workplace English-only policies, prohibiting employees from speaking any language other than English

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10. *See infra* notes 66-187 and accompanying text.

11. *See infra* notes 188-195 and accompanying text.

12. *See infra* notes 196-221 and accompanying text.

13. *See infra* note 222 and accompanying text.

14. *See* Julio D. Burroughs, *Pay Secrecy and Performance: The Psychological Research,* 14 COMPENSATION REV. 44, 45 (1982) (discussing the effects of pay confidentiality rules on employee performance); Paul Thompson & John Pronsky, *Secrecy or Disclosure in Management Compensation?*, 18 BUS. HORIZONS 67, 69-74 (1975) (comparing open and confidential pay systems by studying their effect on two companies).

15. *See, e.g.*, Fredericksburg Glass and Mirror, Inc., 323 N.L.R.B. 165, 173-174 (1997) (holding pay confidentiality rule found in employee manual a violation of the NLRA).

16. *See, e.g.*, NLRB v. Main St. Terrace Care Ctr., 218 F.3d 531, 535 (6th Cir. 2000) (finding NLRA violations based in part on supervisor statements that employees "were not allowed to discuss [their] paychecks with anyone.").

17. *See, e.g.*, Int'l Bus. Machs. Corp., 265 N.L.R.B. 638 (1982) (upholding the discharge of an employee for releasing confidential information collected and classified as confidential by the employer).

18. David Yamada, *Voices from the Cubicle: Protecting and Encouraging Private Employee Speech in the Post-Industrial Workplace*, 19 BERK. J. EMP. LAB L. 1, 8-21 (1998) (describing the restrictions placed on employees in the contemporary workplace).

19. *See, e.g.*, Peyton Packing Co., Inc., 49 N.L.R.B. 828, 843 (1943) (finding no-solicitation rules during working hours presumptively valid).

while at work, are another example of workplace speech rules.[20]

### B. *How Common are PSC Rules?*

Over one-third of private sector employers (different rules apply in the public sector) recently surveyed admitted to having specific rules prohibiting employees from discussing their pay with coworkers.[21] In contrast, only about 1 in 14 employers have actively adopted a "pay openness" policy.[22] About fifty-one percent of the employers surveyed stated that they did not have any specific policy regarding pay secrecy or confidentiality issues.[23]

Survey data also suggest that managers are generally predisposed to PSC rules.[24] A consistent finding in research dating back to the 1970s is that a large proportion of managers agree with the use of PSC rules.[25] Available data thus appears to suggest that a significant number of employers have either a preference for, or have actually instituted specific PSC rules. In short, it is not an overstatement to suggest that employers appear to prefer pay secrecy and confidentiality.

What makes the prevalence of these rules so interesting is the fact that they have been consistently found to be illegal under the NLRA. In Part III we discuss the legal framework that has been used under the NLRA to deal with challenges to PSC rules.[26]

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20. *See generally*, Rafael Gely, *Workplace English Only Rules*, *in* 1999 EMPL. L. UPDATE, 35, 37-63 (Henry H. Perritt, Jr. ed., 1999) (describing English-only rules and the legal challenges created by them).

21. *See* HRnext Survey, *supra* note 2.

22. *Id.*

23. *Id.*

24. Cohen, *supra* note 3 ("Whether it's in the employee manual or just a de rigueur part of corporate culture, many companies frown on employees talking about salaries and raises.").

25. *See* Charles M. Futrell & Omer C. Jenkins, *Pay Secrecy Versus Pay Disclosure for Salesmen: A Longitudinal Study*, 15 J. MARKETING RES. 214 (1978) ("Most sales managers contend that peer pay information should not be disclosed to their salesmen."); Walsh, *supra* note 2 ("For many managers, including those who do not formally make pay confidential, the thought of any new law that could set off a wave of freewheeling pay discussions is disturbing. There are valid reasons, they say, for keeping pay under wraps.").

26. We note that there do not appear to have been any challenges to PSC rules under any other kind of statute or common law cause of action. A *New York Times* article discussed a complaint filed by a temporary female employee in Milwaukee who overheard fellow male employees talking about their pay. *See* Cohen, *supra* note 3. Believing that she was being paid less than her male coworkers, she complained to her agency. *Id.* Following her complaint, a supervisor at the temporary employment agency told employees that they were not allowed to discuss their pay at work. *Id.* The female employee filed a complaint with the Equal Employment Opportunity Commission ("EEOC") and was ultimately fired. *Id.* According to news reports, the EEOC eventually ruled that the employment agency had engaged in gender discrimination by paying the complainant and other women less than

## III. OVERVIEW OF THE CURRENT LEGAL FRAMEWORK

The NLRA describes and prohibits a series of unfair labor practices ("ULPs").[27] ULPs are conduct considered illegal because of their effect on the substantive rights of employees to self-organize, i.e., "to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. . . ."[28] Section 8(a) of the Act safeguards these rights by prohibiting certain employer actions.[29] The NLRA also outlaws a number of union ULPs.[30]

A three-part test is applied in Section 8(a)(1) cases generally, and to PSC rule cases in particular.[31] First, it must be determined that the PSC

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men doing the same job. It is not clear from the reports, however, what part the pay confidentiality rule played in the EEOC decision.

27. *See, e.g.*, 29 U.S.C. § 158 (2000) (prohibiting unfair labor practices for employers and unions).

28. 29 U.S.C. § 157 (2000).

29. Section 8(a) makes it an unfair labor practice for an employer:

> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 [29 U.S.C.S. § 157]; (2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it . . . ; (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . . ; (4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act; (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a) [29 U.S.C.S. § 159(a)]

29 U.S.C. § 158(a) (alterations in original).

30. Section 8(b) makes it an unfair labor practice for labor organizations "(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7 . . . ; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances; (2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) of this section or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues . . . ; (3) to refuse to bargain collectively with an employer . . . ;" (4) to engage in various forms of secondary pressure; (5) to negotiate "closed shop" provisions; (6) to negotiate "featherbedding" provisions; and (7) to engage in organizational and recognitional picketing under certain circumstances. 29 U.S.C. § 158(b). Section 8(e) outlaws "hot cargo" provisions. 29 U.S.C. § 158(e).

31. *See* Medeco Sec. Locks v. NLRB, 142 F.3d 733, 745 (4th Cir. 1998) ("[A]n independent violation of § 8(a)(1) exists when (1) an employer's action can be reasonably viewed as tending to interfere with, coerce, or deter (2) the exercise of protected activity, and (3) the employer fails to justify the action with a substantial and legitimate business reason that outweighs the employee's § 7 rights."). Some employers' activities have been found to be so inherently destructive of the employees' Section 7 rights as to be found illegal irrespective of any balancing (i.e. of any employer's legitimate business reason). NLRB v. Erie Resistor Corp., 373 U.S. 221 (1963). We are not aware of any PSC rule cases

rule adversely affected the employees' Section 7 rights.[32] Second, the employer must advance a "substantial and legitimate business reason" for her conduct if the rule adversely affected the employees' rights.[33] Third, the Board must then apply a balancing test to determine whether the employees' Section 7 rights outweigh the employer's business justification.[34] Such a finding will require the Board to conclude that the PSC rule and its application have violated Section 8(a)(1).

Regarding the first part of the Section 8(a)(1) analysis, the inquiry focuses on two issues: whether the employees were engaged in concerted activity, and whether that concerted activity was for mutual aid or protection.[35] Only if both of these factors are met can the employee be protected under Section 7 of the NLRA.[36]

The NLRB and the various courts addressing PSC rules have consistently found that discussion about wages are considered concerted activity for mutual aid or protection because they are an integral part of organizational activity. For example, in a recent case the NLRB considered a PSC rule included in an employee manual.[37] The rule provided that employees' earnings were "a confidential matter between the employee and his earnings supervisor," and thus, that any discussions among employees involving earnings "will result in dismissal and/or disciplinary action at the supervisor's discretion."[38] The Board upheld the administrative law judge's finding that the rule violated Section 8(a)(1).[39]

More typical are situations in which the PSC rule is not contained in an employment manual, but has been orally and informally communicated to employees during the course of their employment. In *NLRB v. Main Street Terrace Care Center*, an employee was at the time of her hiring told "'not to tell anyone [how much money she would be making], because it caused hard feelings, and the management did not want it known,'"[40] and later on "'[t]hat we [employees] were not allowed to discuss our paychecks with anyone.'"[41] The Sixth Circuit upheld the Board's conclusion that the oral PSC orders violated the Act.[42]

Thus, regardless of whether found in employment manuals or

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in which the inherently destructive argument has been raised.

32. Medeco Sec. Locks, Inc. v. NLRB, 142 F.3d 733, 745 (4th Cir. 1998).

33. *Id.*

34. *Id.*

35. *Id.* at 745-46.

36. *Id.* at 746.

37. *See* Fredericksburg Glass and Mirror, Inc., 323 N.L.R.B. 165, 165 (1997) (holding a "no-discussion rule" formalized by the employer was a violation of the NLRA).

38. *Id.* at 168.

39. *Id.* at 165.

40. 218 F.3d 531, 534 (6th Cir. 2000) (alteration in original).

41. *Id.* at 535 (alterations in original).

42. *Id.* at 538.

informally communicated to employees, the Board has held in a number of cases that PSC rules inhibit employees' Section 7 rights to engage in concerted activities for mutual aid and protection.[43] As the Third Circuit Court of Appeals stated: "dissatisfaction due to low wages is the grist on which concerted activity feeds. Discord generated by what employees view as unjustified wage differentials also provides the sinew for persistent concerted action."[44]

Notice that a central basis of the holdings in these cases is the principle that the discussion of wages is a concerted activity under Section 7 and thus potentially subject to the protections of the NLRA.[45] In Part IV we explore this question in detail and provide both doctrinal and theoretical support for the Board's current position.[46]

Once it has been established that the employer's policy interfered with the employees' Section 7 activity, the employer has the opportunity to advance a legitimate business justification for the rule.[47] The Board will

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43. *Id.* The Board and reviewing courts have also struggled somewhat with cases involving the issue of whether a PSC rule actually existed. It is very common for PSC rules to be orally and informally communicated to employees at no specific time in the employment relationship. For example, in a number of cases employers did not have a formally written policy, but instead statements were made during the course of the employment relationship that potentially could have been interpreted as amounting to an expectation that wage information should not be discussed. *See* Wilson Trophy Co. v. NLRB, 989 F.2d 1502, 1506 (8th Cir. 1993) (involving a supervisor's statement to an employee not to open his paycheck in the warehouse); NLRB v. Certified Grocers of Ill., 806 F.2d 744, 745 (7th Cir. 1986) (involving a statement by the employer that names, addresses, and wages were considered to be confidential). The question then becomes in these circumstances whether there was indeed a PSC rule, which as implemented interfered with the employees' Section 7 rights.

For example, in NLRB v. Main St. Terrace Care Ctr., 218 F.3d 531, 538 (6th Cir. 2000), the employer contended that comments made by a manager to two employees that employees were not allowed to discuss their paychecks with anyone, nor disclose the pay raises that the employees were receiving, did not establish a rule sufficient to trigger a NLRA violation. The employer's argument was threefold: 1) the rule was not written or acknowledged; 2) the manager who made the comment did not have the authority to promulgate such a rule; and 3) the rule was not enforced. *Id.* at 538.

The Sixth Circuit rejected all three arguments. *Id.* Regarding the first argument, the Court held that whether the rule is oral rather than in writing made no difference to the 8(a)(1) analysis. *Id.* The Court noted that "any rule prohibiting wage discussions, whether written or oral, has a tendency to discourage protected" activity, and is thus potentially illegal under Section 8(a)(1). *Id.* Similarly, the fact that the rule was not enforced was irrelevant, since in 8(a)(1) cases, "'the actual effect of a statement is not so important as is its tendency to coerce.'" *Id.* at 539 (quoting NLRB v. Okun Bros. Shoe Store, Inc., 825 F.2d 102, 107 (6th Cir. 1987).

44. Jeannette Corp. v. NLRB, 532 F.2d 916, 919 (3d Cir. 1976).

45. The concerted activity requirement satisfies one of the elements of Section 7. In addition, the activity must be for "the purpose of collective bargaining or other mutual aid or protection . . . ." 29 U.S.C. § 157 (1994).

46. *See infra* notes 66-148 and accompanying text.

47. Medeco Sec. Locks, Inc. v. NLRB, 142 F.3d 733, 745 (4th Cir. 1998).

then balance the employer's proffered justification against the employees' Section 7 rights.[48]

Surprisingly, employers have in general been rather timid in advancing possible justifications for the adoption of PSC rules. Employers have advanced only a single argument to support their claims for maintaining PSC rules. Employers have continuously argued that PSC rules are necessary as a way of limiting "jealousies and strife among employees."[49] The argument is based on the commonsensible understanding that a differentiation in wages between employees will generate internal conflicts among them. Employees will observe the wage difference, but may not have all of the information necessary to evaluate the justification for the differing wages. This in turn will strain relationships among employees.

The NLRB and reviewing courts have, however, consistently rejected this argument. In an often-quoted passage, the Third Circuit held that the possibility that a discussion over wages may cause conflict among employees "is not a justifiable business reason to inhibit the opportunity for an employee to exercise section 7 rights."[50] The Board has found a legitimate business justification to exist only in cases where employees have been disciplined for allegedly disclosing wage or other information that the employer deemed confidential. These cases have involved employees disclosing not only their own wage information, but the wages of other employees as well. For example, in *International Business Machines Corp.*,[51] the employer required all employees to sign upon hiring them an agreement not to disclose to anyone outside the company, or to use in an area unrelated to company business, any confidential information.[52] This rule prohibited the distribution of wage data that the employer had compiled and classified as confidential.[53] An employee was terminated after he had distributed to other employees salary information that he had received in the course of his employment.[54] The Board upheld the discharge, finding that the employer had advanced a valid business justification for the PSC rule.[55] The Board noted that the employee knew that the documents at the center of the disclosure had been classified as confidential, and that he had no reason to believe that the dissemination

48. *Id.*
49. Jeannette Corp. v. NLRB, 532 F.2d 916, 919 (3d Cir. 1976) (quoting Petitioner's brief).
50. *Id.*
51. 265 N.L.R.B. 638 (1982).
52. *Id.* at 641.
53. *Id.*
54. *Id.*
55. *Id.* at 644.

was authorized.[56] Thus, under these circumstances, the discharge was appropriate. The Board, however, refused to give employers the complete authority to discharge employees in all cases involving dissemination of confidential information.[57]

Cases involving confidential information have also raised the issue of whether rules against the disclosure of confidential information could be characterized as rules prohibiting wage discussions. In *Lafayette Park Hotel*, the Board considered the legality of a statement found in the employer's employment manual.[58] The statement prohibited employees from "[d]ivulging [h]otel-private information to employees or other individuals or entities that are not authorized to receive that information."[59] The Board refused to find a violation of Section 8(a)(1), holding that employees would not reasonably read this rule as prohibiting discussion of wages and working conditions.[60] Rather, the Board found that employees would reasonably understand that the rule was designed to protect the employer's legitimate interest in the confidentiality of its private information.[61]

Similarly, in *K-Mart & United Food and Commercial Workers Union, Local 870*,[62] the Board found that an employee handbook rule, that mandated that company business documents be considered confidential and that prohibited disclosure of such information, did not constitute a Section 8(a)(1) violation.[63] The Board did not find that such a rule was likely to "chill" employees' rights by requiring employees who wished to discuss information about employment terms and conditions to risk discipline, or in the alternative, to forgo their Section 7 rights.[64] The Board instead held that the rule found in the employee manual would likely "be reasonably understood by employees not as restricting discussion of terms and conditions of employment but, rather, as intended to protect solely the legitimate confidentiality of the [employer's] private business information . . . ."[65]

Thus, except for cases involving the diffusion of confidential information, the Board consistently has held that there appears to be no legitimate business justifications for supporting employers' adoption of PSC rules. Later in Part V, we probe the Board's position in this area and

56. *Id.*
57. *Id.* at 638.
58. 326 N.L.R.B. 824 (1998).
59. *Id.* at 826.
60. *Id.*
61. *Id.*
62. 330 N.L.R.B. 263 (1999).
63. *Id.* at 263.
64. *Id.*
65. *Id.* at 263-64.

suggest some shortcomings with the Board's current analysis.

## IV. PAY SECRECY/CONFIDENTIALITY RULES AS INFRINGING ON PROTECTED EMPLOYEE CONCERTED ACTIVITY

### *A. Defining Protected Concerted Activity*

As noted previously, a threshold issue in deciding the legality of PSC rules is whether the activity that is affected or potentially affected by the employer rule is a concerted activity, and thus potentially subject to the protections of the NLRA.[66] In the cases in which the legality of PSC rules is considered, the Board has held that wage discussions are a concerted activity.[67] Having made this determination, the Board has then consistently found PSC rules to interfere with the rights of employees to engage in concerted activity.[68] In this section, we explore the rationale for analyzing wage discussions as a protected concerted activity.

In addition to protecting employees who seek union representation, Section 7 of the NLRA also protects employees who "engage in other *concerted activities* for the purpose of... other mutual aid or protection...."[69] Thus, employees who are not represented by a labor organization or do not seek such representation may enjoy the protection of Section 7 as much as a unionized employee.[70] For example, an unorganized employee who is terminated for distributing union organizing literature is protected under Section 7. In this sense, Section 7 protection is broader than protection for union activity.[71] The issue of how far to extend this protection in cases where there is no union organizing activity requires one to define what is meant by "protected concerted activity."

As the name suggests, protected concerted activity involves two separate, yet related questions. First, is the employee activity concerted? Second, is the activity "for mutual aid or protection?"[72] Concerted activities can be activities undertaken together by two or more employees[73]

66. *See supra* notes 35-46 and accompanying text.

67. *See supra* notes 37-39 and accompanying text.

68. *See supra* notes 37-45 and accompanying text.

69. 29 U.S.C. § 157 (2000) (emphasis added).

70. *See, e.g.*, DOUGLAS E. RAY ET AL., UNDERSTANDING LABOR LAW, 414-15 (1999) (explaining the expansion of Section 7 protections through the mutual aid and protection clause).

71. *Id.* at 415.

72. *See* Meyers Indus., Inc., 281 N.L.R.B. 882, 885 (1986) [hereinafter *Meyers* II] (explaining the mutual aid and protection standard under the *Meyers* I definition of concerted activities).

73. *See* NLRB v. Wash. Aluminum Co., 370 U.S. 9, 15 (1962) (holding that seven employees who walked off their jobs to protest the cold temperatures existing at the shop

or by one employee on the behalf of others.[74] Thus, when two or more employees together lodge a complaint with a supervisor, such an activity will meet the requirement of concert under Section 7.[75] On the other hand, when an employee in a non-unionized workplace, acting alone and without consulting with fellow employees, lodges separate complaints on the same issue, the concert requirement is not met and the employee can thus be terminated without violating the NLRA.[76]

However, there are a number of situations in which an employee acting alone might meet the concerted activity requirement. The easier cases involve situations in which an individual employee claims a right under an existing collective bargaining agreement. The Board, with Supreme Court approval, has consistently held such activity to involve concerted action.[77] According to the Board, actions taken by individual employees intended to implement the terms of a collective bargaining agreement are "but an extension of the concerted activity giving rise to that agreement."[78]

A second type of case involves those situations in which an individual employee claims an employment right under state or federal law. Initially, the Board treated these cases as those involving individuals invoking a collective bargaining right.[79] The Board found that the employees' presumed interest in occupational safety linked with the statutory mandate for safety in the workplace supported a finding of concerted activity.[80] Accordingly, the Board held that "in the absence of any evidence that fellow employees disavow" the actions of the single employee, there was "implied consent."[81] This opinion lends credence to the assertion that the Board at that time supported a broad construction of concerted activity.

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floor were engaged in concerted activity).

74. *See* Esco Elevators, Inc., 276 N.L.R.B 1245 (1985) (finding concerted activity where a union officer raised a safety complaint on behalf of workplace employees).

75. *See* Atl.-Pac. Constr. Co. v. NLRB, 52 F.3d 260, 263-64 (9th Cir. 1995) (finding a substantial relation to working conditions so as to conclude that there is concerted activity where a group of employees wrote a group letter protesting the selection of an unpopular coworker as the new supervisor).

76. *See* Joanna Cotton Mills Co. v. NLRB, 176 F.2d 749, 751-52 (4th Cir. 1949) (refusing to find concerted activity for an employee's circulation of a supervisor removal petition where it was found that the employee had a personal grudge against the supervisor and therefore was not acting for the union's mutual aid or protection).

77. *See, e.g.*, NLRB v. City Disposal Sys., Inc., 465 U.S. 822, 823 (1984) (finding that action by one employee to enforce a provision of an existing collective bargaining agreement amounted to concerted activity).

78. Bunney Bros. Constr. Co., 139 N.L.R.B. 1516, 1519 (1962).

79. *See* Alleluia Cushion Co., 221 N.L.R.B. 999 (1975) (holding that an employee was engaged in protected concerted activity when he filed a complaint with the California OSHA office).

80. *Id.* at 1000.

81. *Id.*

Concerted activity was to be found where, judging from the subject matter of the individual employee's claim, it could be reasonably inferred that such a concern was shared by other employees.[82]

However, years later, the Board reversed this broad interpretation. In *Meyers Industries, Inc.*, an employee refused to drive a truck which had been involved in an accident.[83] He did so after having complained to his employer and to a state transportation agency about a known defect with the truck.[84] The Board held, after denying the employee's claim, that concerted activity requires the individual employee to act "'with or on the authority of other employees, and not solely'" on his or her own behalf.[85] The Board distinguished cases involving the assertion of a statutory right from those involving the assertion of a right grounded in a collective bargaining agreement.[86] Under this approach, concerted activity will only be found where an individual employee is, although acting alone, either trying to initiate group action or acting for or on behalf of other workers after having discussed the matter with fellow workers.[87] The NLRB thus generally refuses to find concerted activity where an individual employee acts on his or her own behalf.[88]

In addition to being deemed concerted, activities qualifying for the protection provided under Section 7 must be directed towards the purpose of "mutual aid or protection." The Supreme Court has recognized that the "mutual aid or protection" language in the NLRA is intended to include activities other than those associated with self-organization and collective bargaining (which are mentioned specifically in Section 7).[89] For instance, the Court has held that Section 7 covers concerted activities by employees "in support of employees of employers other than their own,"[90] as well as encompassing activities by employees whose objective is "to improve terms and conditions of employment or otherwise improve their lot as employees through channels outside the immediate employee-employer

82. Meyers Indus., Inc., 268 N.L.R.B. 493, 493 (1984) [hereinafter *Meyers* I].

83. *Id.*

84. *Id.*; *see also Meyers* II, 281 N.L.R.B. 882, 885-86 (1986) (finding concerted activity where an employee brings a group complaint to management).

85. *Meyers* II at 885 (quoting *Meyers* I, 268 N.L.R.B. 493, 497 (1984)).

86. *See id.* at 888 ("[I]nvocation of employee contract rights is a continuation of an ongoing process of employee concerted activity, whereas employee invocation of statutory rights is not").

87. *Id.* at 885-86.

88. *See, e.g.*, NLRB v. Portland Airport Limousine Co., 163 F.3d 662, 666 (1st Cir. 1998) (finding no concerted activity where employee refused to drive assigned tractor due to personal safety concerns).

89. *See* Eastex, Inc. v. NLRB, 437 U.S. 556, 573-76 (1978) (holding that distribution of a newsletter discussing right-to-work legislation and minimum wage federal legislation was a protected activity).

90. *Id.* at 564.

relationship."[91]

The Court, however, has made clear that while broad, there are limits to the "mutual aid or protection" language of Section 7. According to the Court, "at some point the relationship [between the activity and the interests of the employees] becomes so attenuated that an activity cannot fairly be deemed to come within the 'mutual aid or protection' clause."[92]

### *B. Wage Discussions as Protected Concerted Activity*

Both the Board and the various courts of appeals that have dealt with PSC rules cases have found wage discussions to be protected concerted activity, and thus have found that PSC rules amount to a Section 8(a)(1) violation.[93] This determination is made once it is decided that conversations about wages are concerted activity.[94] In this section we explore in detail the doctrinal foundations of the Board's position.

At first blush, a conversation will clearly appear to be concerted activity. By definition, a conversation involves at least two individuals: the speaker and the listener. As such it appears to meet the concertedness requirement of Section 7. Indeed, the Board and various courts have recognized for a long time that "a conversation may constitute a concerted activity although it involves only a speaker and a listener."[95]

However, the Board also has required that "to qualify as [concerted activity] it must appear at the very least that [the activity] was engaged in with the object of initiating or inducing or preparing for group action or that [the activity] had some relation to group action in the interest of the employees."[96] In so holding, the Board has been particularly concerned that without a requirement that the activity had the object of initiating, inducing, or preparing for group action, every conversation by employees would have come within the ambit of activities protected by the NLRA.[97] That view, according to the Board, would be mistaken.[98]

Conversations might present a somewhat difficult scenario in the application of the protected concerted activity question. While clearly involving two or more employees, conversations are subject to the general

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91. *Id.* at 565.

92. *Id.* at 567-68. The Court left the task of delineating the extent of the "mutual aid or protection" clause to the Board.

93. *See supra* notes 37-39 and accompanying text.

94. *See supra* notes 35-39 and accompanying text.

95. *See* Mushroom Transp. Co. v. NLRB, 330 F.2d 683, 685 (3d Cir. 1964).

96. *Id.* at 685.

97. *Id.*

98. *Id.* Although it preceded *Meyers* I and II, this view of concerted activity was cited approvingly by the Board in *Meyers* II. *Meyers* II, 28 N.L.R.B at 887 (citing Mushroom Transp. Co. v. NLRB, 330 F.2d 683, 685 (3d Cir. 1964)).

requirement of group action. This requirement can be hard to apply in some situations, particularly given that the Board has recognized that Section 7 protections may "extend to concerted activity which in its inception involves only a speaker and a listener, for such activity is an indispensable preliminary step to employee self-organization."[99] Consequently, conversations could be concerted activity if they are intended to invoke group action, even if group action does not immediately follow from it. On the other hand, if the purpose of the conversation is only to "advise an individual as to what he could or should do without involving fellow workers or union representation to protect or improve his own status or working position, it is an individual, not a concerted, activity, and, if it looks forward to no action at all, it is more than likely to be mere 'griping.'"[100]

Often, the Board and reviewing courts have found conversations to be concerted activity and thus also have found rules prohibiting employees from engaging in these conversations to be a violation of Section 8(a)(1). For example, as discussed earlier,[101] in *NLRB v. Main Street Terrace Care Center*, the Sixth Circuit enforced a Board order finding that an employer's rule that prohibited employees from discussing their wages with other employees constituted a violation of Section 8(a)(1). [102] The Court was particularly concerned that such a rule "undoubtedly tends to interfere with the employees' right to engage in protected concerted activity."[103]

This same rationale has been applied to rules prohibiting employees from complaining to clients about working conditions. In *Compuware Corp. v. NLRB*, the employer terminated an employee who threatened to raise concerns he had about his employment conditions at a meeting in which a client would be present. [104] The Sixth Circuit found that while the discharged employee had not sought the authorization of coworkers in complaining to the client, the employee was acting with the purpose of furthering group goals, and thus was engaged in concerted activity.[105]

The Court also rejected the employer's argument that the work rule prohibiting employees from complaining to its clients about working conditions was valid under Section 7 since it was designed to protect legitimate employer interests.[106] The Court noted that while a rule designed to protect legitimate employer interests might be valid even if there exists

99. *Meyers* II, 28 N.L.R.B. 882, 887 (1986) (quoting Root-Carlin, Inc., 92 N.L.R.B. 1313, 1314 (1951)).

100. *Mushroom Transp. Co.*, 330 F.2d at 685.

101. *See supra* notes 40-42 and accompanying text.

102. 218 F.3d 531, 539 (6th Cir. 2000).

103. *Id.* at 537.

104. 134 F.3d 1285, 1287 (6th Cir. 1998).

105. *Id.* at 1290.

106. *Id.*

an ancillary effect of discouraging participation in protected activities, the work rule that the employer had adopted was too broad, and thus was likely to improperly interfere with the employees' right to engage in concerted activity.[107]

Thus, there appears to be strong doctrinal support for the finding that rules prohibiting conversations about wages and working conditions amount to a violation of the NLRA. However, some cases have led to contrary results. Consider the situation in *Adelphi Institute Inc.*,[108] where an employee who had been placed on probation approached a coworker and inquired if the coworker had ever been placed on probation.[109] The employee was terminated and then argued that her termination was a Section 8(a)(1) violation since her conversation with the coworker was protected concerted activity.[110] The Board found against the employee, holding instead that there had not been concerted activity.[111] According to the majority opinion, nothing in the record supported the conclusion that the employee was initiating, inducing, or preparing for group action when she asked her coworker if he had ever been on probation.[112]

In response to the dissent, which argued that concerted activity could be found when looking at the subject matter of the conversation,[113] the majority noted that "[s]ubject matter alone . . . is not enough to find concert."[114] Similarly, the majority also rejected the dissent's argument that the fact that the employee was seeking the aid of her coworker in determining the impact of probation established the concerted nature of her activity.[115] The majority argued that the record was absent of any indicia that the purpose of the conversation was as the dissent contended.[116] Thus, according to the majority, while contacting this particular coworker might have been an indication of a desire to engage in group action, it was also consistent with a uniquely personal motive, such as inquiring if the coworker had anything to do with the disciplinary action.[117] The majority concluded by noting, "not every discussion of terms and conditions of

107. *Id.*
108. 287 N.L.R.B. 1073 (1988).
109. *Id.*
110. *Id.*
111. *Id.* at 1074.
112. *Id.* at 1073.
113. *Id.* at 1075.
114. *Id.* at 1074.
115. *Id.* at 1075.
116. *Id.* at 1074.
117. *Id.* The ruling in *Adelphi* is somewhat in tension with the Board's recent pronouncement in Epilepsy Foundation of Northeast Ohio, 331 N.L.R.B. No. 92,2000, where the Board found that unrepresented employees enjoy the right to have a coworker present at any investigatory interview that the employee reasonably believes might result in disciplinary action.

employment constitutes protected concerted activity."[118]

More recently the U.S. Court of Appeals for the District of Columbia Circuit chastised the Board for taking "preposterous" and "not even close" to a reasonably defensible position in a case involving a challenge to a rule similar to those discussed above. In *Adtranz v. NLRB*, the Court considered a challenge to a rule prohibiting the use of "'abusive or threatening language to anyone on Company premises'" and making a violation of this rule punishable with suspension for a first offense and possible termination for a second offense.[119] The Board had found that the abusive language provision constituted an unfair labor practice under Section 8(a)(1) and ordered the employer to rescind the rule.[120] According to the Board, the rule prohibiting the use of abusive or threatening language had the threatening potential of chilling the exercise of protected activity.[121] The Court of Appeals refused to enforce the Board's order.[122] The Court noted that the Board was not arguing that such chilling had occurred in the particular case, nor that the employer had adopted or applied the policy in order to frustrate or discourage union activity, but instead it argued that the rule was unlawful on its face.[123] However, the Court found that the same manual which included the abusive language rule, also made clear that the employer was trying to maintain a decorous and peaceful workplace by encouraging an atmosphere of trust, respect and effective communication.[124] Thus, the Court found "preposterous" the Board's position that a prophylactic rule against abusive and threatening language is unlawful on its face.[125] According to the Court, "[i]t defies explanation that a law enacted to facilitate collective bargaining and protect employees' right to organize prohibits employers from seeking to maintain civility in the workplace."[126]

However, the Court did recognize that an "uneven or partial application of a rule against abusive and threatening language" could constitute an unfair labor practice under some circumstances.[127] The Court also noted that rules barring "false, vicious, profane or malicious statements *about the employer*" were more likely to discourage protected

118. *Id.*
119. 253 F.3d 19, 23 (D.C. Cir. 2001).
120. *Id.* at 24.
121. *See* Adtranz, ABB Daimler-Benz Transp., N.A., Inc., 331 N.L.R.B. 291, 293 (2000) (concluding that the provision could be interpreted as "barring lawful union organizing propaganda").
122. *Adtranz*, 253 F.3d at 28.
123. *Id.* at 25.
124. *Id.* at 25.
125. *Id.* at 28.
126. *Id.* at 28.
127. *Id.* at 27-28.

activities, and thus are more likely to amount to an unfair labor practice.[128]

Despite decisions like *Adelphi* and *Adtranz*, there appears to exist a robust doctrinal basis supporting the Board's decisions regarding prohibitions on wage discussions under the NLRA. Under the Act and under relevant case law, the Board appears to be on firm ground in concluding that wage conversations are concerted and protected activity and that absent legitimate business justifications PSC rules violate the employees' Section 7 rights. In the next section we argue that there are also strong theoretical reasons supporting the Board's conclusions.

### *C. Additional Support for the Board's Posture Regarding Pay Secrecy/Confidentiality Rules*

In a sense wages are a very personal matter. As the laborers in the vineyard parable cited in the introduction illustrates,[129] hypothetically what others get paid should not be of any relevance to what one gets paid, so long as what one's wage is in accordance with one's employment contract. Indeed, neoclassical economists have traditionally argued that individuals care about their income exclusively in absolute terms, not in relative terms.[130] That is, individuals' utilities depend on the absolute quantities of their income, not on how those quantities compare with others.[131] This view is based on the assumption that individuals' preferences are independent of each other.[132] Individuals are concerned only about their own welfare and are generally indifferent to the welfare of others.[133]

However, an alternative view to the neoclassical explanation of independent preferences has emerged over the last several decades. Both economists and legal scholars have advanced the theory of relative preferences.[134] This theory provides a framework that recognizes that

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128. *Id.* at 26-27 (emphasis in original).

129. *See supra* note 1 and accompanying text.

130. *See* Robert H. Frank, *Are Workers Paid their Marginal Products?* 74 AM. ECON. REV. 549, 570 (1984) (arguing that in a model that assumes that individual preferences are relative, the wage structure within a firm must be one in which individuals are not paid their marginal products); *see generally* ROBERT H. FRANK, CHOOSING THE RIGHT POND: HUMAN BEHAVIOR AND THE QUEST FOR STATUS, 3-38 (1985) (commenting on relative standing, income increases, and their effect on employee happiness) [hereinafter CHOOSING THE RIGHT POND].

131. *See also* Richard H. McAdams, *Relative Preferences*, 102 YALE L.J. 1, 3 (1992) (developing the implications of the theory of relative position for a number of legal issues). *But see* CHOOSING THE RIGHT POND, *supra* note 130, at 5 ("[A]bundant evidence suggests that people do in fact care much more about how their incomes are in any absolute sense.").

132. McAdams, *supra* note 131, at 3.

133. *Id.*

134. *See* CHOOSING THE RIGHT POND, *supra* note 130, at 3-34 (developing the theory that has come to be known as the theory of relative preferences); McAdams, *supra* note 131, at

individual preferences can be dependent in the sense that they are measured relative to one another.[135] The relative preferences framework has important implications for our understanding of PSC rules, since it helps us identify the rationale for the finding that wage discussions are protected concerted activity. According to the theory of relative preferences, individuals care a lot about their status in local hierarchies.[136] Consequently, a market is likely to develop for local status. Those that have strong preferences for status will "pay" for the privilege to be the highest paid employee by accepting a wage less than their marginal productivity.[137] Those that do not care about status as much (although they may have some concern about it) will require a premium for being at the bottom of the status hierarchy in the form of a wage above their marginal productivity.[138]

We believe that the theory of relative preferences provides strong support for the Board's position regarding PSC rules. The existence of markets for local status, at least in theory, creates a rationale for the need of employees to have open discussions about wages. To properly evaluate the tradeoffs that they have made between status and income, employees need to know their position in the local hierarchy. That is, employees must be able to make wage comparisons. If employees are not only valuing absolute levels of compensation, how much I am paid, but also relative levels of compensation, how much are others paid, it is essential that they have information about the wages paid to those employees in their local hierarchies.[139]

Employees also need to share wage information in order to facilitate other important tradeoffs. Consider for example the tradeoffs employees make regarding their consumption of positional vis á vis non-positional goods. Positional goods are defined as "things whose value depends relatively strongly on how they compare with things owned by others."[140]

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26-69.

135. *See* CHOOSING THE RIGHT POND, *supra* note 130, at 5-7 (outlining the issues brought upon by relative economic standing).

136. *See id.* at 30-34 (analyzing evidence which proves that people care less about how their income compares to persons from other countries).

137. *See* Frank, *supra* note 130, at 551 (concluding that the highest paid worker in a firm earns less than his/her marginal product while the lowest paid worker earns more than his/her marginal product).

138. *Id.*

139. Indeed, the employer could be expected to voluntarily disclose that information. Overall, the wage bill for the employer remains the same—all that is changing is the distribution of wages inside the firm, but not the total cost of labor. Furthermore by facilitating the market for local status, better matching between workers' preferences and jobs occur, resulting in potential efficiency gains for employers.

140. *See* Robert H. Frank, *The Demand for Unobservable and Other Nonpositional Goods*, 75 AM. ECON. REV. 101, 101 (1985) [hereinafter *Nonpositional Goods*].

Examples of positional goods include cars, houses, and clothing. Non-positional goods depend less strongly on such comparisons, and include job safety, savings, and pensions.[141]

Positional goods serve an ability-signaling function. Important outcomes in social interactions are made based on assessments of other people's talents and abilities. Since information about talents and abilities is seldom available, we have to rely instead on other signals, such as the signals provided by the acquisition of positional goods. Thus, "[w]hen an individual's ability level cannot be observed directly, such observable components of his consumption bundle constitute a signal to others about his total income level, and on average, therefore, about his level of ability."[142]

The relative preferences framework suggests that in the search for status, individuals will consume more positional goods than what is socially optimal, but will be less likely to consume non-positional goods. The tendency to devote extra resources to the consumption of observable positional goods, however, is "suboptimal from the point of view of the population as a whole."[143] This is the case because in the market for social status, one individual's advancement in a local hierarchy occurs only at the expense of others falling behind in the same hierarchy. To avoid falling behind, individuals will spend on positional observable goods, without affecting the final outcome, since competitors are doing the same. Ultimately, too many resources are allocated to the consumption of positional observable goods.[144]

One of the implications of the relative preferences framework is that individuals will tend to overspend on positional (or observable) goods and underspend on non-positional (or unobservable) goods. This tendency arguably will be worse in cases where individuals do not have other ways of finding information about local status.[145] That is, employees who have

141. *Id.*

142. *Id.* at 107.

143. *Id.* at 108.

144. *Id.* The same dynamics also help to explain production ceilings, and the negotiation of safety and health rules. While collectively employees are better off in agreeing to impose a safety rule, there are individual incentives that prevent this more favorable outcome from being achieved. *See id.* at 102-03 (analyzing a table which concludes that mine workers chose to work in dusty mine conditions rather than collectively impose cleaner working conditions).

145. *See* Frank, *Nonpositional Goods*, *supra* note 140, at 108 ("The ability-signaling rationale for imitative behavior suggests that incentives to distort consumption in favor of observable goods will be inversely related to the amount and reliability of independent information that exists concerning individual abilities."); *see also*, CHOOSING THE RIGHT POND, *supra* note 130, at 121-42 (discussing the importance of differentiating characteristics, and the role of the prisoner's dilemma in creating sub-optimal outcomes when individuals act in their own self-interest).

complete information about what every employee in the relevant local hierarchy makes in the form of wages and benefits, do not need to spend resources in communicating their local status by buying positional goods. A quick look at the wage rate will do the trick.

Indeed, the difference between unionized and non-unionized employee compensation packages has been explained from this perspective. Professor Robert Frank has analyzed the composition of compensation packages for both unionized and non-unionized employees. He has hypothesized that the "very existence of the union's administrative apparatus may facilitate an exchange of information between coworkers that enhances the likelihood of their being able to form agreements about how compensation should be allocated between various budget categories."[146] Indeed, in analyzing estimates of the effect of collective bargaining on fringe benefits, Professor Frank has found data consistent with the relative preferences model. According to Professor Frank, collective bargaining has its largest impact on the amount of money spent in acquiring life, accident, and health insurance, and in the amount of money allocated to pensions.[147] These findings are an indication that cooperative decisions will tend to favor non-positional goods.[148]

This analysis suggests that the Board has been right in finding wage discussions to be a concerted activity. The relative preferences theory tells us that employee wages are not independent phenomena as the neoclassical model suggests. Instead, there is an inherent interdependent relationship surrounding what each worker gets paid. Consequently, employee wage discussions by their very nature have a collective or concerted dimension.

In short, the ability of employees to engage in wage conversations with coworkers markedly facilitates economically proper local status hierarchy tradeoffs by employees. These interdependent tradeoffs by themselves represent a sort of concerted action that should be protected by the NLRA. The relative preference theory thus provides additional support for the Board's position regarding the concerted nature of PSC rules.

146. Frank, *Nonpositional Goods*, *supra* note 140, at 111.

147. *Id.* at 112.

148. The same analysis helps explain the existence of production ceilings and the negotiation of safety and health rules. *See* McAdams, *supra* note 131, at 21-22 (describing Professor Frank's theory of how government regulations may reduce inefficiencies caused by the prisoner's dilemma). The prisoner's dilemma is a theory arguing that workers competing for relative income will sacrifice safety for greater income. *Id.* at 21.

## V. LEGITIMATE BUSINESS JUSTIFICATIONS FOR PAY SECRECY/CONFIDENTIALITY RULES UNDER THE NLRA

### A. *Basic Construct*

Once the Board finds that employees are involved in protected concerted activity, the Board allows the employer to advance a legitimate business justification for the employer's actions.[149] The Board then balances the employer's business interests and the employees' Section 7 rights in deciding whether the employer's behavior amounted to an unfair labor practice.[150]

As discussed earlier, in defending their adoption of PSC rules, employers have advanced the jealousy and strife argument[151]—PSC rules are necessary as a way of limiting "jealousies and strife among employees."[152] This argument is based on the commonsensical understanding that wage differentials will generate internal conflicts among employees,[153] particularly where employees do not have the information necessary to evaluate the justification for the differing wages.[154] The NLRB and reviewing courts, however, have consistently rejected this argument.

Are there any other possible arguments that could be advanced by employers in support of the wide adoption of PSC rules? Based on recent business management and economics literature, we suggest that a strong argument could be made in support of PSC rules, at least in certain situations.

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149. *See supra* notes 51-57 and accompanying text.

150. *Id.*

151. *See supra* notes 49-57 and accompanying text.

152. *See, e.g.*, Jeannette Corp. v. NLRB, 532 F.2d 916, 919 (3d Cir. 1976) (holding that jealousy and strife are not justifiable business reasons to intrude upon an employee's Section 7 rights).

153. *See* John Case, *When Salaries Aren't Secret*, 79 HARV. BUS. REV. 37, 39 (2002) (analyzing a fictional case of a company facing the decision of whether to make salaries public information); *see also*, Robert L. Opsahl, *Managerial Compensation: Needed Research*, 2 ORG. BEHAV. & HUM. PERFORMANCE 208, 212-13 (1967) (arguing that open pay systems make individual differences too readily apparent leading to negative effects on group cohesion and satisfaction).

154. *See* Case, *supra* note 153, at 48 (explaining the conflicts caused by wage differentials, particularly where hiring outside the company will require new recruits to get paid more than current employees); *see also* George A. Arkerlof & Janet L. Yellen, *The Fair Wage-Effort Hypothesis and Unemployment*, 105 Q. J. ECON. 255, 264 (1990) (pointing out the difficulties in explaining the equity of compensation systems to employees); George T. Milkovich & Philip H. Anderson, *Management Compensation and Secrecy Policies*, 25 PERSONNEL PSYCHOL. 293 (1972) (discussing the over and underestimating of employee wages and how it plagues their perceptions of pay levels).

### *B. PSC Rules and Compensation Systems*

Compensation systems are complex mechanisms designed to meet a variety of goals. For instance, compensation systems play a screening and sorting function by helping to allocate employees to particular jobs according to employee preference.[155] Compensation contracts are also used as a means of allocating employment-related risks.[156] Furthermore, compensation contracts serve as incentive mechanisms[157] and fulfill a monitoring function.[158]

In order to accomplish some or all of these objectives, employers utilize a variety of tools. For example, the manner in which employees are paid—by the hour,[159] by salary,[160] or by the results[161]—has sorting,

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155. *See* Martin Brown & Peter Philips, *The Decline of Piece Rates in California Canneries: 1890-1960*, 25 INDUS. REL. 81, 82 (1986) (describing the sorting effects of the piece-rate compensation systems in the cannery industry).

156. *See* Joseph E. Stiglitz, *The Design of Labor Contracts: The Economics of Incentives and Risk Sharing*, *in* INCENTIVES, COOPERATION, AND RISK SHARING 47, 50 (Haig R. Nalbantian ed., 1987) (describing risk-sharing elements in employment contracts including income insurance, guaranteed incomes, and training and moving costs).

157. *See* Haig R. Nalbantian, *Incentive Compensation in Perspective*, *in* INCENTIVES, COOPERATION, AND RISK SHARING 3, 14 (Haig R. Nalbantian ed., 1987) ("[F]irms [may] offer employees a premium over general market wages in an effort to provide incentives for the appropriate supply of labor inputs."); Stacey R. Kole, *The Complexity of Compensation Contracts*, 43 J. FIN. ECON. 79, 81-83 (1997) (describing the incentive functions of pay with respect to managerial compensation).

158. *See* Nalbantian, *supra* note 157, at 14 ("Monitoring activity by managers . . . is the primary source of the information used to develop estimators on which rewards are necessarily based.").

159. Hourly work is directly linked to time at work during a pay period. *See* Eugene F. Fama, *Time, Salary, and Incentive Payoffs in Labor Contracts*, 9 J. LAB. ECON. 25, 25 (1991) (discussing time, typically an hourly wage, as one type of payoff in a labor contract). Hourly pay incentives are likely to occur under three scenarios. First, to the extent that the pace of the job is controlled by the employer or dictated by the work situation rather than controlled by the worker, employers are more likely to rely on hourly pay, since it facilitates a fixed relationship between time at work and the output produced. Second, hourly pay is more attractive to employers to the extent that the individual employee's output is observable by the employer at the time it is produced. Third, hourly pay is more likely to be used where the job involves tasks in which the duration is certain and easy to predict, since this predictability makes it possible for the employer to plan staffing and production requirements. *See* Sheldon E. Haber & Robert S. Goldfarb, *Does Salaried Status Affect Human Capital Accumulation?*, 48 INDUS. & LAB. REL. REV. 322, 326 (1995) (listing three criteria for identifying job characteristics that make hourly pay alluring to employers).

160. Salary compensation refers to situations where the contract specifies a weekly or monthly salary. Fama, *supra* note 159, at 25. Compensation is generally independent of output and depends primarily on time worked, although pay does not vary strictly from month to month depending on actual time worked. "A salaried employee is compensated not for the amount of time spent on the job, but rather for the general value of services performed." Abshire v. County of Kern, 908 F.2d 483, 486 (9th Cir. 1990). *But cf.* 29 C.F.R. § 541.118(a) (2002) (stating that salaried employees *cannot* have their salaries

incentive, and monitoring implications. For example, the choice between form of pay has been argued to be related to decisions regarding the amount of supervision that is efficient in a particular type of job.[162] Compensation based on results, as opposed to as on time worked, is more likely to take place in situations where it would be too costly to supervise the employee directly, or where supervision of employee effort is "noisy" and thus provides little information about the relationship between effort and productivity.[163] In these cases, the employer is shifting the risk associated with fluctuation in income to the employee.[164] The employee is accepting this shift on the expectation that she will be able to perform her job in a more autonomous manner.[165]

PSC rules are one piece of the entire compensation system adopted by a particular employer. To the outside observer, it might be difficult to appreciate what role PSC rules play in helping employers achieve the objectives of their compensation structures. Eliminating the ability of employers to utilize PSC rules could have negative efficiency implications.

Consider the possible impact that the prohibition against PSC rules might have on the implementation of merit-based compensation systems. Merit-based compensation systems are generally viewed as having a positive effect on productivity.[166] The question then becomes, what is the impact on the use of merit-based compensation systems of PSC rules? Or, alternatively, are PSC rules necessary for employers to implement effective merit-based compensation systems?

Jobs and job duties come in all sizes and forms. Some jobs involve

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reduced because of "variations in the quality or quantity of the work performed"). *See generally* Edward P. Lazear, *Salaries and Piece Rates*, 59 J. OF BUS. 405, 406-07 (1986) (identifying the factors that influence the employer's decision of which salary structure should be used to pay employees).

161. Under result-based compensation (RBC), pay is made proportional to outcome. RBC utilizes individual or group performance indicators as proxies for labor inputs. *See* Nalbantian, *supra* note 157, at 16 ("Output-based estimators utilize individual or group performance indicators as surrogate measures of labor inputs."). Among the different types of RBC systems, piece-rate systems are the most widely known. *Id.*

162. *See* Lazear, *supra* note 160, at 407 (distinguishing workplaces by the difference in salary structure).

163. *See* John H. Pencavel, *Work Effort, On-the-Job Screening, and Alternative Methods of Remuneration, in* 1 RES. IN LAB. ECON. 225, 232-34 (Ronald G. Ehrenberg ed., 1977) (discussing the wage structure problems faced by an employer that has workers of various skills).

164. *See id.* (emphasizing that an employee's income affects that employee's productivity).

165. *See id.* at 232-34 (noting that employees may be uncooperative when they believe a piece-rate incentive system is unfair).

166. *See* Rafael Gely, *Distilling the Essence of Contract Terms: An Anti-Antiformalist Approach to Contract and Employment Law*, 53 FLA. L. REV. 669, 686-90 (2001) (discussing the incentive function of compensation systems).

fairly easy tasks, which lend themselves to easy evaluations of performance. Other jobs, however, involve much more complex tasks, making it harder to evaluate job performance. For example, as compared to a production worker in a manufacturing plant, the various aspects that can be used to evaluate the performance of a scientific researcher working to develop a new product are significantly harder to formulate.[167] In the case of a production worker, it is likely that both the specific tasks and the employee's output are observable, making it easy to evaluate performance.[168] In the case of the researcher, the opposite is true, making the evaluation of performance a much harder task.[169]

Compensation theory tells us that in the case of the factory worker, the factors used in evaluating performance and the level of compensation are likely to be objective factors. These factors by definition are more or less easy to quantify. On the other hand, the evaluation of the performance of the researcher, and the factors considered in calculating her wages, are likely to be of a more subjective and informal nature, since the relationship between job effort and output is less clear than in the factory worker case. Indeed, we would expect the employer to prefer to use these subjective factors rather than a rigid formula, in order to have the flexibility necessary to provide the right amount of incentives depending on the circumstances.

Whether or not employees are allowed to discuss their wages in the case of a "simple task" job should not affect the ability of management to implement a merit-based compensation system. The factors used in the evaluation are objective and easy to verify. The employer should not be concerned about having employees compare their wages in relation to each other and to their own productivity.

However, in the case of the more complex jobs, employers might be less likely to evaluate performance on the basis of some of the more subjective factors that go into the job under a pay openness system, opting instead to rely on factors that are objectively measurable. To the extent that in complex jobs the subjective factors used in evaluating performance are considered an essential part of implementing a merit based compensation system, pay openness may prevent reward allocations based strictly on merit.[170] Indeed research indicates that organizations unable to

167. *See* Haber & Goldfarb, *supra* note 159, at 326 (discussing how job characteristics affect the selection of compensation systems).

168. *Id.* at 325-26.

169. *Id.*

170. *See* Burroughs, *supra* note 14, at 48 ("Pay secrecy may also stem from the difficulty that pay allocators (bosses) have in distributing widely varying rewards, even when individual performance and effort indicate that this is warranted."); *see also* Gerald S. Leventhal et al., *Inequity and Interpersonal Conflict: Reward Allocation and Secrecy about Reward as Methods of Preventing Conflict*, 23 J. PERSONALITY & SOC. PSYCHOL. 88, 100 (1972) (finding, in an experimental setting, that under conditions of secrecy individuals in

evaluate performance objectively will find it economically inefficient to implement a pay openness system.[171] A critical variable affecting the decision to establish an open pay system is the ability of management to clearly measure task performance.[172] Forcing the use of more objective measures of performance in situations where such performance appraisal techniques are not appropriate, will likely reduce the set of incentives necessary for innovation and have a corresponding downward effect on long-term productivity.[173] In sum, it seems that fairly strong employer justifications for PSC rules exist in employment situations involving the use of more subjective performance appraisal standards.

In addition to upsetting the use of merit-based compensation systems, a ban on PSC rules might interfere with the risk-allocation function of employment contracts. As mentioned above, compensation systems serve a risk allocation function.[174] That is, compensation contracts allocate the risks associated with stochastic factors that could affect variations in streams of income.[175] As part of the various complex arrangements that are made when entering employment contracts, the parties also "negotiate" over the allocation of these risks.[176]

Risk management theory suggests that it is efficient to allocate risk to the party better able to bear the cost associated with that risk.[177] In the employment context, since employers are generally believed to be risk-neutral and employees are believed to be risk averse, employers are in a better position to bear the risk associated with stochastic fluctuations in income.[178] Accordingly, we should expect to see employers assume the

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charge of allocating pay were more likely to increase the difference between the rewards of superior and inferior performers).

171. *See* Thompson & Pronsky, *supra* note 14, at 72 (concluding, based on survey data, that managers felt it was difficult to evaluate performance so as to objectively link performance with rewards).

172. Futrell & Jenkins, *supra* note 25, at 214 (noting that by misjudging their employees' wages, managers misconstrue their employees' performance).

173. *See* Case, *supra* note 153, at 44 ("One frequently cited problem of such a formal pay structure is that is doesn't allow for flexibility in a tight job market, where you typically need to pay a recruitment premium above a job's market value to attract people.").

174. *See supra* note 163 and accompanying text.

175. *See* Nalbantian, *supra* note 157, at 14-15 (arguing that monitoring is necessary to make successful incentive compensation systems); *see e.g.*, Fama, *supra* note 159, at 42 (explaining various forms of compensation approaches).

176. *See* Stiglitz, *supra* note 156, at 54-61 (discussing the ways that employment contracts address risks).

177. *Id.* at 50.

178. *Id.* If employees were not risk averse but were instead risk-neutral, designing an efficient contract would be a trivial issue. Nalbantian, *supra* note 157, at 12. Unlike most employers, employees have a fairly limited ability to diversify their human capital portfolio. Human capital refers to the investments individuals make which cannot be separated from their knowledge or skills, such as education. *See* GARY S. BECKER, HUMAN CAPITAL: A

role of "insurers" of employment-related risks,[179] by insuring employees against the risks associated with income uncertainty. This is accomplished by properly structuring the compensation arrangements in a way that reflects the desired share of the burden of risks.[180] For example, by guaranteeing employees a monthly income, the parties are shifting to the employer the risk associated with month-to-month variations in productivity.[181]

Risk-shifting contracts of this kind are not feasible in situations in which labor can move freely from one firm to another.[182] As a result, workers will only stay with their firms during bad times and then move to "greener pastures" during good times. Arguably, then without some restrictions on labor mobility, risk-shifting contracts will probably not be offered.

Labor mobility can be limited by utilizing so-called "social conventions" that make it more difficult or costly for employees to move. PSC rules represent one such social convention, since they can limit the ability of employees to talk to fellow employees about pay, including different wage offers other employees have received. Consequently, some economists have recently argued that companies adopt pay secrecy polices in order to avoid employee opportunism in risk-shifting compensation policy situations.[183] Put another away, there seems to be substantial and legitimate business justifications for PSC rules in situations where employers and employees have entered into risk-shifting compensation agreements.

*C. Summary*

Many U.S. corporations today put considerable effort into designing employee compensation plans.[184] Indeed, many companies pay outside

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THEORETICAL AND EMPIRICAL ANALYSIS WITH SPECIAL REFERENCE TO EDUCATION 15-17 (U. of Chi. Press 3d ed., 1993).

179. Stiglitz, *supra* note 156, at 50.

180. *See id.* (providing ideas for how compensation contracts can be structured so as to accommodate risks).

181. *See id.* (suggesting that guaranteed incomes be added to employment contracts so as to better accommodate risks). Notice that under such an agreement, although the risk is shifted to the employer, employees, at least in part, are paying for the shift in the burden of risk by likely accepting a wage rate lower than what otherwise would be the case. *Id.*

182. *See* Leif Danziger & Eliakim Katz, *Wage Secrecy as a Social Convention*, 35 ECON. INQUIRY 59, 59 (1997) ("[T]he role of wage secrecy is to reduce effective labor mobility, and thereby enhance the feasibility of risk-shifting contracts.").

183. *See id.* at 60 (describing the different ways in which workers can get higher wage offers).

184. *See* Lucian Arye Bebchuk et. al., *Managerial Power and Rent Extraction in the Design of Executive Compensation*, 69 U. CHI. L. REV. 751, 753 (2002) (suggesting an

compensation consultants to assist them in this endeavor.[185] Human resource professionals believe that properly designed employee compensation programs can represent a source of firm competitive advantage.[186]

PSC rules are one of the elements that could be incorporated as part of a compensation program. While the discourse in cases challenging PSC rules has been exclusively focused on the arguably weak "employee conflict" rationale, employer justifications for PSC rules might become considerably stronger when PSC rules are understood as being a part of the larger concept of compensation structures. In a variety of situations, there seems to be both legitimate and substantial business justifications for PSC rules, justifications which call into question the broad brush determinations by the NLRB and the federal courts that PSC rules are illegal.

## VI. THE FUTURE OF PAY SECRECY/CONFIDENTIALITY RULES UNDER THE NLRA

### *A. Overview*

Despite having consistently been found illegal under the NLRA, PSC rules perplexingly continue to be commonly adopted by employers in workplaces across the United States. Given that there is no indication that employers will become less inclined to adopt PSC rules anytime soon, the question is where do we go from here? In many ways this situation represents an arguable illustration of the current impotence of the NLRA.

### *B. The Current Impotence of the NLRA and Chances for Reform*

One reason employers may flagrantly disregard the fact that PSC rules are generally illegal under the NLRA is because they view the law as impotent, or as Columbia Law Professor Cynthia Estlund has recently put it, "ossified."[187] Penalties for violating the NLRA are mild at best,[188] and

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alternative approach to the dominant theory on executive compensation).

185. *Id.* at 789-91.

186. *See* Barry Gerhart, *Compensation Strategy and Organizational Performance, in* COMPENSATION IN ORGANIZATIONS: CURRENT RESEARCH AND PRACTICE 151, 152-53 (Sara L. Rynes & Barry Gerhart, eds., 2000) (explaining that the effect of compensation strategies on employee retention, organization costs, and business performance formulates the business' success).

187. Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527, 1530 (2002). Despite increasing labor legislation, there is little collective bargaining power among workers. *But see id.* at 1535-36 (finding that only minor changes have been made to labor laws despite changes in the labor force).

the vast majority of non-union employees do not realize that the Act provides them with protection.[189] Unions, in their organizing and representational efforts, are probably the most likely group to bring illegal PSC rules to light (and to the attention of the NLRB). Yet they play only a very minor rule in today's private sector workplace. Unions currently represent only 8.5% of the private sector workforce,[190] and union private sector organizational efforts have decreased significantly.[191] In this context, it makes little sense for employers to spend money in an attempt to try and develop more economically sophisticated and acceptable "legitimate" justifications for their use of PSC rules under the NLRA—it is much easier and efficient to simply ignore the law.[192]

The chances of any meaningful reform of the NLRA in this regard are probably fairly close to zero. The last meaningful legislative attempt to put teeth into the NLRA was in the 1978-79 Congressional term, and it was successfully filibustered in the U.S. Senate despite support from a pro-union Democratic White House and pro-union Democratic majorities in both houses of Congress.[193] Indeed, even attempts to simply give non-union employees more "notice" of their rights under the NLRA have gone nowhere.[194] For better or worse, the anomalous situation of PSC rules

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188. *See* COMM'N ON THE FUTURE OF WORKER-MGMT RELATIONS, U.S. DEP'T OF LABOR, FACT FINDING REPORT 68-73 (1994) [hereinafter *Dunlop Commission Report*] (reporting trends in penalties for NLRA violations).

189. *See* Charles J. Morris, *NLRB Protection in the Nonunion Workplace: A Glimpse at a General Theory of Section 7 Conduct*, 137 U. PA. L. REV. 1673, 1702-50 (1989) (evaluating the statutory intent of Section 7 and applying it to case studies which analyze employee knowledge of their legal rights in labor disputes).

190. *See, e.g.*, Charles B. Craver, *The American Worker: Junior Partner in Success and Senior Partner in Failure*, 37 U.S.F. L. REV. 587, 590 (2003) (illustrating the impact of declining unionization).

191. *See Dunlop Commission Report*, *supra* note 188, at 66-68 (examining the decline in the proportion of the private sector workforce whose conditions of employment are shaped by collective bargaining).

192. In this sense, economic efficiency might mandate non-conformity with the law. *See* Frank H. Easterbrook & Daniel R. Fischel, *Antitrust Suits by Targets of Tender Offers*, 80 MICH. L. REV. 1155, 1168 n.36 (1982) ("Managers have no general obligation to avoid violating regulatory laws when violations are profitable to the firm, because the sanctions set by the legislature and courts are a measure of how much firms should spend to achieve compliance"). *But see* Cynthia A. Williams, *Corporate Compliance With the Law in the Era of Efficiency*, 76 N.C. L. REV. 1265 (1998) (disputing the notion of economically "efficient" breaches of the law by arguing that leeways in the law, particularly by corporate citizens, should not be tolerated).

193. *See* Comment, *Labor Law Reform: The Regulation of Free Speech and Equal Access in NLRB Representation Elections*, 127 U. PA. L. REV. 755, 792-97 (1979) (summarizing the variety of ways that the ninety-fifth Congress used labor law reform to address the problem of election free speech and equal access).

194. *See* Rulemaking Regarding Union Dues Regulations, Petition of Charles J. Morris to the NLRB (petition on Feb. 9, 1993) (review still pending) (on file with the University of Cincinnati College of Law) (asking the NLRB to expand the pending Rulemaking

under the NLRA represents a pointed illustration of that Act's increasing irrelevance in today's workplace, an irrelevance which may not change any time soon.

## VII. LEGISLATIVE PROPOSALS

### A. *Overview*

Perhaps in response to the disillusionment with the current status of the NLRA, PSC rules have recently caught the attention of Congress. Various legislative proposals have been introduced dealing with the legality of PSC rules. Interestingly, while all the case law in this area has involved the NLRA, none of the proposed legislation directly involves that statute. Instead, Congress has chosen to address the issue of PSC rules through amendments to the Fair Labor Standards Act of 1935 ("FLSA"). The approach Congress has proposed raises a number of very important questions.

### B. *The Current Proposals*

In the 106th Congress, the 107th Congress, and the 108th Congress, bills were introduced addressing this subject.[195] All of the various proposed bills have taken the form of amending various sections of the Fair Labor Standards Act[196] ("FLSA"). Collectively, these amendments are known as the Equal Pay Act of 1963.[197]

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Proceeding regarding the *Beck* rules to include a broad rule providing for the posting of conspicuous notices which advise employees of their general rights and duties under the National Labor Relations Act).

195. *See* Paycheck Fairness Act, S. 76, 108th Cong. (2003) (amending the Fair Labor Standards Act to enhance enforcement of equal pay requirements and allow the Equal Employment Opportunity Commission to collect pay information); Fair Pay Act of 2001, S. 684, 107th Cong. (2001) (amending the Fair Labor Standards Act to enhance remedies for wage discrimination and prohibit discharge for discussing employee wages); Fair Pay Act of 2001, H.R. 1362, 107th Cong. (2001) (amending the Fair Labor Standards Act to require equal pay for equivalent jobs); Paycheck Fairness Act, S. 77, 107th Cong. (2001) (amending the Fair Labor Standards Act to enhance enforcement of equal pay requirements); Paycheck Fairness Act, H.R. 781, 107th Cong. (2001) (amending the Fair Labor Standards Act affirmative defense requirements); Wage Awareness Protection Act, S. 2966, 106th Cong. (2000) (amending the Fair Labor Standards Act to include a retaliation provision); Paycheck Fairness Act, H.R. 541, 106th Cong. (1999) (amending the Fair Labor Standards Act anti-retaliation provisions and enhancing penalties for wage disparities); Paycheck Fairness Act, S. 74, 106th Cong. (1999) (amending the Fair Labor Standards Act to include an affirmative defense for wage discrimination actions).

196. 29 U.S.C. §§ 201-219 (2000).

197. *See* 29 U.S.C. § 206(d) (2000) (prohibiting wage sex discrimination in wages).

All of the proposals are very similar with respect to proposed statutory language. All of the proposals would make it illegal under Section 215 of the FLSA to discharge or discriminate against any employee because such employee "has inquired about, discussed, or otherwise disclosed the wages of the employee or another employee."[198] One proposal that was introduced by Senator James Jeffords in the 106th Congress was more detailed in its description of prohibited acts. As with the other bills, the Jeffords Bill, introduced as the "Wage Awareness Protection Act," made it illegal for an employer to take any adverse employment action against any employee for inquiring about or discussing wages.[199] The Jeffords Bill, however, also made it illegal for any person "to make or enforce a written or oral confidentiality policy that prohibits an employee from inquiring about, discussing, or otherwise disclosing the wages of the employee or another employee."[200] This additional provision appears to make it per se illegal for the employer to have a PSC rule, even if there is no history of enforcing such a rule.

### C. *What Is Congress Trying to Do?*

The Jeffords Bill differed from other proposals in another very important way: it was narrowly drawn to deal only with the problem of pay confidentiality. All the other proposed bills dealt with the pay confidentiality rule as one proposal among a much larger set of proposals. Indeed, the primary focus of all the other proposals is the problem of pay differentials between men and women, and the legal framework available under the Equal Pay Act to establish a violation of that Act. The Equal Pay Act of 1963 prohibits pay differentials based on sex for employees doing "equal work . . . performed under similar working conditions."[201] The various legislative proposals would amend the Act and allow for class action lawsuits with compensatory and punitive damages.[202] The proposed

198. Paycheck Fairness Act, S. 77, 107th Cong. § 3(d)(2) (2001); Paycheck Fairness Act, H.R. 781, 107th Cong. § 3(d)(4) (2001); Paycheck Fairness Act, S. 74, 106th Cong. § 3(d)(2) (1999); Paycheck Fairness Act, H.R. 541, 106th Cong. § 3(a)(2) (1999). Two other bills have slightly different language. The language in these bills makes it illegal "to discharge or in any other manner discriminate against, coerce, intimidate, threaten, or interfere with any employee or any other person because the employee inquired about, disclosed, compared, or otherwise discussed the employee's wages or the wages of any other employee. . . ." Fair Pay Act of 2001, H.R. 1362, 107th Cong. § 4(7) (2001); Fair Pay Act of 2001, S. 684, 107th Cong. § 4(7) (2001).

199. Wage Awareness Protection Act, S. 2966, 106th Cong. (2000).

200. *See id.* at § 2(a)(2).

201. 29 U.S.C. § 206(d) (2000).

202. *See, e.g.*, Fair Pay Act of 2001, S. 684, 107th Cong. § 5(a)(1) (2001) ("Any employer who violates subsection (d) or (h) of section 6 shall additionally be liable for such

legislation also would eliminate the same establishment requirement,[203] and redefine the defenses available under the statute to employers, making it more difficult for employers to explain away pay differentials.[204]

The remarks made by the sponsors of the bills in introducing the legislation illustrates that Congress' focus was on dealing with the pay differential issue. For example, in introducing the Fair Pay Act of 2001, Senator Tom Harkin focused his remarks exclusively on questions of narrowing the wage gap between men and women and the issue of occupational segregation.

> Millions of women today work in so-called 'women jobs,' as secretaries, child care workers, social workers and nurses. These jobs are often 'equivalent' in skills, effort, responsibility and working conditions to similar jobs dominated by men. But these women aren't paid the same as the men. Work that women have traditionally done continues to be undervalued and underpaid.[205]

This focus on pay discrimination is important because it places into context current Congressional interests in PSC rules. The various proposals suggest a concern with the use of PSC rules as a tool that employers can use to discriminate on the basis of sex. That is, by prohibiting employees from discussing their pay, employers are in a position to pay employees differently based on their sex, or other protected characteristics. As stated by Congresswomen Eleanor Homes Norton, one of the co-sponsors of the House version of the Fair Pay Act, in a press release discussing the provisions of the bill, "[t]he most important provisions include sections to keep employers from *gagging* employees by threatening them with sanctions for freely discussing and learning the wages of their coworkers, enabling women to engage in self-help to demand wage increases where appropriate. . . ."[206]

### *D. Problems with the Current Proposals*

We believe there are two basic problems with the current legislative proposals dealing with PSC rules: 1) the cursory attempt to relate PSC rules to discriminatory practices; and 2) the use of the anti-retaliatory provisions

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compensatory or punitive damages as may be appropriate").

203. Paycheck Fairness Act, S. 77, 107th Cong. § 3(c) (2001).

204. *See, e.g.*, Fair Pay Act of 2001, H.R. 1362, 107th Cong. § 3(a) (2001) (prohibiting the use of wage differentials in several compensation systems, including seniority systems, merit systems, and production-based merit systems).

205. 147 CONG. REC. S3351 (daily ed. Apr. 3, 2001) (statement of Sen. Harkin).

206. Press Release, Office of Congresswoman Eleanor Holmes Norton, Norton and Harkin Ask GAO to Study Pay Evaluations by 20 States that Have Increased Women's Pay: Endorse Paycheck Fairness Act for Equal Pay for Equal Work in EPA (June 12, 2001) (on file with the University of Cincinnati College of Law) (emphasis added).

of the Equal Pay Act as an avenue to prohibit PSC rules. We address these two concerns in turn.

As discussed previously, it appears to be the case that the proposed legislation's primary focus is on addressing issues of sex-based wage differentials by incorporating a "comparable worth" theory into the Equal Pay Act. Similar views have been expressed in committee hearings on the proposed legislation. Female advocacy groups and government officials have argued that PSC rules keep employees in the dark about discriminatory discrepancies in their wages[207] and that wage disparities between men and women are partially based on discriminatory practices "often hidden behind a veil of confidentiality."[208] The problem with this argument is that while there appears to be evidence of wage differentials between men and women not explained by factors other than sex, there does not, to our knowledge, appear to be any evidence, or theoretical justification, indicating that PSC rules play any real part in those differentials. Even assuming arguendo that there is a connection between PSC rules and discriminatory pay differentials, the proposed legislation goes much further than necessary in correcting the problem. The key provisions of the Equal Pay Act are found in Section 6 of the Act. This provision prohibits workplace sex discrimination caused by the unequal and disparate payment of wages between members of the opposite sex "for equal work on jobs the performance of which requires equal skill, effort, and responsibility."[209] Section 6 exempts, however, pay differentials that are based on a seniority system, a merit system, "a system which measures earnings by quantity or quality of production," and differentials "based on any other factor other than sex."[210]

The proposed amendments regarding PSC rules, however, are all framed as amendments not to Section 6 of the Equal Pay Act, but instead to the anti-retaliation provisions of the Fair Labor Standards Act.[211] These anti-retaliation provisions apply by reference to the Equal Pay Act, and are a part of the broader FLSA. As should be the case, these anti-retaliation provisions are very broad and strict since they seek to protect employees in the exercise of their most important and basic protected rights, such as the right to a congressionally-established minimum wage.[212] As with other statutory anti-retaliation provisions, the FLSA provisions protect employees against adverse employment actions where the employee has

207. *See, e.g*, Walsh, *supra* note 2 ("'Company policies that prohibit employees from discussing their salaries with co-workers keep them in the dark' about discriminatory discrepancies.") (quoting Gail S. Shaffer).

208. *Id.*

209. 29 U.S.C. § 206(d)(1) (2003).

210. *Id.*

211. 29 U.S.C. § 215(3) (2000).

212. 29 U.S.C. § 206(a) (2003).

"filed any complaint" or "instituted any proceeding" or "testified . . . in any such proceeding" under the statute.[213] As is also common in anti-retaliation provisions, these provisions are absolute in the sense that they are *not* subject to any defenses. The various amendments, as described above, thus make it per se illegal for an employer to take any action against an employee (i.e., to "discharge or in any other matter discriminate against, coerce, intimidate, threaten, or interfere"[214]) "because the employee inquired about, disclosed, compared, or otherwise discussed the employee's wages or the wages of any other employee."[215]

The importance of placing this prohibition in FLSA's anti-retaliation section is two-fold. First, the amendments elevate the significance of conversations among employees regarding their wages to the level of protection afforded to individuals who decide to file a complaint or participate in a proceeding under the statute. Given that there might be a multiplicity of reasons why employees engage in these conversations, some which might be completely self-serving and devoid of any value to other employees, it is not clear why the level of protection afforded in those cases should be the same as the level of protection afforded to employees that file a complaint and participate in statutory proceedings.[216]

Second, as mentioned previously,[217] there might exist some potentially "valid" business reasons for the use of PSC rules. Arguably, PSC rules are necessary to facilitate the adoption and implementation of merit-based compensation systems, and systems that facilitate very specific risk allocation schemes. Amending the FLSA to include a broad prohibition against PSC rules, as the current legislative proposals do, will make it impossible for employers to operate under a confidentiality scheme. To the extent that there are positive business reasons for PSC rules, the proposed legislation could result in large inefficiencies in the United States labor market.

In sum, proposed congressional legislation dealing with PSC rules clearly seems to represent *overkill.* To the extent PSC rules are facially discriminatory against women (e.g., enforced or applied only to women and not men) a clear Title VII disparate treatment action would appear to lie.[218]

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213. 29 U.S.C. § 215(a)(3) (2000).

214. Fair Pay Act of 2001, S. 684, 107th Cong. § 4(7) (2001).

215. *Id.*

216. Employees might begin a conversation about wages in order to assess the fairness of the employer's compensation system. *See supra* Part IV.B. For entirely individual reasons not related to any collective action, see Abby Ellin, *Want to Stop the Conversation? Just Mention Your Finances*, N.Y. TIMES, July 20, 2003, at C9 ("'Talking about your experience of money has everything to do with how you understand professional success, and with whether you can allow yourself to be happy.'") (quoting Pamela York Kleimer).

217. *See supra* Part V.

218. This type of claim raises the same legal issues raised by cases involving the

Moreover, if a facially neutral PSC rule is found to have a negative disparate impact on women a Title VII case can also be brought, although such a case will likely be somewhat hard to prove.[219] In either situation, employers will at least be allowed to raise some business justification defenses for the PSC rules.[220] This contrasts considerably from the proposed legislative approach of making PSC rules per se illegal under the FLSA.

### *E. Summary*

A variety of bills dealing with PSC rules have recently been introduced to the U.S. Congress. The gist of all of these bills is to make PSC rules per se illegal under the anti-retaliation provisions of the FLSA. Given the existence of possible business justifications for PSC rules, however, it appears that the enactment of such proposed legislation would be quite unwise. Present statutory formulations appear to provide employees ample opportunity to attack PSC rules when deemed necessary, while also affording employers the chance to defend the existence of these rules.

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imposition of job requirements applying only to women. *See generally* Sprogis v. United Air Lines, Inc., 444 F.2d 1194, 1199 (7th Cir. 1971) (holding that a no-marriage rule for flight attendants violated Title VII); George v. Farmers Elec. Coop., 715 F.2d 175, 177 (5th Cir. 1983) (finding a Title VII violation where the employer, in applying an anti-nepotism rule, told the female employee that the decision to terminate her instead of her husband was made because the plaintiff's husband was "the head of the household").

219. *See, e.g.*, HAROLD S. LEWIS, JR. & ELIZABETH J. NORMAN, EMPLOYMENT DISCRIMINATION LAW AND PRACTICE 429-34 (2001) (discussing the difficulties of developing a disparate impact case under the Equal Pay Act of 1963 and Title VII).

220. For example, in disparate impact cases, the business necessity defense allows the employer to come forward with evidence that the "challenged [employment] practice is job related for the position in question and consistent with business necessity." 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2000). Courts interpreting the business necessity defense have generally adopted a fairly strict interpretation. *See, e.g.*, Lanning v. Southeastern Pa. Transp. Auth., 181 F.3d 478, 489 (3d Cir. 1999) ("[A]n employer must demonstrate that its cutoff measures the minimum qualifications necessary for successful performance of the job in question."). The defense has been successfully raised in a number of cases. *See* Fitzpatrick v. City of Atlanta, 2 F.3d 1112, 1123-24 (11th Cir. 1993) (upholding a fire department's beard ban despite its acknowledged disproportionate adverse impact on blacks). Thus, we would expect that under the business necessity standard, employers will be able to adopt the PSC rule when, for example, disclosing employees' salaries will compromise the integrity of the compensation system. *See generally supra* Part V.B. (discussing the application of PSC rules to compensation systems).

## VIII. CONCLUSION

Pay secrecy or confidentiality rules have recently commanded considerable attention in the legal system and in the popular press. Rules of this kind have consistently been found to be illegal under the National Labor Relations Act. Nevertheless, employers in the United States continue to widely adopt rules of this kind. In this article, we explored the various doctrinal issues surrounding the regulation of PSC rules. We analyzed both the "concerted action" and "legitimate business justification" elements of the test used by the NLRB when deciding challenges to PSC rules. We found strong support for the Board's consistent finding that wage discussions amount to concerted activity, and thus that PSC rules interfere with the Section 7 rights of employees. Regarding the "legitimate business justification" prong of the Board's test, we noted that employers have been rather timid in developing arguments to justify the use of PSC rules. We suggested that at least in certain situations PSC rules should be permissible. Our analysis shows that there might be valid justifications for businesses to adopt rules of this kind, justifications which have not been articulated well in either administrative or federal court cases. Our analysis also argues against the enactment of any of the recent or current proposals on the subject in the U.S. Congress, all of which make PSC rules per se illegal. Making these rules per se illegal despite the fact that they have very positive economic impacts in a variety of situations makes little sense, especially in times of ongoing national economic uncertainty.[221]

221. For a good review regarding the increased economic uncertainty in the United States and elsewhere caused by the events of September 11, 2001, see *How the World Has (and Hasn't) Changed*, THE ECONOMIST, Oct. 27, 2001, at 11.