

EMPLOYMENT ALERT

26 August 2013

KNOW WHEN TO SAY NO

Shop stewards and trade union officials have no right to access an employer's privileged information in terms of the Labour Relations Act, No 66 of 1995. Yet by granting trade union representatives access to potentially sensitive information, an employer risks the waiver of its rights to legal privilege.

Legal professional privilege is the protection of dissemination of all communications made by a client to their legal advisor, who is acting in a professional capacity, for the purpose of giving or receiving legal advice. Privilege vests in the client and only the client can waive the right to privilege. Waiver can either be express, implicit or imputed. The courts have extended privilege to include agents of the client. However, if a third party to the privileged information (including a potential witness) overhears or reads a privileged statement, that party may disclose the former privileged information

Shop steward – you may say yes

An employer may, without waiving privilege, authorise an employee, including a shop steward to have access to the privileged information and act as an agent on its behalf. The shop steward may neither disclose the privileged information nor waive the employer's right to this privilege without the employer's consent. Therefore, allowing a shop steward access to privileged information will not amount to a waiver of privilege. The employer is the owner of rights to legal privilege. As a precaution, a shop steward should be warned not to waive privilege by disclosing the information to others. Where any employee attempts to disclose such information the employer must immediately take steps to resist disclosure. Failure to do so may amount to a wavering of the privilege.

Trade union official – always say no

Third parties to privileged communications are not entitled to legally privileged information. A Trade Union Official is a 'third party' as it is elected and remunerated by the Trade Union and is not an agent of the employer as is an employee. A third party who overhears or reads a privileged statement can thus disclose such privileged information. Thus, where an employer involves a Trade Union Official, the employer is seen to waive the privilege. Employers are thus cautioned against involving Trade Union Officials in internal or other processes where privilege may be involved.

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