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The NLRB *Comes* Knocking

Businesses Must Review Confidentiality, At-Will Employment Provisions

BY JEFF BRODIN

For employers with no union presence in their workforce, a potential union-organizing campaign used to be the biggest worry about the National labor Relations Board (NLRB). Those days are gone. The NLRB is now actively enforcing provisions of the National Labor Relations Act (NLRA) that protect all non-supervisory employees when they engage in *protected concerted activity*.

Since its enactment nearly 80 years ago, this protection has applied whether an employee was a member of a collective bargaining unit or not. Recently, however, the NLRB has begun expanding the range of employee activities it views as protected under the Act.[1]

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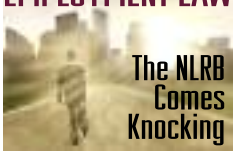

Protected Concerted Activity

Section 7 of the NLRA protects employees who engage in "concerted activities for the purpose … of mutual aid or protection,"[2] including the right to freely discuss wages, hours and other terms and conditions of employment. The NLRB's test for whether an employee is engaged in *concerted* activity under the Act is whether the activity is engaged in "with or on the authority of other employees, and not solely by and on behalf of the employee himself."[3] Concerted activity includes circumstances in which an individual employee brings "truly group complaints" to management's attention.[4]

This broad standard effectively means that very few employee concerns and complaints related to conditions of employment will not be considered concerted activities protected by Section 7.

Does the policy violate Section 8(a)(1)?

Section 8 makes it an unfair labor practice and a violation of the Act for an employer to interfere with Section 7 rights.[5] In analyzing whether an employer's workplace policy or rule violates Section 8(a)(1) of the Act, the Board looks to whether the policy "would reasonably tend to chill employees in the exercise of their Section 7 rights."[6] If so, the Board may conclude that the policy is an unfair labor practice on its face, even without evidence of enforcement.

The Board has created a two-step inquiry for determining whether a workplace policy violates the Act.[7]

First, the policy is unlawful if it explicitly restricts Section 7 protected activities. If it does not do so explicitly, the policy will still violate Section 8(a)(1) if: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the policy was promulgated in response to union activity; or (3) the policy has been applied to restrict the exercise of Section 7 rights.

According to the Board, rules are unlawful if they are ambiguous and contain no limiting language or context that would clarify to employees that the rule does not restrict Section 7 rights.[8] In contrast, rules that clarify and restrict their scope by including examples of clearly illegal or unprotected conduct, such that they would not reasonably be construed to cover protected activity, are not unlawful.[9]

New Areas of NLRB Enforcement

The NLRB first began the expansion of its enforcement of Section 7 rights in the area of social media. Those enforcement actions have received much attention, including an article in this publication in March of this year.[10]

Beyond those issues, the NLRB has continued the expansion of its enforcement of Section 7 rights. Two areas that have seen significant enforcement activity by the Board are confidentiality policies and at-will employment disclaimers.

The NLRB has not limited its enforcement activities to unfair labor practice charges filed by employees in these areas, but also has pursued charges against employers for having policies in place that the Board views as violations of the Act—even if the policies have not been enforced.

Many of these policies and practices the NLRB now views as violations of an employee's right to engage in protected concerted activity have long been considered sound and compliant. As a result, all employers must now regularly review their workplace policies and procedures to ensure compliance with the latest NLRB pronouncements and rulings.

Confidentiality Policies and Workplace Investigations

When an employer investigates a workplace issue, such as a claim of sexual harassment, the object of the investigation is to determine the facts so that appropriate corrective actions can be taken. An employer's liability for a claim is often based on how effectively the employer responds, including the nature of the investigation.

Advising Confidentiality

In a trial, the rules provide for the exclusion of witnesses from the courtroom until after they have testified, to ensure their testimony is not tainted by what they may hear from other witnesses who testify before them. Until recently, employers investigating workplace claims have similarly admonished employee witnesses who are interviewed to keep the information confidential, at least for the duration of the investigation. Their goal was to ensure the integrity of the fact-gathering process.

This approach to confidentiality in an investigation may have seemed logical, and it has long been considered a best practice. But in a recent case in Phoenix against Banner Health, the NLRB took the position that requiring employee witnesses to keep such information confidential violated their Section 7 rights, and that policies requiring such confidentiality violated those rights.[11]

In *Banner Health*, the human-resources consultant who conducted witness interviews in workplace investigations regularly asked employees who raised complaints not to discuss the matter with their coworkers during the investigation. The Board ruled that this admonition violated Section 8(a)(1) of the Act because the employer's blanket approach failed to establish a legitimate business justification for confidentiality that outweighed the employees' Section 7 rights in each case.

Establishing Business Justification

To establish such a legitimate business justification, the NLRB held, the employer has the burden "to first determine whether in any give[n] investigation (1) witnesses need[ed] protection, (2) evidence [was] in danger of being destroyed, (3) testimony [was] in danger of being fabricated, or (4) there [was] a need to prevent a cover up."[12] A generalized concern with protecting the integrity of its investigations was ruled insufficient to outweigh employees' Section 7 rights.

The issue arose again in a case involving Verso Paper, in which NLRB Acting General Counsel Lafe Solomon issued an Advice Memorandum instructing the Milwaukee office of the NLRB to pursue a charge against Verso, stating the company's blanket policy violated the Act because it did not provide for a case-by-case analysis of whether an investigation required confidentiality.[13]

Four Factors To Consider

Verso Paper's investigation policy specifically cited the four factors identified by the NLRB in *Banner Health* to justify confidentiality of an investigation. Nonetheless, Solomon stated that Verso's policy violated Section 8(a)(1) because it did not require those four factors for establishing a business justification to be considered in each case.

The Acting General Counsel went so far as to explain what is required for a confidentiality policy to be compliant with Section 7. He stated the policy should require the four factors identified in *Banner Health* to be considered on a case-by-case basis in determining whether

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there is a business justification to restrict employees' Section 7 rights. Furthermore, if confidentiality is determined to be justified, the analysis and decision for that case must be documented.

In light of this direction from the NLRB, employers should ensure that they have a written investigation policy or guideline, which includes a provision requiring the confidentiality and business-justification analysis to be made and documented in each case.

An alternative approach taken by some employers is to encourage employee witnesses to keep the information confidential during the course of the investigation, but to not require confidentiality. Boeing recently tried this and lost, with the Administrative Law Judge ("ALJ") ruling that Boeing's "recommendation" of confidentiality was likely to be viewed by an employee as a requirement.[15]

At-Will Employment Provisions

In the wake of cases finding implied employment contracts based upon employee handbooks, workplace policies and other management representations,[14] companies began using disclaimer provisions stating that the handbooks and policies did not alter the at-will nature of the employment relationship and that no company representative had the authority to do so.

Various forms of these disclaimers have been used by employers now for many years. In *American Red Cross AZ*,[16] the ALJ held that the at-will disclaimer in that case violated Section 8(a)(1) as a matter of law.

The basis for the ruling was that the disclaimer stated the at-will employment could not be amended, modified or altered in any way. The ALJ ruled that there was no doubt that reasonable employees would construe the language to prohibit Section 7 activity, and that the clause in question premised employment on an employee's agreement not to enter into any contract, to make any efforts, or to engage in conduct that could result in union representation and in a collective bargaining agreement, all in violation of Section 8(a)(1).

Employers and At-Will Disclaimers

Does this ruling mean employers must stop using at-will disclaimers? The facts in the *American Red Cross* case provide some guidance. There, a broad statement that the at-will employment relationship could not be altered existed. Period.

If the disclaimer had stated that the at-will relationship could not be altered *except by* an identified officer of the company, such as the president, it might have passed the muster of the NLRB. Because the president is the company representative who would likely sign a collective bargaining agreement, such a clause may not have been interpreted as prohibiting conduct that could result in union representation and a collective bargaining agreement.

Based on the Board's decision in *Banner Health*, the following at-will employment disclaimer, to be signed by employees, may be considered acceptable under the NLRA:

> I acknowledge that my employment with the company is "at will," which means I may terminate my employment at any time, and the company may terminate the employment relationship at any time. I also acknowledge that nothing in the company's policies or procedures is intended to alter the at-will nature of my employment with the company. Finally, I acknowledge and agree that the at-will nature of my employment cannot be altered, either verbally or in writing, other than by written agreement signed by me and the president of the company.

What's Next?

Employers can count on the NLRB to continue to enforce the Section 7 rights of employees in these areas and in new areas not yet contemplated. This includes finding violations of employees' Section 7 rights by workplace policies that have not been enforced. Thus, employers and their counsel must be vigilant about whether their policies and disciplinary actions may affect employees' rights to engage in concerted activity protected by Section 7 of the NLRA. A lack of such vigilance may lead to the employer battling a costly unfair labor practice charge with its employee and the NLRB.

endnotes

1. The decision in *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013), *cert. granted*, 81 USLW 3629 (June 24, 2013, No. 12-1281), may invalidate any NLRB decision since Jan. 4, 2012, to July 30, 2013, the date the U.S. Senate confirmed President Obama's new Board nominees.
2. 29 U.S.C. § 157.
3. *Meyers Indus.*, 281 N.L.R.B. 882, 885 (1986) (*Meyers II*), *aff'd sub nom.*, 835 F.2d 1481 (D.C. Cir. 1987), *cert. denied*, 487 U.S. 125 (1988).
4. *Meyers II*, 281 N.L.R.B. at 887.
5. 29 U.S.C. § 158.
6. *Lafayette Park Hotel*, 326 N.L.R.B. 824, 825 (1998), *enforced* 203 F.3d 52 (D.C. Cir. 1999).
7. *Lutheran Heritage Village–Livonia*, 343 N.L.R.B. 646, 647 (2004).
8. *See Univ. Med. Ctr.*, 335 N.L.R.B. 1318, 1320-1322 (2001), *enforced. Denied in pertinent part*, 335 F.3d 1079 (D.C. Cir. 2003).
9. *See Tradesmen Int'l*, 338 N.L.R.B. 460, 460-462 (2002).
10. Ashley Kasarjian, *The Social Media Checklist for Companies: What Your Clients Should Do, Know and Learn*, Ariz. Att'y, March 2013, at 16.
11. *Banner Health Sys. d/b/a Banner Estrella Med. Ctr.*, 358 N.L.R.B. No. 93 (July 30, 2012).
12. *Citing Hyundai Am. Shipping Agency*, 357 N.L.R.B. No. 80, slip op. at 15 (2011).
13. *Verso Paper*, Case 30-CA-089350, NLRB Office of the General Counsel Advice Memorandum (Jan. 29, 2013)
14. *See Wagenseller v. Scottsdale Mem'l Hosp.*, 710 P.2d 1025 (Ariz. 1985). 15. Case 28-CA-23443 (Feb. 1, 2012).
15. *The Boeing Company*, Case 19-CA-08934 (July 26, 2013).
16. Case 28-CA-23443 (Feb. 1, 2012).