

Non-Unionized Employers: The NLRB Commands Your Attention

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Many non-unionized employers might be surprised to learn that they, too, are governed by the National Labor Relations Board (NLRB). In fact, in 2012, the NLRB launched a website directed at non-union employees, which details the employees' rights and provides instructions on how to access the NLRB to seek redress for employer violations.

Under Section 7 of the National Labor Relations Act (NLRA) (29 U.S.C. § 157), all employees—regardless of whether they are affiliated with a union—enjoy the right to engage in concerted activities “for the purpose of . . . mutual aid or protection.” Based on this protection, the NLRB is actively regulating four important areas of non-unionized employment: social media policies, at-will employment policies, confidentiality of internal investigations and class-action waivers. All employers should understand the NLRB’s recent decisions and their resulting implications.

Social Media Policy: Consider Revising

The NLRB has increasingly treated online interaction by employees as protected concerted activity, frequently finding that employers have chilled their employees’ Section 7 rights by disciplining or terminating them based on their online activity. In December 2012, the NLRB ordered the reinstatement of five employees of *Hispanic United of Buffalo, Inc.* who had been fired after posting comments on Facebook in response to a co-worker’s criticism of their job performance. This decision illustrates the NLRB’s view that concerted activity on non-work-related social media platforms is entitled to the same protection as concerted activity in the workplace and urges employers to craft their policies accordingly.

Additionally, the NLRB has issued advice memoranda providing numerous examples of policy provisions deemed overbroad in violation of the NLRA. For example, a policy that prohibits employees from “releas[ing]



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confidential guest, team member or company information” is unlawful because a reasonable person could interpret the policy as prohibiting activity protected by Section 7, such as the discussion of an employee’s or co-worker’s working conditions and wages. Similarly, an employer’s policy that prohibited “[m]aking disparaging comments about the company through any media, including online blogs, other electronic media or through the media” was determined to be unlawful because it contained no “limiting language that would clarify to employees that the rule does not restrict Section 7 rights.” The NLRB ruled that a policy that directs employees to “[a]dopt a friendly tone when engaging online . . . and [give] proper consideration of privacy and topics that may be considered objectionable or inflammatory” was unlawful because it could be reasonably construed to prohibit protected discussions about working conditions or unionism. Likewise, a policy instructing employees to “[t]hink carefully about ‘friending’ co-workers . . . on external social media sites” was found unlawfully overbroad because the policy discourages communications among fellow employees, and “thus it necessarily interferes with Section 7 activity.”

The memoranda also highlight social media policies that the NLRB deems lawful. In upholding these policies, the NLRB pointed to the fact that the policies provide sufficient examples of prohibited conduct, such that employees would not reasonably conclude that Section 7 activity fell within the policies’ scope. Accordingly,

employers’ social media policies should avoid the use of overbroad and ambiguous language, provide specific examples illustrating prohibited conduct and highlighting particularly egregious behavior, and carefully define what the employer means by confidential and proprietary information with specific examples that would not violate protected Section 7 activity.

At-Will Employment Policy: Proceed With Caution

A recent decision by an Administrative Law Judge (ALJ) serves as a warning to employers to review their at-will employment policies to ensure compliance with the NLRA. In *American Red Cross Arizona Blood Services Region and Lois Hampton*, employees were required to sign an acknowledgement form stating: “I further agree that the at-will employment relationship cannot be amended, modified or altered in any way.” The ALJ concluded that requiring employees to sign this acknowledgement violated Section 8 of NLRA because the form was “essentially a waiver in which an employee agrees that his/her at will employment status cannot change, thereby relinquishing his/her right to advocate concertedly, whether represented by a union or not, to change his/her at-will status.” Practically speaking, the ALJ concluded that the acknowledgement form would discourage employees from exercising their Section 7 rights by engaging in conduct that could result in union



representation and in a collective bargaining agreement, which would alter the at-will employee relationship. The parties settled this matter before the NLRB review of the ALJ's decision.

The NLRB, however, has declined to find at-will employment policies unlawful under the NLRA *per se*. In October 2012, the NLRB issued two advice memoranda finding two different at-will employment policies permissible. The first policy stated that the at-will provision could only be modified in writing by the employer's president. The second policy provided that "[n]o representative of the Company has authority to enter into any agreement contrary to the . . . 'employment at will' relationship." Both policies were not reasonably construed to restrict Section 7 activity. Explicitly distinguishing *American Red Cross*, the NLRB noted that the provisions did not require employees to refrain from seeking to change their at-will status or to agree that their at-will status cannot be changed in any way. Rather, the policies merely prohibited the employers' own representatives from entering into employment agreements that provide for other than at-will employment.

Confidentiality of Internal Investigations: Not a Given

Employers may be accustomed to asking employees to remain quiet during internal investigations, but a recent NLRB decision considers such blanket policies in conflict with the NLRA. In July 2012, in *Banner Health System*, the NLRB found that an employer violated the NLRA by asking an employee who was the subject of an internal investigation to refrain from discussing the matter while the employer conducted the investigation.

The NLRB did not foreclose an employer's ability to instruct an employee not to discuss an investigation, but only permitted such an instruction where the employer can show a legitimate business justification for doing so that outweighs the employee's Section 7 rights. Factors that would weigh in favor of confidentiality include a witness in need of protection, the danger of destruction of

evidence, the danger of fabricated testimony, or the need to prevent a cover-up.

Cases should therefore be reviewed on an individualized basis to determine if circumstances warrant confidentiality. Where the employer can articulate a legitimate business reason for confidentiality, the employer should provide its employees with a written explanation of why confidentiality is necessary. The NLRB will likely condemn broad policies requiring confidentiality in all internal investigations, so employers should fashion any confidentiality requirement to the facts at issue. And given that the NLRB's concerns are to avoid any "chilling effect" on employees' rights to discuss workplace conditions, the more specific the instructions are about what not to discuss, the more likely the instructions will withstand scrutiny.

Class-Action Waiver: Unlawful In Some Cases

Following the January 2012 ruling in *D.R. Horton, Inc.*, employers are on notice for the first time that requiring employees to waive their rights to participate in class or collective actions to address wage, hour or working condition concerns is unlawful under the NLRA. The employer at issue required all new and current employees to execute a Mutual Arbitration Agreement (MAA) as a condition of employment. The MAA provided that all disputes and claims relating to an employee's employment would be determined exclusively by binding arbitration and that the arbitrator could hear only individual employee claims, lacking authority to consider a class or collective action or to award collective relief.

In 2012, the NLRB launched the Protected Concerted Activity (<http://www.nlr.gov/concerted-activity>) website, which details non-union employees' rights under the NLRA.



When an attorney notified the employer that it was pursuing arbitration of certain Fair Labor Standards Act (FLSA) claims on behalf a former employee, and a nationwide class of similarly situated employees, the employer objected, pointing to the MAA's prohibition on arbitration of class actions. The employee then filed an unfair labor practice charge with the NLRB, claiming that the MAA prohibition unlawfully interfered with an employee's rights under the NLRA to access the NLRB and prohibited employees from engaging in protected concerted activity.

The NLRB agreed. First, the NLRB determined that the MAA's mandatory arbitration provision violated the NLRA because it caused employees to reasonably believe that they could not seek redress from the NLRB for unfair labor practices. Second, the NLRB decided that the MAA's class action waiver was unlawful because Section 7 protects employees' rights to improve their working conditions through proceedings in court and administrative forums, including a collective workplace grievance in arbitration. While employers remain free to

insist that arbitrations be conducted on an individual basis, employers must leave available a judicial forum for class and collective claims.

Even though numerous federal courts have declined to follow the NLRB's decision in *D.R. Horton, Inc.*, indicating the strong federal preference for arbitration, *D.R. Horton, Inc.* provides a warning to employers as to how the NLRB is likely to view class action waivers in the context of the NLRA.

Conclusion

These examples illustrate what is likely only the beginning of an increased level of involvement by the NLRB in non-unionized employment. All employers are advised to timely review their policies to minimize exposure to an NLRB lawsuit. **LS**