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Virginia Workplace Law

Are Your Employment Policies Too "Chilling?"

By: Mike DeCamps. ***Friday, October 19th, 2012***

An increasingly proactive National Labor Relations Board ("**NLRB**") has struck down several common workplace employment policies followed by many private employers. Primarily, this is due to the Board's expansive interpretation of **Section 7** of the National Labor Relations Act ("NLRA"). Section 7 of the NLRA gives employees the right to engage in protected concerted activities regarding the terms and conditions of their employment. These rights apply to both unionized and non-unionized private employers with certain limited exceptions. The NLRB has been aggressive in striking down seemingly neutral policies that have been in place for years because it deems that they would tend to chill employees in the exercise of their **Section 7** rights.

The NLRB decisions sparking the most recent discussions are those decisions deeming as unlawful, social media policies containing general provisions prohibiting employees from using online media to either disparage the employer, disclose confidential information, or refrain from posting photos of the workplace without company permission. The NLRB's general counsel has even issued three reports outlining and addressing alleged abuses relating to social media policies. In its last **report**, the NLRB distinguished general statements in policies prohibiting posting defamatory material, from policies that include "examples of clearly illegal or unprotected conduct." If the policy is too general, the NLRB rules them "ambiguous" and thus "chilling" of employee's Section 7 rights. Policies that provide "**sufficient** examples of prohibited conduct, so that in context, employees would not reasonably read the rules to prohibit Section 7 activity" are deemed lawful.

In early September, the Board issued yet another **opinion** illustrating how difficult it is to apply the above rationales. In reviewing the legality of certain workplace rules and policies by the retailer Costco, the Board found the following handbook provision to violate employees' Section 7 rights:

Employees should be aware that statements posted electronically (such as [to] online message boards or discussion groups) that damage the Company, defame any individual or damage any person's reputation, or violate the policies outlined in the Costco Employee Agreement, may be subject to discipline, up to and including termination of employment.

The Board found this to be in violation of Section 7 rights because the above statement "clearly encompasses concerted communications protesting [Costco's] treatment of its employees." The Board held that the above policy language would cause employees to reasonably conclude that the rule requires them to refrain from engaging in certain protected communications. The Board ordered Costco to rescind or modify the language in the policy.

Perhaps even more troubling than its pronouncements regarding written policies, is the NLRB's foray into the human resources investigation process of employee misconduct. By way of example, in its recent opinion in ***Banner Health System***, a divided Board ordered a Phoenix, Arizona hospital to cease and desist from maintaining or enforcing a rule that employees may not discuss with each other ongoing investigations of employee misconduct.

In the Banner Health System case, a human resources officer had instructed a hospital technician under investigation not to discuss a matter with coworkers in order to protect the integrity of the ongoing investigation. Nonetheless, the Board majority found that it was the hospital's burden to "first determine whether in any given investigation witnesses needed protection, evidence was in danger of being destroyed, testimony was in danger of being fabricated or there was a need to prevent a cover up" before delivering such an instruction. Significantly, the Board provided no direction as to what information would need to be gathered to meet the threshold necessary to justify such a directive from the HR Department.

The effect of such opinions by the NLRB leaves employers in a quandary. While many times a request for confidentiality or a direction not to defame other individuals is issued by an employer for the benefit of employees and seems fully justified, nonetheless ordering, or even suggesting, such confidentiality, or directing employees not to make harassing or defamatory comments, may find an employer on the wrong side of the NLRB. Clearly, such decisions have a chilling effect on employers and put employers in a position of uncertainty when handling workplace investigations or writing anti- defamation policies.

If you need further legal guidance concerning confidentiality restrictions or workplace policies and investigations, the **Sands Anderson Employment attorneys** will be happy to assist you.