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# NLRB Law Update – Recent NLRB Decisions That Affect The Non-Union Workplace

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Within the past year, the National Labor Relations Board ("NLRB" or the "Board") has taken action restricting normative and commonly found personnel policies of non-union employers finding them restrictive of Section 7 of the National Labor Relations Act ("NLRA") and thus unlawful pursuant to Section 8(a)(1). Most recently, the Board has targeted the confidentiality of an employer's internal investigation, at-will employment language in an employee handbook, and social media policies. The Board is also expected to issue a decision within the next month concerning email policies.

### Confidentiality Directives During Internal Investigations

In *Banner Health Systems d/b/a Banner Estrella Medical Center and James Navarro*, 358 NLRB 93 (2012), the NLRB declared that a blanket statement to employees that the contents of a complaint and/or investigation should not be discussed with co-workers was in violation of Section 8(a)(1) of the NLRA. In *Banner Health Systems*, after an employee had made a complaint concerning a supervisor, he was told by the human resources consultant not to discuss the matter with his coworkers while the employer was investigating the complaint.

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While it is generally a standard investigative protocol to advise an interviewee to keep the subject matter of the interview confidential during the investigative process, the NLRB found that the employer had failed to show that the desire for confidentiality outweighed the employee's Section 7 rights. Rather, the NLRB held that in order to minimize the restrictive nature of the prohibition on communication, the employer must first determine whether in any given investigation: (i) witnesses needed protection; (ii) evidence was in danger of being destroyed; (iii) testimony was in danger of being fabricated; or (iv) there was a need to prevent a cover-up.

In light of this decision, employers should be aware that mere protection of the investigation may no longer be sufficient to justify a blanket prohibition. Instead, an employer must make a case-by-case, witness-by-witness determination of the above four factors before prohibiting an employee from discussing the investigation and/or complaint with his/her coworkers. Individually analyzing these four factors should ensure that the prohibition on discussion will be justified.

### Employment At-Will Statement In Employee Handbook Acknowledgement

In *American Red Cross Arizona Blood Services Region and Lois Hampton*, Case 28-CA-23443, (2012), an NLRB Administrative Law Judge ("ALJ") held that a statement in an employee handbook acknowledgment form concerning the permanence of the employee's at-will employment status was in violation of Section 8(a)(1) of the NLRA. In *American Red Cross*, the employer's Agreement and Acknowledgment of Receipt of Employee Handbook form contained the following language: "I further agree that the at-will employment relationship cannot be amended, modified or altered in any way." The ALJ found that the acknowledgment form was essentially a waiver in which an employee agrees that his/her at-will employment can never change, thereby relinquishing any rights to advocate concertedly, whether represented by a union or not.

While it remains to be seen whether this case will be reviewed by the NLRB, employers should be mindful of and review the employment at-will language contained in their employee handbooks and acknowledgment forms. One fix for employers is to ensure that your standard "at-will" statements do not include a permanent ban on future amendments – something akin to the language reflecting that the at-will employment status can be changed only with the approval of an officer of the employer should suffice and/or simply omitting any reference regarding the permanence of the at-will status.

### Social Media Policies

Proving the NLRB's concern for this

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issue and its dedication to ensuring that social media be a logical outlet for workplace grievances, the Acting General Counsel for the NLRB issued three separate reports – from August 2011 through May 2012 – on employer social media policies. According to the reports, rules that are ambiguous concerning their application to Section 7 activity and containing no limiting language or context that would clarify to employees that their Section 7 rights are not restricted would be found unlawful. Despite the employer's intention behind the restrictive social media policy, if the policy does not explicitly contain language limiting its application or examples and term definitions, it will likely be found unlawful by the Board. Moreover, the reports explicitly note that an employer's "savings clause" in a handbook will likely not cure an overbroad and thus unlawful restriction on electronic communication because, according to the NLRB, employees may not understand that protected activities are permitted. While these reports were instructive to employers, the Acting General Counsel does not have the authority to issue NLRB binding policy, and thus many employers disregarded the pronouncements.

However, in line with the three previously released reports, on September 7, 2012, the NLRB issued its first decision on an employer's social media policy in *Costco Wholesale Corp. and United Food and Commercial Workers Union, Local 371*, Case 34—CA—012421. In *Costco*, the Union issued a complaint alleging, among other things, that Costco's policy on electronic posting violated Section 8(a)(1) of the NLRA.

The NLRB held, among other things, that Costco violated Section 8(a)(1) by maintaining a rule prohibiting employees from electronically posting statements that damage the company or damage any person's reputation. The NLRB found that, by its terms, Costco's broad prohibition against making statements damaging the company, defaming any individual or damaging a person's reputation, clearly encompassed concerted communications protesting Costco's treatment of its employees, and that there was nothing in the rule to suggest the broad prohibition excluded protected activities. Accordingly, the NLRB held that "in these circumstances" employees would reasonably conclude that the rule requires them to refrain from engaging in certain protected communications and, thus Costco's policy concerning electronic posting was unlawful.

Following quickly on the heels of *Costco*, in *EchoStar Technologies, L.L.C. and Gina M. Leigh*, Case 27—CA—066726, an NLRB ALJ struck down EchoStar's social media policy, finding that it chills employee's Section 7 rights. Of particular note is that EchoStar's social media policy was found in its employee handbook, and on page two of that handbook was a "savings clause" stating that "[o]ne or more of the policies set forth in this Handbook may be affected by the application of law. Should a conflict arise between a EchoStar policy and the law, the appropriate law shall be applied and interpreted so as to make the policy lawful in that particular jurisdiction." Eleven pages later appeared the social media policy which specifically prohibited employees from making "disparaging or defamatory comments about EchoStar, its employees, officers, directors, vendors, customers, partners, affiliates, or our or their, products/services." In line with the Acting General Counsel's social media reports, the ALJ found that the "savings clause" did not save the policy because a reasonable employee would not react to the savings clause.

In light of this first NLRB decision on an employer's social media policies, and the subsequent ALJ decision, employers should ensure that their electronic communication policy is in line with the social media guidelines as espoused in the Acting General Counsel's reports, as it is now clear that the Board will be closely following them. More specifically, while employers are able to define a policy that restricts electronic postings and communications, employers must make clear, within the policy itself, that the policy is not intended to restrict Section 7 activities through either explicit language, examples of activities that violate the policy, or definitions of the terms in the policy.

### Employer Email Systems As Private Property

It is expected that the NLRB will shortly be issuing a ruling in a closely watched case concerning a grocery company's ban on handbill distribution by union agents, which many experts have predicted may be used by the NLRB to give a green light for union organizers to use employer email systems for union solicitation activities.

In *Roundy's, Inc. and Milwaukee Building and Construction Trades Council, AFL-CIO*, Case 30—CA—17185, the General Counsel for the NLRB issued a complaint alleging that Roundy's violated Section 8(a)(1) of the NLRA for its discriminatory practice of prohibiting the union from handbilling while permitted nonunion solicitations and distributions on the property. The General Counsel's complaint covered all of Roundy's Wisconsin locations. The ALJ found that because Roundy's had a non-exclusive easement at 23 of its locations, it did not have a sufficient state property right to exclude the handbillers, and Roundy's thus violated the NLRA by preventing the union from engaging in protected Section 7 activities. The NLRB affirmed the ALJ's determination, and the Seventh Circuit upheld the NLRB's determination.

What remains before the NLRB is the issue of whether Roundy's violated the NLRA in excluding the union from the two properties over which Roundy's may have sufficient state property rights. On this issue, in November 2010, the NLRB called upon interested groups to file briefs concerning, among other issues, what bearing, if any, *Register Guard and Eugene Newspaper Guild, CWA Local 37194*, 351 NLRB 1110, has on the Board's standard for finding unlawful discrimination in non-employee access cases. In *Register Guard*, the Board found that an employer may restrict the use of its computer systems for union solicitation purposes, even though it allowed other employees to use it for other personal, non-business purposes.

Based upon this briefing request, it is expected that the Board is considering whether to expand the scope of "property" from the physical to the virtual, thereby extending Roundy's exclusion of handbillers to an employer's restriction of its email systems in order to overturn *Register Guard*.

In anticipation of this decision, employers should be mindful of and review the language of their email policies, as the overturning of *Register Guard* would require a revision of existing internet policies which currently link nonsolicitation and email policies which generally restrict the use of email concerning union related purposes. Depending on how the NLRB decides *Roundy's,* restrictions on the use of email or the internet for union activities may be revisited.