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Legal Update

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MORE CONTROVERSIAL RUMBLINGS FROM THE NLRB

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Last month's Legal Update reported on a controversial report and a disturbing ruling of the National Labor Relations Board (NLRB) that are critical of common employer social media policies. This month we cover some important additional pronouncements from the NLRB placing limitations on employment-at-will acknowledgments, confidential employer investigations, and even office courtesy policies and practices.

At-Will Acknowledgments

Under the employment-at-will doctrine, absent a statute or a court-created exception to the contrary, private sector employers and employees may terminate the employment relationship at any time without cause or notice. (We wrote about some exceptions to this doctrine in our March 2012 Legal Update). Frequently, employers seek to confirm these at-will relationships by having employees sign acknowledgments contained in their employee handbooks. The acknowledgements make clear that the handbooks do not create a contract promising continued employment. Employers often find these acknowledgments useful in heading off and defending against claims for wrongful discharge.

Recently, however, such acknowledgments have come under fire from the NLRB for allegedly interfering with employees' right to engage in "protected concerted activity" – including discussions aimed at changing working conditions. Such discussions are safeguarded under Section 7 of the National Labor Relations Act. The NLRB's theory is that, by requiring employees to acknowledge their at-will employment, employers may discourage employees from bargaining for a guaranteed employment term, through a union or otherwise. Therefore, employment-at-will acknowledgements that can be construed as prohibiting Section 7 activities are regarded as unlawful.

In one case, *American Red Cross Arizona, Blood Services Region and Lois Hampton*, an Administrative Law Judge ("ALJ") in Arizona reviewed an at-will acknowledgement requiring the employee to "agree that the at-will employment relationship cannot be amended, modified or altered in any way." The ALJ found that this language is

> essentially a waiver in which an employee . . . relinquish[es] his/her right to advocate concertedly, whether represented by a union or not, to change his/her at-will status. For all practical purposes, the clause in question premises 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, which would amend, modify, or alter the at-will relationship.

It is possible that the NLRB would have upheld the policy if it only acknowledged the then-existing at-will relationship and did not address future modifications of the relationship. Employers should take this

into account in drafting or revising their policies. The NLRB has indicated, however, that simply including broad language stating that a particular provision is not intended to restrict Section 7 rights will not suffice if the language of the provision can be construed as restricting Section 7 rights.

Confidential Investigations

Employers often require confidentiality during internal investigations. One reason is to maintain the integrity of the investigation itself. Another reason is to ensure that allegations that may be untrue do not become public, which could subject an employer to potential liability and cause unnecessary embarrassment.

In *Banner Health System d/b/a Banner Estella Medical Center and James A. Navarro,* however, the NLRB found unlawful an instruction requiring employees making internal complaints or participating in internal investigations to maintain the confidentiality of the investigation. The NLRB opined that, in order to require such confidentiality, the employer must have a "legitimate business justification that outweighs employees' Section 7 rights." (Note that this would not apply to managerial employees who are not protected by Section 7). The NLRB determined that the employer's stated concern with protecting the integrity of its investigations was insufficient. The NLRB stated that, prior to requiring confidentiality, it was the employer'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." Absent such findings, a blanket confidentiality requirement is unjustified, according to the NLRB.

Employers might well question how they can determine whether specific witnesses or evidence need protection before they have gathered facts in furtherance of an investigation. As a best practice, employers should, to the extent possible, document specific reasons why confidentiality is necessary prior to initiating an investigation in which employees will be asked to keep information confidential. Documentation tailored to a specific investigation (and, if possible, each specific witness or participant requested to maintain confidentiality) is more likely to appease the NLRB than general policies requiring confidentiality in all investigations.

Courtesy Policies

Another recent decision from the NLRB finds unlawful an Illinois BMW dealership's policy requiring employees to be courteous. The policy provided that "[c]ourtesy is the responsibility of every employee. Everyone is expected to be courteous, polite, and friendly to our customers, vendors and suppliers, as well as to their fellow employees. No one should be disrespectful or use profanity or any other language which injures the image or reputation of the dealership."

The NLRB indicated that the last sentence of that policy crossed the line by prohibiting "language which injures the image or reputation of the dealership." The opinion in *Karl Knauz Motors, Inc. d/b/a Knauz BMW and Robert Becker* states that a "reasonable employee who wishes to avoid discipline or discharge will surely pay careful attention and exercise caution when he is told what lines he may not safely cross at work."

A dissenting opinion argued that the provision could not be reasonably construed as doing anything but encouraging civility and that employees can complain about working conditions without using profane or disrespectful language that would violate the policy: "Reasonable employees know that a work setting differs from a barroom, and they recognize that employers have a genuine and legitimate interest in

encouraging civil discourse and non-injurious and respectful speech." The majority, however, opined that "[r]easonable employees would believe that even "courteous, polite, and friendly" expressions of disagreement with the Respondent's employment practices or terms and conditions of employment risk being deemed 'disrespectful' or damaging to the Respondent's image or reputation." Employers should follow the NLRB's guidance and ensure that courtesy policies do not include broad restrictions on language that may injure the employer's reputation, which may be construed as restricting Section 7 rights. If employers are not comfortable omitting such language entirely, they can attempt to limit the restrictions to language that injures their reputation with regard to their products or services as opposed to their employees' working conditions.

In *Fresenius USA Manufacturing*, another recent case dealing with related issues, a pro-union employee left written statements in an employee break-room that, in addition to advocating for the union, included profanity and, arguably, threats and sexually harassive language. Several female employees complained, and the company terminated the employment of the author of the statements. The NLRB found that discharging the employee violated the NLRA because it discouraged employees from engaging in protected activities. The comments at issue, the NLRB determined, were not "so egregious as to cause [the employee] to lose the protection of the Act" where their purpose was to "convey to the warehouse employees his concern over their faltering support for the Union." The NLRB's decision did note that the company had allegedly tolerated similar profanity in other contexts and that, considering the "totality of the circumstances," the comments were likely not intended to harass or threaten. One lesson employers can take from the case is to enforce policies consistently regardless of whether offensive conduct arises during a discussion of working conditions.

Conclusion

It is becoming clear that the NLRB is intent on limiting employers' ability to adopt common policies that may seem innocuous to many employers. Traditionally, the NLRB has struck down policies that could be "reasonably construed" to prohibit protected activity. The NLRB's current standard, however, seems to effectively change "reasonably" to "conceivably." Still, carefully-worded policies can accomplish employers' legitimate objectives while minimizing the chances of raising the NLRB's ire. Employers would be wise to consult with counsel regarding policies that may need to be reviewed and revised in light of the NLRB's recent pronouncements.
