Employers Beware! NLRB Activism Impacts Both Non-Unionized and Unionized Employers

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NLRB Promotes Webinar

Recent NLRB Initiatives Affecting Non-Union Employers

- Protected Concerted Activity
- Confidentiality in Internal Investigations
- Social Media (Facebook, Twitter, etc.)
- Access to Employer E-Mail for Organizing Activity
- Basic Handbook Policies Now in Question
- Class Action Waivers
- Quickie Elections
Protected Concerted Activity
NLRA Section 7

• “[Sec. 7] Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. . .”

Keep This Confidential – Not so fast!

Banner Health System, 358 NLRB No. 93 (2012)

• Employer violated the NLRA by asking an employee who was the subject of an internal investigation to refrain from discussing it while the investigation was pending

• The Board held: “[T]o justify a prohibition on employee discussion of ongoing investigations, an employer must show that it has a legitimate business justification that outweighs employees’ Section 7 rights”

Confidential Investigations

Banner Health System (cont’d)

• In any given investigation, employer must first determine if:
  • (1) witnesses needed 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

• The Board found that the general assertion of protecting the integrity of an investigation “clearly failed to meet” that burden
Confidential Investigations (cont’d)

Banner Health System (cont’d)

- Decision applies equally to unionized and non-union settings
- The decision does **not** totally prohibit asking employees for confidentiality during an internal investigation
  - Requiring confidentiality is permitted if employer establishes that it’s necessary to protect a witness, prevent the destruction of evidence, preserve testimony, prevent a cover up, or further another legitimate business interest

  *Compare – EEOC’s position to keep harassment investigations as confidential as possible*

Concerted Activity On-Line

- “Water cooler” discussions now occur via social media
- Many companies use social media to promote their business and allow employee access during work
- Employees have access anyway during the day even if you do not allow via work computers

The NLRB and Social Media

- **Two Issues:**
  1. Whether individual cases of employee discipline for their conduct on social media involve protected activity?
  2. Whether an employer’s policies unlawfully restrict what employees can say on social media?
- **Tension:**
  1. The NLRB views employees as having an expansive ability to question terms and conditions in the workplace, even if the communication is disrespectful and occurs in a public forum.
  2. Employers are concerned with the reputation of the organization and its products and services. Employers expect employees to voice concerns professionally and confidentially to management.
Social Media

• **Triple Play Sports Bar & Grille (361 NLRB No. 31, 2014)** – Employees engaged in protected concerted activity using Facebook to complain about employer’s treatment of state income tax withholding, among other things.

• **Laurus Technical Institute (360 NLRB No. 133, 2014)** – Employee sent coworker protected text messages regarding employer favoritism in assigning leads.

• **Salon/Spa at Boro, Inc. (356 NLRB No. 69, 2010)** – Employees exchanged protected text messages concerning plan to complain to management about conduct of supervisors.

• **Hispanics United of Buffalo, Inc. (2011 WL 3894520, ALJ)** – Employees exchanged protected messages on Facebook responding to criticism of their job performance.

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**Social Media - Discipline Analysis**

**Issues to Consider re: Social Media Postings**

1. Protected “concerted activity” or individual gripe? Attempt to solicit group action? Egregious content?

2. When was the post submitted? On whose equipment?

3. Context: Does the post concern compensation, working conditions, performance, discipline, staffing, scheduling?

4. Intended audience and response: Dialog with co-workers?

5. Does the post trigger an obligation to act? (discrimination/harassment)

6. How is the conduct impacting the workplace?

7. What is the employee’s position (management vs. hourly)?

8. Caution: Profanity and abusive language
Practical Tips – Employee Discipline

• Carefully examine any disciplinary action due to employee’s communication via Social Media

• Prior to issuing disciplinary action, determine if the employee’s posting was contrary to any other applicable policies (e.g., anti-harassment policy), and if discipline could be issued for those reasons

• Develop thicker skin. Consider the context of an employee's negative post among the billions of words posted on-line each day

New Rule Regarding E-Mail Use

Purple Communications (December 2014)

• In most settings, employees can use employer’s email system to organize

• Some facts
  • Purple Communications operates 16 call centers 24/7
  • Policy prohibited employees from using its email system except for “business purposes”
  • During a union organizing campaign, CWA filed an unfair labor practice challenging the policy

The NLRB and Employee Handbook Policies

NLRB’s Recent Decisions Calling Into Question Standard Handbook Policies
Employee Handbook Policies (cont'd)

Hills and Dales General Hospital (April 1, 2014)

• At issue in this case were three paragraphs in the employer’s Values and Standards of Behavior Policy which:
  1. Prohibited employees from making “negative comments about our fellow team members,” including coworkers and managers;
  2. Required employees to represent the employer “in the community in a positive and professional manner in every opportunity;” and
  3. Prohibited employees from engaging or listening to “negativity or gossip.”

Employee Handbook Policies (cont'd)

Hills and Dales General Hospital (cont'd)

• What did the NLRB have to say about these policies?
  • ALL OF THEM ARE UNLAWFUL!!

• Why?
  • The language in the policies could be viewed as “chilling” the employees’ Section 7 Rights.

Employee Handbook Policies (cont’d)

First Transit, Inc. (April 2, 2014)

• At issue in this case were provisions prohibiting the disclosure of the following:
  • “any company information,” including wage and benefit information;
  • statements about work-related accidents to anyone but the police or company management; and
  • “false statements” about the company.

• Another policy barred participation in outside activities that would be “detrimental” to the company’s image.
Employee Handbook Policies (cont’d)

First Transit, Inc. (cont’d)
• What did the NLRB have to say about these policies?
  • ALL OF THEM ARE UNLAWFUL!!!(°)
• Why?
  • Same as with Hills and Dales
    • The policies could be viewed as “chilling” employees’ rights.

Employee Handbook Policies (cont’d)
Laurus Technical Institute and Joslyn Henderson (June 13, 2014)
• The provision at issue:
  • A “no gossip” policy which prohibited employees from “participating in or instigating gossip about the company, fellow employees or customers.”

• Holdings:
  • “[T]he policy was overly broad, ambiguous and severely restricted employees from discussing or complaining about any terms and conditions of employment.”
  • The policy improperly restricted the employees’ ability to engage in protected concerted activity

Employee Handbook Policies (cont’d)
The Kroger Co. (April 22, 2014)
• Policy required employees to include a disclaimer whenever they published “work-related information” online and identified themselves as Kroger employees.
  • The disclaimer had to read: “The postings on this site are my own and do not necessarily represent the postings, strategies, or opinion of the Kroger Co. family of stores.”
• Holding: The policy was too broad and lacked significant justification, and therefore violated the NLRA.
Class Action Waivers

- **D.R. Horton, Inc. v. NLRB,** 737 F.3d 344 (5th Cir. 2013) – Court reversed the Board and found employer did not violate NLRA by requiring employees to sign an arbitration agreement preventing them from “filing joint, class, or collective claims addressing their wages, hours, or other working conditions…in any forum, arbitral or judicial.”
  - As of year-end 2014, reviewing courts have uniformly rejected the Board’s position.
- **Murphy Oil USA, Inc. (361 NLRB No. 72, 2014)** – Reaffirmed D.R. Horton, Board found employer arbitration agreements that preclude or prevent filing joint, class or collective claims addressing protected topics, were unlawful.
  - Current NLRB and non-acquiescence.
- **Memorandum GC 14-01** (Feb. 25, 2014) – D.R. Horton cases submitted for advice as cases that involve difficult legal issues or the absence of clear precedent.

“Quickie Elections”

- In December 2014, the NLRB published new rules to further help unions organize employees (effective April 14, 2015).
  - Significant changes include:
    - Parties may file petitions electronically;
    - Employers must provide eligible voters list within two work days after the direction of election, including addresses, phone numbers and email addresses;
    - Employer must submit pre-hearing position statement; and
    - Regional Director will set a pre-election hearing to begin 8 days after a hearing notice is served, and a post-election hearing 21 days after the tally of ballots (or as soon thereafter as practicable).
  - Elections may occur in as little as 10 days after petitions are filed!

Questions?
Thank you.