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NLRB Strikes Again: Two Long-Standing Employment Policies Attacked

Over the past year, the National Labor Relations Board ("NLRB") has unsettled many employers through its far-reaching efforts to purportedly protect employees against violations of their rights in the realm of social media. The NLRB has now continued to extend its reach into the private workplace by taking controversial stances in connection with two provisions that are the standard in most companies' employee handbooks. The first such provision concerns the confidentiality of an employer's investigation of employee misconduct, and the second is in connection with the memorialization of employees' "at will" status.

Era of Confidentiality Gone?

In a highly controversial move, the NLRB determined in two separate cases that despite well-settled precedent to the contrary, routine confidentiality instructions in connection with investigations into alleged employee misconduct may violate the National Labor Relations Act ("NLRA" or the "Act"). Section 7 of the NLRA governs employees' rights in connection with collective bargaining and union representation in the private workplace. [1] Section 7 provides employees with 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…." [2] Section 8 of the Act provides that "it shall be an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 157 of this title." [3] Notably, many private employers have an unfounded sense of security because they mistakenly believe that without unions in the workplace they are immune from NLRA liability. Unfortunately, such beliefs are misplaced because the liabilities associated with such violations of the NLRA apply to most private employers, even those with no union presence. [4] Indeed, Section 7 protects concerted activity concerning terms and conditions of employment irrespective of whether employees are members of a unionized workforce. [5]

Most companies routinely provide employees with confidentiality instructions in connection with their investigation of employee misconduct, including complaints of workplace harassment and discrimination. Such instructions are often provided for various reasons, including encouraging cooperation and honesty from witnesses, and to protect such witnesses from retaliation. In fact, absent the capability of protecting the integrity of such investigations, an employer is distinctly handicapped in its ability to effectively conduct workplace investigations and remediate any workplace misconduct. Nevertheless, despite these and other well-grounded bases for seeking to maintain confidentiality, the NLRB found in two separate cases that generalized confidentiality policies violated employees' rights under the NLRA.

In Hyundai America Shipping Agency [6] and Banner Health Systems [7] the NLRB continued its recent trend of upsetting well-settled employer policies by finding that an employer's "generalized concern" with protecting the integrity of investigations does not outweigh employees' Section 7 rights to discuss such investigations. In Hyundai America Shipping Agency , the NLRB found that the employer's routine oral instruction to maintain confidentiality was enough to create a violation of Section 8 of the Act. The Administrative Law Judge determined that it was the employer's responsibility in the first instance to assess whether in any specific situation the subject witnesses needed protection, evidence was in danger of being tampered with, testimony was likely to be fabricated, or whether such instructions would be necessary to prevent a cover up. [8] The NLRB affirmed the Administrative Law Judge's finding, but stopped short of requiring employers to engage in this analysis in connection with each investigation.

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In Banner Health Systems , however, the NLRB went one step further. In Banner Health Systems , a hospital employee responsible for the proper sterilization of hospital equipment was provided with an instruction by his supervisor that he believed was improper. As a result, he refused to comply with the directive and was reprimanded for his insubordination. The company investigated the propriety of his refusal to follow his supervisor's instruction and the employee was directed not to discuss the ongoing investigation with his coworkers. Despite that instruction, the employee did discuss the investigation

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with coworkers. Following the investigation, the employee was given "coaching" concerning his refusal to sterilize equipment as directed. The employee filed a charge with the NLRB alleging that the company's "coaching" was punishment for discussing the investigation with coworkers.

The NLRB's Office of General Counsel issued a complaint against the employer alleging a violation of Section 8(a)(1) of the NLRA. An Administrative Law Judge determined that the coaching was a result of the employee's insubordination and not his discussion of the investigation. The Judge also determined that the confidentiality instructions did not violate the employee's Section 7 rights. However, while the NLRB ultimately affirmed the Administrative Law Judge's finding concerning the coaching of the employee, it also found that the confidentiality instructions did constitute a violation of Section 7. In fact, in finding that a blanket approach to confidentiality violated Section 8(a)(1), the Board went a step further than in Hyundai America Shipping Agency by holding that in each case it is 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." [9]

These recent determinations by the NLRB are reflective of the current trend of the NLRB in stretching the prior limits of its reach into private workplaces. They also send a clear message that companies must take a proactive approach and immediately review their policies to assess whether they contain broad confidentiality provisions which, while standard for many years, must now be modified.

The End of At-Will Provisions?

In another striking move by the NLRB, in two recent cases brought by Region 28 of the Board, located in Phoenix, Arizona, the NLRB has sought to make unlawful the common practice of memorializing employees' at-will status in employee handbooks.

The majority of employers that maintain employee handbooks include at-will language. Most companies feel compelled to include such language out of the concern, among others, that if an off-hand comment is made by someone in management to an employee, such comment may later be construed by a court as an oral contract or obligation of the employer. In addition to protecting employers, the inclusion of these provisions also gives clarity to employees, who might otherwise be mistakenly led to believe the veracity of such an off-hand comment. Despite many well-reasoned bases for the inclusion of such protective language, in cases brought separately against Hyatt Hotels Corporation and American Red Cross Arizona and Lois Hampton ,[10] the NLRB took the position that certain "at-will" language in employee handbooks – language routinely used by most employers for years – was overly broad and thus violated Section 8(a)(1) of the NLRA.

In the case against Hyatt Hotels, the NLRB challenged the following statements set forth in the Acknowledgment of Employee Handbook: "I understand my employment is 'at will'" and "I acknowledge that no oral or written statements or representations regarding my employment can alter my at-will employment status, except for a written statement signed by me and either Hyatt's executive vice-president/chief operating officer or Hyatt's president." Prior to a hearing on this matter, Hyatt agreed to alter its policy language.

The NLRB's argument was based upon its position that if employees were to exercise their rights to unionize, then such exercise might in fact alter the terms and conditions of their employment, contrary to the policy language. Thus, such provisions may interfere with employees' efforts to unionize and engage in concerted activity if employees mistakenly believed that they were unable to alter the terms and conditions of their employment. Similar language was used in the employee handbook at issue in the case against the American Red Cross. In American Red Cross , an Administrative Law Judge for the NLRB in Phoenix held that such provisions violated the NLRA. Again, in the case against the American Red Cross, the parties settled. Thus, the provisions at issue have yet to be analyzed by the courts.

While most employers maintain at-will language similar to those at issue in these cases, it is not yet clear whether these two geographically-isolated cases will become the trend or whether they will remain the exception to the well-established rule. Accordingly, while it may not be necessary to make wholesale revisions to companies' at-will policies at this time, companies should carefully examine their at-will policies to ascertain the potential risk. In certain circumstances, the risks of not having such at-will language could outweigh the likelihood of trouble from the NLRB, particularly in light of the limited geographic scope of the complaints to date. In addition, to further safeguard employers and to clarify employees' rights, companies may consider including limiting language to confirm employees' rights to engage in concerted activities. Finally, at the very least, companies must stay informed of NLRB's actions in this area to minimize the risk of liability.

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1. See 29 U.S.C. § 151 et seq.
2. See 29 U.S.C. § 157.
3. See 29 U.S.C. § 158(a)(1).
4. The NLRA applies to private employees except for "any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act [45 U.S.C. § 151 et seq.]." 29 U.S.C. § 152(3).
5. See 29 U.S.C. § 157.
6. See 357 N.L.R.B. No. 80 (2011).
7. See 358 N.L.R.B. No. 93 (2012).
8. See 357 N.L.R.B. No. 80 (2011).
9. See Banner , 358 N.L.R.B. at 93.
10. See 28-CA-23443 (Feb. 1, 2012).