Addressing Vulnerabilities in Workplace Policies

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In addition to ensuring workplace policies are easily understood and reflect actual practice, company handbooks require review in the constantly changing climate of labor law. With each new year comes an opportunity to update handbooks and recommit management to policy compliance with the latest sets of rules and interpretations.

Recent legal decisions provide new guidance on confidentiality, investigation and social media policies.

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Confidentiality Policies

In 2013, the National Labor Relations Board (NLRB) held that an employer information security policy prohibiting employees from disclosing confidential information violated Section 7 of the National Labor Relations Act (NLRA). In the NLRB's view, the definition of "confidential information," which included "non-public company information" and "team member personnel records," was too broadly defined. (*Target,* 359 NLRB No. 103). According to the NLRB, such a policy prevented employees from sharing information on wages and working conditions, which is protected under federal labor law.

Any employer maintaining a confidentiality policy must draft it in a way that clearly does not restrict disclosure of employees' wages, hours or working conditions.

Investigation Policies

The *Target* ruling follows similar 2011 and 2012 rulings from the NLRB, including *Banner Estrela Medical Center* (358 NLRB No. 93) and *Hyundai* (357 NLRB No. 80), both of which invalidated blanket prohibitions on employees discussing ongoing investigations. The *Banner* and *Hyundai* rulings are on appeal in federal court. Notably, each came from NLRB panels with recess appointees, whose validity is now in question in the *Noel Canning* case pending before the U.S. Supreme Court.

The Equal Employment Opportunity Commission (EEOC) also weighed in on investigation policies via a field office pre-determination letter. According to the letter, an employer policy that threatened termination for employees who discussed an ongoing investigation with "anyone" violated EEOC guidance. Similarly, the NLRB weighed in on a communication policy in *DirecTV* (359 NLRB No. 54) that prevented employees from disclosing company information "not already disclosed as a public record." As in *Target,* the board found this prohibition to be overbroad and in violation of the NLRA. The continuing trend is for the NLRB to invalidate any broad or blanket prohibition on speech.

The investigation-related cases show that employers should tailor and enforce their policies to require investigation if certain criteria are met. The *Banner* ruling provided an analysis that allows an employer to require confidentiality for reasons specific to each case requiring investigation, such as a threat of destruction or spoliation of evidence.

Social Media Policies

As social media continues to expand into the workforce, employers must protect themselves from the risks and liabilities associated with employees who engage much of their time in a previously unregulated area of technology. Employers and employees now use social media as a business tool for marketing, research, client development and information-sharing, as well as to personalize the company and stay in touch with increasingly digitalized consumers.

The primary guidance on social media policies comes from the NLRB, which aims to protect private sector employees' rights to engage in concerted activities involving wages, hours and working conditions, as well as to form and organize unions. These rights under federal labor law often involve communication among employees. In the social media realm, that may involve a variety of communication formats, such as Facebook "likes," "tweets," or posts and comments on LinkedIn, YouTube, Yelp, Instagram and other platforms.

In September 2013, the 4th Circuit Court of Appeals reviewed a case in which a public sector employer refused to reappoint two employees to a position after they "liked" the Facebook page of a political rival (*Bland v. Roberts,* 730 F.3d 368). The 4th Circuit held that "liking" a Facebook page was protected speech under the First Amendment, and thus the adverse employment action against the employees was unconstitutional.

Likewise, the NLRB takes the view that employee speech and expressive activity on social media deserves the same treatment as regular speech. For example, employees who faced retaliation and discharge because of Facebook posts about their workplace were entitled to reinstatement and back-pay in *Hispanics United of Buffalo,* 359 NLRB No. 37 (2012).

The analysis can be very detail oriented, as when the NLRB reviewed the social media activity of a terminated employee in *Knauz BMW,* 358 NLRB No. 164 (2012). In summary, a car salesman's Facebook posting about his dealership's marketing efforts were protected, but posting about a test drive car crash at a neighboring dealership was unprotected—making his termination about the car crash post lawful.

In this light, social media policies should be mindful of federal labor law protections. Note: Such protections remain in place even if the employee is using company equipment (computers, tablets, cell phones, etc.).

Though the NLRB is aggressive in protecting concerted activity, the scope of protected activity has

limits. The board has recognized that unprotected activity may include personal attacks on other individuals, unprovoked "opprobrious" comments and comments that are designed to publicly harm the employer in a manner that does not further the employees' position in a labor dispute, as well as those that are maliciously false (*Fresenius USA Manufacturing Inc.,* 2012 WL 4165822, citing *Atlantic Steel,* 245 NLRB 814, 1979).

The NLRB issued several memoranda to provide guidance on social media issues, but it was not always clear or consistent. Perhaps the most useful social media policy guidance the NLRB provided came from a May 30, 2012, Operations-Management Memorandum that referenced—and blessed in its entirety—the social media policy used by Walmart. The Walmart policy language is especially interesting because of its length and efforts to provide clear examples of allowable and prohibited social media conduct.

The need to regulate the workplace is clear. The tough part is creating workable rules that maintain management's control while respecting employees' rights under applicable law. The landscape is constantly changing as new laws and interpretation of existing legal rules come into play. When questions arise, it's best to contact the firm's labor or employment counsel.

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