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The NLRB Strikes Again: Protected Concerted Activity in Workplace Investigations and Employment-at-Will

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In recent years, the National Labor Relations Board (NLRB) made headlines with its application of "protected concerted activity" under the National Labor Relations Act (NLRA) to social media in the workplace. Since then, union and union-free employers repeatedly have been warned that disciplining an employee engaged in protected concerted activity (which has been defined broadly by the NLRB) even if that activity takes place on social media, violates the NLRA. Recently, the NLRB again has signaled its intention to continue expansively interpreting and aggressively enforcing the provisions of the NLRA, particularly against non-union employers, by targeting common employment-at-will and workplace investigation policies. In two recent decisions, an administrative law judge (ALJ) and the NLRB held these standard policies infringe upon protected concerted activity and are unlawful.

In *American Red Cross Arizona Blood Services Region v. Hampton,* an ALJ was presented with a typical employment-at-will disclaimer which stated the employees' employment-at-will relationship with the employer could not be changed. The ALJ held that, "for all practical purposes" the clause had the effect of chilling employee rights under the NLRA by prohibiting any

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conduct that could alter the employment-at-will relationship, including engaging in union organizing. In comments made following this decision, NLRB Acting General Counsel Lafe Solomon indicated the NLRB might begin turning its attention to the lawfulness of employment-at-will statements. While the ALJ decision is not binding precedent, employers at least should be aware that certain at-will statements could be construed as overly broad and infringing upon employees' right to organize under the NLRA.

Another seemingly non-controversial employment policy came under attack in *Banner Health System*, a July 30, 2012, NLRB decision. In *Banner*, the NLRB was faced with a workplace investigation where a human resource department employee, as a standard practice, asked investigation participants not to discuss the matter with co-workers during the investigation. The ALJ had held the employer's practice was "justified by its concern with protecting the integrity of investigations" but the NLRB reversed, finding the employer's "generalized concern" did not "outweigh employees' Section 7 rights." Instead, the NLRB found the employer's policy requiring confidentiality during workplace investigations was "overly broad" and did not take into account whether there was an actual need to maintain confidentiality because of a concern that evidence would be destroyed or stories would be changed. Therefore, because the request to maintain confidentiality would coerce employees not to engage in protected, concerted activity (here, discussing terms or conditions of employment) the policy was unlawful.

As private sector union membership continues to decline, the activism of the NLRB continues to be directed at non-union employers. Employers should be aware that any new policies or policy revisions will be scrutinized by a NLRB intent on aggressive enforcement of the NLRA against all employers. Labor and employment counsel should be consulted to determine if these policies violate the NLRA or other state and federal laws.

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