COLLAZO FLORENTINO & KEIL LLP Client Advisory

For Clients And Friends Of The Firm

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NLRB Scrutinizes At-Will Disclaimers and Confidentiality Protocols

It is well known that Section 7 of the National Labor Relations Act ("NLRA") gives employees the right to communicate with one another about their wages, hours and working conditions or, stated otherwise, to engage in protected concerted activity ("Section 7 rights") in both unionized and non-unionized contexts. In several recent proceedings, the National Labor Relations Board (the "Board") has taken the position that two common employment policies or practices, at-will employment disclaimers and confidentiality protocols, may in certain contexts improperly chill employees' exercise of Section 7 rights.

At-Will Employment Disclaimers

Employee handbooks commonly contain provisions reminding employees of their at-will employment status and advising them that their status may not be modified absent a writing by a company executive (or, indeed, at all). Under the at-will employment doctrine, an employment relationship may end at any time for any reason at the initiation of either party. Employers typically use at-will disclaimers to insulate themselves from claims of an implied employment contract for an indefinite duration.

The Board has recently taken the position that exceedingly broad at-will disclaimers may deter employees from engaging in protected concerted activity by implying that departure from the principle of at-will employment is impossible and that any effort at self-organization by employees (purportedly to seek a greater measure of job security) would be futile. On February 1, 2012, for example, an administrative law judge ("ALJ") determined that a regional division of the American Red Cross ("Red Cross") violated section 8(a)(1) of the NLRA by maintaining an "agreement and acknowledgement of employee handbook" form which read, in relevant part: "I further agree that the at-will employment relationship cannot be amended, modified or altered in any way." *NLRB v. American Red Cross*, Case 28-CA-23443.

Although the quoted language makes no explicit reference to Section 7 rights, the ALJ nonetheless concluded that "there is no doubt that employees would reasonably construe the language to prohibit Section 7 activity." By

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signing this acknowledgement form, according to the ALJ, employees agreed that their at-will status could not change, and they thereby "relinquish[ed] [their] right to advocate concertedly, whether represented by a union or not, to change [their] at-will status." The ALJ further contended that, for all practical purposes, the provision discouraged employee efforts to unionize or collectively bargain.

Nor was this *Red Cross* decision completely isolated as an expression of an emerging Board policy. Just weeks after the *Red Cross* decision issued, the Board's Acting General Counsel issued a complaint against Hyatt Hotels Corporation ("Hyatt") alleging similar improprieties in connection with the following handbook language:

> "I understand my employment is 'at will' … 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 … The sole exception to [Hyatt's ability to modify or delete policies] is the at-will status of my employment, which can only be changed in a writing signed by me and either Hyatt's Executive Vice President/Chief Operating Officer or Hyatt's President."

This matter settled before hearing. In light of the recent challenge to at-will employment disclaimers, we recommend that our clients review their policies and employee handbooks (as well as offer letters and other at will employment agreements) to assess whether any changes are warranted.

Confidentiality Protocols

On July 30, 2012, the Board determined that a hospital violated employees' Section 7 rights through its practice of requesting (not mandating) that employees not discuss complaints they had voiced to management with their coworkers during the pendency of the investigation. *Banner Health System*, 358 NLRB No. 92 (2012). The clear implication of the Board's decision is that an employer may not require (or request) confidentiality of its employees indiscriminately in all investigations it may choose to undertake; instead, an employer needs to be prepared to cite specific legitimate and substantial business justifications for a request of confidentiality and be prepared to show that those business needs outweigh the employees' Section 7 rights in the particular matter under consideration.

Banner involved an employee who approached the hospital's department of human resources to discuss concerns over a supervisor's directive that appeared to depart from approved infection control procedures. The employee was asked by management not to discuss the matter with coworkers while the investigation was ongoing, as was the standard protocol during interviews with employees submitting complaints. The employee ultimately received a non-disciplinary "coaching" for insubordinate behavior when he disregarded the supervisor's directive, and he subsequently filed an unfair labor practice charge.

In finding a violation, the Board stated that a "generalized concern with protecting the integrity of its investigations is insufficient to outweigh employees' Section 7 rights." It is not enough, in other words, for employers to rely on "standard protocol" as a basis to forbid discussion of an investigation among coworkers. Instead, before imposing such a confidentiality requirement, the employer has the burden to assess the particularized need for confidentiality in the context of a specific investigation. Non-exhaustive examples of particularized need that the Board has mentioned in its own decisions include whether witnesses need protection, evidence is in danger of being destroyed, testimony is in danger of being fabricated, or specific concerns about an impending cover up. In *Banner*, the employer made no such assessment and, according to the Board, its automatic request for confidentiality in a context that did not seem to require it had a reasonable tendency to unnecessarily restrain employees' exercise of Section 7 rights.

As with the prior discussion of at-will employment language, the Board's ruling in *Banner* is not an isolated decision, but rather appears to reflect a broader development of Board policy. Other decisions, for example, have found employers to have violated Section 7 rights by disciplining employees for spreading news of their own or others' sexual harassment complaints in alleged violation of similar confidentiality requirements. Likewise, *Banner*, in addition to the foregoing discussion, found an independent violation of the NLRA where employees were required to sign an agreement not to discuss private employee information such as salaries and disciplinary action, which are commonly recognized subjects that employees are allowed to discuss among themselves under Section 7. As a result, and in recognition that this is an evolving area of law, we recommend that employers take this opportunity to develop a more nuanced approach to the issue of requests for confidentiality during internal investigations, as well as to reexamine their business justifications for requests for confidentiality in the workplace more generally, in order to ensure compliance with Board law.

Conclusion

The Board has long recognized that an employer may not restrict employees' right to organize or engage in Section 7 protected activity without a clear need to maintain production or discipline. In addition to the subject of the current advisory, the Board has examined the implications of employers' social media policies on Section 7 rights in a similar manner. Given the Board's recent decisions, we strongly urge employers (both unionized and non-unionized) to review company handbooks, offer letters, employment agreements, policies, and practices to reduce the risk that these materials would be construed by the Board to improperly interfere with employees' exercise of Section 7 rights.

If you have any questions or need assistance reviewing or revising your company's policies, please contact John Keil at (212) 758-7862, Farah Mollo at (212) 758-1078, or Rebecca Fischer at (212) 758-7793.