Say What? Employees' Right to Communicate under the National Labor Relations Act

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The National Labor Relations Act (Act) is one of a number of federal statutes that governs the relationship between private-sector employers and employees. Even though the Act applies to all employees, union and non-union, many employers have never heard of it, and those that have often presume, erroneously, that the Act applies only to unionized work forces. Over the years, the National Labor Relations Board (NLRB)—the federal administrative agency that enforces the Act—has done little to interject itself into the non-union workforce, largely confining its activities to matters involving labor unions.

Unions, however, now represent only approximately 7% of the private sector workforce, down from a peak of approximately 35% in the 1940s and 1950s. In 2008, legislation was introduced in Congress that would have radically changed the rules for how unions gain the right to represent employees by requiring that employers accept union authorization cards as proof of majority desire, instead of the NLRB-supervised secret ballot election process. This controversial proposed legislation, called the Employee Free Choice Act, was backed by President Barack Obama, but failed to gain the necessary support in the Senate.

After the legislation failed to move forward, the Obama Administration in 2012 made several recess appointments to the NLRB.[1] Those appointees, along with the NLRB's acting general counsel (the agency's chief prosecutor), issued a series of controversial administrative decisions and policy memoranda. The focus of many of these recent rulings has been the protection of the right of employees to communicate with their coworkers about their terms and conditions of employment. Indeed, the NLRB has increasingly defined the contours of this right expansively. This article discusses the relevant statutory provisions, examines two examples of the NLRB's recent rulings involving employees' right to communicate, and provides some practical guidance to help healthcare employers address these important issues.

The National Labor Relations Act

The core rights provided to employees under the Act are set out in Section 7, which states that employees have the right to organize, join unions, bargain collectively, as well as "to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."[2] Importantly, employees possess these rights regardless of whether they are represented by a union.

The NLRB and Social Media

Perhaps no area has garnered as much recent attention for the NLRB as its decisions and policy memoranda involving non-union employees' use of social media to discuss workplace issues. For example, in *Hispanics United of Buffalo*,[3] the NLRB scrutinized an employer's response to its employees' airing of workplace issues through social media, finding that the non-union, nonprofit agency employer in that case violated the law by discharging five employees for comments they made on Facebook in response to a coworker's criticisms of their job performance.

In that case, after one employee, Lydia Cruz-Moore, threatened to report her concerns about her coworkers' allegedly lackadaisical performance to their supervisor, a coworker, Marianna Cole-Rivera, took to her Facebook page to ask how her fellow employees felt about Cruz-Moore's threat. Four coworkers who had access to Cole-Rivera's Facebook page (her "friends," in Facebook parlance) commented on the post, objecting to the assertion that their performance was substandard. Cruz-Moore printed the Facebook comments, brought them to her supervisor and, as a result, Cole-Rivera and her four colleagues were terminated for engaging in "bullying and harassment" of a coworker. The employees filed an unfair labor practice charge, contending that they had been fired for engaging in protected concerted activity in violation of the Act.

The matter went to trial before an administrative law judge (ALJ), who ruled that the employer violated the Act by firing the employees for their Facebook comments. The employer appealed to the NLRB, which affirmed the ALJ's decision. The NLRB concluded that the online comments constituted concerted activity for the purpose of mutual aid or protection—specifi-

cally, protesting Cruz-Moore's threat to report their alleged poor performance to their supervisor. Although the NLRB recognized that the employees' "mode of communicating their workplace concerns might be novel," it nonetheless concluded that their actions fell within the scope of activity protected by the Act, and therefore the employer's termination of the employees was illegal.

Although in *Hispanics United* and other cases and policy memoranda the NLRB has interpreted the Act broadly to protect employees' right to use social media as a vehicle to communicate and discuss workplace issues, it also has noted that this right is not without limit. In May 2012, the NLRB's general counsel (GC) issued a memorandum explaining his decision not to issue a complaint against a non-union dermatology practice (*Tasker Healthcare Group*) that terminated an employee based on comments she posted on her personal Facebook page.[4]

In that case, the employee and 10 other individuals, seven of whom were her current coworkers and three others who were former coworkers, participated in a "group message" exchange on Facebook. Some of that exchange concerned organizing a social event, but at one point, the conversation drifted into a discussion about a current supervisor at the practice. This discussion included the employee at issue making several disparaging comments about the employer, using profanity, and culminating in the employee stating "FIRE ME . . . make my day." The conversation then moved on to other topics. The employer found out about the employee's comments from another employee who was invited into, but did not comment during, the exchange. The employer terminated the employee, stating that it was "obvious" she no longer wished to work for the practice. The employee then filed an unfair labor practice charge, alleging that her employer fired her for engaging in protected concerted activity with other employees on Facebook.

In declining to issue a complaint based on the employee's charge, the NLRB's GC determined that, although the terminated employee did discuss some workplace issues generally in the Facebook message exchange, her comments were not shared concerns about working conditions, but instead were her own "individual gripes." Because she expressed only her own dissatisfaction with the employer, and did not suggest any group activity or elicit any direct response from the other employees in the Facebook exchange, her comments did not constitute concerted activity that is protected by the Act.

Although the GC's memorandum is not binding precedent from the NLRB, it is useful guidance to employers who may be confronted with a similar scenario involving an employee who complains about his or her job on social media. The memorandum's conclusion that the employee's comments were individual gripes and not concerted activity largely rested on the fact that no other current or former employee joined in her criticism of the supervisor or the employer in general. If this had been the case, the GC's determination may have been different.

The NLRB Weighs in on Confidentiality in Internal Investigations

On July 30, 2012, the NLRB issued another ruling that was at odds with another common and seemingly well-settled employer practice of asking employees to refrain from discussing ongoing internal investigations with coworkers. A divided NLRB issued a two-to-one opinion holding that "maintaining or enforcing a rule that employees may not discuss with each other ongoing investigations of employee misconduct" constitutes an unreasonable restraint on employee rights under Section 7 of the Act.[5] In *Banner Health System d/b/a Banner Estrella Medical Center*, the NLRB's GC challenged a non-union hospital's practice of asking employees who make complaints about misconduct to refrain from discussing the matter with their coworkers while the employer's investigation of the allegations is ongoing. After a hearing, an ALJ ruled that the hospital's request for confidentiality was permissible and therefore lawful, both because it was simply a "suggestion" and because it was necessary to "preserve the integrity of the investigation." Drawing an analogy to a "sequestration rule," where employees are separated in order to ensure that they give their own version of the facts and not what they heard someone else say, the ALJ concluded that the employer had a legitimate business reason for suggesting confidentiality.

The NLRB sharply disagreed, rejecting the ALJ's finding that the employer merely "suggested," but did not require, confidentiality, as unsupported by the record. Moreover, the NLRB held that irrespective of whether the request for confidentiality was construed as a suggestion or a demand, the request "had a reasonable tendency to coerce employees, and so constituted an unlawful restraint on Section 7 rights." The NLRB concluded that the hospital's "blanket approach" of demanding confidentiality failed to establish a "legitimate business justification" that would justify a prohibition on employees' Section 7 rights, noting that the hospital's "generalized concern with protecting the integrity of its investigation is insufficient to outweigh employees' Section 7 rights." In support of its decision, the NLRB cited its earlier ruling in *Hyundai America Shipping Agency*,[6] for the proposition that, in order to minimize the impact on employees' Section 7 rights in requiring confidentiality, an employer must determine, on a case-by-case basis, whether: (1) witnesses need protection; (2) evidence is in danger of being destroyed; (3) testimony is in danger of being fabricated; or (4) there is a need to prevent a cover up. Only when one or more of these factors is satisfied, the NLRB said, could an employer legitimately instruct employees not to discuss ongoing investigations.

On April 16, 2013, the NLRB's Associate GC made public an Advice Memorandum reiterating the concerns about confidentiality rules outlined in the *Banner Health* decision.[7] At issue in the Advice Memorandum was a provision in a non-union employer's code of conduct policy that prohibited employees from discussing ongoing investigations. The policy at issue stated:

> [The employer] has a compelling interest in protecting the integrity of its investigations. In every investigation [the employer] has a strong desire to protect witnesses from harassment, intimidation and retaliation, to keep evidence from being destroyed, to ensure that testimony is not fabricated, and to prevent a cover-up. To assist [the employer] in achieving these objectives, we must maintain the investigation and our role in it in strict confidence. If we do not maintain such confidentiality, we may be subject to disciplinary action up to and including immediate termination.

Although noting that the first two sentences of the policy "lawfully" set forth the employer's interest in protecting the integrity of its investigation, the Advice Memorandum concluded that the policy as a whole violates employees' rights because it impermissibly imposes "a blanket rule regarding confidentiality of employee investigations" and failed to "demonstrate its need for confidentiality on a case-by-case basis." The Advice Memorandum suggested a proposed modification to the last two sentences of the confidentiality provision that would lawfully advise employees of the employer's need for confidentiality:

> [The employer] may decide in some circumstances that in order to achieve these objectives, we must maintain the investigation and our role in it in strict confidence. If [the employer] reasonably imposes such a requirement and we do not maintain such confidentiality, we may be subject to disciplinary action up to and including immediate termination.

Practice Tips for Employers

The NLRB will likely continue to scrutinize employers' discipline of employees for the use of social media to discuss workplace issues and focus on employers' control over internal investigations, placing the burden on employers to demonstrate the need for confidentiality in order to justify instructing employees not to discuss matters being actively investigated.[8] This being the case, what can or should a non-union employer do? Fortunately, there are some clear takeaways in the NLRB's rulings and guidance.

First, employers must be aware that comments made by employees on social media websites, even when off-duty and outside the workplace, may be protected. More specifically, comments on Facebook or other social media websites that discuss or raise workplace-related issues among, between, or on behalf of a group of employees, as opposed to an individual employee's gripe, will generally be deemed protected, and thus taking adverse action against an employee (e.g., termination) for posting those comments could trigger liability under the Act. To avoid violating the Act, employers must proceed with caution in responding to even sometimes seemingly outrageous online criticism. Employers also should be aware that some states are enacting legislation addressing employer conduct vis-à-vis social media. Twelve states have passed laws prohibiting employers from asking employees and applicants to provide login credentials to access private social media accounts.[9] Similar bills are pending in almost every other state, as well as in Congress.

Second, investigation policies and codes of conduct that implicate confidentiality should be reviewed to determine whether they impose an impermissible non-discretionary, blanket confidentiality rule. If so, those policies and documents should be revised to permit (not require) confidentiality consistent with the guidance set forth in *Banner Health* and in the Advice Memorandum discussed herein. Moreover, internal investigation policies should be revised to spell out the business justifications that underscore the need for confidentiality in such investigations. In carrying out such policies, employers would be wise to carefully document in the investigative file the reasons supporting the decision to impose a confidentiality requirement, together with an articulation of the scope of the instruction necessary to satisfy the legitimate business reason(s) for its imposition in the event the decision to impose confidentiality is later questioned. In addition, employers should explain to employees both the specific objectives the confidentiality directive is designed to achieve (e.g., preventing a cover up, protecting employees from retaliation) and the limits on the instruction (e.g., what the employees should not discuss, with whom, and for how long).

Last, employers must remain vigilant, as the NLRB appears determined to reemerge as a significant player in the day-to-day activities of non-union employers, and because this area of the law is continually evolving.

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1 In January 2013, the D.C. Circuit ruled in *Noel Canning, Inc. v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013), that President Barack Obama made these appointments in violation of the Constitution. (The Third Circuit reached a similar conclusion in May 2013 in *NLRB. v. New Vista Nursing and Rehab.*, No. 11-3440, 2013 WL 2099742 (3d Cir. May 16, 2013), and in July 2013, the Fourth Circuit also held the 2012 appointments unconstitutional in *NLRB v. Enterprise Leasing Company Southeast, LLC*, No. 12-15140, 2013 WL 37322388 (4th Cir. July 17, 2013).) The issue of whether those NLRB decisions issued by the recess-appointed NLRB members are valid currently is pending before the U.S. Supreme Court. If *Noel Canning* is upheld, many of the NLRB's controversial recent decisions will be invalidated. The discussion herein assumes, however, that for the time being these decisions will survive, or that they will be upheld on remand by a subsequent NLRB panel comprised of properly appointed or confirmed Members.

2 29 U.S.C. § 157.

3 359 NLRB No. 37 (2012).

4 *Report of the Acting General Counsel Concerning Social Media Cases*, NLRB General Counsel Memorandum Opinion 12-59 (May 30, 2012).

5 358 NLRB No. 93 (2012).

6 357 NLRB No. 80 (2011).

7 *Verso Paper*, NLRB Div. of Advice, No. 30-CA-089350 (Jan. 29, 2013).

8 Indeed, as recently as July 26, 2013, an NLRB administrative law judge held that The Boeing Company's confidentiality policy violated the Act because it "recommended" that employees refrain from discussing matters under internal investigation with other employees. *The Boeing Company*, Case No. 19-CA-089374, JD (SF-34-13) (July 26, 2013), *available at* http://mynlrb.nlrb.gov/link/document.aspx/09031d458136686e.

9 The 12 states that currently have such laws are Arkansas, California, Colorado, Illinois, Maryland, Michigan, Nevada, New Mexico, Oregon, Utah, Vermont, and Washington.