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ADVISORY | Employment and Privacy

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THE NLRB STRIKES DOWN EMPLOYER POLICIES ON SOCIAL MEDIA AND THE CONFIDENTIALITY OF COMPLAINT INVESTIGATIONS

Many employers have been surprised by recent rulings that two common employment policies run afoul of the National Labor Relations Act ("NLRA") even if their employees are not union members. Based on a legitimate interest in preserving confidentiality and privacy, many employers have adopted social media policies limiting what employees may post on Facebook or Twitter about their employer or co-workers. Based on similar privacy considerations, employer procedures for investigating sexual harassment and other complaints often place restrictions on what employees may reveal to their co-workers or others about the allegations. According to recent decisions, however, both policies may violate Section 7 of the NLRA, which permits employees to engage in "concerted activity" for "mutual aid and protection."

Section 7. It is well established under the NLRA that employees may confer with one another about their wages and other terms of employment and may take "concerted" action in an effort to improve their working conditions. Employees (but not managers) are protected by Section 7 of the NLRA, whether or not they are members of a union. But employers rarely face Section 7 issues since claims under Section 7 must be asserted in charges filed with the National Labor Relations Board ("NLRB"), and few employees do so.

Confidentiality of Complaint Investigations. Enforcement Guidance issued by the EEOC directs employers conducting investigations of workplace harassment to assure complainants that they "will protect the confidentiality of harassment complaints to the extent possible." Employers routinely adopt policies asking employees who are part of workplace investigations, either as complainant or witness, to keep such investigations confidential. Such policies help ensure the integrity of investigations, prevent workplace retaliation for participation in investigations, protect the privacy of complainants, and foster an environment where employees will readily report harassment concerns.

Despite the EEOC Guidance, an NLRB judge in *The Boeing Co.*, case no. 19-CA-089374 (July 26, 2013), held that two notices issued by Boeing violated Section 7 of the NLRA: one "directing" employees not to discuss workplace investigations with each other and a subsequent notice "recommending" that employees not discuss such investigations with other employees.

The Boeing decision relies upon last year's NLRB ruling in *Banner Health System, d/b/a Banner Estrella Medical Center*, case no. 28–CA–023438 (July 30, 2012), which prohibits blanket confidentiality rules whose potential (if unintended) effect may be to chill or prohibit the exercise of protected Section 7 rights. While acknowledging that blanket confidentiality rules serve some useful purposes, the Boeing judge concluded that he was bound to follow Board precedent. Although the Board indicated in Banner Health that confidentiality may be requested in specific situations, involving a case-by-case inquiry, such individualized determinations can be unworkable for a large employer that frequently and routinely conducts workplace investigations.

Overbroad Social Media Policies. In an effort to protect their image, reputation, and proprietary information, as well as the morale of their employees, many employers have issued comprehensive social media policies governing what employees can and cannot post on social media websites or

blogs. These policies have come before the NLRB in a number of cases involving employees disciplined or terminated for posting comments on Facebook or Twitter about their employer or co-workers in violation of the employer's social media policy.

The NLRB has struck down a number of these social media policies. At issue is whether employer policies are so sweeping in their prohibitions that they bar the kinds of activity protected by Section 7, such as the discussion of wages or working conditions among employees, or could be reasonably construed by employees to do so. The Board has distinguished between comments that amount to "protected concerted activity" and mere gripes not made in relation to group activity among employees, although the line is hardly a bright one. Thus, it was an unlawful employment practice to terminate three employees who posted messages on Facebook criticizing a manager for not being responsive to safety concerns expressed by the employees, and the employer was ordered to rescind portions of policy on which the discipline was based. *Design Technology Group, LLC* (April 19, 2013). And in *Karl Knauz Motors, Inc.* (September 28, 2012), the Board ordered an employer to rescind its social media policy, which, among other problems, contained a provision requiring employees to be "courteous, polite, and friendly" to customers and employees and not to use "language which injures the image or reputation" of the employer. The NLRB held that the "courtesy" rule violated the NLRA because employees could "reasonably construe its broad prohibition against 'disrespectful' conduct and 'language' which injures the image or reputation of the Dealership as encompassing Section 7 activity."

There are limits to Section 7 rights, however. A recent advice memorandum from the General Counsel concluded that an employee's profanity-laced comments about the company and her supervisor in a private group message on Facebook in which she allegedly told her supervisor to "back the freak off" and suggested that the employer could "FIRE ME…Make my day" constituted unprotected "boasting and griping." Advice Memorandum in *Tasker Healthcare Group, d/b/a Skinsmart Dermatology*, May 8, 2013.

Next Steps. Confronted with repeated Supreme Court decisions encouraging appropriate investigation of harassment complaints, and by the digital-age risk that employee gripes and criticisms can be quickly disseminated world-wide, sophisticated employers have adopted policies designed to preserve some measure of confidentiality and privacy. The NLRB's enforcement of Section 7 rights threatens these policies, and it is not clear that the NLRB gave sufficient consideration to the countervailing employer concerns that justify these policies. Employers now need to review and rethink existing policies and prohibitions to ensure that they properly take account of Section 7 concerns.

Leveraging its cross-disciplinary expertise in both employment and privacy law, Covington has extensive experience advising companies on these issues.

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