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# Labor board continues its foray into nonunion workplaces

By Eli Kantor

Many employers and their attorneys do not realize that the National Labor Relations Act applies to *nonunion* workplaces as well as to union workplaces. In this regard the National Labor Relations Board has recently been aggressively intruding into nonunion workplaces, striking down overly broad social media policies, at-will employment policies, mandatory arbitration policies, as well as confidentiality policies, as violating employee's Section 7 rights.

Up until last year it was standard practice for employers to require employees to maintain confidentiality during internal investigations of misconduct and sexual harassment. All of this changed dramatically with the NLRB's decision in *Banner Health Systems*, 358 NLRB No. 93 (2012), where the board held that in order for an employer to justify a prohibition on employee discussion of ongoing investigations, it must demonstrate that it has a legitimate business justification that outweighs employee's Section 7 rights.

The NLRB found that a policy requiring employee-witnesses to maintain confidentiality of workplace investigations interfered with the employee's Section 7 rights to engage in protected concerted activity and thus violated Section 8 (a)(1) of the NLRA, because the policy interfered with the right of employees to communicate with one another about workplace issues. *Banner Health* required employers to demonstrate a case-by-case confidentiality need as to whether: employee-witnesses need protection, evidence is in danger of being destroyed, testimony is in danger of being fabricated, or there is a need to prevent a cover-up. It held that the employer's "blanket" approach of prohibiting employees from discussing an ongoing investigation violated the act.

More recently, in April of this year the NLRB's Division of Advice issued an advice memorandum in *Verso Paper* further clarifying its decision in *Banner Health* and offering employers guidance on how to properly draft a confidentiality policy.

According to Verso Paper's employee code of conduct:

"Verso has a compelling interest in protecting the integrity of its investigations. In every investigation, Verso 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 Verso 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."

The NLRB found that policy to be overbroad and in violation of employee's Section 7 rights, holding, "Employees have a Section 7 right to discuss discipline or disciplinary investigations involving their fellow employees." The memo further noted that, "An employer may prohibit employee's discussions during an investigation only if it demonstrates that it has a legitimate and substantial business justification that outweighs the Section 7 right."

The NLRB determined that a blanket policy prohibiting employees from discussing investigations in all cases was therefore invalid. Instead, employers must demonstrate, "a particularized need for confidentiality in any given situation." Such a need may arise where there are concerns regarding whether witnesses need special protection, evidence is in danger of being destroyed, or testimony is in danger of being fabricated.

Significantly, in a footnote, the advice memo provided employer's guidance in drafting a legally sufficient policy. It suggested changing the last two sentences of its policy as follows: "Verso 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 Verso 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."

The suggested language does not relieve an employer from its obligation to make a case-by-case determination that *Banner Health* requires, but it permits an employer to tell its employees in advance that if a determination of a *need of confidentiality* is made based upon the *Banner Health* factors, the employee must follow the confidentiality rule.

In a further erosion of employer's rights to maintain confidentiality policies, in June an NLRB administrative law judge struck down an employer's confidentiality policy in *American Red Cross Blood Services*, No. 08-CA-090132 (2013), holding that the confidentiality related policies of the American Red Cross regarding confidential, proprietary and intellectual property were overbroad and could be read to chill the exercise of employee rights under the NLRA.

Significantly, the ALJ rejected the employer's argument that a *savings clause* in its handbook stating, "This agreement does not deny any rights provided under the National Labor Relations Act to engage in concerted activity, including but not limited to collective bargaining" could not render an otherwise unlawful policy lawful.

Further, the ALJ noted, "under Board law, such a disclaimer does not make lawful the content of a provision that unlawfully prohibits Section 7 activity ... The 'savings clause' noted above arguably would cancel the unlawfully broad language, but only if employees are knowledgeable enough to know that the Act permits employees to discuss terms and conditions of employment with each other and individuals outside of their employer."

*Banner Health*, the *Verso Paper Advice Memo* and *American Red Cross* read together illustrate the NLRB's continued limitations of an employer's ability to maintain a confidentiality policy during internal investigations and in their employee handbooks. Significantly, these limitations apply to both union and *nonunion* workplaces. Moreover, while it is highly recommended that employer's have a *savings clause* in their policies, that alone will not always be sufficient. Thus, the take away is that the NLRB will continue to scrutinize facially neutral employment policies for violations of employee's Section 7 rights to engage in protected concerted activity. Therefore, employers and their counsel must review their policies and take steps to ensure that their confidentiality policies are narrowly tailored to avoid infringing on employee's Section 7 rights.

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