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Quarterly Bio New Jersey HR Forum: Employment Law Updates

Article By:

Lynne Anne Anderson

NLRB Rulings Challenge Non-Union Employers

a. Broad social media policies found unlawful.

In 2012, the NLRB and its Acting General Counsel expanded the Board's focus from traditional areas of labor-management relations to the relationship between non-union employers and their employees.[1] Much of that focus has been centered on the highly publicized determination that handbook policies which restrict the right of employees to post comments on social media sites on the Internet are unlawful if the restriction could be construed as interfering with the Section 7 right to engage in protected concerted activity: to communicate with co-workers about wages, hours or terms and conditions of employment.

The Board first addressed social media last Fall when it decided in *Costco Wholesale Corp.*[2] that the company's social media policy, which broadly prohibits online comments "that damage the Company, defame any individual or damage any person's reputation," was overbroad and unlawful because it could be read by employees to interfere with their Section 7 rights.

The Board observed in *Costco* that in the absence of a disclaimer notifying employees that the rule is not intended to restrict the right to engage in protected concerted activity, the prohibition on comments that might "damage the Company" was unlawful because employees could "reasonably assume" that the rule requires them to refrain from engaging in communications that are "critical" of the company or its supervisors. The Board reached that conclusion without any evidence that the employer had disciplined anyone for criticizing the company, or any evidence that the policy prohibits critical comments about the company. In this respect, the opinion reflects the Board's intention to broadly evaluate policy statements not by what they purport to prohibit – in this case, comments that "damage" the company or an individual's reputation – but instead by whether the prohibitions could be read as restricting the right of employees to communicate about their terms and conditions of employment. The Board did observe, however, that context matters, suggesting that employers may avoid liability by strategically placing disclaimers in their social media policies to the effect that the stated restriction is not intended to prohibit or interfere with protected concerted activities, and/or by making clear with specific examples that the policy is intended to apply only to prohibit improper or unlawful conduct such as the use of profane or threatening language, abusive or unlawful

statements, or comments reflecting sexual or racial harassment.[3]

In light of the Board's focus on social media policies, employers should review and revise their policies to avoid charges before the NLRB. In doing so, it is important to keep in mind that it is not unlawful for employers to emphasize in their social media policies that, when making comments on the Internet about the employer or its business activities, employees must clarify that they are speaking for themselves and not on behalf of the employer. Policies may also lawfully reinforce the employer's rules and regulations prohibiting disclosure of trade secrets, confidential or proprietary business plans, and customer information, and should clearly prohibit discrimination, harassment, and threats on the Internet, while making clear that employees are not restricted in their right to engage in protected concerted activity. Social media policies with vague or overbroad restrictions on making "disparaging, disrespectful or unprofessional" comments, or prohibiting disclosure of "confidential" business information, will be found by the NLRB to interfere with Section 7 rights because such broad references could be read as prohibiting discussions about wages, hours or other terms and conditions of employment. Because a general disclaimer will not suffice, employers should strategically include disclaimers with each policy statement to make clear that there is no intent to restrict the right to engage in protected concerted activity.

As a separate matter, employers should be extremely careful about using social media, such as Facebook, to screen applicants for employment. Employer review of Facebook postings can result in charges of discrimination when a recruiter or hiring manager obtains personal identification information – such as an applicant's age, ethnicity, sexual orientation, disability, pregnancy or religion – that may not lawfully be considered in the hiring process. Employers should be advised to avoid this practice, and those who use it must be extremely careful to assure that such identity information plays no part in the decision-making process to screen or hire applicants for employment. A number of states have enacted laws prohibiting employers from compelling applicants or employees to provide access to their social media accounts, and similar legislation may soon be enacted in New Jersey and New York.

b. Non-disclosure agreements and confidentiality policies found unlawful

The NLRB and its Acting General Counsel have gone beyond reviewing social media policies, and are now also scrutinizing confidentiality policies in handbooks, at-will employment agreements and non-disclosure agreements for evidence of potential interference with the Section 7 right to engage in concerted activity. This is an alarming development.

In *Flex Frac Logistics*[4], the Board took issue with a confidentiality provision in an at-will employment agreement which prohibited employees, at penalty of discharge, from sharing confidential personnel or financial information with anyone outside the company. The Board found the confidentiality provision unlawful in the absence of a disclaimer because employees would otherwise reasonably understand that they would be fired if they engaged in discussions with union representatives about wages or other terms and conditions of employment.

Similarly, in *DirectTV*[5], the Board found handbook and Intranet confidentiality policies unlawful where they prohibited discussions about co-workers and employee records "with anyone" not affiliated with the company. Again, the Board determined that in the absence of specific disclaimers the restrictions were overbroad because they could be read to preclude discussions about wages, hours, and terms and conditions of employment with union representatives or NLRB agents.

In *Quicken Loans*[6], an NLRB Administrative Law Judge took the matter one step further by applying

the Board's analysis to a typical restrictive covenant/non-disclosure provision in an employment agreement. In that case, the agreement required employees to hold proprietary and confidential information in strict confidence, and not disclose such information to any person or entity. The non-disclosure provision was found to be unlawful because compliance would prohibit employees from discussing their wages and benefits with co-workers or union representatives.

These recent developments make it imperative for employers to review all of their confidentiality and non-disclosure provisions, in whatever document or agreement, in order to avoid charges before the NLRB.

c. NLRB bars blanket rules on confidentiality during internal investigations

In *Banner Health System*[7], the Board turned the law concerning internal investigations on its head by finding that employers may no longer, as a rule, require employees to maintain confidentiality during internal employment investigations because a blanket rule or policy interferes with the Section 7 right of employees to engage in concerted activity by discussing employment or discipline matters with co-workers or union representatives. According to the Board, the need to protect the integrity of an investigation will not justify a blanket requirement of confidentiality on the part of employee witnesses. Instead, the Board will require employers to demonstrate a legitimate business need for confidentiality – such as a fear of evidence being destroyed or manipulated – with respect to each specific investigation in order to justify the imposition of a confidentiality requirement. Employers are advised to review and revise their policies and practices accordingly.

EEOC Developments

a. EEOC prioritizes systemic or company-wide litigation

The EEOC announced in its latest Strategic Enforcement Plan that it indents to continue to prioritize systemic or company-wide litigation with a focus on claims aimed at eliminating discriminatory barriers in recruitment and hiring. According to Agency statistics, company-wide actions represented nearly 20% of all federal lawsuits filed by the EEOC in the past year, and the stated goal in the Plan is to increase that percentage in the coming year. The Agency will be targeting class-based recruitment and hiring practices that discriminate against women and minorities, as well as claims for equal pay, failure to accommodate and retaliation.

The EEOC has developed a reputation for aggressive enforcement tactics in which it attempts to convert individual claims of discrimination into class action or company-wide litigation without obtaining supporting evidence during the administrative investigation process. By rule, before it may file a lawsuit, the EEOC is required to investigate the claim asserted, determine whether reasonable cause exists to believe discrimination occurred, provide notice of that determination to the employer, and engage in good faith conciliation in which the Agency is required to provide sufficient information to allow an employer to formulate a meaningful approach to settlement. Only if conciliation fails may a lawsuit be filed by the EEOC based on the evidence of discrimination uncovered in the administrative investigation.

In pursuing its class action agenda, however, the EEOC has often ignored those administrative requirements. Instead, it has been widely reported that the Agency assumes from the filing of an individual claim that the employer is engaged in class-wide discrimination without investigating to identify potential class-wide victims. The Agency has issued reasonable cause determination letters accusing employers of class-wide discrimination without having obtained supporting evidence,

and has failed to engage in good faith conciliation by refusing to provide information to the employer about the nature of its classwide claims, the number of potential class members, or the identity of the alleged victims. The Agency has further undermined the conciliation process by insisting that employers accept take-it-or-leave-it settlement demands for millions of dollars, without explaining the basis for its demands, in an attempt to coerce employers to settle in order to avoid protracted and expensive class action litigation. If a lawsuit is filed, the EEOC uses the federal court complaint as a vehicle to engage in a discovery fishing expedition to identify class members and evidence to support the class action claim that was not addressed in the administrative investigation. These tactics have been criticized by the courts, which have dismissed a number of such unsubstantiated class-action complaints, and which have also sought to impose sanctions against the Agency for its "sue first and ask questions later" strategy.

b. EEOC targets criminal background checks

The EEOC has taken the position that blanket rules against hiring individuals with arrest or conviction records has an adverse discriminatory impact on certain minority groups. In recently issued Guidelines, the EEOC has indicated that although it will not bar the use of criminal background checks, it intends to scrutinize their use and will take action based on a disparate impact theory of discrimination against employers who blindly use arrest or conviction records to deny employment or who rely on arrest/conviction checkoff boxes on application forms to reject applicants for employment. Laws which limit the use of such checkoff boxes – so called "ban-the-box" laws – have been enacted by a number of states and more than 40 cities and counties across the country, including Newark and Atlantic City, and a bill has been introduced in the New Jersey State Legislature which would not only ban the box, but also preclude employers from conducting a criminal background check on an applicant until after a conditional job offer has been made, and require employers to provide notice to candidates detailing their rights before a background check is conducted, and a written explanation for any decision made based on a background check.

Because this is a hot button issue with the EEOC, employers are advised to avoid potential claims by removing the criminal record box from their employment applications, and by targeting the use of criminal background checks to positions where integrity is a legitimate condition of employment, such as handling money or financial transactions, interaction with children, and working in a home environment, as well as positions for which federal or state laws require background checks. Where a background check is warranted based on the nature of the job in question employers must provide notice to the applicant before conducting the investigation, and where a conviction is found the employer should, as a best practice, engage in an individualized assessment of its impact on the hiring decision by 1) providing the applicant with an opportunity to explain; 2) giving consideration to the length of time that has passed since the conviction and the level of rehabilitation obtained; and 3) giving consideration to the nature and severity of the crime relevant to the job in question, with the understanding that a record for serious violent crimes justifies automatic rejection. If it is determined that an applicant must be rejected based on a criminal background report, it is best to provide the applicant with a copy of the report and the opportunity to challenge the findings therein.

c. Accomodating pregnancy as a disability

The EEOC has signaled its intent to require employers to provide pregnant workers with reasonable accommodations to allow them to continue to work during pregnancy even when they are unable to physically perform the essential functions of their jobs. Although the Pregnancy Discrimination Act ("PDA") does not require employers to give special treatment to pregnant workers, the EEOC intends to rely on the recent amendments to the Americans With Disabilities Act

(the “ADAAA”) which expand the definition of disability to include temporary disabling conditions. Because employers must now accommodate an employee with a temporary disability under the ADAAA, it would be unlawful discrimination under the PDA to fail to accommodate an employee with a temporary disability caused by pregnancy.

Department of Labor Developments

a. Wage and Hour collective actions

The Department of Labor (“DOL”) has ramped up its investigations of the type of wage and hour violations that typically result in FLSA collective action lawsuits. The Wage and Hour Division has hired additional enforcement investigators, and statistics show that the number of wage and hour investigations has increased by nearly 50% from 2008, while the number of wage and hour lawsuits has tripled since 2001, with the largest increase focused on lawsuits to collect unpaid overtime based on the misclassification of exempt employees. It has been reported that the DOL has instructed its investigators to aggressively seek civil statutory penalties for potential violations found on a first investigation, as opposed to the prior practice of seeking penalties only for second or third violations, and to use site-specific violations as a launching point for enterprise-wide or company-wide investigations.

In a move that mirrors what we see from the EEOC in terms of conciliation coercion or blackmail, it has been reported that DOL investigators are also for the first time seeking liquidated damages in addition to back pay or make whole remedies at the administrative level, daring employers to accept such settlement terms or risk becoming embroiled in FLSA collective action litigation.

b. Targeting misclassifications

In July 2012 the Supreme Court rejected the DOL’s attempt to re-write the law concerning the outside sales exemption and found that pharmaceutical sales representatives may properly be classified as exempt under the sales exemption. That ruling has simply caused the DOL to change its focus, apparently convinced that employers are intentionally misclassifying workers as independent contractors or exempt professional and administrative employees in order to avoid the payment of overtime. That focus puts employers in the Life Sciences Industry – where research personnel are routinely classified under the professional exemption – in the government’s cross-hairs.

The professional exemption applies to employees whose primary duty is the performance of work which requires knowledge of an advanced nature in the field of science acquired from specialized and prolonged education. Many Life Sciences employers simply assume that research personnel automatically qualify for the professional exemption because they have attained advanced knowledge in a particular field of science. But that is not always the case, as not all research associates or analysts have the advanced degrees required for the exemption, and a college degree alone, without advanced or specialized training, may be insufficient.

The use of the administrative exemption, which requires the exercise of independent judgment and discretion, may also lead to litigation in light of the fact that the Life Science Industry is subject to a myriad of federal and state regulation. Such heightened regulation may lead employees to argue that they have been misclassified because they exercise little or no independent judgment or discretion. The risk of misclassification can be high where misclassified employees involved in clinical research and trials may work a significant number of hours beyond 40 per week if they are kept on call at critical stages of the research and development process, or are expected to work remotely to log

data from field research onto company computer systems.

To address the classification issue, the DOL has proposed commissioning a survey of a representative sample of approximately 10,000 employees and employers from various industries to obtain information about the potential misclassification of individuals as independent contractors. It is also contemplating enactment of the “right to know” rule under which employers would be required to provide a written notice to each exempt employee of the basis for the exempt classification. The obvious purpose of the rule is to encourage exempt employees to challenge their classification status.

If enacted, the “right to know” rule would require employers to conduct an analysis of each exempt classification and explain its position in writing. Compliance would likely entail the retention of counsel to conduct the required analysis, and each written explanation would be discoverable in any legal challenge to a classification determination. This would not only be expensive for employers, but would also alleviate the time and expense of conducting exhaustive investigations, making it much easier for the government to challenge alleged misclassifications and pressure employers into settlements of claims for unpaid overtime.

It is important to note that the DOL has implemented an information sharing initiative under which information concerning independent contractor misclassification is shared with the IRS, EEOC, NLRB and interested state agencies.

Risks Associated With Employee Use of Personal Electronic Devices

The increased use by employees of their own laptops, tablets or I-Phones to connect to the employer’s network raises serious security and legal issues of which employers must be aware. While allowing employees to use their own electronic devices can save money, there are a number of hidden costs to consider, including:

- Non-exempt employees may file claims for unpaid overtime for time spent after work responding to e-mails or text messages;
- Unencrypted confidential employer or client information may be accessed by unauthorized persons from lost or stolen devices;
- Employee claims of invasion of privacy when employers retain the ability to access personal devices; and
- Employees refusing to turn over personal devices needed for litigation purposes.

Employers should consider crafting policies designed to avoid these types of problems with employees using personal devices, including:

- Clear limits prohibiting the use of personal electronic devices after working hours without specific authorization;
- Waiver of privacy rights by employees using personal electronic devices to connect to the employer’s network;
- Acknowledging company ownership of all data on any device synced to the employer’s network; and
- Agreement to permit recovery of data upon termination or in response to discovery demands in litigation.

Limiting Filing Periods in Employment Applications or Arbitration Agreements

Employers in New Jersey should consider including in their employment applications, arbitration agreements or at-will agreements specific language requiring employees to initiate employment actions, such as claims for discrimination or retaliation, within one year – or even six months – as a mutually agreed-upon limitations period. New Jersey courts have recognized that parties to a contract may agree to limit the time in which claims may be asserted by one against the other so long as the underlying agreement is valid and the time to file is reasonable, even where the agreed-upon time is less than the employee would have to file a claim under the applicable law or common law statute of limitations, and have found six-month and one-year restrictions to be reasonable. The courts have enforced such filing restrictions found in arbitration agreements, employment applications and at-will agreements to dismiss employment claims under federal law, including Title VII and the ADEA, under state law, including the LAD and CEPA, and with respect to common law claims for breach of implied contract and wrongful discharge.

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1 Although the validity of approximately 600 Board decisions from 2012is in doubt because of the D.C. Circuit Court's recent opinion that the recess appointment of three Board Members was invalid, that issue will likely not be resolved until it is heard by the Supreme Court. In the interim, the Board and its Acting General Counsel can be expected to continue to scrutinize the policies of non-union employers.

2 356 N.L.R.B. No. 106 (Sept. 7, 2012).

3 The Board has recognized that not all Internet postings are subject to protection as concerted activity. In a case decided shortly after Costco, the Board held that the discharge of an employee for posting inappropriate pictures and comments on Facebook was not unlawful because the postings were not protected where they did not concern terms and conditions of employment. *Karl Knauz Motors, Inc.*, 358 NLRB No. 164 (Sept. 28, 2012). On the other hand, the Board found comments on Facebook were protected as concerted activity where the employee posted the comments to solicit a response and support from co-workers in a potential protest to management. *Hispanics United*, 359 N.L.R.B. No. 37 (Dec. 14, 2012).

4 358 N.L.R.B. No. 127 (Sept. 11, 2012).

5 359 N.L.R.B. No. 54 (Jan. 25, 2013).

6 Case No. 28-CA-75857 (Jan. 8, 2013).

7 358 N.L.R.B. No. 93 (July 30, 2012).

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