Some employers might assume that, unless their workforce is represented by a union or they are facing a union-organizing campaign, the National Labor Relations Act (NLRA) does not apply to them. That is a dangerous assumption; Section 7 of the act, which protects employees’ “concerted activities for the purpose of ... mutual aid or protection,” applies to both union and non-union employers. In 2012, the National Labor Relations Board (NLRB) flexed its administrative muscle and issued several decisions that radically changed employer assumptions about traditional personnel policies and procedures. Rather than focusing on purported unfair labor practices among union employers, some of the more noteworthy NLRB rulings involved workplace policies common in both union and non-union settings.

The NLRB’s rulings covered a broad swath of employer policies, including those pertaining to social media, conduct standards, confidentiality in investigations, off-duty access and mandatory arbitration. While the D.C. and Third Circuits have ruled that 200-plus NLRB decisions issued since January 4, 2012, are invalid on the grounds that President Obama’s recess appointments to the NLRB were unconstitutional, employers and attorneys alike would be wise to acquaint themselves with the board’s rulings in the event the U.S. Supreme Court disagrees with the circuit courts. Moreover, even if the high court affirms the appellate courts’ rulings, there are no indications that the board’s stance toward workplace policies will change anytime soon. To provide a primer on the NLRB’s stand against broad personnel policies, this article focuses on four NLRB decisions, involving such familiar and fundamental workplace rules and procedures as confidentiality in investigations, courtesy in the workplace, arbitration of employment claims and social media.
NLRB Restricts Rules Requiring Employees to Maintain Confidentiality in Investigations

The NLRB’s ruling in Banner Health System, 358 NLRB 93 (July 30, 2012) is an example of the board’s increased focus on workplace issues that affect union and non-union employers alike. In Banner Health, the board held that an employer may not have a blanket rule prohibiting employees from discussing ongoing investigations. The NLRB rejected the employer’s argument that a confidentiality instruction was necessary to protect the integrity of its investigations and found the employer’s “generalized concern” insufficient to outweigh employees’ rights under the NLRA. The NLRB concluded that in order to minimize the impact on employees’ rights under the NLRA, it was the employer’s burden to first determine if, in any given investigation, a confidentiality instruction was needed to:

1. Protect witnesses,
2. Preserve evidence,
3. Prevent the fabrication of testimony,
4. Prevent a cover up.

As a result of Banner Health, employers must now evaluate each of these four areas to determine whether or not a routine workplace investigation warrants a confidentiality instruction. On April 24, 2013, the NLRB’s Office of the General Counsel released an advice memorandum (dated January 29, 2013) that reaffirmed Banner Health’s holding that an employer cannot institute a blanket rule of confidentiality but must demonstrate the need for the same on a case-by-case basis. In addition to reaffirming the decision in Banner Health, the advice memorandum explained how the employer in question could modify its confidentiality policy to comply with the NLRA. In sum, employers should eliminate blanket prohibitions on employee discussions of internal investigations in favor of language indicating that confidentiality may be necessary under certain circumstances, such as those expressly identified by the NLRB.

NLRB Invalidates Rule Requiring Courtesy

As further evidence of the NLRB’s focus on workplace policies, the board in Karl Knaur Motors, Inc., 358 NLRB 164 (September 28, 2012) concluded that an employer’s rule requiring employees to be courteous violated the NLRA. The rule in question, which was contained in the employee handbook, stated:

“Employees should eliminate blanket prohibitions on employee discussions of internal investigations in favor of language indicating that confidentiality may be necessary under certain circumstances, such as those expressly identified by the NLRB.”

The NLRB focused on the last sentence of the rule and opined that employees would reasonably construe it to cover protected statements. According to the board, such protected statements include employee complaints about work conditions made to garner support and approval of the employee’s position. Further, the board asserted that an employee reading the rule would reasonably believe that the employer would consider “statements of protest or criticism as ‘disrespectful’ or ‘injurious’ [to] the image or reputation of the [employer].” Ultimately, the NLRB declared the rule in question unlawful, because it was not narrowly tailored and did not exclude protected speech from its reach.

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DON’T BE LEFT OUT!

Nevada Lawyer’s November issue coincides with Veterans Day, and the magazine editors would like take this opportunity, as in years past, to recognize State Bar of Nevada members with military backgrounds.

If you serve or have served in the U.S. military, please send an e-mail to nvlawyer@nvbar.org. Your e-mail should include:

★ Your full name as you would like it to appear,
★ Your bar number, and
★ Your branch of service (only one will be included, so select the one you would most like to see listed).
★ Please also let us know if you served as a Judge Advocate General (JAG).

We would love to see photos from your time in uniform, if you have them. Photos must be of members during their time in military service, preferably in uniform (no law firm portraits). They must be submitted in high-res digital format (600 KB – 2 MB). Preference will be given to photos that have not appeared in years past.

Please remember that the state bar does not keep records of military service, nor do we keep a running, updated list. We only know what our members tell us each year.

If you want to be included, you MUST send us your information this year, regardless of what has appeared in years past. The deadline is September 14, 2013.
The Board Strikes Down a Mandatory Arbitration Policy

Following the decisions in Banner Health and Karl Knauz Motors, the NLRB continued to focus on employer policies in Supply Technologies, LLC, 359 NLRB 38 (December 14, 2012). There, the NLRB ruled that an employer’s policy requiring mandatory arbitration violated the NLRA. The arbitration policy at issue applied to “claims relating to [an employee’s] application for employment, [an employee’s] employment, or the termination of [an employee’s] employment; [and] claims under any federal state, or local statute… .” The policy then listed several federal statutory claims that the employee was required to arbitrate. Even though the policy did not list the NLRA as one of the statutes subject to arbitration, the board believed that employees would reasonably construe the arbitration policy to prohibit the filing of unfair-labor-practice charges with the NLRB. To support this conclusion, the NLRB pointed out that the policy stated that the list of federal statutory claims subject to arbitration was not exhaustive. Also, the NLRB emphasized that the arbitration policy listed only three exceptions, none of which pertained to the NLRA.

The NLRB also rejected the argument that the arbitration policy was lawful because it stated that “[b]oth [the employer] and [the employee] can still file a charge or complaint with a government agency” and “are free to cooperate with a government agency that might be investigating a charge or complaint.” The NLRB determined that this language did not save the arbitration policy because “no statute or government agency is named here.” The NLRB continued, “Nor does this language explain that filing an administrative charge is intended to be an exception....”

The NLRB’s decision in Supply Technologies demonstrates that, as with rules involving confidentiality and workplace behavior, employers must expressly define the parameters of arbitration policies. In particular, an arbitration policy should contain a specific exception for claims under the NLRA and proceedings before the NLRB.

The NLRB Continues to Weigh In on Social Media

On the same day the NLRB issued the Supply Technologies decision, it ruled that an employer violated the NLRA when it...
fired five employees for comments they made on Facebook. In *Hispanics United of Buffalo, Inc.*, 359 NLRB 37 (December 14, 2012), an employee frequently complained to a co-worker via text messages that some of the other employees did not do enough to help the employer’s clients, who were domestic-violence victims. On a Saturday, which was a non-work day, the complaining employee text messaged her co-worker to explain that she planned to inform the executive director of the alleged poor performance. In response, the co-worker posted a message on Facebook informing her “fellow coworkers” of the complaining employee’s accusation and soliciting their response. Four off-duty employees used their respective personal computers to reply via Facebook and objected to the accusation that their work performance was substandard.

The complaining employee also replied via Facebook calling for the co-worker who made the original Facebook post to “stop with ur [sic] lies about me.” The complaining employee notified the executive director and provided copies of the Facebook comments. The first day after the Facebook postings, the executive director fired the five employees because they had allegedly taken part in harassment and bullying and violated the employer’s zero tolerance policy prohibiting such conduct.

The NLRB concluded that the terminations violated the NLRA. The NLRB ruled that the five terminated employees had engaged in “concerted activity,” which was protected under the NLRA because their Facebook exchange centered on a discussion of their job performance. The NLRB rejected the employer’s argument that terminations were lawful because the employer sought to enforce its zero-tolerance harassment policy. In addition to asserting that the Facebook actions did not fall within the activities that the employer’s harassment policy prohibited, the NLRB ruled that “legitimate managerial concerns to prevent harassment do not justify policies that discourage the free exercise of [NLRA] rights by subjecting employees to ... discipline on the basis of the subjective reactions of others to their protected activity.”

The NLRB ruling in *Hispanics United* demonstrates that protected, concerted activity under the NLRA extends beyond the walls of the workplace. Moreover, the case shows that the enforcement of an employer’s anti-harassment policy does not trump employees’ rights to band together for mutual aid or protection under the NLRA. Where concerted, protected activity is involved, an employer must have specific evidence that the protected activity violates an anti-harassment policy. Further, the employer cannot rely on its own subjective interpretations that other employees would perceive the protected activity as harassment.

**How Should Employers React to the NLRB’s Focus On Employer Policies?**

The NLRB’s recent focus on personnel policies emphasizes the need for employers to review existing rules and procedures, including those relating to internal investigations, behavior, social media,