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Inside This Issue: *workplace investigations; "at-will" employment policies; health care reform; EEOC enforcement priorities through 2016; and EEO-1 report filing. Employers with questions are encouraged to contact Mark Amberg, Sharon Rudnick, Andrea Nagles, or Kate Watkinson Wright.*

RECENT TARGETS OF THE NLRB: Workplace Investigations and "At-Will" Employment Policies

The National Labor Relations Board (NLRB) continues to take issue with workplace policies it deems to violate the National Labor Relations Act (NLRA). In addition to the NLRB's recent focus on overly broad social media policies, the NLRB is expanding its enforcement agenda to curtail confidentiality requirements for workplace investigations and scrutinize employers' "at-will" employment policies. The NLRB's recent actions call into question the validity of some widely-utilized workplace policies.

The NLRB consistently takes issue with workplace policies that are deemed to "unlawfully interfere with" employees' rights to engage in "protected concerted activity" under the NLRA. Section 7 of the NLRA gives non-supervisory employees the right to engage in concerted activity for the purpose of collective bargaining or mutual aid or protection. "Protected concerted activity" under the NLRA can include employee discussions about union issues as well as non-union discussions about employee wages, safety concerns, working

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For employers in business and government alike, employees are your most valuable, and often most expensive, asset. How you handle employment issues can have a significant impact on your bottom line. Our labor and employment attorneys provide creative, strategic legal counsel – targeted to your mission and business environment. We can help ensure the most proficient use of human resources, prevent costly disruptions, and help you identify and address issues before they become costly claims or lawsuits.

We specialize in providing labor and employment advice, counseling and litigation services to public and private employers.

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conditions and other terms and conditions of employment. Interference with employees' exercise of Section 7 rights is an unfair labor practice in violation of the NLRA.

Employers are reminded that the NLRA applies to ***both*** unionized and non-unionized private sector employers who fall within the broad statutory jurisdiction of the NLRB.

Employer's Blanket Confidentiality Policy during Workplace Investigation Unlawful

On July 30, 2012, the NLRB issued a decision in *Banner Health Systems d/b/a Banner Estrella Medical Center and James Navarro*, 358 NLRB 93 (2012), which held that an employer's routine practice of instructing employees to not discuss an ongoing, internal workplace investigation violated the NLRA. After receiving an internal complaint from an employee, the employer's human resources consultant instructed the employee to not discuss the matter with his co-workers while the investigation was ongoing.

The NLRB found the confidentiality instruction unlawful under the NLRA because it had a reasonable tendency to interfere with employees' Section 7 "concerted activity" rights – *e.g.*, talking to each other about terms and conditions of employment. The decision noted that an employer must show it has a legitimate business justification outweighing employees' Section 7 rights to justify prohibiting employees from discussing ongoing workplace investigations.

The Board rejected the notion that an employer's "generalized concern" with protecting the integrity of its workplace investigations was sufficient by itself to outweigh employees' Section 7 rights. Rather, the Board held that in order to minimize interference with employees' Section 7 rights, an employer has the burden to "first determine whether in any given investigation 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." The Board expressly commented that the employer's "blanket approach" of applying its standard policy prohibiting employees from discussing ongoing investigations was insufficient and violated Section 8(a)(1) of the NLRA.

Employer's Overly Broad "At-Will" Employment Policy Unlawful

The NLRB has also recently scrutinized "at-will" employment policies found to violate employees' Section 7 rights. "At-will" policies are commonly found in employee handbooks and inform the employee that either the employee or the employer may terminate the employee's employment at any time with or without cause or advance notice. "At-will" policies frequently include statements providing that only a designated officer of the company is authorized to modify the terms and conditions of the employee's employment. Many employers also have employees sign an acknowledgment recognizing their "at-will" status.

Earlier this year, an Administrative Law Judge (ALJ) for the NLRB issued a decision in *American Red Cross Arizona and Lois Hampton*, 29-CA-23442 (Feb. 1, 2012), which found the following language from an employer's "at-will" handbook acknowledgment overly broad in violation of the NLRA:

"I further agree that the "at-will" employment relationship cannot be amended, modified or altered in any way."

The ALJ found this language unlawful because it could reasonably be construed to prohibit employees from engaging in protected concerted activity to secure union representation and a collective bargaining agreement, which could ultimately result in an amendment or modification of the employees' "at-will" status. The ALJ's decision in Red Cross was not appealed, preventing the NLRB from issuing a decision providing further guidance on the issue.

Less than a month later, the NLRB again took issue with an employer's "at-will" policy language in *Hyatt Hotels Corporation and Unite Here International Union*, Case 28-CA-06114 (Feb. 29, 2012). An NLRB Regional Director issued

a complaint alleging the employer's standard "at-will" handbook acknowledgment was overly broad and violated employees' Section 7 rights. The parties in *Hyatt* reached a settlement in which the employer agreed to rescind and revise its "at-will" statements. The case settlement again precluded the NLRB from issuing a written decision clarifying the Board's position on the legality of these common "at-will" handbook provisions.

Most recently, the NLRB's Acting General Counsel Lafe Solomon commented at a state bar event that the NLRB would continue its efforts to strike down overly broad "at-will" employment policies found to violate employees' Section 7 rights. This comment signals the agency's continued focus on this issue.

Impact on Employers

The NLRB's recent focus on overly broad confidentiality mandates in workplace investigations and "at-will" policies illustrates the agency's broader initiative to crack down on workplace practices which might interfere with employees' right to engage in protected Section 7 "concerted activity" under the NLRA. The NLRB's rulings and stated positions are still developing and leave many unanswered questions for employers. It is expected that employers will receive additional guidance through future NLRB action.

In the meantime, in light of the NLRB's decision in *Banner* regarding workplace investigations, employers should note that they may violate the NLRA by applying a blanket confidentiality workplace investigation instruction without conducting an individualized assessment to determine whether the instruction was permissible or necessary for the specific investigation. Employers should consider conducting a case-by-case assessment using the factors identified in *Banner* to identify whether a legitimate business justification outweighs employees' Section 7 rights before issuing confidentiality instructions. Employers may also consider using a confidentiality statement which informs the employee(s) that they are not prohibited from exercising Section 7 rights.

As for the "at-will employment" issue, employers should review their "at-will" employment policies as well as other employment policies to determine whether any provisions could be viewed as overly broad by the NLRB by interfering with employees' Section 7 rights.

Employers with questions about the NLRB's recent activity or who would like assistance reviewing or developing employment policies are encouraged to contact our Labor and Employment Team.

HEALTH CARE REFORM: Impacts on Employers

Now that the dust has settled around the constitutionality of the Patient Protection Affordable Care Act, it is time for employers to focus energy on evaluating the impact of—and ensuring compliance with—the mandates of the Act. The effects of the Act are numerous and impact employers differently, depending on the size and structure of each workforce. Below are several important features of the Act that may impact your business in the near future.

Play or Pay Mandate

Starting in 2014, "large employers" must provide adequate and affordable group health insurance to their full-time employees—or pay an annual penalty. Generally, a "large employer" is one with an average of 50 or more full-time equivalent employees (FTEs) during the preceding year.

Employers with a workforce close to the 50-FTE threshold should be aware of the appropriate formula for calculating an FTE, as part-time positions can be combined to constitute one full-time position. "Large employers" may wish to conduct a cost-benefit analysis as to whether they will provide health insurance benefits to employees or opt to pay the annual penalty.

Reporting Requirements

Summary of Benefits and Coverage: Effective on the first day of open enrollment after September 23, 2012, insurers and group

health plans must provide enrollees with a written Summary of Benefits and Coverage (SBC) statement. Employers should work with their plan administrators to ensure timely distribution of the SBC.

W-2 Reporting: Employers that filed 250 or more W-2s in the preceding year must report the cost of covering each employee under the employer-sponsored group health plan on each employee's 2012 W-2 form. This reporting is informational only, and is not calculated as employee income. Employers subject to this requirement should follow IRS guidance regarding what expenses may—and may not—be included in the cost report.

Fiduciary Responsibilities

By offering health insurance, employers may find themselves in a fiduciary relationship with their employees. In an attempt to manage the cost of healthcare, the Act requires insurance plans to return certain unspent premiums. These rebates—called Medical Loss Rebates (MLRs)— may be paid directly to employers. Upon receipt of an MLR, an employer may have a fiduciary obligation under the Employee Retirement Income Security Act (ERISA) with respect to the appropriate distribution of the rebate funds.

Tax Implications

The Act carries various tax implications for businesses, both large and small. The Act currently offers a tax credit to certain small businesses that cover at least half of their employees' health care premiums. Effective January 2013, employers are required to withhold an additional .9% Medicare payroll tax on employee wages in excess of $200,000 (single) or $250,000 (married and filing jointly).

Employers with questions about the mandates of the Patient Protection and Affordable Care Act are encouraged to contact a member of our Labor and Employment Team.

EEOC IDENTIFIES ENFORCEMENT PRIORITIES THROUGH 2016

In a recently published draft Strategic Enforcement Plan, the U.S. Equal Employment Opportunity Commission (EEOC) signaled its intent to focus enforcement efforts on three "emerging issues:" (1) ADA claims; (2) employment discrimination against lesbian gay bisexual and transgender individuals as prohibited under federal employment anti-discrimination law (Title VII); and (3) circumstances in which pregnant women have been forced to take unpaid leave after being denied accommodations routinely provided to similarly situated employees. The EEOC also prioritized the elimination of discriminatory recruitment and hiring practices and the protection of immigrant, migrant, and other vulnerable workers. In light of the EEOC's draft Strategic Enforcement Plan, employers in the private and public sector can expect a targeted increase in litigation by the EEOC surrounding these substantive areas over the 2012—2016 fiscal years.

REMINDER: FILE YOUR EEO-1 REPORT

Are you one of the following?

- A private employer who has 100 or more employees
- A private employer who has fewer than 100 employees, but is owned by or corporately affiliated with another company and the entire enterprise has a total of 100 or more employees
- A federal contractor with 50 or more employees who has a "government contract, subcontract or purchase order amounting to $50,000 or more"

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If you are, then you must file Form EEO-1 with the Equal Employment Opportunity Commission (EEOC). **The deadline for filing the Form is September 30, 2012.**

The EEOC and the U.S. Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) have used the EEO-1 report since 1966 to collect annual data from covered employers about their minority and female workforces. The EEOC uses the data it collects to support civil rights enforcement and to analyze employment patterns within companies, industries and regions. If you are a federal contractor, then the Office of Federal Contract Compliance Programs will use the data to select facilities for compliance reviews. Facilities with data showing systemic discrimination are at greatest risk for a compliance review. Submitting employers are allowed to use employee data from any pay period from July through September of the current survey year.

The preferred method for completing the EEO-1 reports is the web-based filing system. Online filing requires you to log into your company's database with a Login ID and Password. All companies should have received EEO-1 filing materials by mail no later than mid-August 2012. If you cannot locate your Login ID and/or Password, contact the EEO-1 Joint Reporting Committee at: e1.lostloginpassword@eeoc.gov.

UPCOMING EVENTS

Will still have a *few* spaces left for the next Breakfast Seminar!

RSVP today to reserve your space by calling 541.485.0220 or 800.315.4172 or via email to casey.ganieany@harrang.com.

Eugene
October 18
RSVP by October 15

Portland
October 25
RSVP by October 22

Visit our "Events" page for more details.

Please Note
Nothing in this communication creates or is intended to create an attorney-client relationship with you, constitutes the provision of legal advice, or creates any legal duty to you. If you are seeking legal advice, you should first contact a member of the Labor and Employment Team with the understanding that any attorney-client relationship would be subsequently established by a specific written agreement with Harrang Long Gary Rudnick P.C. To maintain confidentiality, you should not forward any unsolicited information you deem to be confidential until after an attorney-client relationship has been established.

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