

September 26, 2012

## New NLRB Decisions Nix Confidentiality and Social Media Policies

Continuing its trend of making life more difficult for employers, the National Labor Relations Board (“NLRB” or the “Board”) has issued several new decisions, striking down employer policies and practices that conventional wisdom would otherwise say make perfect business sense.

First, in [Banner Health System](#), No. 28-CA-123438 (July 30, 2012), the NLRB ruled that the National Labor Relations Act (“NLRA”) prohibits employers from instructing witnesses in a workplace investigation to refrain from discussing the investigation with other employees and to keep the matters discussed confidential, absent the existence of particularized facts demonstrating a business justification for maintaining confidentiality. Specifically, the NLRB held that Section 7 of the NLRA (which gives employees the right, among other things, to engage in concerted activities for their mutual aid or protection) protects employees’ rights to discuss investigations.

*Banner Health System* arose out of an all-too-familiar fact pattern for most employers: an investigation into whether an employee was insubordinate. During the investigation, the company’s human resource consultant routinely asked employees not to discuss the matter with their coworkers while the investigation was pending. The Board concluded that, in context, this instruction “had a reasonable tendency to coerce employees” and constituted an unlawful restraint on their Section 7 rights.

The NLRB rejected the employer’s argument that general business considerations aimed at protecting the integrity of its investigation warranted the confidentiality instruction. According to the Board, this “blanket approach” failed to meet the employer’s burden of establishing facts that would outweigh employees’ NLRA rights. According to the NLRB, facts that may support the need for confidentiality may consist of: 1) the need to protect witnesses; 2) the danger that evidence may be destroyed; 3) the risk that testimony may be fabricated; or 4) the need to prevent a cover up.

Of course, there are many reasons for a confidentiality requirement which the Board appeared to ignore -- for example, such a policy helps to ensure that the employer will obtain each witness’s own best memory of the events relevant to the investigation -- and

111 SUTTER STREET  
SUITE 700  
SAN FRANCISCO  
CA 94104  
415 464 4300 T  
415 464 4336 F

12121 WILSHIRE BLVD.  
SUITE 1300  
LOS ANGELES  
CA 90025  
310 943 8500 T  
310 943 8501 F

the new decision imposes unrealistic requirements. Nonetheless, employers should review their policies to ensure compliance and, to the extent possible during an investigation, carefully document the facts supporting the need for confidentiality. In a unionized environment, it also may be worthwhile for the employer to notify a union representative of the need and reasons for conducting the investigation on a confidential basis.

In another development, the Board itself has issued its first ruling addressing an employer's social media policy (prior decisions in this area were issued by administrative law judges). The case is [Costco Wholesale Corp.](#), No. 34-CA-012421 (September 7, 2012). Specifically, the Board reviewed Costco policies requiring employees to use "appropriate business decorum" in communicating with others and prohibiting employees from posting messages that "damage any person's reputation."

The Board found that the rule requiring employees to use "appropriate business decorum" was permissible. However, the Board found unlawful the broader rule that barred employees from posting messages that damage a person's reputation. The Board reasoned that this prohibition could encompass protected activity under the NLRA, including communications among employees protesting an employer's treatment of them. And, absent anything to suggest that such protected communications were excluded from the policy, employees could reasonably conclude that the rule precluded them from engaging in protected activity. Of note, the Board distinguished other cases involving rules prohibiting abusive posts and communications -- in each such case, the Board explained, the rule either addressed specific conduct or was part of a broader list of conduct that fell outside the NLRA's protection, *i.e.* rules prohibiting harassing, profane, abusive, or malicious communications.

As we have discussed in prior alerts (see Employment Law Alerts dated [June 4, 2012](#), [April 9, 2012](#) and [September 9, 2011](#)), the NLRB's General Counsel has issued several memoranda over the past year summarizing administrative decisions dealing with social media policies, and there have been numerous decisions by administrative law judges. With the Board itself now weighing in with the *Costco* decision, it is clear that social media policies will continue to be an area of concern for employers. Indeed, as the *Costco* decision highlights, it is critical that employers review their social media policies in light of current developments to ensure that the policies do not restrict protected activity under the



NLRA. Of course, we will continue to monitor decisions in this area and keep you updated on new developments.

**Miller Law Group exclusively represents business in all aspects of California employment law, specializing in litigation, risk management, wage and hour class actions, ERISA litigation, trials and appellate law.** If you have questions about your workplace obligations, please contact Michele Ballard Miller ([mbm@millerlawgroup.com](mailto:mbm@millerlawgroup.com)) or M. Michael Cole ([mmc@millerlawgroup.com](mailto:mmc@millerlawgroup.com)), or call (415) 464-4300. To learn more about our firm, visit our website at [www.millerlawgroup.com](http://www.millerlawgroup.com).

**This Alert is published by Miller Law Group to review recent developments in employment law. This material is designed to provide informative and current information as of the date of the Alert, and should not be considered legal advice.**