The National Labor Relations Act

Employment Law Gap Filler

By Joseph S. Murray IV and Dalton B. Green

Ultimately, the NLRB's pronouncements and actions will require counsel to help their clients navigate permissible policies, best practices, and conduct under the act.

Since its passage 75 years ago, most employers have considered the National Labor Relations Act of 1935, 29 U.S.C. §151 *et seq.* (NLRA), a union law and of no concern to employers with nonunionized workforces. While the act applied to virtually all private-sector employers, the National Labor Relations Board (NLRB) only occasionally took actions or pursued cases that affected nonunion employers.

However, during the past several years, the NLRB has taken its fight to nonunion employers through a series of complaints, cases, and advice memorandums addressing social media policies and so-called "Facebook firings." Advice memorandums are not controlling authority, and the NLRB can ignore them. However, the advice memorandums generally accurately indicate the NLRB's position on different aspects of the NLRA. While the NLRB's aggressive campaign against employer's social media policies has garnered the most attention, the NLRB's opinions and advice memorandums on social media use among workers touch on almost every aspect of the employer-employee relationship. In some respects, the NLRB has become the employment law gap filler when other state and federal employment laws do not apply.

The way that the law is currently written, the NLRB has a free hand to interpret the act in accordance with the sitting president's leanings or the current political climate. Attempts to amend the act in the past half century since it was last amended in 1959 have faced fatal opposition, either from unions, employers, or both. Congress has been unable to muster the necessary majority to amend the act so that it depends less on interpretation by current NLRB members, which has varied and ignored previous opinions, sometimes including cases issued just a few years earlier, resulting in instability.

By all appearances, the current NLRB has prioritized expanding the reach of the act and publicizing its protections. Unfortunately, the NLRB's focus on expanding the act's reach has come at a cost of ignoring or overruling longstanding precedent

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while failing to establish rules that employers, employees, and unions can rely on.

This article focuses on some of the NLRB's more extreme pronouncements during the past several years in the areas of confidentiality policies, workplace investigations, at-will employment statements, civility policies, and policies limiting the taking of photographs or recordings in the workplace. These pronouncements contradict established precedent or place employers in troubling quandaries about the best ways to comply with the act and other laws. We have found that our nonunionized clients do not realize that the act applies to them and that the NLRB has sought to expand its control over the employer-employee relationship in the nonunionized workplace. Based on the complaints and the decisions issued by the NLRB, our clients are not alone in this misunderstanding. The authors hope to provide employment lawyers who do not routinely deal with the NLRB ideas on how the NLRB's recent positions should affect their advice to clients, as well as the actions such lawyers take on behalf of their clients.

Background

The National Labor Relations Act (NLRA) covers almost all private-sector employers except for employers in the agricultural and domestic services sectors regardless of union status. 29 U.S.C. §157(2) & (3). In general, gross revenue determines whether the act would not cover employers, and it would generally not apply to employers with less than $100,000 to $500,000 in gross revenue, depending on the industry, although it still would cover all nonsupervisory employees in such businesses. *Id.* at §157(3).

The act protects employees' rights "to engage in… concerted activities for the purpose of… mutual aid or protection," referred to as the so-called "Section 7 rights." 29 U.S.C. §157. Mutual aid or protection refers to employees' actions related to the terms and conditions of their employment, whether or not they are engaged in union-related activity. *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 14 (1962). Terms and conditions of employment include almost any conceivable aspect of the employment relationship, including but not limited to wages, benefits, treatment by management, safety concerns, and conditions of the workplace.

The act prohibits employers from "interfere[ing] with, restrain[ing], or coerc[ing] employees in the exercise" of their Section 7 rights. 29 U.S.C. §158(a)(1). While the Facebook firing cases focused on employers' discipline of employees for engaging in Section 7 activities on social media, the NLRB's decisions and advice memorandums apply to all employer policies that can violate the act by interfering with or restricting an employee's Section 7 rights.

In evaluating an employer's policies, the NLRB first determines if a policy explicitly restricts Section 7 activities. If it does, then the policy automatically violates the act. If the policy does not explicitly restrict Section 7 activities, then the NLRB considers "whether the rules would reasonably tend to chill employees in the exercise" of their Section 7 rights. *Lafayette Park Hotel*, 326 N.L.R.B. 824, 825 (1998). The NLRB is to consider a policy as a whole, to give it a reasonable reading and interpretation, and not to presume that it violates the National Labor Relations Act. *Id.* at 825, 827.

As we will discuss, the current NLRB pays lip service to the *Lafayette Park Hotel* analysis and appears to parse the language of employer rules, view the challenged rules in isolation, and attribute to employers the intent to interfere with Section 7 rights. The NLRB appears to take the position that if a policy could in any way interfere with Section 7 rights, no matter how unlikely, then the policy violates the NLRA.

Confidentiality Policies: Only the NLRB Knows What Is Just Right

Tucked innocuously in the second of three NLRB reports on social media cases, a reader will find one decision about an employer's policy on disclosure of confidential information that found the policy overly broad. Office of the General Counsel, Nat'l Labor Relations Bd., Operations-Management Mem. OM 12-31 (Jan. 24, 2012) (containing Jan. 2012 *Report of the Acting General Counsel Concerning Social Media Cases*). The described policy, however, appears to have met the requirements of longstanding NLRB precedent that allowed a confidentiality policy to use broad language as long as the policy did not specifically prohibit employees from discussing "personnel information" or "employee information." Based on this case and the other recent NLRB actions the NLRB appears to have signaled that it currently will not favor broad confidentiality policies.

Until recently, *Lafayette Park Hotel* provided the controlling and accepted standard for employer confidentiality policies. In *Lafayette Park Hotel*, the employer handbook contained a confidentiality provision that prohibited employees from "divulging hotel-private information to employees or other individuals or entities that are not authorized to receive that information." The NLRB decided that employees would not reasonably read the rule as prohibiting the discussion of wages and working conditions among employees or with a union. The NLRB noted that businesses have a substantial and legitimate interest in maintaining the confidentiality of private information, including guest information, trade secrets, supplier contract details, and other proprietary information. Although the employment policy did not define "hotel-private" information, the NLRB found that employees would reasonably understand that the rule was designed to protect the employer's legitimate business interest in the confidentiality of such information rather than to prohibit discussion of their wages.

With *Lafayette Park Hotel,* the NLRB adopted a "common sense" approach to determining whether a confidentiality policy could be reasonably construed to chill protected concerted activity: If a confidentiality policy did not specifically prohibit the discussion of wage or personnel information, then the NLRB would find that employees would understand that the policy did not prohibit those discussions. *See, e.g., K-MART d/b/a Super K-MART,* 330 N.L.R.B. 263 (1999). The NLRB would deem a confidentiality policy valid even if the policy did not define the term "confidential information." The NLRB understood that employers maintained these policies not to interfere with section 7 rights, but rather, they intended to protect themselves from disclosure of proprietary information and confidential information pertaining to their business operations.

This January 2012 NLRB report threw common sense and reliable standards into question. Nat'l Labor Relations Bd., Mem. OM 12-31, *supra*. While nominally applying *Lafayette Park Hotel*, the NLRB found portions of an employer's communications systems policy overbroad. The NLRB described that the policy prohibited employees from "disclosing or communicating information of a confidential [sic], sensitive [sic], or non-public information concerning the company on or through company property to anyone outside the company without prior approval of senior management or the law department." *Id*. Although the policy did not prohibit employees from discussing "employee information" or "personnel information" specifically, the NLRB found that employees would reasonably interpret this provision to prohibit them from communicating with third parties about Section 7 issues such as wages and working conditions. *Id*. *See also Stant USA Corporation*, 2011 WL 7789839 (N.L.R.B.G.C. 2011) (determining that in an employer's confidentiality policy, among other deficiencies, the clause "and any other information that has not been publicly released by the Company" was overly broad).

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The NLRB pronouncement in this report diverges from *Lafayette* in that the employer policy described in the report did not refer to employee or personnel information. Nat'l Labor Relations Bd., Mem. OM 12-31, *supra*. But the NLRB still deemed the policy unlawful. *Id*. This suggests a shift in the NLRB's previously established position, and it suggests that the board could take a much more restrictive approach to confidentiality policies. It no longer appears sufficient simply to avoid mentioning "employee information" or "personnel information." Rather, the NLRB now seems to require confidentiality policies to define "confidential information" specifically as well as to include detailed examples in policies of the information that they permissibly can consider "confidential." Permissible examples of confidential information appear to include things such as trade secrets, client information, and information about internal systems and processes.

Workplace Investigations: Everything to See Here

The NLRB took its more restrictive position on confidentiality policies a step further when it determined that a blanket confidentiality requirement for workplace investigations was a per se violation of the National Labor Relations Act. Further, the NLRB has now established four specific factors for an employer to consider before designating an investigation confidential. These factors, however, do not address why employers need to maintain confidential investigations. The NLRB ignores that its position places employers in a serious quandary: employers must attempt to fit their real reasons for confidentiality into the NLRB's four factors and risk that the NLRB may later reject those reasons, or they must allow investigations to remain public and risk placing themselves in legal jeopardy under other federal employment laws.

On July 30, 2012, the NLRB issued a decision in *Banner Health System*, 358 N.L.R.B. No. 93 (2012), finding that Banner Health's customary policy to request that employees not discuss complaints with coworkers while an investigation was ongoing violated the NLRA. In *Banner Health*, the human resources officer asked an employee not to discuss his complaints with other employees while the human resources officer investigated them. In an earlier decision, the administrative law judge found that Banner Health had a legitimate business reason to request confidentiality: to protect the integrity of the investigation. The administrative law judge noted that employees have Section 7 rights to discuss issues that may affect the terms and conditions of their employment, including investigations. However, the administrative law judge also noted that the NLRB had previously recognized that employers have legitimate reasons to protect workplace investigations that could outweigh the employees' Section 7 rights.

The NLRB overruled the administrative law judge because, in the NLRB's opinion, an employer's "generalized concern with protecting the integrity of its investigations is insufficient to outweigh employees' Section 7 rights." The NLRB outlined that for an employer to justify a request to keep an investigation confidential, the employer must determine the need to (1) protect witnesses, (2) protect evidence, (3) prevent fabrication of testimony, or (4) prevent a cover up. *Banner Health System*, 358 N.L.R.B. No. 93 (2012) (citing H*yundai America Shipping Agency*, 357 N.L.R.B. No. 80 (2011)). The NLRB Office of the General Counsel quickly followed the *Banner Health* decision with an advice memorandum in the Verso Paper charge, which found that Verso Paper's confidential investigation policy violated the NLRA because it did not make a situation-specific finding on the need for confidentiality. Office of the General Counsel, Nat'l Labor Relations Bd., Advice Mem. on *Verso Paper*, Case 30-CA-089350 (Jan. 29, 2013).

The NLRB decision in *Banner Health* and the subsequent *Verso Paper* advice memorandum ignore, or misrepresent, the circumstance of the cases that the board relies on to narrow previous NLRB decisions. Before *Banner Health* and *Hyundai America Shipping Agency*, earlier NLRB decisions established that an employer must have a "substantial business justification" to maintain the confidentiality of an ongoing investigation—a much broader defense than the four *Banner Health* factors. *See, e.g., Caesar's Palace*, 336 N.L.R.B. 271 (2001).

The limitations in *Banner Health* ignore the real world consequences of openness. First, when employees discuss an ongoing investigation or its subject it inevitably will impair the investigation. Allowing witnesses to discuss an ongoing investigation or the allegations will color witnesses' memories because they will begin to fail to distinguish what they know from what they have heard. Further, when witnesses discuss an investigation and the allegations during the investigation, it becomes much

more difficult for an employer to weigh inaccurate and conflicting evidence and to determine if employees have lied.

Second, when unfounded or unsupported complaints or allegations become public it can have significant repercussions for the accused. In particular, unfounded allegations of sexual misconduct or racial discrimination can lead to ostracism and negatively affect the accused person's future employment despite their untruthfulness. Making allegations or an investigation public may also lead to litigation because an accused often will seek to protect his or her name, and it can potentially lead to the loss of qualified privilege for an employer in a defamation claim. *See, e.g., Lawson v. Boeing Co.*, 792 P.2d 545 (Wash. App. 1990).

Finally, and most importantly, failing to maintain a confidential investigation may lead to claims of retaliation under other federal employment laws. Identifying a complainant, the allegations, or the fact that an investigation continues may "dissuade a reasonable worker from making or supporting a charge of discrimination." *Burlington Northern & Santa Fe Ry. v. White*, 548 U.S. 53, 57 (2006). S*ee, e.g., Fordham v. Islip Union Free School District*, 2012 WL 3307494, at *6 (E.D.N.Y. 2012) (finding that the plaintiff met the requirements of prima facie retaliation, in part, based on the public nature of the investigation).

Clearly blanket confidential investigation policies will not survive an NLRB challenge. Further, employers, and their counsels, cannot automatically deem every investigation confidential while acting as though they made the confidentiality determination on a case-by-case basis. Rather, attorneys should list the facts and the specific reasons why each investigation requires confidentiality. While the NLRB appears to favor the *Banner Health* factors, solid business justifications that consider the validity of an investigation, the potential to harm other employees, and other federal laws should be valid reasons to keep investigations confidential. Employers should conduct investigations in an expedited manner and inform the relevant employees of the results of the investigations. Finally, employers and their attorneys should inform employees once they no longer need to maintain confidentiality.

Courtesy Policies: Employers Can Only Prohibit *Fight Club*

No employer wants employees instigating fights with each other. And yet the NLRB contends that a policy that discourages fights and discussions on inflammatory topics violates the NLRA. While the NLRB pronouncement against picking fights was addressed in social media-related rulings, the NLRB continues to push to limit the ability of employers to establish policies regarding the conduct and social interaction of their employees despite the clear NLRB precedent contrary to its current position and repeated court admonitions.

The NLRB set the standard to determine if a courtesy policy or related discipline violates the NLRA in *Atlantic Steel Co.*, 245 N.L.R.B. 814 (1979). Under the standard an employee loses the protections of the NLRA if "the nature of the employee's outburst" is "opprobrious." Previously, to determine whether an employee engaged in "opprobrious conduct" that did not warrant NLRA protection required evaluating the following four factors: (1) where a discussion happened, (2) the discussion subject, (3) "the nature of the employee's outburst," and (4) whether an employer's unfair labor practice prompted it. Since the *Atlantic Steel* ruling, the NLRB has repeatedly tried to limit this analysis so that only threats of violence or actual violence would meet the "opprobrious conduct" standard. The NLRB has taken the position since that time—often supported by unions—that no conduct short of violence can remove the protections of the NLRA. *See Felix Industries, Inc. v. NLRB*, 251 F.3d 1051, 1055 (D.C. Cir. 2001).

For instance, in *Adtranz Abb Daimler–Benz Transportation, N.A., Inc. v. NLRB*, 253 F.3d 19 (D.C. Cir. 2001), the NLRB found Adtranz's policy that prohibited the use of "abusive or threatening language to anyone on company premises" to violate the NLRA and to constitute a per se unfair labor practice. *Id.* at 25. The court summarized the NLRB position as "[a]ccording to the Board and the Union…, it is perfectly acceptable to use the most offensive and derogatory racial or sexual epithets, so long as those using such language are engaged in union organizing or efforts to vindicate protected labor activity." *Id.* at 26. The court went on to note that the NLRB's position directly conflicted with federal and state laws that subject employers to liability for hostile work environments. *Id.* at 27. Ultimately, the court found that the NLRB position was untenable based on its previous decisions and case law.

The NLRB took a similar position in *Felix Industries*, a case in which an employee had referred to his supervisor as a "f--king kid" at least three times and explicitly stated that he did not need to listen to his supervisor. According to the NLRB, this conduct was not sufficiently bad or insubordinate for the employee to lose the protections of the NLRA. *Felix Industries, Inc.*, 251 F.3d at 1055. The court found that the NLRB position effectively turned the third prong of the four factors articulated in *Atlantic Steel* into a violence-only standard. The court reiterated that "denouncing a supervisor in obscene, personally-denigrating, or insubordinate terms… properly counts against according [the employee] the protection of the Act." *Id.*

Most importantly, failing to maintain a confidential investigation may lead to claims of retaliation under other federal employment laws.

Despite its own precedent and repeated court decisions against the position, the NLRB continues to push against employers' ability to require civil conduct from their employees and to punish employees for abusive actions. *See, e.g., Medco Health Solutions of Las Vegas v. NLRB*, 701 F.3d 710, 712–13 (D.C. Cir. 2012); *Plaza Auto Center, Inc. v. NLRB*, 664 F.3d 286, 293–95 (9th Cir. 2011). An August 2011 report noted that a company's standards-of-conduct policy that prohibited "offensive conduct" and "rude or discourteous behavior" was overly broad and violated the NLRA. Office of the General Counsel, Nat'l Labor Relations Bd., Operations-Manage-

ment Mem. OM 11-74, at 6 (Aug. 8, 2011) (containing a *Report of the Acting General Counsel Concerning Social Media Cases*). In May 2012, the NLRB general counsel noted in a third report on social media cases that a social media policy that encouraged employees not to pick fights and to avoid objectionable or inflammatory topics violated the NLRA because "[d]iscussions about working conditions or unionism have the potential to become just as heated or controversial as discussions about" other topics. Office of the General Counsel, Nat'l Labor Relations Bd., Operations-Management Mem. OM 12-59, at 10 (May 30, 2012) (containing a *Report of the Acting General Counsel Concerning Social Media Cases*).

Ultimately, the current NLRB position appears to be that anything short of violence or an action that violates a federal law is fair game for employees if it happens during a discussion. *But see Stant USA Corporation*, 2011 WL 7789839 (N.L.R.B.G.C. 2011) ("harassing" could be interpreted to violate Section 7 rights). For instance, the NLRB found that a provision that provided "any harassment, bullying, discrimination, or retaliation that would not be permissible in the workplace is not permissible between coworkers online" to violate the act. Nat'l Labor Relations Bd., Mem. OM 12-59, *supra*. This provision, however, ignores that expletive-filled rants and arguments, regardless of location, can and do cause problems in the workplace. "[B]oth employees and employers have a substantial interest in promoting a workplace that is 'civil and decent.'" *Martin Luther Memorial Home, Inc.*, 343 N.L.R.B. No. 75, 648 (2004) (quoting *Adtranz*, 253 F.3d at 25).

In advising clients on their policies and handbooks, attorneys should craft standards-of-conduct policies and other controls of employees' actions carefully. The NLRB will consider the policies in context, and if a potentially offending rule is in a list of other, clearly lawful rules, then the NLRB will be less likely to strike the provision. *Lutheran Heritage Village-Livonia*, 343 N.L.R.B. 646 (2004). Examples of prohibited conduct will also militate against a violation finding by the board.

When it comes to actual employee discipline, an employer must first consider the context of an outburst. If an outburst is wholly unrelated to employment, then the NLRA does not apply, and an employer is free to discipline subject to all other employment laws. However, the NLRB is quick to find a nexus between an employee's comments and the employment. So an employer should not stretch to find an outburst unrelated to the employment. If an outburst is related to the terms and conditions of the employment, then an employer needs to weigh the *Atlantic Steel* factors before terminating an employee.

At-will Employment: Unsettled Law?

Since Horace Gray Wood published his seminal treatise *Master and Servant* in 1877, all states have adopted at-will employment as the basic employment contract. Despite more than 130 years of at-will employment and the generally accepted principles of at-will employment, the NLRB believes that "the law in this area remains unsettled" and that the NLRB regional offices should "submit all cases involving employer handbook provisions that restrict the future modification of an employee's at-will status to the [NLRB] Division of Advice." Advice Mem. on *SWH Corporation d/b/a Mimi's Café,* Case 28-CA-084365 (Oct. 31, 2012).

On June 30, 2011, the NLRB issued a complaint against American Red Cross Arizona Blood Services Region alleging that the American Red Cross' definition of at-will employment, "I further agree that the at-will employment relationship cannot be amended, modified or altered in any way," violated the NLRA. Although the American Red Cross revised this provision before an administrative law judge issued a decision, thereby rendering the complaint moot, the administrative law judge found that this provision was overly broad and would "reasonably restrict employees in the exercise of their Section 7 rights, even absent any effort to enforce that language." *American Red Cross Arizona Blood Services Region*, Case 28-CA-23443 (Feb. 1, 2012).

Following the *American Red Cross Arizona* case, other NLRB regions began filing complaints against companies' at-will employment provisions. On February 29, 2012, the NLRB filed a complaint against Hyatt Hotels Corporation alleging that the following was unlawful:

> *I understand my employment is "at will."* This means I am free to separate my employment at any time, for any reason, and Hyatt has these same rights. Nothing in this handbook is intended to change my at-will employment status. *I acknowledge that no oral or written statements or representations regarding my employment can alter my at-will employment status, except for a written statement signed by me and either Hyatt's Executive Vice-President/Chief Operating Officer or Hyatt's President.*
>
> In order to retain flexibility in its policies and procedures, I understand Hyatt, in its sole discretion, can change, modify or delete guidelines, rules, policies, practices and benefits in this handbook without prior notice at any time. *The sole exception to this is the at-will status of my employment, which can only be changed in a writing signed by me and either Hyatt's Executive Vice President/Chief Operating Officer or Hyatt's President.*

(emphasis in complaint). Hyatt Hotels resolved this claim before a hearing began.

The NLRB then filed complaints against two more employers in the late summer of 2012 alleging that the employers' at-will employment clauses violated the NLRA. Before these cases proceeded to hearings, the NLRB Office of General Counsel issued advice memorandums on them that determined that the complained of policies did not violate the NLRA. They also both ruled that future cases regarding at-will employment should be submitted to it.

While the NLRB has not provided much guidance about what it believes makes an at-will employment provision unlawful, the NLRB has hinted at what it sees as invalid at-will statements. First, at-will employment policies and disclaimers cannot foreclose any opportunity for an employee to change his or her status. Second, the policy should not make it more difficult or otherwise discourage employees from seeking to change their at-will status. Finally, if a provision provides a way to change the at-will status, it should not limit that ability to an employee individually—as appears to have been the problem in the Hyatt Hotels case.

Photographs and Videos: Everybody Say Cheese

Every day employees bring sophisticated spying devices onto employers' property

that would make Cold War spies lust with envy: smart phones. These devices allow employees to easily make recordings at work and post them for all to see on the web. Unfortunately, these recordings can paint the employer in a bad light and reveal a company's confidential, proprietary information. Recognizing this problem, many employers have attempted to limit employees' ability to take photographs or videos of or on company property. Unsurprisingly, the NLRB has tried to limit employers' ability to prohibit this conduct.

In an advice memorandum issued in the summer of 2013, the general counsel reviewed the social media policy of Giant Food, LLC, which provided, in part "Do not use any… photographs or video of the Company's premises, processes, operations, or products, which includes confidential information owned by the Company, unless you have received the Company's prior written approval." Office of the General Counsel, Nat'l Labor Relations Bd., Advice Mem. on *Giant Food LLC,* Cases 05-CA-064793, 05-CA-065187, and 05-CA-064795 (Mar. 3, 2012) (specifying the mem. date as Mar. 21, 2012 although it was not released to the public until June 2013). The memorandum advised that the Giant Food policy prohibiting employees from photographing or videotaping the employer's premises could reasonably be interpreted to stop employees from using social media to communicate and to share information regarding protected concerted activities through pictures or videos, such as employees engaged in picketing or other Section 7 activities.

The NLRB position on employees' general right to photograph or to videotape an employer's premises has long been settled. In this case, the NLRB, however, failed to address Giant Food's policy to prohibit "photographs or video of… processes, operations, or products, which includes confidential information." Employers clearly have vested interests in preventing this type of confidential information from being published. For instance, the layout of a factory, as well as the tooling, staffing, and machines used in the manufacture of a product, may provide insight to competitors that could undermine an employer's competitive advantage. Further, many businesses have documents on walls and desks that contain confidential information. Employers need to prevent employees from taking photographs or videos in these areas.

In *Flagstaff Medical Center,* 357 N.L.R.B. No. 65 (August 26, 2011), the NLRB held that a hospital's policy that prohibited "[t]he use of cameras for recording images of patients and/or hospital equipment, property, or facilities" did not violate the Act since it did not "have a reasonable tendency to interfere with Section 7 activities." The NLRB supported this decision by noting the "weighty" privacy interests of hospital patients and the hospital's obligations under the Health Insurance Portability and Accountability Act (HIPAA). Interestingly, the NLRB did not address the hospital's prohibition against photographing hospital facilities—in direct contrast to the *Giant Food* advice memorandum.

The NLRB has made it clear that it will carefully scrutinize a blanket policy prohibiting employees from photographing or making video recordings of an employer's premises. Employers should carefully craft their policies to limit the ban to photos or videos of an employer's processes, operations, or products. Employers should heed the NLRB's reasoning in *Flagstaff Medical Center* and support their policies by noting their privacy interests. Again, the NLRB appears to disfavor vague blanket bans and favors specific, narrowly tailored policies that provide specific examples of prohibited behaviors.

Moving Forward: *Weingarten* Rights Again

This article highlights only four NLRB positions that should concern nonunionized employers and their counsel. But the NLRB has actively tried to limit employers' ability to control their employees in numerous other areas, including access to company property and solicitation. In addition, several cases are wending their way through the courts based on arbitration clauses in employment contracts and the NLRB's ability to force employers to post NLRB notices or face sanctions. Even if these decisions do favor employers, it seems highly likely that the NLRB will continue to try to limit the reach of the decisions in the future.

The NLRB may also attempt to reinstate "*Weingarten* rights" in nonunionized workplaces in light of the recent Occupational Safety and Health Administration (OSHA) statutory interpretation on allowing union representation during inspections. In 1975, the Supreme Court ruled that employees have the right to union representation during investigatory interviews that could lead to discipline or require the employee to defend his conduct. *NLRB vs. Weingarten, Inc.*, 420 U.S. 251 (1975). From July 2000 until June 2004, the NLRB extended modified *Weingarten* rights to nonunionized employees by allowing those employees to make requests to have an employee representative attend investigatory interviews, and the NLRB invoked the NLRA to do so.

Ultimately, the current NLRB position appears to be that anything short of violence or an action that violates a federal law is fair game for employees if it happens during a discussion.

On February 21, 2013, OSHA clarified in a standard interpretation that nonunionized employees could designate a union-affiliated individual as the "employee representative" during an OSHA inspection. If OSHA will allow nonunionized employees to have union representation, it seems possible that the NLRB will revisit allowing nonunionized employees to have union representation during workplace investigations.

Ultimately, the NLRB's pronouncements and actions will require counsel to help their clients navigate permissible policies, best practices, and conduct under the National Labor Relations Act.