SUPREME COURT ADOPTS HEIGHTENED STANDARD FOR EMPLOYEE RETALIATION CLAIMS

Recently, the Supreme Court of the United States issued its decision in ***University of Texas Southwestern Medical Center v. Nassar***, which raises the bar for employees who file Title VII retaliation claims against their employers.

Title VII protects employees from discrimination based on race, sex or gender, religion, or national origin. Title VII also protects employees against certain forms of retaliation. Specifically, Title VII prohibits an employer from retaliating against an individual who has opposed, complained of, or participated in any complaint of unlawful employment practices by the employer. Retaliation can take many forms, including actions relating to terms and conditions of employment (*i.e.* hiring, firing, promotions, *etc.*), disciplinary actions and even discriminatory acts that occur outside the workplace.

For an employee to prevail under Title VII for a claim of retaliation, the employee must show some causal link between an adverse employment action and the employee's protected activity. Although federal district courts have been divided on just what type of proof an employee must establish in order to succeed on a Title VII retaliation claim, the key inquiry has always been the employer's motivation. Some courts have allowed employees to prove retaliation claims by establishing that the employer's action or decision was motivated by the employee's complaint or other protected activity, even if the employer also had other lawful motives that caused the employer's action or decision. Other courts, however, have applied a more stringent standard that requires employees to prove that the employer would not have taken the challenged employment action "but for" the employee's complaint or engagement in other protected activity.

In *Nassar*, the Supreme Court clarified that in order to prove retaliation under Title VII, an employee must prove "but-for" causation – that the employee's complaint of unlawful employment practices was the "but-for" reason for the challenged employment action rather than just one of many reasons. Proving that a challenged employment action was motivated by discriminatory reasons, even if the employer's action was also motivated by other lawful reasons, is no longer sufficient to succeed with a retaliation claim.

What does the Court's decision mean for employers?

The Court's decision in *Nassar* is of particular significance because the number of retaliation claims filed by employees has significantly increased in recent years and has nearly doubled from 1997 to 2012, according to EEOC statistics. Requiring employees to prove "but-for"

causation in a Title VII retaliation claim should make it easier for employers to succeed at the early stages of litigation and will hopefully curb the filing of frivolous claims that cost employers time and money to defend. That is not to say that employers no longer need to apply or enforce anti-retaliation policies. Documenting performance problems and adhering to consistent disciplinary and termination practices continues to be of critical importance for employers as evidence of legitimate and non-discriminatory reasons for any challenged employment action.

BEWARE POTENTIAL EMPLOYMENT SUCCESSOR LIABILITY IN ASSET TRANSACTIONS

With Labor Day in the rearview mirror and the fall M&A deal season now upon us it is important to remember that, while most liabilities can be extinguished in an Asset Purchase Transaction, there are a few liabilities that cannot. This post will focus on one such liability – Federal Employment Liability.

Last spring, the Seventh Circuit, in *Teed v. Thomas and Betts Power Solutions, L.L.C.,* held that certain federal employment liabilities (e.g. ongoing Fair Labor Standards Act (FLSA) litigation) may flow from the seller through the asset purchase to the buyer despite language to the contrary in the purchase agreement.

In *Teed*, the seller was in receivership and embroiled in various FLSA litigation stemming from pre-sale activity. The buyer negotiated a clause in the asset purchase agreement absolving it of liability in this pending litigation and the state court approved the sale of the assets "free and clear of all liens, claims, encumbrances, and other interests of any kind."

After the acquisition, the plaintiffs moved to substitute the seller for the buyer in their ongoing FLSA cases. The Seventh Circuit determined that because a federal law was at issue, federal common law applied. The federal common law regarding successor liability is not as limited as most state's successor liability laws and, in *Teed*, the court held that the seller was liable under the doctrine of successor liability.

Successor liability is a complicated doctrine, particularly when federal laws are involved or the parties to a transaction are from more than one state. Not only do the successor liability laws vary from state to state, the Federal Circuits all have their own interpretations of it as well. Therefore, it is important to perform thorough due diligence of a target company and hire transactional attorneys who have employment law experience and are able to evaluate whether or not the liabilities can be contracted around or have the potential to attach to the

buyer after the transaction is complete so that the proper indemnifications, escrow, or holdbacks can be negotiated into the purchase agreement.

As always, if you have any questions on this topic or employment law in general, please do not hesitate to contact us.

SEVENTH CIRCUIT REVERSES COURSE ON EMPLOYER'S ADA REASONABLE ACCOMMODATION OBLIGATIONS

In *EEOC v. United Airlines*, the Court of Appeals for the Seventh Circuit held that an employer, as part of its reasonable accommodation obligations under the Americans with Disabilities Act ("ADA"), must reassign a disabled employee to an open and available position regardless of whether there might be a better or more qualified applicant for that job position. The Seventh Circuit's holding is a direct reversal of its previous decision on the same issue twelve years earlier when it held that an employer who has an open and available position is not required to provide a disabled employee seeking reassignment to that open and available position preferential consideration when there are better qualified applicants for the position provided the employer has a consistent policy to hire the best applicant for the particular job in question, rather than the first qualified applicant.

In a decision issued twelve years ago by then Chief Judge Richard Posner, the Seventh Circuit took the position that the ADA is not a mandatory preference act and that the ADA only requires an employer to consider the feasibility of reassignment. The Seventh Circuit also previously held that it was not Congress' intent when it passed the ADA that a reasonable accommodation should be used to provide a disabled employee an advantage or preference over non-disabled employees. Rather, it was Congress' intent to provide disabled employees a level playing field with non-disabled employees relative to job opportunities. In that case, the Seventh Circuit held that a "policy of giving the job to the best applicant is legitimate and nondiscriminatory."

In its United Airlines decision, the Seventh Circuit reversed its anti-preference interpretation of the ADA based upon a re-examination of the U.S. Supreme Court's decision in *Barnett v. U.S. Air, Inc*. where the U.S. Supreme Court arguably rejected that interpretation of the ADA noting that such an argument "fails to recognize what the Act specifies, namely, that preferences will sometimes prove necessary to achieve the Act's basic equal opportunity goal." The Seventh Circuit interpreted this language from the Barnett decision to mean that

an employer is mandated under the ADA to reassign a disabled employee to a vacant position absent a showing of an undue hardship, regardless of whether there might be better qualified candidates for the position.

An argument can be made that the Seventh Circuit interpreted the U.S. Supreme Court's "preference" requirement in Barnett too broadly. That is, the ADA does in fact provide a preference to disabled employees – that preference is in the form of a reasonable accommodation as a means of leveling the "playing field" between disabled and non-disabled employees. However, the ADA does not expressly provide that employees with disabilities should be given "bonus points" relative to other qualified applicants or candidates when competing for the same position. As Judge Posner astutely questioned: Should the ADA provide preferential consideration to a 29-year-old white male with tennis elbow in providing that employee preferential treatment in reassignment to a vacant position over a 62-year-old black woman with no disability who also happens to be the more qualified and better applicant for the job? Under such a scenario, the ADA creates a hierarchy of protections against discrimination, placing an employee with a disability ahead of members of other groups also deserving protections, such as racial minorities. In our opinion, the U.S. Supreme Court in Barnett did not intend to signal such preferential treatment to employees with disabilities, but, rather, was addressing those preferences that may be necessary to level the "playing field" in the workplace for such employees. The question becomes how far does the duty of reasonable accommodation extend when it affects the legitimate expectations of other qualified applicants or employees. This was an important question that the Seventh Circuit did not address in its United Airlines decision and, perhaps, may be a question the U.S. Supreme may wish to address.

In *Huber v. Wal-Mart Stores, Inc.*, a case that followed the Barnett decision, the U.S. Supreme Court had the opportunity to address the issue of whether an employer who has an established policy to fill vacant job positions with the most qualified applicant is required to reassign a qualified disabled employee to a vacant position as a reasonable accommodation, although the disabled employee is not the most qualified applicant for the position. Unfortunately, this case was settled by the parties before the U.S. Supreme Court could rule on the case. A decision in the Wal-Mart case would have answered this important question regarding an employer's obligation to reassign a disabled employee who can no longer fulfill the responsibilities of his or her original job position when there are other better qualified applicants.

Despite the Seventh Circuit's reliance on the Barnett decision, it less than clear whether the U.S. Supreme Court intended for the application of a best-qualified applicant policy to be a per se violation of the ADA when a disabled employee seeks reassignment as a form of a reasonable accommodation, especially when that reassignment is to the detriment of better qualified applicants or candidates. Neither the ADA nor the corresponding regulations express that reassignment to a vacant position is mandatory when it is to the exclusion of

other qualified applicants or that an employer has to provide a disabled employee preferential treatment. In fact, the ADA stops short of requiring that any particular group be afforded a competitive advantage over all others when it comes to hiring or other job placements decisions. Although the U.S. Supreme Court recently rejected the opportunity to review the Seventh Circuit's decision in United Airlines, it will hopefully be an issue that the Court will address in the near future when given the opportunity.

FIFTH CIRCUIT FINDS FIRING A WOMAN FOR EXPRESSING BREAST MILK IS SEX DISCRIMINATION

The U.S. Court of Appeals for the Fifth Circuit recently held that firing a female employee because she is lactating or expressing breast milk constitutes sex discrimination in violation of Title VII of the Civil Rights Act.

Title VII of the Civil Rights Act prohibits discrimination on the basis of sex, which, until Congress enacted the Pregnancy Discrimination Act ("PDA"), did not include discrimination on the basis of pregnancy. The PDA made clear that discrimination based on or because of sex includes discrimination based on or because of pregnancy, childbirth, or related medical conditions. In *EEOC v. Houston Funding II Limited*, the Fifth Circuit has now held that lactation is a "related medical condition" of pregnancy for purposes of the PDA.

In the *Houston Funding* case, a female employee filed a charge of sex discrimination with the EEOC when her employer, Houston Funding, fired her after she asked whether she could use a breast pump at work. The employee took a personal leave of absence to have a baby. Shortly after giving birth, the employee told Houston Funding that she would return to work once her physician released her to do so. While she was on leave, the employee had communicated to her supervisor that she was breastfeeding her child and asked whether she would be able to use her breast pump at work. When the employee's physician finally released her to return to work, the employee again mentioned that she was lactating and wanted to know whether she could use a back room to express breast milk. Houston Funding told the employee that they had filled her position and that she was being terminated for job abandonment because she had not contacted her supervisor during her leave and had not attempted to return to work. The employee responded by filing a sex discrimination claim with the EEOC.

The Fifth Circuit found that Houston Funding discriminated against the employee based on a

related medical condition of the employee's pregnancy – in other words, because she was lactating and wanted to express breast milk at work. The Fifth Circuit's holding in *Houston Funding* means that courts are beginning to recognize that employment decisions based upon whether a woman is lactating may be considered discriminatory in violation of Title VII.

What Should Employers do to Avoid These Types of Claims?

Be sure to follow best practices and applicable employment laws. For example, federal law requires employers to provide reasonable break time and a private place (other than a restroom) for female employees to express breast milk after giving birth to a child. Additionally, Wisconsin law prevents employers from prohibiting a mother from breast-feeding her child, directing a mother to move to a different location to breast-feed her child, directing a mother to cover her child or breast while breast-feeding, or otherwise restricting a mother from breast-feeding her child. You should be sure to update your policies accordingly to ensure that you are in compliance with federal and state law.

If you would like more information about this topic or if you need advice on how to draft your personnel policies to ensure compliance with applicable laws, please contact Sarah C. Matt.

RECENT LAWSUIT TESTS MINISTERIAL EXCEPTION

Generally, the "ministerial exception" allows religious employers to avoid liability for discrimination claims when making employment decisions concerning employees who qualify as "ministers." The exception is rooted in religious freedom principles found in the U.S. Constitution. Specifically, the First Amendment of the U.S. Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." The first part of this amendment is known more commonly as the "Establishment Clause" and the second part is commonly known as the "Free Exercise Clause." The U.S. Supreme Court has held that a church's selection of its leaders is grounded in the Free Exercise Clause. The Free Exercise Clause recognizes that "perpetuation of a church's existence may depend upon those whom it selects to preach its values, teach its message, and interpret its doctrines both to its own membership and to the world at large."

More than one year ago, the U.S. Supreme Court confirmed that claims involving the employment relationship between a religious institution and its ministers exempt employers from liability under Title VII pursuant to the "ministerial exception" founded upon an employer's First Amendment rights. In Hosanna-Tabor Evangelical Lutheran Church and

School v. EEOC, the Supreme Court held that:

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"Requiring a church to accept or retain an unwanted minister, or punishing a church for failing to do so, intrudes upon more than a mere employment decision. Such an action interferes with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs. By imposing an unwanted minister, the state infringes the Free Exercise Clause, which protects a religious group's right to shape its own faith and mission through its appointments."

The Supreme Court in *Hosanna-Tabor* refused to adopt a rigid formula for deciding when an employee qualifies as a minister. So, one of the primary questions that remains after the Supreme Court's decision in *Hosanna-Tabor* has been how broadly the courts will interpret "minister" and which employees will be covered by the ministerial exception.

One of the first opportunities to test the Supreme Court's ruling in *Hosanna-Tabor* presented itself in *Dias v. Archdiocese of Cincinnati*, a case coming out of the U.S. District Court for the Southern District of Ohio. On June 4, 2013, a jury returned a verdict for Crista Dias, a former technology coordinator for two Catholic schools in the Cincinnati area. Dias filed a complaint against the Archdiocese alleging the Archdiocese terminated her for being pregnant and unmarried in violation of Title VII's ban on sex and pregnancy discrimination.

The Archdiocese moved to dismiss Dias' complaint by invoking the "ministerial exception," but the district court denied the motion. The court found that Dias was not a minister for purposes of the ministerial exception to Title VII because Dias taught computer classes and

because she was a non-Catholic who was not permitted under church rules to teach religion to her elementary school students. If the Ohio Archdiocese appeals the jury's verdict, it will have an opportunity to pursue defense of the claim under the ministerial exception at the federal appellate court level, which will give the appellate court a chance to develop the standard for determining when an employee qualifies as a minister.

Religious-based employers should closely follow the developing case law of the ministerial exception for guidance as to which employees will be considered "ministers" within the meaning of the exception.

RECORD RETENTION POLICY: A START TO BEING LITIGATION-READY

Almost 99% of today's information created by businesses is generated and stored electronically. The ability to easily and conveniently store large amounts of data has created a hidden liability that did not exist in the age of when companies maintained its information primarily in paper format. The effect of this hidden liability is twofold. First, companies create more information then they know what to do with. Second, companies sometimes delete or destroy data and information that they actually do need.

For the unwary, these hidden liabilities may become exposed when your company is faced with a lawsuit. In today's litigation, the age of electronic data has generated a paradigm shift away from traditional paper documents to digital information. This shift has changed the discovery process in litigation by changing what attorneys are looking for; how they are looking; and where they are looking for relevant information. Companies can expect in today's litigation that the way it stores and preserves electronic information will be a central topic during the discovery process that will involve not only your record custodians, but also your information technology department. How well a company manages and preserves its electronic information may be an outcome determinative factor for it in litigation.

Today, companies that find themselves involved in a lawsuit oftentimes are faced with attacks through the discovery process as to how they typically store and delete electronic information. The purpose of this inquiry is to set the expectation as to what electronic information, such as e-mails, the company should or should not reasonably have at its disposal for discovery purposes. Companies that do not have a well-drafted record retention plan that addresses electronic information and which incorporates a comprehensive litigation hold policy may find themselves at a significant disadvantage in trying to defend what might otherwise be a winning case. That is why it is more important than ever for all companies,

both large and small, to effectively manage their electronic information. This means that **companies must be litigation-ready** by taking affirmative actions that allow the company to effectively manage and retain electronic information. It is simply too late to start thinking about the manner and method of retention and destruction of electronic data after you have been served with a lawsuit.

The best tools to avoid these hidden liabilities is a **record retention policy** that addresses electronic information as well as a **litigation hold policy** that is designed to preserve electronic data once litigation is reasonably anticipated. A record retention policy should be designed so that your company does not destroy information that it is obligated to maintain and at the same time the policy should be designed to destroy or delete information that the company no longer needs and/or is no longer mandated to maintain. Most companies have some sort of document retention policy. These retention policies were originally implemented to manage the volume and space occupied by paper documents. Companies have been less diligent, however, in applying their retention policies to the electronic information that they store on their servers and individual computer hard drives. This lack of diligence in managing electronic data has created a treasure trove for plaintiffs' lawyers looking for the proverbial "smoking gun," such as that e-mail that explains exactly what motivated the company's decision to terminate that troublesome employee.

A litigation hold policy has long been an important concept in litigation. In simple terms, it means that once you are sued, you have to stop destroying documents. It is an easy concept to understand when applied to paper documents, but it becomes a much more complicated task when dealing with electronic information. Electronic evidence can easily disappear, be altered or destroyed if not properly preserved. For example, some companies' computer systems provide for automatic deletion of e-mails and documents, so stopping that process takes an affirmative effort on behalf of management. When implementing a legal hold, a company needs to approach the hold requirement with a coordinated team effort. Business units, IT, records management and custodial personnel, and either in-house or outside counsel need to be involved and work together in the process of implementing the hold.

The failure to have a properly drafted record retention policy as well as a litigation hold policy may result in serious and adverse consequences for your company and may compromise your company's ability to defend itself in a lawsuit. For example, failure to have these policies in place can result in court-imposed sanctions, adverse jury instructions and significant monetary awards.

For example, a federal district court in Illinois recently agreed to permit the jury to be instructed that it can assume computer data destroyed by an employer would be unfavorable to its defense in an employee's lawsuit under the Americans with Disabilities Act when the employer permitted a software program to automatically overwrite computer data relevant to the claims in the case. It made no difference that the employer did not act intentionally in

deleting the information, rather, the district court found that the employer's failure to prevent the automatic deletion made it "at fault" relative to its duty to preserve evidence that was discoverable pursuant to the Federal Rules of Civil Procedure. Consequently, thinking ahead and addressing the hidden liabilities created by your electronic information can save your company time and money, and, more importantly, potentially prevent your company from having to incur an unfavorable judgment as the result of electronic information being inadvertently deleted.

EEOC SEEKS DETERMINATION FROM SEVENTH CIRCUIT THAT ITS PRE-SUIT CONCILIATION EFFORTS CANNOT BE REVIEWED

The EEOC is statutorily obligated to enter into confidential conciliation efforts with an employer prior to commencing a lawsuit. Only if the EEOC is unable to secure a conciliation agreement acceptable to it may it bring a civil action, as conciliation is a condition precedent to the EEOC's power to sue. The purpose of this requirement is to encourage settlement of discrimination cases through voluntary compliance, rather than litigation. If the EEOC commences suit against an employer without first engaging in a good faith effort to conciliate the case, the employer may seek dismissal of the lawsuit because conciliation raises a quasi-jurisdictional issue.

Despite case law to the contrary, the EEOC has now attempted to argue that a federal district court is without authority to review the EEOC's pre-suit conciliation efforts. In *EEOC v. Mach Mining*, the EEOC has argued that an employer cannot challenge the EEOC's pre-suit conciliation efforts because Title VII prohibits disclosure of conciliation efforts in a subsequent proceeding. The federal district judge, however, was not persuaded by the EEOC's argument as he found that the prohibition was in conflict with Title VII's mandate that the EEOC must attempt to conciliate with the employer prior to bringing a civil action. Moreover, the federal district judge also held that Title VII's prohibition regarding disclosure of conciliation efforts goes to the introduction of such evidence relative to the merits of the case and not to introducing such evidence for the purpose of determining whether the EEOC first satisfied its prerequisite to bringing suit.

Nevertheless, the federal district judge granted the EEOC's motion to seek an interlocutory appeal before the Seventh Circuit because there exist a split between the federal circuits as to the scope of a court's review of the EEOC's conciliation efforts – an issue that the Seventh Circuit has not yet addressed. Some circuits employ a "deferential standard" inquiring only

whether the EEOC made an attempt to conciliate whereas other circuits apply a "heightened scrutiny standard" which requires the EEOC to make a sincere and reasonable effort to negotiate by providing the employer with an explanation as to the reasonable cause for its belief that Title VII has been violated and an adequate opportunity to respond to all charges and negotiate a possible settlement.

The federal district court certified the following two questions for the Seventh Circuit on appeal: (1) Is the EEOC's conciliation process subject to judicial review?, and (2) if so, is that level of review a deferential or heightened scrutiny level of review? It would be anticipated that the Seventh Circuit will hold that the EEOC's conciliation is subject to judicial review and will most likely find that a district court's scope of review will include a determination as to whether the EEOC in fact engaged in conciliation and whether that effort was made in good faith. We will update this blog article when the Seventh Circuit issues its decision.

OSHA NOW PERMITS UNION ORGANIZER TO ACCOMPANY OSHA COMPLIANCE OFFICER DURING WALK AROUND INSPECTION IN NON-UNION FACILITY

OSHA has literally opened the door for union organizers to enter an employer's non-union facility during an OSHA walkaround inspection. In a February 21, 2013 interpretation letter, Richard E. Fairfax, OSHA's Deputy Assistant Secretary, opined that employees without a collective bargaining agreement may designate a person affiliated with a union or community organization to act on their behalf as a walkaround representative. Mr. Fairfax opined that the OSH Act, specifically, 29 U.S.C. § 657(e), authorizes participation in the walkaround portion of an OSHA inspection by "a representative authorized by the employer's employees." Mr. Fairfax further attempts to support his opinion by citing to the underlying OSHA regulations, 29 C.F.R. § 1903.8, which explicitly allows walkaround participation by an employee representative who is not an employee of the employer when, in the judgment of the OSHA compliance officer, such a representative is "reasonably necessary to the conduct of an effective and thorough inspection."

Mr. Fairfax's interpretative letter conveniently fails to acknowledge that permitting a non-employee to participate in the walkaround inspection is an exception to the express part of the regulation that provides that "[t]he representative(s) authorized by employees shall be an employee(s) of the employer." Further, Mr. Fairfax fails to acknowledge that the exception permits only those third parties with special expertise or knowledge to participate in a

walkaround inspection, such as a hygienist or a safety engineer. OSHA's interpretative letter fails to clarify what special skill or knowledge a union or community organizer may bring to the inspection.

OSHA's interpretative letter also fails to clarify when an alleged "employee representative" is "authorized" by the employees. Can a minority faction of employees claim that an union organizer is their "authorized" representative when other employees may object to such individual as their authorized representative? It appears that OSHA's interpretative letter takes a very liberal interpretation of who is or can be an "authorized" employee representative. If an employer is confronted with this scenario, should it halt the inspection and provide the compliance officer the option of conducting the walkaround without the union organizer or should the employer require OSHA to seek a warrant if the compliance officer insists that he or she will only conduct the walkaround if the union organizer is permitted to accompany the compliance officer? Obviously, these significant issues, as well as others, should be discussed with experienced legal counsel prior to permitting an OSHA compliance officer to proceed with a walkaround inspection under such circumstances.

DOES YOUR "AT-WILL" EMPLOYMENT STATEMENT VIOLATE THE NATIONAL LABOR RELATIONS ACT?

To maintain its relevancy and expand the scope of its authority, the NLRB continues its attack upon non-union employers' policies. This time the NLRB has positioned its cross-hairs upon employers' "at-will" employment policies or statements. Most non-union employers include within their employee handbook a statement that employees' employment is "at-will," meaning either the employee or the employer may end the employment relationship at any time, for any reason, either with or without notice. Most "at-will" statements further provide that no agent or representative of the employer may enter into any agreement to the contrary unless done so in writing and signed by the president or CEO of the company. These types of statements reflect nothing more than the reality of the legal relationship between the employer and the employee.

The NLRB, however, has recently taken a different viewpoint, finding that such "at-will" statements have a chilling effect upon employees' Section 7 rights. In American Red Cross Arizona Blood Services Region, an administrative law judge found that the employer had violated Section 8(a)(1) by maintaining the following language in a form that employees were required to sign acknowledging their at-will employment status: "I further agree that the at-

will employment relationship cannot be amended, modified or altered in any way." The NLRB found this language to essentially constitute a waiver by the employee of his/her Section 7 rights to "advocate concertedly … to change his/her at-will status."

The NLRB applies a two-step inquiry to determine if a work rule would "reasonably tend to chill employees in the exercise of their Section 7 rights." First, a rule is unlawful if it explicitly restricts Section 7 activities. Second, if the rule does not explicitly restricted protected activities, it will nonetheless be found to violate the National Labor Relations Act upon a showing that: (1) employees would reasonable construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights.

Due to a significant uproar from employers, the NLRB issued two sets of advice memoranda on October 31, 2012 and February 4, 2013, back-pedaling on its position with regard to "at-will" employment statements. In these advice memoranda, the NLRB now takes the position that an "at-will" statement will not be considered to interfere with employees' Section 7 rights if the statement (1) does not explicitly restrict Section 7 rights, or (2) was promulgated in response to union or other protected activity, or (3) that the policy had been applied to restrict protected activity.

While most employers' at-will statements will pass the NLRB's scrutiny relative to employees' Section 7 rights, this does not mean that all "at-will" statements, especially those that imply that there can never be any other employment relationship between the employee and employer, will be considered lawful under the National Labor Relations Act. To be prudent, employers should review their "at-will" employment statements in their employee handbooks to make sure that such statements do not foreclose to its employees the possibility of a potential modification of the at-will relationship.

NLRB ASSERTS THAT TELLING EMPLOYEES TO MAINTAIN CONFIDENTIALITY DURING INTERNAL INVESTIGATIONS VIOLATES SECTION 7 RIGHTS

The National Labor Relations Board (NLRB) has taken the position, in a recent Advice Memorandum dated January 29, 2013, that an employer's confidentiality rule may unlawfully interfere with employees' Section 7 rights. Section 7 of the National Labor Relations Act (29 USC § 157) guarantees employees the right to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection. Many employers incorrectly assume

that if they do not have a unionized workforce, the NLRA does not apply to them. However, many of the protections afforded under the NLRA apply to both union and non-union employers alike.

Many employers have written policies providing that employees must maintain the confidentiality of internal investigations for such matters involving employee misconduct, employee theft or workplace harassment. During the investigation process, most employers warn employees involved with the investigation to keep matters discussed during the investigation strictly confidential and not to share such information with other employees. The obvious purpose of such admonition is to maintain the integrity of the investigation and to prevent employees from fabricating or colluding to get their respective stories straight.

The NLRB, however, takes a different view. The NLRB holds that an employer violates Section 8(a)(1) of the NLRA when it maintains a work rule that reasonably chills employees in the exercise of their Section 7 rights. According to the NLRB, employees have a Section 7 right to discuss discipline or disciplinary investigations involving their fellow employees.

An employer may prohibit employees' discussions during an investigation only if it demonstrates that it has a legitimate and substantial business justification that outweighs employees' Section 7 rights. The NLRB's position is that the employer must show more than a generalized concern with protecting the integrity of its investigations. Rather, an employer must show that in any particular investigation that witness(es) needed protection, evidence was in danger of being destroyed, testimony was in danger of being fabricated, or that there was a need to prevent a cover-up. Consequently, any blanket rule prohibiting employee discussions of ongoing investigations is invalid and will be held by the NLRB to violate employees' Section 7 rights.

Most, if not all, employers recognize the importance of employees maintaining the confidentiality of any pending internal investigation. Even the NLRB has not gone as far as to hold that employees have an unfettered right to communicate about internal investigations. Employers should review their employee handbook and other policies that address confidentiality of internal investigations and make sure such policies do not contain a blanket rule regarding confidentiality. In addition, where applicable, employers should add savings clauses to their policies providing that the employer's policy shall not be construed or interpreted to interfere with employees' Section 7 rights. Finally, to avoid NLRB interference, employers should address the issue of maintaining the confidentiality of any internal investigation on a case-by-case basis when it can be demonstrated that maintaining confidentiality is significant to preserving the integrity of the investigation. When such a need arises, employees should be instructed on an individual basis regarding the need to maintain confidentiality about the investigation.