NELA PROGRAM
SEPTEMBER 27, 2012

BY: PATRICK M. FLYNN

LEVERAGING RECENT NLRB DEVELOPMENTS FOR THE PLAINTIFF'S CASE

NATIONAL LABOR RELATIONS BOARD, REGION 16
HOUSTON RESIDENT OFFICE
1919 SMITH STREET, SUITE 1545
HOUSTON TX 77002
713-209-4888

NATIONAL LABOR RELATIONS ACT

SECTION 7

Employees have the right to engage in "concerted activities for the purpose of . . . mutual aid or protection." 29 U.S.C. § 157.

(Two or more employees discussing wages, hours, or working conditions)

SOCIAL MEDIA POLICIES

Costco Wholesale Corp., 358 NLRB No. 106 (Sept. 7, 2012)

Valero -- excerpt

Sample Approved Policy – Still could be unlawfully applied.

KEEPING INVESTIGATIONS CONFIDENTIAL

Banner Health Systems, 358 NLRB No. 93 (July 2012)

EEOC – Buffalo, NY

OTHER CONCERTED ACTIVITY CASES

Trump Marina, 355 NLRB No. 107 (2010)

White Oak Manor, 355 NLRB No. 211 (2010)

ARBITRATION AGREEMENTS

D.R. Horton, Inc., 357 NLRB No. 184 (2012)

The case is being appealed to the Fifth Circuit. NELA has filed an amicus brief supporting the Board.

Concerted Activity in the News

June 18, 2012
NLRB launches webpage describing Protected Concerted Activity

May 30, 2012
Acting General Counsel releases report on employer social media policies

February 10, 2012
Settlement distributes more than $300,000 to unlawfully discharged workers in Texas

September 30, 2011
Administrative Law Judge rules Chicago car dealership had overly broad employee policy, but discharged employee's activity not protected

September 6, 2011
Administrative Law Judge finds New York nonprofit unlawfully discharged employees following Facebook posts

June 2, 2011
ALJ finds parts supplier unlawfully discharged 20 immigrant employees in Minnesota after they refused to sign away NLRA and other rights

May 24, 2011
Chicago car dealership wrongfully discharged employee for Facebook posts, complaint alleges

May 18, 2011
Complaint issued against New York nonprofit for unlawfully discharging employees following Facebook posts

May 5, 2011
Milwaukee job training center pays $22,000, reinstates workers fired for complaining about bounced paychecks

April 27, 2011
Regional News: Build.com settles charge of unlawful discharge for comments posted on Facebook with NLRB agreement in San Francisco

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FORM EXEMPT UNDER 44 U.S.C 3512

INTERNET
FORM NLRB-501
(2-08)

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
CHARGE AGAINST EMPLOYER

DO NOT WRITE IN THIS SPACE	
Case	Date Filed

INSTRUCTIONS:
File an original with NLRB Regional Director for the region in which the alleged unfair labor practice occurred or is occurring.

1. EMPLOYER AGAINST WHOM CHARGE IS BROUGHT

a. Name of Employer	b. Tel. No.
	c. Cell No.
	f. Fax No.
d. Address *(Street, city, state, and ZIP code)* / e. Employer Representative	g. e-Mail
	h. Number of workers employed
i. Type of Establishment *(factory, mine, wholesaler, etc.)*	j. Identify principal product or service

k. The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8(a), subsections (1) and *(list subsections)* _____ of the National Labor Relations Act, and these unfair labor practices are practices affecting commerce within the meaning of the Act, or these unfair labor practices are unfair practices affecting commerce within the meaning of the Act and the Postal Reorganization Act.

2. Basis of the Charge *(set forth a clear and concise statement of the facts constituting the alleged unfair labor practices)*

3. Full name of party filing charge *(if labor organization, give full name, including local name and number)*

4a. Address *(Street and number, city, state, and ZIP code)*	4b. Tel. No.
	4c. Cell No.
	4d. Fax No.
	4e. e-Mail

5. Full name of national or international labor organization of which it is an affiliate or constituent unit *(to be filled in when charge is filed by a labor organization)*

6. DECLARATION
I declare that I have read the above charge and that the statements are true to the best of my knowledge and belief.

	Tel. No.
By _____ *(signature of representative or person making charge)* _____ *(Print/type name and title or office, if any)*	Office, if any, Cell No.
	Fax No.
Address _____ _____ *(date)*	e-Mail

WILLFUL FALSE STATEMENTS ON THIS CHARGE CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)

PRIVACY ACT STATEMENT

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 *et seq.* The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing unfair labor practice and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is voluntary; however, failure to supply the information will cause the NLRB to decline to invoke its processes.

Guidelines

Follow the Code

The Valero Code of Ethics and Business Conduct and Valero corporate policies – including the Electronic Communications Policy and the Valero Global Information Security Policy – apply to your online conduct (blogging or other online activities) just as much as they apply to your offline behavior. Make sure you're familiar with them.

Protect Confidential Information

Your may not use your blog or other social media to disclose Valero's confidential information. This includes nonpublic financial information such as future revenue, earnings, and other financial forecasts, and anything related to Valero strategy, products, policy, management, operating units, and potential acquisitions, that have not been made public.

Protecting the confidential information of our employees, customers, partners, and suppliers is also important. Do not mention them, including Valero executives, in social media without their permission, and make sure you don't disclose items such as sensitive personal information of others or details related Valero's business with its customers. Third party social media services use servers that are outside of Valero's control and may pose a security risk. Do not use these services to conduct internal Valero business or to host business information.

In addition, you may not publish (nor should you possess) our competitor's proprietary or confidential information. You may make observations about competitors' products and activities if your observations are accurate and based on publicly available information. Take care not to disparage or denigrate competitors.

Don't Comment on M&A Activity

You must not comment publicly on Valero's merger and acquisition (M&A) activity, including potential and pending acquisitions. This applies to potential acquisitions regardless of their status – in diligence, announced but not closed, etc. Any commentary on what a transaction or potential transaction may mean to Valero, positive, negative or neutral can be problematic.

Refrain from Objectionable or Inflammatory Posts

Do not post anything that is false, misleading, obscene, defamatory, profane, discriminatory, libelous, threatening, harassing, abusive, hateful, or embarrassing to another person or entity. Make sure to respect others' privacy. Third party Web sites and blogs that you link to must meet our standards of propriety. Be aware that false or defamatory statements or the publication of an individual's private details could result in legal liability for Valero and you.

Don't Speak for Valero

Remember that you are not an official spokesperson for Valero. Make it clear that your opinions are your own and do not necessarily reflect the view of the corporation.

Social Media Policy

Updated: May 4, 2012

At [Employer], we understand that social media can be a fun and rewarding way to share your life and opinions with family, friends and co-workers around the world. However, use of social media also presents certain risks and carries with it certain responsibilities. To assist you in making responsible decisions about your use of social media, we have established these guidelines for appropriate use of social media.

This policy applies to all associates who work for [Employer], or one of its subsidiary companies in the United States ([Employer]).

Managers and supervisors should use the supplemental Social Media Management Guidelines for additional guidance in administering the policy.

GUIDELINES

In the rapidly expanding world of electronic communication, *social media* can mean many things. *Social media* includes all means of communicating or posting information or content of any sort on the Internet, including to your own or someone else's web log or blog, journal or diary, personal web site, social networking or affinity web site, web bulletin board or a chat room, whether or not associated or affiliated with [Employer], as well as any other form of electronic communication.

The same principles and guidelines found in [Employer] policies and three basic beliefs apply to your activities online. Ultimately, you are solely responsible for what you post online. Before creating online content, consider some of the risks and rewards that are involved. Keep in mind that any of your conduct that adversely affects your job performance, the performance of fellow associates or otherwise adversely affects members, customers, suppliers, people who work on behalf of [Employer] or [Employer's] legitimate business interests may result in disciplinary action up to and including termination.

Know and follow the rules

Carefully read these guidelines, the [Employer] Statement of Ethics Policy, the [Employer] Information Policy and the Discrimination & Harassment Prevention Policy, and ensure your postings are consistent with these policies. Inappropriate postings that may include discriminatory remarks, harassment, and threats of violence or similar inappropriate or unlawful conduct will not be tolerated and may subject you to disciplinary action up to and including termination.

Be respectful

Always be fair and courteous to fellow associates, customers, members, suppliers or people who work on behalf of [Employer]. Also, keep in mind that you are more likely to resolved work-related complaints by speaking directly with your co-workers or by utilizing our Open Door Policy than by posting complaints to a social media outlet. Nevertheless, if you decide to post complaints or criticism, avoid using statements, photographs, video or audio that reasonably

could be viewed as malicious, obscene, threatening or intimidating, that disparage customers, members, associates or suppliers, or that might constitute harassment or bullying. Examples of such conduct might include offensive posts meant to intentionally harm someone's reputation or posts that could contribute to a hostile work environment on the basis of race, sex, disability, religion or any other status protected by law or company policy.

Be honest and accurate

Make sure you are always honest and accurate when posting information or news, and if you make a mistake, correct it quickly. Be open about any previous posts you have altered. Remember that the Internet archives almost everything; therefore, even deleted postings can be searched. Never post any information or rumors that you know to be false about [Employer], fellow associates, members, customers, suppliers, people working on behalf of [Employer] or competitors.

Post only appropriate and respectful content

- Maintain the confidentiality of [Employer] trade secrets and private or confidential information. Trades secrets may include information regarding the development of systems, processes, products, know-how and technology. Do not post internal reports, policies, procedures or other internal business-related confidential communications.
- Respect financial disclosure laws. It is illegal to communicate or give a "tip" on inside information to others so that they may buy or sell stocks or securities. Such online conduct may also violate the Insider Trading Policy.
- Do not create a link from your blog, website or other social networking site to a [Employer] website without identifying yourself as a [Employer] associate.
- Express only your personal opinions. Never represent yourself as a spokesperson for [Employer]. If [Employer] is a subject of the content you are creating, be clear and open about the fact that you are an associate and make it clear that your views do not represent those of [Employer], fellow associates, members, customers, suppliers or people working on behalf of [Employer]. If you do publish a blog or post online related to the work you do or subjects associated with [Employer], make it clear that you are not speaking on behalf of [Employer]. It is best to include a disclaimer such as "The postings on this site are my own and do not necessarily reflect the views of [Employer]."

Using social media at work

Refrain from using social media while on work time or on equipment we provide, unless it is work-related as authorized by your manager or consistent with the Company Equipment Policy. Do not use [Employer] email addresses to register on social networks, blogs or other online tools utilized for personal use.

Retaliation is prohibited

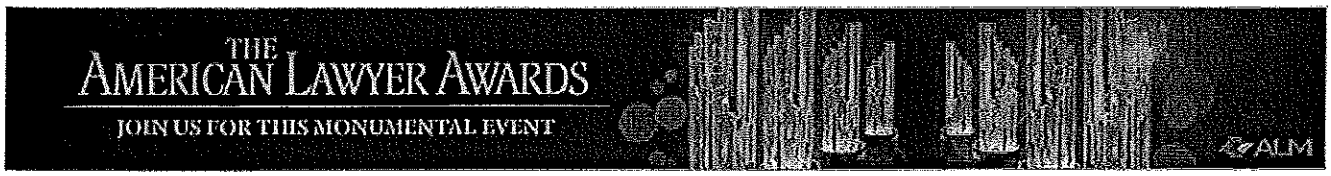
[Employer] prohibits taking negative action against any associate for reporting a possible deviation from this policy or for cooperating in an investigation. Any associate who retaliates against another associate for reporting a possible deviation from this policy or for cooperating in an investigation will be subject to disciplinary action, up to and including termination.

Media contacts

Associates should not speak to the media on [Employer's] behalf without contacting the Corporate Affairs Department. All media inquiries should be directed to them.

For more information

If you have questions or need further guidance, please contact your HR representative.



CORPORATE COUNSEL
ALM Properties, Inc.
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EEOC Warns Against Silencing Employees During Investigations

EEOC Warns Against Silencing Employees During Investigations

A letter sent by a U.S. Equal Employment Opportunity Commission field office raises questions about the legality, under Title VII of the Civil Rights Act, of telling employees not to discuss an internal investigation.

Shannon Green
Corporate Counsel
August 20, 2012

A recent letter sent by a U.S. Equal Employment Opportunity Commission field office to an employer is giving some employment lawyers pause. On August 3, the agency's Buffalo office warned the employer—whose name was redacted in the document—that its policy prohibiting workers from discussing an ongoing internal investigation of harassment was unlawful.

The agency claimed that the policy was illegal under Title VII of the 1964 Civil Rights Act, which prohibits workplace harassment and discrimination on the basis of—including, but not limited to—race, sex, and religious belief.

In a recent blog post about the matter, Lorene Schaefer, mediator and workplace investigator with One Mediation, reproduced portions of the letter, which stated the case thusly: "An employer who tries to stop an employee from talking with others about alleged discrimination is violating Title VII rights, and the violation is 'flagrant' not trivial."

According to excerpts from the letter, the employer's prohibition was itself a Title VII violation:

> *In this case, telling [redacted] women who complained of harassment that they were not to tell others about the alleged harassment is enough to constitute harm under Title VII. There does not have to be a separate adverse action. In addition, your written policy is so broad that a reasonable employee could conclude from reading it that she could face discipline or charge for making inquiries to the EEOC about harassment if that harassment is being or has been investigated internally by your organization.*

A spokesperson for the EEOC said Title VII confidentiality provisions prevented the agency from commenting on the matter.

Schaefer, a former general counsel of General Electric Company's transportation unit who has nearly 15 years of in-house legal experience, says that this move by the EEOC office suggests certain steps that employers may want to consider taking.

Crafting policies for handling internal investigations into claims of harassment and discrimination is a balancing act, she says. "You want to protect the integrity of the investigation." It's fair to inform witnesses, including the complaining party, that you "have a duty to investigate" and that you take that duty seriously.

Is the agency potentially moving in the direction of the National Labor Relations Board, which recently struck down similar prohibitions in its *Banner Estrella Medical Center* decision [PDF]. In that decision, the NLRB ruled that a blanket policy prohibiting an employee from discussing an ongoing investigation violated the National Labor Relations Act. The board said an individual showing must be made that the employer's legitimate business interest outweighs employees' Section 7 rights.

Employers can take some comfort in the fact that the letter from the field office isn't yet EEOC law. Schaefer says it's still okay for employers conducting internal investigations to ask witnesses not to discuss the specifics of any interviews that take place in that review. What employers *can't* do is prohibit any form of discussion of the matter whatsoever.

"It cannot be a complete gag order," says Schaefer.

Jay Sabin, general counsel of Grocery Haulers Inc. in Avenel, New Jersey, says he's not sure if the EEOC matter "has legs." When

an employer is investigating a complaint "the standard protocol is to ask an employee not to discuss it."

There are a lot of legitimate reasons for that. An individual might be reluctant to come forward with a complaint in the first place, says Sabin. Ensuring that the investigation remains confidential minimizes the potential for workplace gossip, he says, which "may buttress that reluctance."

Employers conducting an internal investigation also have to worry about maintaining the integrity of their review. "Discussions among coworkers could taint the objectivity of the investigation," says Sabin, "leading employees to modify or even recant statements."

Sabin notes, "In my experience, the most important thing to do is conduct an investigation and document it." If the EEOC files a lawsuit on behalf of an employee, Sabin says jurors will be looking for evidence that the employer thoroughly reviewed the worker's claim. "They'll ask themselves, 'Did the employer act how I would have acted in that situation?' "



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Employers should be careful with confidentiality policies

Most companies ask employees who are involved in an internal investigation not to discuss it around the office.

Sometimes the demand for confidentiality is part of the employee handbook and includes penalties for violators. Other times it's a more informal request.

Either way, the word gets passed: Don't talk about the issue, your role in it or who else is getting questioned as the human resources department tries to ferret out the truth, whether it's allegations of sexual harassment, workplace violence or theft.

It would be a good idea, however, for employers to rethink that practice, lest they might run afoul of government regulators.



L.M. SIXEL

The National Labor Relations Board ruled earlier this summer that a hospital in Arizona violated federal labor law by asking one of its employees not to discuss its internal investigation of alleged misconduct.

The technician, whose job was to sterilize hospital equipment, received "coaching" when he refused to follow his supervisor's instructions. The pipes broke and there was no hot water, but the board's decision says the technician refused to utilize the alternative techniques, which included use of hot water from a coffee machine, to sterilize the surgical instruments.

The employee discussed his concerns about patient safety

Working continues on D5

Houston Chronicle 29 Aug. 2012

Working: Policy can infringe on rights

Working from page D1

with his co-workers and supervisors.

The board ruled that the hospital's desire to sort out the facts in confidential fashion so as not to tip off others who may have had critical information did not outweigh the federal right of employees to discuss their wages, hours and working conditions.

"The decision sure isn't good for employers," said Michael Muskat, an employment lawyer who represents management with Muskat, Martinez & Mahony in Houston.

Muskat said employers conduct many investigations in which it's important that participants keep information confidential, at least as long as the investigation is going on.

In a typical sexual-harassment investigation, witnesses are interviewed first, and the alleged harasser is interviewed at the end, Muskat said. But if the witnesses discuss what they said, the alleged harasser gets a chance to shape his or her own story.

Employees also may be less likely to come forward if they believe information generated from a complaint won't be kept confidential, Muskat said.

Timely decision

The timing of the case comes at a good time for Houston labor and employment lawyer Patrick Flynn, who plans to use it to represent a worker who was fired for violating confidentiality rules.

The company was conducting an internal investigation into whether the employee, who had been suspended pending the outcome, was involved in a workplace argument when she sent a private email to her co-workers about unfair treatment, Flynn said.

He plans to argue she has the right to talk to her co-workers about working conditions and that her termination was therefore unlawful.

To avoid those kinds of problems, lawyers are scrambling to help their clients shift their approach to internal investigations.

Rather than having a blanket rule requiring confidentiality, Muskat said, employers should make decisions on a case-by-case basis.

A. Kevin Troutman, an employment lawyer at Fisher & Phillips, is telling his clients to evaluate each investigation carefully to determine whether there is an overwhelming reason to ask for confidentiality.

That would include whether the employer believes evidence might be destroyed, witnesses need protection, or a cover-up could be prevented.

Virtual water cooler

It's more important than ever to explain to employees involved in an investigation how the process works from beginning to end, Troutman said.

"It may tamp down the gossip," he said.

Troutman believes the protection of what's known in labor circles as "Section 7 rights" can also be seen in recent rulings involving social media.

The NLRB has ruled that employees can discuss an abusive supervisor, compare their wages or complain about working conditions on electronic bulletin boards such as Facebook or Twitter much like they can around the office water cooler.

lm.sixel@chron.com

NELA And The Institute File *Amicus* Brief In Support Of *D.R. Horton*

On September 11, 2012, NELA and its charitable public interest arm, The Employee Rights Advocacy Institute For Law & Policy, joined with two dozen workers' rights organizations to file an *amicus* brief in support of the National Labor Relations Board (Board) in *D.R. Horton, Inc. v. National Labor Relations Board,* currently pending before the Fifth Circuit Court of Appeals.

NELA's brief urges the Fifth Circuit to affirm the earlier ruling of the Board in *D.R. Horton and Michael Cuda*, 357 NLRB No. 184 (2012). The brief argues that requiring workers, as a condition of employment, to waive their rights to bring class, collective, joint, or representative actions in any forum violates those workers' rights under sections 7 and 8(a)(1) of the National Labor Relations Act (NLRA). The brief discusses the well-settled principle that workers have a substantive right under the NLRA to use the judicial forum to achieve more favorable terms or conditions of employment. In addition, the brief points out that the availability of class actions not only makes vindicating the claims of low-wage workers cost-effective, but also provides an additional layer of protection against retaliation.

The brief further argues that the Board's conclusions about the NLRA do not create a conflict with the Federal Arbitration Act (FAA). The U.S. Supreme Court long ago recognized that federal courts cannot enforce the provisions of a contract that violate the NLRA, and more recently the Supreme Court has held that arbitration agreements cannot strip employees of any of their federal substantive statutory rights. Ergo, the issues in this case are distinguishable from those at stake in *AT&T Mobility, LLC v. Concepcion*, as the plaintiffs in *Concepcion* did not allege the violation of any substantive federal statutory rights.

NELA's brief was authored by Michael C. Subit of Frank Freed Subit & Thomas, who also authored our *amicus* brief before the Board below. NELA *Amicus* Advisory Council Co-Chair Victoria W. Ni and Cliff Palefsky provided valuable feedback during the drafting process, and reviewed the brief on NELA's behalf. A copy of NELA's brief is available for download on The NELA Exchange.

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- Board Certified - Labor & Employment Law Texas Board of Legal Specialization
- Member - State Bar College

- Fellow - The College of Labor and Employment Lawyers, Inc.
- Fellow - Texas Bar Foundation

BACKGROUND, EDUCATION AND EMPLOYMENT

- Patrick M. Flynn was born in Miami, Florida on August 10, 1951
- University of Central Florida; Orlando, Florida; graduated, cum laude, with a Bachelor of Science degree in Management, 1973
- South Texas College of Law; Houston, Texas; graduated with honors, 1977
- National Labor Relations Board, Field Attorney from 1977 to 1980
- 1980 to present, private law practice (Board Certified in Labor and Employment Law since 1982)
- Arbitrator, AAA Employment Dispute Resolution Roster

PROFESSIONAL COMMITTEES

- Past-Chairman, Houston Bar Association, Labor and Employment Law Section
- Past Chairman, Labor and Employment Law Advisory Commission, Texas Board of Legal Specialization
- Past Chairman, State Bar of Texas, Labor and Employment Law Section
- Past Member, AFL-CIO Lawyers Coordinating Committee Advisory Board
- Past-Labor Co-Chair, ABA/Regional EEOC Liaison Program

PROFESSIONAL ASSOCIATIONS

- Fellow, The College of Labor and Employment Lawyers, Inc.
- Past-President, Greater Houston Chapter, Industrial Relations Research Association
- Member, American Bar Association and its Labor and Employment Law Section
- Member, Houston Bar Association and its Labor and Employment Law
- Member, International Foundation of Employee Benefit Plans
- Member, National Employment Lawyers Association
- Member, Lawyer Pilot's Bar Association
- Member, NTSB Bar Association

PRESENTATIONS

- State Bar of Texas CLE Programs
- South Texas College of Law
- Society for Human Resource Management
- University of Texas School of Law
- University of Texas School of Public Health
- International Foundation of Employee Benefit Plans
- Greater Houston Chapter of Industrial Relations Research Association
- Texas AFL-CIO

COURT ADMISSIONS

- U. S. Supreme Court
- U. S Courts of Appeals for the Fifth, Eleventh and D. C. Circuits
- U. S. District Courts for the Southern, Eastern, Northern and Western Districts of Texas
- State Bar of Texas
- Florida Bar