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National Labor Relations Board Focusing On Employee Use of Social Media

Social media has come to play an important role for employees airing workplace grievances. As a result, employers have had to develop policies that restrict inappropriate speech while not violating their employees' rights. In just the past few months, the US National Labor Relations Board (the "NLRB") has addressed numerous claims made by employees who were terminated for postings they made on Facebook and other social media sites. A review of these cases, and the policy assertions by the NLRB, can be helpful to employers seeking to develop or refine their policies.

The National Labor Relations Board and Social Media

Unions have used social media to enhance the effect of strike activity. In a recent strike by union workers against Verizon Communications, strikers took to Facebook to organize demonstrations, promote solidarity and educate workers. The strikers' Facebook page grew to include more than 5,400 members of the American and International Brotherhood of Electrical Workers. In another example in August 2011, 400 college students hired by Hershey through a State Department-sponsored foreign exchange program used YouTube, Facebook and other social media tools to bring attention to their dissatisfaction with wages and working conditions, before ultimately walking off the job.

Employers know they cannot stop their employees' use of social media, but must deal with it effectively. For example, in a *Forbes Magazine* article, Clara Shih, CEO of Hearsay Social, whose software helps businesses manage their social media, said that when her clients defend lockdown policies against social media, claiming they've successfully kept employees offline, she unleashes Hearsay's "rogue page finder." For one large company, it recently turned up 60,000 different social media pages where employees mentioned or discussed company matters.[1] The NLRB has taken the lead among government agencies in addressing employer social media policies and discipline against employees for social media use. Importantly, the NLRB's social media enforcement policies affect union and non-union workplaces alike. Non-union employers may not be as familiar with the legal framework that puts them at risk of NLRB enforcement activity.

Section 7 of the National Labor Relations Act (the "NLRA")—the federal labor law that covers most private-sector employees—guarantees employees not only the right to form, join, or assist labor organizations, *but also* the right "to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." The NLRB now has social media cases pending against employers in every region of the United States under NLRA Section 8(a)(1), which prohibits employers from interfering with, restraining, or coercing

employees in the exercise of their Section 7 rights to engage in concerted protests or complaints about working conditions. These cases signal that the NLRB, under acting General Counsel Lafe Solomon, will take a more active role in issuing complaints against employers when they attempt to regulate what their employees say on social media about their work and workplace.

As recently as 2009, in a case against Sears Holding Corporation, the NLRB took the position that employer policies prohibiting workers from disparaging employers on the Internet were permissible and would *not* chill activity protected under Section 7 of the NLRA. However, in October 2010, the NLRB took quite a different position in *In The Matter of American Medical Response of Connecticut, Inc.*, Case No. 34-CA-12576.

In that case, the NLRB and American Medical Response of Connecticut, Inc. (AMR), an ambulance company, settled the NLRB's claim that AMR wrongfully terminated an employee who criticized her boss on Facebook. The NLRB argued that the worker's negative comments were protected speech under federal labor laws and that the AMR's blogging and Internet policy, which barred workers from disparaging the company, was "overly broad." Under the settlement, AMR agreed to change its policy.

After *AMR*, the NLRB targeted social media policies at several other companies for being too restrictive, in violation of Section 7 of the NLRA. On February 4, 2011, a Connecticut chapter of the Service Employees International Union filed a charge with the NLRB challenging a policy of Student Transportation of America, Inc., that bans "the use of electronic communication and/or social media in a manner that may target, offend, disparage or harm customers, passengers or employees."[2]

Shortly thereafter, another social media policy dispute ended hours before the NLRB was set to issue a complaint when the New York Newspaper Guild announced a tentative deal with Thomson Reuters Corporation.[3] In February 2010, reporter Deborah Zabarenko sent a tweet to Reuters that said, "one way to make this the best place to work is to deal honestly with guild members." Reuters verbally disciplined her for the public tweet. The NLRB complaint would have alleged Reuters implemented an unlawful social media policy that chilled employees' rights to discuss working conditions and applied the policy improperly to Zaberenko. The union did not specify the terms of Reuters' new social media policy, but issued a press release that stated the company has agreed to negotiate a policy and has also agreed "to include language that will protect employee speech."

In an August 18, 2011, memorandum,[4] Solomon reviewed unfair labor practice cases considered in the past year by the NLRB's Division of Advice in an attempt to provide guidance to practitioners and human resource professionals as to which social media policies the NLRB will act against. The memorandum discussed employer policies addressing social media and Internet discussion of work activities as well as employee discipline for such matters.

For policies, the memorandum makes clear that, even where a policy has legitimate aims—such as protecting the company's image, reputation, intellectual property, or even its patients' confidentiality—the NLRB will take action to insist that policies be narrowly tailored so as not to affect employees' ability to use social media to complain about their working conditions in a concerted manner. On the other hand, the memorandum indicates that the NLRB will not protect employees who use social media merely to complain about their workplace and not to act concertedly with other employees.

In addition to the *AMR*, *Student Transportation*, and *Thomson Reuters* cases, the memorandum discussed the scope of other companies' social media and Internet policies and often found them overbroad.

- A hospital's policy on social media, blogging, and social networking prohibited, in broad terms, employee conduct that disregarded any person's privacy or confidentiality rights. The policy also prohibited communications or postings that might damage the reputation or goodwill of the institution, its staff, or employees. In finding this policy overbroad, the NLRB wrote that the hospital applied it to protected concerted activity and that the policy "could reasonably be interpreted as prohibiting protected employee discussion of wages and other terms and conditions and was therefore overbroad."
- A grocery store could use its social media and electronic communication policy to inform employees that the company's public affairs office was responsible for external communications and that it was important for one spokesman to act for the company in order to deliver its message and avoid the distribution of misinformation. According to the NLRB memorandum, "[A] media policy that simply seeks to ensure a consistent, controlled, company message and limits employee contact with the media only to the extent necessary to effect that result cannot be reasonably interpreted to restrict Section 7 communications." However, the provisions that restricted revealing personal information and using the employer's logos or photographs of the employer's stores would restrain an employee from engaging in protected activity and were not permissible.
- A sports bar and restaurant's Internet/blogging policy stated that while the employer supported the free exchange of information and camaraderie among employees, if an employee reveals confidential and proprietary information about the employer or engages in inappropriate discussions about the company, management and/or coworkers, the employee may be violating the law and could be subject to disciplinary action, up to and including termination. The NLRB found that the policy utilized broad terms that would commonly apply to protected criticism of the employer's labor policies, treatment of employees, and terms and conditions of employment. Moreover, the policy did not define what was encompassed by the broad term "inappropriate discussions" by specific examples or limit it in any way that would exclude Section 7 activity.

The lesson that can be gleaned from the discussion is that the NLRB will find sweeping categorical bans on employees' "inappropriate" postings or depicting the employer in any way in the media to violate Section 7 of the NLRA. However, employers are entitled to protect their business interests through such policies, if the policies are narrowly tailored to avoid placing a burden on the exercise of Section 7 rights. In the absence of more specific guidance from the NLRB, employers will take a variety of routes to implement policies that fit these criteria.

The NLRB memorandum also provides examples of circumstances when disciplinary action against employees for social media use will be permitted under the law and when discipline will be considered a violation of the law. According to the NLRB, if an employee is not trying to communicate with co-workers about working conditions in a concerted manner, but is instead merely complaining about work, the NLRA will *not* protect the employee.

For example, in *JT's Porch Saloon & Eatery Ltd.*, NLRB Div. of Advice, No. 13-CA-46689, 7/7/11, a restaurant and bar maintained a policy that wait staff were not required to share their tips with bartenders even though the bartenders helped with food service. In February 2011, one of the bartenders had a conversation on Facebook with his stepsister. When the stepsister asked how the bartender's night at work had gone, he responded that he had gone five years without a raise and was doing the job of waitresses without the tips. The bartender also referred to the customers as "rednecks" and said he hoped they choked on glass as they drove home drunk. The bartender

then received a Facebook message and a voicemail message from his manager terminating him because of the post. Finding that the bartender was just responding to his stepsister's question, the NLRB's advice memorandum concluded that there was no evidence that the employee engaged in concerted activity and no basis for concluding that he was unlawfully fired.

Likewise, in *Wal-Mart*, NLRB Div. of Advice, No. 17-CA-25030, 7/19/11, a customer-service employee was given a one-day suspension after the employee posted on his Facebook page: "Wuck Falmart! I swear if this tyranny doesn't end in this store they are about to get a wakeup call because lots are about to quit." Although one of his co-workers posted a Facebook reply of "hang in there," the NLRB's associate general counsel said there was no evidence that the customer-service employee engaged in concerted activity and found that the Facebook comments expressed "an individual gripe" rather than an effort to induce Wal-Mart employees to engage in group action.

The most recent statement on this topic comes through an Administrative Law Judge decision in *Hispanics United of Buffalo Inc.*, 3-CA-27872 (Sept. 2, 2011). On May 18, the NLRB filed a complaint against a New York nonprofit organization, Hispanics United of Buffalo (HUB), alleging that HUB unlawfully terminated five non-union employees who complained about working conditions on Facebook.

In this case, one employee complained that other employees were not working hard enough; the employee also met with a supervisor to make this complaint. Another employee, learning of the complaint, posted on Facebook "a coworker feels that we don't help our clients enough at HUB I about had it! My fellow coworkers how do you feel." Other employees posted angry follow-ups like "What the f… Try doing my job," and "We don't have a life as is, What else can we do???" After being informed of these posts, HUB terminated all five employees, claiming that their comments constituted harassment of the employee originally mentioned in the Facebook post, who reportedly suffered a heart attack.

The NLRB's General Counsel called the HUB case a textbook example of an illegal firing. The ALJ reached the conclusion that Section 7 was violated, finding that "[t]he discussion was initiated by the one co-worker in an appeal to her co-workers for assistance. Although there was swearing and/or sarcasm in a few of the Facebook posts, the conversation as objectively quite innocuous." The NLRB ordered HUB to reinstate the fired employees with backpay. "Explicit or implicit criticism by a co-worker of the manner in which they are performing their jobs is a subject about which employee discussion is protected by Section 7."

The ALJ did consider whether the employees had acted in such a way as to lose their protected status, relying on NLRB-precedent outside the social media arena. Although, in *HUB*, the ALJ found that the employees had not acted in such an extreme manner as to lose their protected status, we predict that future cases are likely to test the limits of this principle. We also expect employers increasingly to challenge the legal standard for losing protected status and to argue that it must be adapted to the social media framework.

Given the NLRB's recent focus on social media issues, this is a rapidly developing area to which employers should play close attention. All employers should review their social media policies to ensure that they do not unduly restrict employees' rights under the NLRA. Further, if employers are confronted with an employee's social media posts that violate company policy, they should take account of the potential for an unfair labor practice charge when they review a potential decision to take disciplinary action against an employee for social media activity.

Endnotes

[1] David Kirkpatrick, Social Power and the Coming Corporate Revolution, Forbes Magazine, September 26, 2011.

[2] 34-CA-12906 (Feb. 4, 2010).

[3] Abigail Rubenstein, *Reuters Reaches Deal With Union, Avoids NLRB Fight*, Law 360, Apr. 29, 2011, http://www.law360.com/articles/242421/reuters-reaches-deal-with-union-avoids-nlrb-fight.

[4] Memorandum OM 11-74, 8/18/11.

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