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ACT NOW ADVISORY

Helpful Guidance Summarizing the National Labor Relations Board's Position on Social Media Issues: Two Reports and One Decision

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On Thursday, August 18, 2011, the Acting General Counsel of the National Labor Relations Board ("NLRB" or "Board") issued a report on the outcome of 14 cases involving employees' use of social media or social media policies in general.[1] This report follows a more expansive "Survey of Social Media Issues Before the NLRB" issued by the U.S. Chamber of Commerce on August 5, 2011, which addresses 129 cases involving social media reviewed by the NLRB at some level.[2] Further, after these reports were published, an NLRB administrative law judge ("ALJ") issued the first decision of its kind – finding that terminating employees for using social media to express concerns about the workplace violates the National Labor Relations Act ("NLRA" or "Act").

Read together, those two reports and that ALJ decision begin to give employers some guidance on reacting to the use of social media by their employees, and on developing social media policies. Most of the cases covered in the reports are at early stages of investigation or litigation, or were settled. Thus, the NLRB's position may evolve further as cases are decided on fully developed records.

Generally, the cases reported on fall into two categories: (1) claims that employees have been retaliated against in violation of the NLRA as a result of statements made about their employers or working conditions on or in any of the wide variety of social media channels available, such as Twitter, Facebook, YouTube, blogs, podcasts, and the like; and (2) claims that an employer's social media policy violates the NLRA because its prohibitions may "chill" employees in the exercise their rights under the Act.

Social Media Cases Before the NLRB Impact Both Union and Non-Union Employees

One of the most striking aspects of the two reports is that most of the cases reported on have nothing to do with union-represented workforces. The reports highlight the often overlooked fact that the rights protected under Section 7 of the NLRA, to "engage in …

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[1] *See* Memorandum OM 11-74, which is available on the NLRB's website at http://mynlrb.nlrb.gov/link/document.aspx/09031d458056e743.

[2] "A Survey of Social Media Issues Before the NLRB," U.S. Chamber of Commerce, 2011, is available on the Chamber's website at http://www.uschamber.com/reports/survey-social-media-issues-nlrb.

concerted activities for the purpose of … mutual aid or protection," extend to all employees, whether or not they are represented by a union or are seeking union representation.

Disciplinary Action for Use of Social Media

Many of the cases covered in the reports address charges filed with the NLRB by employees who have been terminated, suspended, or otherwise disciplined as a result of posts they made on social media sites. Almost all of these cases involve non-union employees. The issue in all these cases is whether the employee's[3] use of social media constitutes activity protected by the NLRA. In making this determination, the NLRB will rely on its traditional analyses to determine whether the post involved terms and conditions of employment. For example, did the posting concern such issues as:

- Wages, tipping arrangements, or commissions?
- Complaints about management in general or perhaps a specific supervisor?
- Failure to get raises, or complaints about annual reviews?

Next, the NLRB will look to whether the posting constitutes "concerted" activity. With respect to social media, the NLRB looks at various factors, such as whether the posting was:

- Engaged in with or on authority of other employees?
- Engaged in to solicit or induce group action?
- Engaged in to advance truly group complaints?

In applying these principles to social media cases, the NLRB examined such factors as whether, in the social media posting, the employee appealed to co-workers for assistance, whether co-workers responded to the posting, whether the posting involves shared concerns of a group of employees, or whether the employee discussed the posting with co-workers before or after the posting. Importantly, in a number of cases, the NLRB found that the use of social media to simply air individual gripes was *not* protected activity.

The NLRB also examined, under its traditional rules, whether employee posts on social media sites were so egregious as to lose the protection of the NLRA. The cases in the reports make clear that, in this regard, the NLRB views the use of social media to be outside the workplace. Thus, the Board is likely to find that a great deal of insulting, profane, or obscene language in social media postings will not cause statements that otherwise meet the definition of "protected activity" to lose that protection. In the NLRB's view, even untrue statements that are not "maliciously false" would not lose the protection of the Act. The NLRB does concede, however, that actual threats made through social media would cause an otherwise protected posting (and the employee who posted it) to lose the protection of the NLRA.

[3] Employee" is a defined term under the NLRA. Excluded from the definition are "supervisors," a defined term that generally includes employees with authority to hire, fire, etc., 29 USA § 152(11), and managerial employees who are generally high-level employees who formulate and effectuate management policies. Policies covering, or disciplinary actions taken against, employees in these categories are not subject to review by the NLRB.

Subsequent to the publication of the Board's report, the first decision on discipline for the use of social media was issued. An NLRB ALJ held that an employer had violated the NLRA by terminating five employees for posting on Facebook complaints about a co-worker's criticism of job performance. The case arose in a non-union workplace. The ALJ found that the posting by an employee of her concern about the co-worker's criticism, in which she solicited other employees to comment (and four employees did), constituted protected concerted activity, and the employer's decision to terminate them for that posting, which the employer admitted was the sole reason for the termination, violated the Act. The ALJ recommended that the Board order reinstatement with full back pay for the terminated employees. The ALJ rejected the employer's defense that the Facebook posting violated the company's anti-harassment policy.

In several other cases involving the termination of employees for postings on social media sites, the NLRB reached settlements with the employers that involved "make whole" remedies, including back pay for the affected employees, and also reinstatement, in some cases.

Review of Employer Policies

The majority of the cases in which the NLRB reviewed social media and other policies likewise involved non-union workplaces. The focus of the NLRB's review is determining whether the language of the applicable policy either specifically prohibited employees from discussing among themselves or with third parties (*i.e.,* unions or news media) issues involving terms and conditions of employment, or whether the use of broad or vague and undefined terms could reasonably be read by employees to be such a restriction. The policies reviewed were generally either confidentiality, non-defamation, or media relations policies, or e-mail/Internet policies, including restrictions on the use of social media. In the NLRB's view, the mere existence of such language in a policy, whether actually enforced or not, violates the NLRA because of its "chilling" impact on employees' exercise of rights protected by the Act.

The cases in the reports give some guidance as to the types of phrases in employer policies that will raise a red flag. The NLRB will focus on broadly worded prohibitions, such as those that prohibit "rude or discourteous language," "inappropriate discussions about the company management, and/or co-workers," and statements that "lack truthfulness," or "might damage the reputation or goodwill of the company." The reported cases give a clear indication that the NLRB will find that such phrases, in the absence of defining or limiting language, or the use of accompanying examples that make clear that the company did not intend to limit protected speech, violate the NLRA.

In the reported cases on this subject, the NLRB also focuses on employer policies that prohibit the use of company names or logos in social media posts. With respect to these matters, the NLRB makes clear its view that such a prohibition, without express limiting language, would violate the NLRA because it could be read to prohibit posting pictures of picket signs or t-shirts worn in support of a collective action that bear the company's name.

What Employers Should Do Now

Employers, whether or not they have a union-represented workforce, should take immediate steps to protect themselves from adverse NLRB action. For example, employers should:

1. Review their policies to:

   (a) Ensure that they include no express prohibitions on employees discussing terms and conditions of employment (in social media or otherwise);

   (b) Confirm that they do not include broad or vague prohibitions on employees' use of social media that could be reasonably interpreted to prohibit discussion of terms and conditions of employment; the use of specific definitions, limiting language, and examples can be used to clarify the reach of the applicable policy; and

   (c) Consider including a broad disclaimer that such policies are not intended to limit any rights protected by federal or state law.

2. In deciding whether to terminate, discipline, or otherwise take adverse action against an employee for social media postings, carefully review, with counsel, whether the employee's activity may constitute conduct protected by the NLRA.

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