By George! Here's An Angle On NLRB/Social Media That I Bet You Haven't Thought Of

By Robin E. Shea on February 17, 2012

Fellow blogger Jon Hyman, among others, has already written an eloquent critique of the latest report from the Office of the General Counsel of the National Labor Relations Board on social media and protected concerted activity, and Dan Schwartz has a good roundup of what labor lawyers are saying about it (and also a call for employers not to overreact). If you haven't read Jon and Dan, you ought to do so.

I was interviewed by LXBN TV recently about this topic, but today I'd like to expand on it a bit with the help of my law partner and labor "gladiator," Cliff Nelson. To hear Cliff tell it, he is a low-tech kind of guy. Maybe because of this, he had a fresh insight into the NLRB's social media policy that I haven't heard anywhere else.

Cliff notes (*hahaha - get it?*) that an overbroad no-solicitation policy can result in setting aside a union election, and he says that the same could be true where an employer has an overbroad social media policy. So, even if you agree with Dan Schwartz that generally it's premature to rush out to rewrite your social media policy, you might want to do it post haste if you think your company is vulnerable to a union campaign -- especially with the new "streamlined" election procedures, which don't give employers much time to get ready.

"In any event," Cliff says, "amending the policy once an 'R' case [election] petition had been filed would not insulate the policy from being objectionable and from being ground for overturning a company victory."

He adds, "Of course, it may take some of the unions a bit of time to wake up to this fact, but employers would be taking an unnecessary risk nonetheless."

Accentuate the Positive

The NLRB report said that almost every social media policy under consideration was overbroad. However, two policies survived the General Counsel's scrutiny*, and they bear some examination: (1) it was ok for an employer's social media policy to prohibit discriminatory or harassing comments based on race, sex, and other "EEO-protected" characteristics; and (2) it was ok for a pharmacy chain's social media policy to prohibit communication of the employer's confidential and proprietary

information, client or employee protected health information, or information that had been "embargoed" by corporate (in other words, scheduled for public release but not until a later date).

I will go out on a limb and posit two principles based on the above:

(1) If a communication would violate a law (or cause the employer to be in violation of the law) or a specific legitimate employer interest, the employer can probably prohibit it.

(2) If the policy provides specific guidance, preferably with examples, about what types of communications are prohibited, it is more likely to be upheld because the specificity would make it that much less likely to have a "chilling effect" on all protected communication. This is in contrast to policies that simply ban "inappropriate" use of social media, or "disparaging" comments.

One other reason not to panic about this: As long as you haven't fired an employee for violating your social media policy, or taken some other action that results in a monetary loss (like a demotion or suspension without pay), the legal remedy for your "unlawful" policy is to replace it with a lawful one and to post an NLRB notice in the workplace saying you did wrong and won't do it again. In other words, not the end of the world.

That is, unless your policy invalidates your union election victory and requires you to go through all *that* mess again. *Sigh.*

Terminations and Other Adverse Actions

When the first General Counsel report on social media came out last summer, I provided some bullets on the terminations that were considered legal and illegal. Recall that "protected concerted activity" (affectionately known as "PCA" for short) can exist even if the employer is non-union. For those of you used to the "EEO" world, a protected concerted activity claim is essentially a type of "retaliation" claim. As you read the outcomes of the latest social media/termination charges, keep these two points in mind:

The activity has to be "concerted," meaning that the employee must be part of a group or acting on behalf of a group, or preparing for group action.

The subject matter of the "concerted" activity must pertain to terms and conditions of employment.

A summary of the terminations discussed in the January General Counsel report appears after the jump:

PCA, and Termination Illegal

- Employee was transferred to less-lucrative call center position and posted "expletive-laden" status on her Facebook wall, receiving supportive comments from approximately 10 co-

workers, one of whom called for a "class action" against the employer. Employer fired her for Facebook posting.

- Employee, an administrative assistant, was frequently sought out by employees for work-related advice. She posted on her Facebook wall a complaint about an allegedly sexist remark made by a manager (something about women not coming to work on snow days). A supervisor who was a "friend" communicated with the assistant about her post for several hours, and she received supportive remarks from other "friends" (it's not clear whether these were co-workers). A week later, another employee was fired, and the assistant cried about it in front of the president of the company. He told her "that he did not know why she was upset and that she was already on thin ice." She took her cell phone into the restroom and posted on Facebook "that she couldn't believe employees were losing their jobs because they asked for help." The president later called her in and told her the terminated employee's situation "was none of her business." At lunch, the assistant posted several more comments on Facebook, saying that a friend had been fired for asking for help and that she had been "scolded for caring." She got supportive responses from "friends" who were not co-workers. The president fired her that afternoon. In this case, the General Counsel said that the activity was PCA because of her involvement in employees' work-related problems. Moreover, she was fired because the president considered the Facebook postings evidence that she would not heed his warning to avoid getting involved in discussions with other employees about their working conditions. So, in this case, the General Counsel looked at the combination of the assistant's "low-tech" and social media activity.

- Employees of veterinary clinic complained in person about a co-worker's promotion -- both the process and the selection. That evening, one of the employees posted about it on Facebook, receiving comments from three co-workers discussing the promotion, that they had not received a performance review or a raise in three years, and that the employer didn't know how to express appreciation for employees who did a good job. One co-worker commented "that it would be pretty funny if all of the good employees actually quit." The employee who had made the original post and one co-worker were fired the next day. These employees' communications were obviously "concerted" and were obviously related to "terms and conditions of employment."

- Employees of popcorn plant had complained in person about "the negative attitude and supervision" of an operations manager "and its effect on the workplace." One employee later posted about "drama at the plant" on Facebook, starting a conversation with co-workers, in which one employee posted that she had heard another employee was written up for being a "smart ass," and claiming that they did not have the supplies they needed to be able to make production. The employee who made the original post commented about the operations manager and said that she "could not wait to get out of there." She was fired the next day. Like the last one, this is pretty straightforward -- clearly "concerted" activity, and clearly related to "terms and conditions of employment." (Although it seems that her expression of hatred for her workplace and wanting to get out of there should arguably have changed the result . . . but, what do I know?)

- "Activist" nurse made numerous "low-tech" public criticisms of hospital related to workplace violence incident (letters to the editor of the newspaper, and old-fashioned stuff like that). He also criticized employee safety at the hospital on a blog and posted on Facebook a presentation that he made to his borough assembly, alleging unfair labor practices, policy changes, workplace violence, "unfair firings, harassment, and workplace bullying." Some of his many complaints were made "in concert with" other employees. Again, this seems to be a pretty clear-cut case of PCA. Although comments about the quality of patient care might not have been protected, the General Counsel said that the comments pertained almost exclusively to "terms and conditions of employment."

No PCA, and Termination Was Legal

- Employee of home improvement store was (allegedly) reprimanded in front of a Regional Manager for not performing a task that she had never been told to perform; on lunch break via cell phone, she posted on her Facebook wall about it, cursing and using the employer's name; one co-worker "liked" her post. Later, she posted again, saying employer did not care about employees. None of her co-worker Facebook "friends" responded. She later complained to co-workers in person, and they expressed sympathy but did not indicate any intention to prepare for or take "group action." Employer fired her for her Facebook postings.

- Bartender posted on Facebook that a co-worker was "screwing over" customers by using a pre-made mix for certain drinks when the customer was paying for premium liquor. She later posted "that dishonest employees along with management that looks the other way will be the death of a business." One co-worker "friend" agreed but said she should be careful about what she posted on Facebook. Another co-worker simply agreed. The bartender responded that she had every right to say how she felt. She was terminated after the accused bartender and two wait staff complained about the posts. The General Counsel said that complaints about customer service generally did not affect "terms and conditions of employment," and so the terminated bartender's posts were not PCA.

- Phlebotomist posted on Facebook that she hated employer and co-workers, that she had anger problems, and that she wanted to be left alone. Clearly not "concerted" behavior.

- Respiratory therapist posted on Facebook that she couldn't stand co-worker's habit of sucking his teeth. (*I kid you not!*) Her post said that he was driving her nuts and that she "was about to beat him with a ventilator." She was suspended for this, as well as a patient issue. Another pretty clear-cut case.

- Truck driver complained on Facebook that he couldn't get in touch with a dispatcher during a snowstorm "and that if he or anyone was late, it would be their own fault." He also said that the company was running off all the good drivers. No co-workers responded to these posts, but a few days later the operations manager (a Facebook "friend" of the driver) posted a critical response. The driver's "leader operator" duties were taken away from him, and he quit soon after. The General Counsel found that the driver's posts were not "concerted" -- in other words,

that he "was not seeking to induce or prepare for group action. Instead, he was simply expressing his own frustration and boredom while stranded by the weather . . ." The General Counsel also said he was not constructively discharged, and there was no unlawful surveillance of his Facebook activities because the operations manager who saw his posts had been accepted by him as a "friend."

- Employee posted on Facebook his irritation about having to take an attendance point if he left work early because of illness. No co-workers responded, and employee admitted that he was "just 'pissed.'" He also made an ambiguous comment that the employer interpreted as threatening. He was terminated on the grounds that "his Facebook comments were inappropriate, threatening, and violent." The General Counsel found that the employee's postings were not protected, agreeing that he was "just venting."

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