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Social Media, the National Labor Relations Board, and Why Health Care Employers Should Be Concerned

January 4, 2012

By Ana S. Salper

Social media has revolutionized how we communicate with one another. From Facebook to Twitter, YouTube to blogs, social networking sites have permeated the workplace in ways that have significant implications for all employers.

Social media is both a source for marketing and promoting companies and products as well as an enterprise risk factor if not used appropriately or in a compliant way. In the health care industry, with the Health Insurance Portability and Accountability Act ("HIPAA") and other privacy laws at stake, employers must have a heightened sensitivity to ensuring that confidential health information is protected, while simultaneously being mindful of the precise contours of what restrictions on social media usage are permissible and lawful. Also, for pharmaceutical and device firms, where promotion is highly regulated by the federal Food and Drug Administration ("FDA"), there are likely even greater compliance concerns.

To date, no governmental body – not even the court system – has been more active in addressing social media's impact on the workplace generally than the National Labor Relations Board ("Board"). The Board's reach has extended to non-unionized employers and to those that are unionized. In what has now become the famous "first Facebook case," the first social media complaint issued by the Board was, in fact, against an employer in the health care industry, a leading medical transportation company. That October 2010 case, involving the discipline of an employee for posting derogatory comments about her supervisor on Facebook from her home personal computer, established the foundation for the Board's two areas of scrutiny: employer discipline of employees' social media site usage, and the appropriate scope and breadth of employer social media policies.

The Board's inquiries in cases involving disciplinary decisions made in connection with employee usage of social media sites turn on whether the employee in question was engaged in "protected concerted activity." Such activity is generally found when an employee is engaged in discussions about his or her wages, hours, and terms and conditions of employment with, or on the authority of, other employees, and when such activity is the logical outgrowth of concerns expressed by the employees collectively.

This concept also would encompass employee disparagement or criticism of his or her employer on his or her own Facebook page while sitting at home during his or her own personal time. The determinations are generally made on a case-by-case basis, as they are fact-specific inquiries.

In an effort to address breaches of patient privacy and other confidential information, however, the Board's General Counsel issued a memorandum establishing that "Facebooking" on working time and disclosing confidential client information did not constitute "protected concerted activity." The case referenced in the memorandum involved an individual employed by a nonprofit residential facility for individuals with mental illness and substance abuse issues who had engaged in a conversation on her Facebook wall about the mental state of certain residents while working on an overnight shift. The employer fired this employee because her posts were not "recovery oriented" and because she engaged in this activity on working time. In ruling in favor of the employer, the Board held that the employee's conduct was not "protected concerted activity" because she was not engaged in a discussion with co-workers and was neither discussing terms and conditions of her employment nor seeking to induce or prepare for group action.

The Board's inquiries in cases involving social media policies have centered on the potential infringement of employee rights to engage in "protected concerted activity." Such inquiries are consistent with the Board's overall mission -- *i.e.,* to protect the rights of private sector employees to join together, with or without a union, to improve their wages and working conditions. Thus, while social media policies may prohibit clearly unlawful conduct (*i.e.,* harassment of co-workers, threats of violence, etc.), and the disclosure of confidential business data and other private information (this would particularly extend to information protected by HIPAA), the Board has deemed unlawful employer social media policies containing broad prohibitions on employees' ability to "disparage," "disrespect," and "criticize" their employer on social media sites.

The intersection of traditional labor law and social media has presented many new issues. What does all of this mean for health care employers? In a recent U.S. Chamber of Commerce survey, 129 cases involving social media have reached the Board, and a good number of them involved health care industry employers, with both unionized and non-unionized employees.

Thus, health care employers must tread carefully: to the extent a health care employer has not established a social media policy, it is advisable to develop one and incorporate it as part of the company's overall corporate compliance policy in order to ensure that appropriate guidelines are in place for managers and employees. In addition, when faced with an issue that could lead to potential discipline of an employee for "tweeting," "posting," or blogging about their employer in a critical way, employers should be judicious on how to proceed with the discipline, as the Board may find that the employee's actions constitute "protected concerted activity." Of course, these Board considerations are in addition to HIPAA privacy and any FDA-related regulatory

considerations that may need to be taken into account when developing a social media policy for a health care company.

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