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NLRB Actively Engaged in Examining Employee Social Media Use

By Maria Z. Stearns

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Over the course of the last year, the National Labor Relations Board (NLRB) has taken an active role in shaping the legal framework of social media use by employees. On Sept. 2, 2011, an NLRB administrative law judge ruled that a nonprofit organization violated federal law when it fired five employees for messages posted on Facebook. This groundbreaking decision, together with the NLRB's recently issued report on social media cases, provide important guidance to employers regarding workplace social media policies.

Section 7 of the National Labor Relations Act (NLRA) permits employees to engage in "concerted activities for the purpose of collective bargaining ***or*** other mutual aid or protection." Regardless whether the employer is unionized, employees must be free to discuss the terms and conditions of employment without fear of reprisal. Recent actions by the NLRB make it unmistakably clear that the NLRB shows no signs of retreating from its strong stance that Section 7 rights carry at least equal weight in the context of social media as compared to more traditional forums.

Hispanics United of Buffalo, Inc. (HUB) is a 30-employee nonprofit corporation that renders social services to economically disadvantaged people in Buffalo, New York. HUB terminated five employees after they engaged in a group Facebook discussion about a co-worker's criticism of their work performance. The co-worker saw the Facebook posts written about her and complained to her manager. HUB viewed the Facebook posts as a form of co-worker bullying and harassment and terminated the employees on that basis.

Thereafter, one of the terminated employees filed an unfair labor practice charge with the NLRB, claiming that his Facebook posts qualified as protected concerted activity and could not be used as the basis for termination. In response, HUB argued that the employees were not engaged in protected concerted activity because they were merely griping that another employee had criticized their work performance. According to HUB, the employees were not trying to change their working conditions and did not communicate their concerns to management. Following a three-day trial, the judge rejected HUB's argument, concluding that "If employees have a protected right to discuss wages and other terms and conditions of employment, an employer violates [the NLRA] in disciplining or terminating employees for exercising this right—regardless of whether there is evidence that such discussions are engaged in with the object of initiating or inducing group action."

Based on its conclusion that the Facebook postings qualified as protected concerted activity, the judge ordered HUB to reinstate the five terminated employees with back pay. In addition, the judge ordered HUB to post a workplace notice stating, in part, "We violated Federal labor law and [the NLRB] has ordered us to post and obey this notice. WE WILL NOT discharge or otherwise discriminate against you for engaging in protected concerted activity, including discussing amongst yourselves your wages, hours and other terms and conditions of your employment, including criticisms by coworkers of your work performance."

HUB has indicated it intends to appeal the decision.

Not All Social Media Use Is Protected

Although the *HUB* decision is broad, a recent report from the NLRB demonstrates that Section 7 of the NLRA does not extend to all social media use. On Aug. 18, 2011, the acting general counsel of the NLRB issued a report summarizing 14 social media cases decided by the NLRB during the last year. While the report does not establish bright-line rules, the following general themes emerge:

*****_Two-Pronged Analysis_: Section 7 protects employees' right to engage in "protected concerted activity." The cases summarized in the NLRB's report suggest that an employee's social media use is protected if the employee's comments: (i) relate to the terms and conditions of employment; *and* (ii) can reasonably be interpreted as acting with, or on behalf of, other employees. The NLRA does not protect personal gripes and/or comments that have no real connection to work conditions.

*_Related to Terms and Conditions of Employment_: Examples of social media cases where the NLRB concluded the comments were sufficiently related to the terms and conditions of employment involved topics of job performance, workload, supervisors, and staffing levels. In contrast, employee comments about the employer's customers or third parties were not entitled to protection under the NLRA.

*_Concerted Activity_: To be concerted, social media use must be directed to or involve coworkers and invite or induce them to engage in further action. In several cases, the NLRB concluded that, although the employee's social media posts were read by fellow

coworkers and elicited responses by some, the complaints did not constitute "concerted activity" because they were individual gripes and not aimed to induce group action. For example, in one case, an employer disciplined an employee for profane Facebook comments that were critical of management, and several coworkers posted supportive responses. The NLRB concluded the employee's Facebook postings were not concerted activity because "they contained no language suggesting that the employee sought to initiate or induce coworkers to engage in group action; rather they expressed only his frustration regarding his individual dispute with the [manager] . . . . Moreover, none of the coworkers' Facebook responses indicated that they had otherwise interpreted the employee's postings. They merely . . . offered emotional support."

Overly Broad Social Media Policies Are Unlawful

In several cases, the NLRB found social media policies overbroad and unlawful because the policies "chilled" or discouraged protected concerted activity. According to the NLRB, the mere existence of an overly broad social media policy exposes the employer to an unfair labor practice charge even if no disciplinary action is taken against an employee.

Given the significant cost and distraction of defending an unfair labor practice charge, any employer seeking to regulate employee social media use should give careful consideration to the NLRB's reasons for declaring certain social media policies unlawful. The policy provisions examined by the NLRB include the following:

SOCIAL MEDIA POLICY LANGUAGE	NLRB RULING
Policy prohibited employees from using social media in a way that: (1) violates, compromises, or disregards the rights and reasonable expectations as to, privacy or confidentiality of any person or entity; (2) constitutes embarrassment, harassment or defamation of the employer or any of its employees; and/or (3) lacks truthfulness or damages the reputation or goodwill of the employer or its employees.	*Unlawful*. Employees could reasonably interpret policy as prohibiting their discussion of wages and other terms and conditions of employment. Employer did not include any language excluding Section 7 activity.
Policy subjected employees to disciplinary action, including termination, for engaging in "inappropriate discussions" about the company, management, and/or co-workers.	*Unlawful*. Because policy did not define "inappropriate discussions," employees could reasonably interpret the rule to prohibit criticism of the employer's labor policies, treatment of employees, and terms and conditions of employment.
Policy prohibited employees from making "disparaging remarks" when discussing the company, supervisors, co-workers or	*Unlawful*. The policy proscribed a broad spectrum of conduct, did not define "disparaging," and contained no limiting language to clarify that the rule did not limit an

SOCIAL MEDIA POLICY LANGUAGE	NLRB RULING
competitors.	employee's right to discuss matters related to the terms and conditions of employment.
Policy prohibited employees from posting pictures of themselves in any media that depicted the company in any way, including a company uniform or corporate logo.	*Unlawful.* Policy would prohibit an employee from engaging in protected activity; for example, an employee could not post a picture of employees carrying a picket sign depicting the company's name, or wear a t-shirt portraying the company's logo in connection with a protest involving the terms and conditions of employment.

The NLRB recommends that a social media policy include language clearly informing employees that the policy does not apply to Section 7 activity and that employees are permitted to engage in concerted activity regarding matters related to their terms and conditions of employment. It remains to be seen whether such language, by itself, can overcome legal challenge to a broadly drafted social media policy.

The NLRB's Increasing Presence in the Workplace

The NLRB has not signaled any intention to depart from its active involvement in social media related employment issues. If anything, the NLRB's presence may increase as a result of a new rule that goes into effect on Nov. 14, 2011, requiring employers to post a notice informing employees of their rights under the NLRA.

Given the NLRB's stance in applying the NLRA to social media policies and the rapidly evolving law on this topic, employers should exercise caution in implementing such policies and before imposing social media related disciplinary action.

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