

Labor and Employment Law Update

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Don't Ignore NLRB Rules: Necessary Action by All Employers

Employers should pay close attention to recent activity by the National Labor Relations Board (“NLRB”), which is the federal agency charged with enforcing the National Labor Relations Act (“NLRA”). The NLRB recently adopted a rule that requires all employers to post a new workplace poster. In addition, the NLRB has issued welcome guidance for employers on disciplining employees for social media activities without running afoul of the NLRA.

NLRB Mandates Posting of Employee Rights

The NLRB recently adopted a new rule requiring employers to post a new workplace poster explaining employee rights under the NLRA. The NLRB’s poster is available on the agency’s website at <https://www.nlrb.gov/poster>. The NLRB has also posted a FAQ concerning the posting regulation, which can be accessed at <https://www.nlrb.gov/news-media/fact-sheets/final-rule-notification-employee-rights>. The poster informs employees of their right to act together to improve wages and working conditions; to form, join and assist in a union; to bargain collectively with their employer; and to refrain from these activities. In addition to the English version, the notice must be posted in languages other than English if at least 20 percent of an employer’s workforce is not proficient in English and speaks another language. The NLRB has indicated that it will be preparing versions of the notice in other languages. Employers who customarily post personnel policies or rules on a company intranet or Internet site must also post the new NLRA notice on that site.

An employer who does not comply with the posting requirements may be charged with an unfair labor practice. The NLRB has indicated that a charge alleging a failure to post the notice will “typically” be closed with no further action when an employer complies with the rule after having been notified of its obligation by the NLRB. However, non-compliance carries with it additional possible consequences. If an employer knowingly and willfully fails to post the notice, the statute of limitations for unfair labor practices (which is six months) will not begin to run. As a result, an employer that does not post could be faced with a “stale” unfair labor practice charge alleging a discharge in violation of the NLRA that would otherwise be time-barred. Additionally, a failure to post may be considered evidence of unlawful motive in an unfair labor practice case involving other alleged violations of the NLRA.

The NLRB’s rule applies to all employers who are covered by the NLRA. Generally, all private sector employers who have annual revenues of at least \$500,000 are covered by the NLRA. Federal contractors that already post a similar notice of rights that is required by the Department of Labor do not have to post the NLRB’s notice. Public agency employers, employers covered by the Railway Labor Act, and agricultural employers are excluded from the NLRB’s coverage.

The NLRB's rule requires employers to post no later than November 14, 2011. However, the NLRB's authority to adopt this rule and impose sanctions against employers for non-compliance was recently challenged in federal court by the National Association of Manufacturers, so this effective date may change.

NLRB General Counsel Issues Guidance on Social Media Cases

On August 18, the NLRB Acting General Counsel issued a report summarizing the outcomes and reasoning behind 14 cases in which employees were disciplined for social media postings. Each case was submitted by a NLRB Regional Office to the NLRB's Division of Advice in Washington, which in turn issued guidance for the Regional Office. While the findings are neither binding nor precedential, they do convey the current prosecutorial policy of the NLRB, and thus provide welcome guidance for employers in determining whether the NLRB considers such activities to be protected under the NLRA.

The NLRB has found protected activity where the conduct directly implicates the terms and conditions of employment, and where the conduct constitutes "concerted activity" — i.e., activity with or on the authority of other employees and not solely on behalf of the employee himself. Below are a few examples of social media communications that the NLRB Division of Advice found to be protected concerted activity under the NLRA:

- An employee posted negative comments on her Facebook page about a supervisor who ignored her request for union representation. This posting prompted co-workers to post supportive comments.
- An employee working on commission posted pictures and comments critical of a sales event on his Facebook page. The postings were prompted by earlier discussions with co-workers.

The NLRB is far less likely to find a single employee's "individual gripe" to be protected, especially when communicated to a non-employee. The Division did not find protected concerted activity in the following cases:

- An employee posted negative comments about a supervisor on a social networking site. Co-workers responded, but only with comments that indicated emotional support.
- A bartender complained via Facebook to a non-employee about not receiving a raise for five years and the bar's "redneck" customers. No coworker participated in the discussion on Facebook.
- An employee at a mental health care facility made Facebook comments to non-employees in which she mocked patients and described the workplace as "spooky."

Administrative Law Judge Finds Nonprofit Employer Unlawfully Fired Employees for Facebook Posts

Shortly after the NLRB issued its report on social media, an NLRB Administrative Law Judge ("ALJ") issued a decision finding that a Buffalo nonprofit organization unlawfully fired five of its employees for comments they had posted on Facebook. In that case, an employee became vocal in her criticism of her co-workers' job performance. In response, another employee posted a comment on her personal Facebook page, asking how other employees felt about the criticism. The second post generated responses from other co-workers, who defended their own job performance and discussed workload and

staffing issues. The employer later fired the employee who posted the initial comment, along with the four employees who responded. The employer claimed that the employees engaged in harassing behavior. Interestingly, the ALJ stated that it was “irrelevant” that the employees were not trying to change their working conditions and that they had not communicated their concerns to their employer. The ALJ found the Facebook discussion to be protected concerted activity under the NLRA because it involved a conversation between co-workers about the terms and conditions of employment — i.e., job performance, staffing levels and working conditions. The ALJ ordered the employer to reinstate the five employees with back pay. This decision may be challenged on appeal to the full Board, and to the Court of Appeals, so employers should stay tuned to see if this decision will stand.

Best Practices for Employers

- Unless the new rule is enjoined by a court, download and post the new NLRA poster no later than November 14, 2011, when the posting requirements become mandatory.
- Continue best practices to maintain an open door and clear channels of communication so that management is informed of workplace concerns, including any union organizing activity, and can respond appropriately.
- Train managers how to respond, in compliance with the NLRA, to questions about unions and union organizing activity.
- Carefully weigh any decision to discipline an employee for posting comments on social media websites or responding to other employees’ communications.
- Given the developing law in this area, consult experienced labor and employment counsel before disciplining or discharging any employee who engaged in social media activities that may involve protected concerted activities and before adopting any policies addressing social media, communications outside the company, disclosure of proprietary or confidential information, or any other related subjects.

**For more information, please contact the Labor and Employment Practice Group at
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