NLRB Offers Additional Guidance on Social Media Issues, Continues to Expand Employee Rights in Social Media Outlets and to Scrutinize Employer Communication Policies

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On January 25th, National Labor Relations Board Acting General Counsel Lafe Solomon issued his second report summarizing cases that involve employee activity on social media outlets like Facebook or Twitter. General Counsel Memorandum OM 12-31 follows on the heels of the Acting General Counsel's August 2011 report and generally summarizes 14 recent and "extremely fact-specific" social media cases reviewed by the Board's Division of Advice, half of which involved questions about employer social media policies. The remaining cases involved employees who were discharged after they posted comments to Facebook. Unfortunately, the Memorandum does not include any identifying information about the cases, making it difficult to do more than take the summaries at face value. Although the cases reflect the current thinking of the Board's national and regional level staff, employers should note that the Acting General Counsel selected these cases from the Board's Division of Advice opinions on whether to issue a complaint, and not from formal Board decisions.

Already this year, in *Triple Play Sports Bar*, Case No. 34-CA- 12915 (January 3, 2012), a Board administrative law judge (ALJ) found that even using Facebook's "Like" button might confer protection under the National Labor Relations Act. In *Triple Play Sports Bar*, the ALJ found that an employer had unlawfully terminated employees for participation in a Facebook conversation regarding their employer's withholding of taxes. In an example of the ever-expanding category of actions that might merit protection under the Act, the ALJ found that one of the discharged employees had participated in a protected discussion by simply clicking the "Like" button on another employee's Facebook wall post about the employer's tax withholding error.

As we warned after the Acting General Counsel's first report, the Board will not hesitate to extend employee rights to a broad range of social media activity. The new Memorandum and its accompanying press release also reemphasize that employers are not free to adopt blanket social media policies that could discourage or prohibit protected concerted activity. The Memorandum also reminds employees, however, that their individual gripes and complaints on social media outlets will not receive protection under the National Labor Relations Act.

Most troublingly for employers, the Board's national and regional staff continue to find many facially neutral, but broadly worded, policies to be unlawful restraints of employees' rights to engage in protected concerted activities under the Act. For example, the Board has found unlawful restraint in social media policies that:

- specified that employees should generally avoid identifying themselves as their employer's employees, unless they were discussing the terms and conditions of their employment in an appropriate manner;
- prohibited "disrespectful conduct" and "inappropriate conversations" generally;
- prohibited unprofessional communications that could negatively impact the employer's reputation or interfere with its mission;
- prohibited unprofessional or inappropriate communications about members of the employer's service area/community;
- required employees to make honest, professional, and appropriate communications on social networking sites without any defamatory or inflammatory comments;
- prohibited employees from disclosing or communicating confidential, sensitive, or non-public information about the company on or through company property to anyone outside the company without prior approval from senior management or company legal counsel; prohibited employees from using the company's name, trademarks, or service marks outside the normal course of business without prior approval of company legal counsel;
- required employees to include disclaimers on their social media posts that any opinions expressed were their own and not their employer's; and
- banned all discriminatory, defamatory, or harassing social media posts about specific employees or work-related issues.

In an effort to inoculate their policies against NLRB attack, many employers have added "savings clauses" to their handbooks that expressly inform employees that it will not interpret or apply a social media (or other) policy to interfere with employees' Section 7 rights. In at least one case, however, the Division of Advice has determined that a broad Section 7 "savings clause" did not remove the taint from the employer's otherwise unlawful policy. In that particular case, the employer's policy included language that informed employees it would not use the policy "to interfere with employee rights to self-organize, form, join, or assist labor organizations, to bargain collectively through representatives of their choosing, or to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from engaging in such activities." Notwithstanding the employer's disclaimer, the Division of Advice concluded that the policy should have been far more limited, preventing only social media messages that were "vulgar, obscene, threatening, intimidating, harassing, or a violation of the Employer's workplace policies against discrimination, harassment, or hostility on account of age, race, religion, sex, ethnicity, nationality, disability, or other protected class, status, or characteristic." In reaching this conclusion, and in evaluating these social media policies overall, the Division of Advice relied on the test set forth in the Board's decision in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), for determining whether in reading these employment policies "employees would reasonably construe the language to prohibit Section 7 activity," even where there was no evidence that they had been enforced against employees in that manner.

Heightened NLRB scrutiny of seemingly standard, unobjectionable language in communications policies should give employers pause, since many of these provisions have long appeared in the vast majority of standard handbook policies. What were once unobtrusive, and we suspect mostly ignored, policies have become fodder for NLRB complaints and the basis for violations of federal labor law. In light of the fast-emerging pitfalls associated with employer communication policies, we encourage employers to carefully review their handbooks and revise as necessary to avoid giving the Board a reason to strike down those policies.

Over the past year, the Board's Democratic majority has expanded the definitions of "concerted" activity, "reasonable construction," and the range of inflammatory conduct by employees that will nonetheless receive protection under the Act. The Acting General Counsel's most recent report and decisions like *Triple Play Sports Bar* confirm that social media and communication policies will not be exempt from the Board's expanding regulation of employer actions.

More Information

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