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Think Your Hospital Is Non-Union? Think Again!

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It's an easy trap for employers—if your health care facility doesn't have a union, you may feel like the National Labor Relations Act doesn't have much application in your workplace. After all, the NLRA was designed to handle labor relations problems, and you have to have a union before labor issues can arise—right?

Unfortunately, this misconception is far from the truth. In reality, it is those facilities which are *not* unionized that most frequently run afoul of the provisions of the Act—and they often do so by simply enforcing their own policies and rules. And, under the expanding laws, a company's social media policy may be the biggest trap of them all.

What is the National Labor Relations Act?

First, it is important to understand exactly what the law does. The National Labor Relations Act ("NLRA") defines the rights of employees to organize to join a union, and to bargain collectively with their employers through union representatives; however, in addition to conducting union elections and overseeing the collective bargaining process, the Act also protects employees in exercising additional rights, including the right to engage in protected, concerted activity. Employees receive this protection whether a union is involved or not; as such, this is where most employers run unto trouble.

Traditionally, the NLRA has protected concerted employee actions which are undertaken for the benefit of others, and which relate to working conditions. As such, it is a violation of the NLRA for an employer to discipline employees (including non-union employees) for discussing wages or working conditions. And, although normally more than one employee must be involved (thereby making the activity "concerted,"), even a single employee can be engaged in protected concerted activity if that employee purports to be acting on behalf of a group, or preparing for group action. Finally, even when the activity is somehow defamatory or damaging to a company, the Board still applies a high standard, and holds that all communications concerning working conditions are protected so long as they are not so disloyal, reckless, or maliciously untrue as to lose the Act's protection.

Today, however, the members of the National Labor Relations Board—the federal agency charged with administering the Act (the "NLRB")—have expanded the notion of what constitutes protected concerted activity. While previously, the "concerted" concept necessarily meant two or more employees working together (or one employee acting on behalf of other employees), the new Board members take a less restrictive view. Consequently, they have begun to find cases in which individual employees, seemingly acting alone, can still receive protection; one particularly con-

troversial example of this new approach occurred in the "Facebook case."

The Facebook Case: A New View Of Concerted Activity

Recently, the NLRB filed a complaint against American Medical Response of Connecticut, alleging the company engaged in unfair labor practices by firing an emergency medical technician after she posted negative comments about her supervisor and the company on her private Facebook page. The NLRB has also contended that the employer's blogging and internet posting policy was overly broad, based on the employer's prohibitions on disparaging the company or individual supervisors, and on depicting the company on the internet in any way without permission.

The Facebook exchange, which the employer released to the media, went as follows:

> Employee: looks [sic] like I'm getting some time off. Love how the company allows a 17 to be a supervisor! [A "17" is the employer's code for a psychiatric patient.]
>
> Commenter: What happened?
>
> Commenter: What now?
>
> Employee: Frank being a [expletive deleted].
>
> Commenter: I'm so glad I left there!
>
> Commenter: Ohhh, he's back, huh?
>
> Employee: yep has a [expletive deleted] as usual [sic]
>
> Commenter: I am sorry, hon! Chin up!

The employee was terminated in December 2009, although company representatives claimed that it was because of "multiple, serious complaints about her behavior," and not because of her Facebook posting. To this end, the company claimed that it received two complaints in 2009 that Souza was rude to patients.

Still, what is noteworthy here is not the company's defense, but the fact that the NLRB took the position that, by posting her complaints on her Facebook page, the employee was engaged in protected concerted activity. To this end, Lafe Solomon, Acting General Counsel for the NLRB, was quoted by *The New York Times* as saying that Facebook is no different from a water cooler—and that discussions on Facebook or other social media are just as protected.

Nevertheless, there may be several problems with the NLRB's position. First, as noted by many commenters, it defies common sense to bash one's supervisor and employer in a semi-public arena where the evidence may exist forever. Second, is calling one's supervisor a "psychiatric patient" and "expletive deleted" necessarily a discussion of working conditions at all? Third, based on the exchange quoted above (which may not be complete), it does not appear that the commenters responding to Souza's post were co-workers at all, but were actually *former* co-workers. Indeed, there are an estimated 500 million active users of Facebook, the vast majority of which would not be co-workers of the posters. Finally, although most courts would probably find that Souza's calling her boss

a "17" (psychiatric patient) was mere opinion and hyperbole (and therefore not defamatory), it seems there is at least an argument that this *was* a defamatory statement which should not be protected by the Act.

But even if the statements themselves were not protected, this was only half of the issue. The other consideration is the fact that the Board further contended that the ambulance service's internet and blogging policy unlawfully deterred protected concerted activity because it prohibited (1) online disparagement of the company and supervisors, and (2) *any* depiction of the company on the internet without prior permission. Whether the Board's position here is correct is a much closer call, and something with even more universal application—if *any* employer's social medial policy is too overbroad, and places too much restriction on what employees can say online, then the employer may be violating the Act simply by having the policy in place.

Thus, even though the Facebook case involved a unionized employer, it is important to remember that there is nothing that prevents the same fate at a non-union facility. Merely maintaining an overbroad rule can be seen as a violation of the Act; terminating an employee under the rule could constitute a further violation, and would make an employer liable for back pay. As such, the following are some other tips on social media policies in light of the NLRB's action:

Don't give up on having a social media policy.
Having a realistic and enforceable social media policy in place before issues arise is still highly recommended. In addition to providing helpful and proactive guidance to employees who may or may not be very sophisticated about who actually reads their Facebook postings, such policies are also helpful in defending cases of online harassment or discrimination. Make it clear that the policy is for the mutual protection of the employer and employees, and that the company respects the individual's right to self-expression and concerted activity. Ensure that every employee receives and signs a copy of your policy. Make it clear that any violation will subject an employee to disciplinary action, up to and including termination. But, by all means, revise the policy regularly in light of changes in technology and in the law.

Make sure your employees don't forget their day jobs.
In addition to these broader guidelines, an employer should also make it clear that social networking should not interfere with job performance, and that employees should avoid harming the image and integrity of the company—for example, by making an unflattering (or potentially libelous) portrayal of the company to the general public or customers. Also make it clear that the publication of any confidential or proprietary information will be grounds for discipline or termination, as will publication of statements that falsely purport to be made on behalf of the company.

Posting at home can still violate the policy if it affects the workplace.
A good social media policy should convey that harassment, bullying, discrimination, or retaliation that would not be permissible in the workplace is not permissible between co-workers online, even if it is done after hours, from home, and on home computers. In sum, respectful communication is still a requirement for the well being of all parties.

"Drink responsibly," as they say.
Encourage responsible use of the internet and social media forums when discussing the company or its employees. Many employees actually believe that their social media communications are "private," and it is worthwhile to caution them that such is not the case. Warn them that if they wouldn't say it directly to a supervisor's face, then

they may not want to publish it to Twitter, which is estimated to hit 200 million users by the end of the year, or on Facebook, with 500 million users. Moreover, electronic communications live forever: an employee can deny calling his boss an "SOB" at the water cooler (not that we condone lying), but the MySpace post saying the same thing can never be denied.

Don't Fall Into The Trap!

The Facebook issue was ultimately settled, and so the case law on the matter is not yet solidified; however, from the statements of the Board and the General Counsel, it is clear that the view of concerted protected activity is expanding. In light of the NLRB's position, it is prudent for employers to consider a legal review of their social media policies, as well as other potentially damaging handbook provisions, to ensure compliance with the Board's expanding view. Remember, even if your hospital is union-free, don't forget that the NLRA traps are still out there—and you don't want to be the next to fall in!