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Settlement of NLRB's "Facebook Case" Offers Little Guidance to Employers

The National Labor Relations Board (NLRB) and American Medical Response of Connecticut (AMR) on Monday settled the unfair labor practice complaint the Board brought against AMR over what the Board depicted as overly broad social media policies that allegedly infringed upon employees' rights to communicate about terms and conditions of employment under Section 7 of the National Labor Relations Act (NLRA).

AMR's social media policy prohibited employees from posting pictures of themselves online which also depicted the company in anyway without first getting approval by their employer. The policy further prohibited employees from making "disparaging, discriminatory, or defamatory comments when discussing the company or the employee's superiors, co-workers, and/or competitors." Employee Souza was terminated after initiating and responding to vulgar commentary about her supervisor on her Facebook page.

The NLRB's complaint against AMR alleged that Souza was illegally terminated for engaging in protected concerted activity and that AMR's social media policy was unlawful. The Board also claimed she was denied *Weingarten* rights (the right to have union representation during an investigatory interview). In response, AMR stated that Souza's termination was based on multiple, serious issues, not just the negative comments that she posted on Facebook.

Employers across the country were hopeful that this case would reconcile their legitimate business necessity to manage their corporate image with the employees' right to engage in social media activities outside of the workplace and on non-work time. However, on the eve of trial, the NLRB and AMR settled the matter without shedding light on this controversy. According to the Board's press release:

> [T]he company agreed to revise its overly-broad rules to ensure that they do not improperly restrict employees from discussing their wages, hours, and working conditions with co-workers and others while not at work, and that they would not discipline or discharge employees for engaging in such discussions.

> The company also promised that employee requests for union representation will not be denied in the future and that employees will not be threatened with discipline for requesting union representation. The allegations involving the employee's discharge were resolved through a separate, private agreement between the employee and the company.

Although the AMR case settled without providing other employers guidance on creating social media and internet use policies that do not impinge on employee's rights under the NLRA, another unfair labor practice charge alleging an improper social media policy was filed last week in the same NLRB Region in Connecticut.

While it is too early to know whether the new social media policy charge will be settled based on the AMR settlement, comments made by the NLRB Regional Director that brought the action against AMR make it clear that the Board is clearly looking at policies that prohibit or interfere with negative off-duty banter about a company and its leadership. As a result, all employers should take a critical look at their own internet usage policies with an eye towards ensuring that they do not violate the NLRA.

To obtain more information, please contact the Barnes & Thornburg Labor and Employment attorney with whom you work, or a leader of the firm's Labor and Employment Law Department in the following offices: Kenneth J. Yerkes, Chair (317) 231-7513; John T.L. Koenig, Atlanta (404) 264-4018; Norma W. Zeitler, Chicago (312) 214-8312; William A. Nolan, Columbus (614) 628-1401; Eric H.J. Stahlhut, Elkhart (574) 296-2524; Mark S. Kittaka, Fort Wayne (260) 425-4616; Michael A. Snapper, Grand Rapids (616) 742-3947; Peter A. Morse, Indianapolis (317) 231-7794; Tina Syring-Petrocchi, Minneapolis (612) 367-8705; Janilyn Brouwer Daub, South Bend (574) 237-1139; and Teresa L. Jakubowski, Washington, D.C. (202) 371-6366. Visit us online at www.btlaw.com/laborandemploymentlaw.