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Recent Developments Under the NLRA – Why All Employers Should Take Note: The NLRB Is Challenging Employers’ Social Media Policies



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Employers without a unionized workforce often pay little attention to the National Labor Relations Act (NLRA). Often this is because of the mistaken belief that the NLRA does not apply to them. Two recent developments, however, highlight the need for virtually all employers to understand their obligations under the NLRA.

First, the National Labor Relations Board (NLRB) seems to be stepping up its efforts to challenge employers’ social media policies (as chilling employees’ rights under the NLRA) and employers’ disciplinary actions against employees under those policies (as retaliatory for employees’ exercise of their rights under the NLRA). Second, the NLRB has promulgated a controversial new rule requiring almost all employers to notify

their employees of the employees’ rights under the NLRA.¹ This new rule was originally scheduled to become effective on November 14, 2011, but the NLRB recently postponed that effective date until January 31, 2012, possibly in response to lawsuits that have been filed challenging the rule.²

The Use of Social Media to Exercise Section 7 Rights

Under the NLRA, most employees have the right to engage in “concerted activities” for the purpose of “mutual aid or protection” (sometimes referred to as “Section 7” rights).³ Most employers understand that Section 7 rights include attempting to organize a union. It is not as universally understood that Section 7 rights also encompass employees discussing amongst themselves the terms and conditions of their employment.⁴ These rights apply whether or not the employees are unionized.

In recent months, the NLRB, through its General Counsel’s office, has become more active in attempting to enforce these rights with respect to employees’ use of social media (such as Facebook). Many employers have written policies that restrict what topics an employee may address via social media. In some cases, employers have terminated or taken disciplinary action against employees for violating those policies. In at least three recent cases, the NLRB has alleged that the underlying terminations were unlawful because the employers allegedly terminated the employees for exercising their Section 7 rights.

In one case, five employees were terminated. The employer decided to terminate the employees after it concluded that the five employees, via Facebook postings, bullied and harassed another employee in violation of company policy. An administrative law judge at the NLRB disagreed and found that the terminations were unlawful. As a remedy, the administrative law judge required the employer to offer reinstatement to work to all five employees and to make them whole for any loss of earnings or other benefits.⁵

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In another case, the NLRB alleged a wrongful discharge where an employee was fired allegedly for posting negative remarks about her supervisor on her Facebook page. The employer settled this case with the NLRB. The settlement terms between the employer and the former employee were not disclosed.⁶ And in yet another case, the NLRB alleged a wrongful discharge where an employee was fired allegedly for posting negative comments on Facebook about the food served by the employer at a sales event. The employer prevailed by establishing that the employee was terminated for a different set of Facebook postings that were found not to be protected by the NLRA.⁷

There is no question that employees have the right to exercise their Section 7 rights via in-person meetings, phone calls, e-mails, text messages, social media, or whatever the next form of person-to-person communication will be. However, in the context of social media, the NLRB seems to be taking an aggressive approach to enforcing those rights, even where the employee seems to have engaged in behavior that an employer has an interest in curtailing (such as bullying of another employee and criticism of an employee's supervisor or employer). Further, the NLRB is taking the position that many of the social media policies by themselves violate the NLRA (separate and apart from any disciplinary action taken by the employer) because the policies are allegedly too expansive and tend to "chill" employees' ability to exercise their Section 7 rights.

In light of this increased attention from the NLRB, employers should review with employment counsel, in advance, any decision to terminate or discipline an employee for his or her use of social media or other communication about the employer or the employee's working conditions. Employers should also ensure that they have appropriate social media policies in place, and that such policies (and other policies regulating communications) are not broader than necessary and clearly provide that Section 7 rights remain protected.

The Controversial New Notice Requirement

The Notice Requirement. The NLRB recently published a final rule requiring employers, even those without unionized employees, to post in their workplaces a notice about employees' rights under the NLRA.⁸ (As noted, the NLRA applies to the vast majority of employers.) The NLRB is providing a form of notice (which is available on the NLRB's website) that employers can use to satisfy this requirement.⁹ The notice must be posted in conspicuous places where employees can readily see it, including all places where the employer customarily posts notices about personnel rules or policies. If an employer customarily communicates with its employees about personnel rules or policies via an intranet or internet site, that employer must also post the notice to that site. Finally, where at least 20% of an employer's workforce is not proficient in English and speaks another language, the employer must post the notice in that other language. The NLRB plans to publish the form of notice in multiple languages. As noted above, this final rule is currently scheduled to become effective on January 31, 2012.¹⁰

Noncompliance and Tolling of the Statute of Limitations. It is not likely that an employer who fails to post the required notice will face any sort of significant monetary penalty. However, with respect to such an employer, the final rule provides that the NLRB is permitted in certain circumstances to toll the statute of limitations (which is normally six months) for employees to file an unfair labor practice charge against that employer.¹¹ This provision is consistent with a number of cases under the anti-discrimination statutes (such as Title VII, the ADEA, and the ADA) that have similarly held that the period of time in which an individual must file a charge alleging unlawful behavior is tolled if the employer has failed to satisfy its notice/poster requirement (although there are also cases that go the other way on this issue and do not permit tolling).¹² The rationale behind this rule is that an employee should not be held to the statute of limitations for filing a charge if the employer fails to notify its employees of their rights under the law. The end result is that an employer who fails to comply with its notice requirements (under the NLRA and other employment laws) potentially leaves itself open to charges of unlawful conduct going further back in time – a potentially harsh result when one considers the expense an employer may need to incur to defend itself on the merits against a "stale" charge.

What is the Controversy? At least three lawsuits have been filed challenging the NLRB's authority to implement this notice requirement. The lawsuits essentially argue that the NLRA does not authorize the NLRB to mandate a notice requirement or to extend the statute of limitations in situations where an employer fails to comply with that notice requirement. Employers are encouraged to stay tuned for future developments.

Key Takeaways for Employers

- Do not operate under the belief that the NLRA does not apply if an employer does not have a unionized workforce.
- With social media websites like Facebook now being accessible from practically any place at any time, expect an increase in critical comments. Before disciplining an employee for such a comment, first consider whether there would be any legal exposure under the NLRA for a claim of retaliation. As discussed above, the NLRB is clearly paying close attention to this issue. We recommend reviewing those decisions with employment counsel before implementing them.
- Have a well-defined social media policy in place. It should be drafted to protect the employer's interests – protecting the employer's proprietary information and its client relationships are often important goals – but not be so broad as to limit employees' Section 7 rights. An employer with an existing social media policy in place is encouraged to review the policy to ensure NLRA compliance.

- Be prepared to comply with the NLRA notice requirement. It is currently scheduled to become effective January 31, 2012. But stay tuned. The courts and/or Congress may have a say in when or if this requirement becomes effective.
- Comply with existing notice/poster requirements. Many laws already require employers to post similar notices to employees. As noted above, the failure to do so could allow a claimant to avoid the statute of limitations for filing a claim. Such a result would deprive the employer of a valuable defense and could force the employer to defend itself against “stale” claims.

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¹ Notification of Employee Rights Under the National Labor Relations Act, 76 Fed. Reg. 54006 (proposed Aug. 30, 2011) (to be codified at 29 C.F.R. pt. 104).

² Press Release, National Labor Relations Board, *Posting of employee rights notice now required on Jan. 31; Board postpones deadline to allow for further education and outreach* (Oct. 5, 2011), <http://www.nlr.gov/news/posting-employee-rights-notice-now-required-jan-31-board-postpones-deadline-allow-further-educa> (NLRB Press Release (Oct. 5, 2011)).

³ 29 U.S.C. § 157 (2011).

⁴ It is for this reason that employers generally are not permitted to instruct employees not to discuss their compensation with their co-workers and others.

⁵ *Hispanics United of Buffalo, Inc.*, No. 3-CA-27872 (N.L.R.B. Sept. 2, 2011).

⁶ Press Release, National Labor Relations Board, *Settlement reached in case involving discharge for Facebook comments* (Feb. 8, 2011), <http://www.nlr.gov/news/settlement-reached-case-involving-discharge-facebook-comments>.

⁷ *Karl Knauz Motors, Inc.*, No. 13-CA-46452 (N.L.R.B. Sept. 28, 2011).

⁸ 76 Fed. Reg. 54006, *supra* note 1.

⁹ National Labor Relations Board, *Employee Rights Notice Posting*, available at <http://www.nlr.gov/poster> (last visited Oct. 27, 2011).

¹⁰ NLRB Press Release (Oct. 5, 2011), *supra* note 2.

¹¹ 76 Fed. Reg. 54006, *supra* note 1, at 54049 (to be codified at 29 C.F.R. § 104.214).

¹² See *id.* at 54033-35.