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Client Alert

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NLRB Announces Another Settlement Protecting Employee "Facebook Complaints"

The NLRB was not joking – complaints about your boss on Facebook could be protected speech in the employment context.

On April 27, 2011 the NLRB publicized settlement of a charge brought by a former employee of a web-based home improvement retailer operating out of Chico, California discharged after posting comments about the company to her Facebook page. The April 27, 2011 press release does not provide details of the employee's comments. However, it quotes Regional Director Joseph Frankl, who expressed satisfaction that "the employer has recognized the rights of its employees to use social networking sites to comment about their working conditions." The release also describes settlement terms and explicitly notes that the employees in this case were not represented by a union.[1]

This settlement was announced on the heels of the highly publicized unfair practices settlement with ambulance service provider American Medical Response of Connecticut, Inc. ("AMR"). The AMR complaint alleged that AMR illegally terminated an employee who called her employer a mental patient in a Facebook post in violation of the company's social media policy. On February 8, 2011 the NLRB issued a press release highlighting the terms of the settlement protecting the employee's right to Facebook gripes about her employer.

By issuing press releases announcing the filing and settlement of complaints arising from employee discipline for Facebook postings the NLRB has brought social media cases into national prominence. The Board's communications signal that the NLRB has a heightened interest in social media and other policies that restrict employee communications. Its current focus raises questions as to how employers may permissibly seek to reduce the risk that employees' off-duty social media activity may damage their reputations or expose them to liability.

Some guidance may be found by review of the NLRB complaint against AMR. The complaint alleges that the company maintained overly-broad rules in its employee handbook regarding blogging, Internet posting, and communications between employees. A portion of that employer's "Blogging and Internet Posting Policy" quoted in the complaint read as follows:

Employees are prohibited from making disparaging, discriminatory, or defamatory comments when discussing the Company or the employee's superiors, co-workers, and/or competitors.

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[1] Employers without a unionized workforce may not pay close attention to the decisions of the NLRB, presuming that they do not apply to them. But often they do, as Section 7 of the NLRA guarantees that all employees – regardless of union status – have the right to engage in "concerted activities for the purpose of . . . mutual aid or protection."

As reported by the NLRB in its November 2, 2010 News Release from the Office of the General Counsel, an NLRB investigation found that the employee's Facebook postings constituted protected concerted activity, and that the provisions of the company's blogging and Internet posting policy set forth above contains unlawful provisions. (The release does not contain further detail of what specific policy language the Board considered to be unlawful). The NLRB News Release of February 7, 2011, specifies that under the terms of the settlement, the company agreed to "revise its overly-broad rules to insure 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." In the build.com case, the employer agreed to post a notice at the workplace for 60 days stating that employees have the right to post comments about the terms and conditions of their employment on their social media pages, and that they will not be terminated or otherwise punished for such conduct.

The NLRB confirmed its intention to continue pursuing employees' social media rights in a March 16, 2011 teleconference reviewing recent Board decisions and regulatory actions. Accordingly, employers should carefully review their social media policies. Should they contain provisions similar to that which the Board has deemed "overly-broad," statements may be added that in no event is protected activity prohibited. In addition to the use of a disclaimer, examples of prohibited and protected activities and speech may be added to minimize ambiguity.