Inside The Beltway

Keeping You Informed

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Critical developments in labor and employment law

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NLRB's complaint against employer for terminating employee for her Facebook posting settled—company rules and policies at risk

Executive Branch/Administration
National Labor Relations Board—Social media

As previously reported on November 11 and November 16, 2010, the National Labor Relations Board (NLRB) Region 34 (Hartford, Connecticut) issued a complaint on October 27, 2010, against American Medical Response of Connecticut, Inc., for terminating an employee who criticized her supervisor on her Facebook page. On February 7, 2011, the day before the scheduled hearing, the employer settled and agreed to revise its social media rules on blogging and internet posting. The NLRB's complaint alleged that the employer's rules were overbroad and could restrict employees from exercising their statutory rights to discuss wages, hours, and working conditions during non-working time on or away from the employer's premises.

The employer's "Blogging and Internet Posting Policy" reads as follows:

- Employees are prohibited from posting pictures of themselves in any media, including but not limited to the Internet, which depicts the Company in any way, including but not limited to a Company uniform, corporate logo, or an ambulance, unless the employee receives written approval from the EMSC Vice President of Corporate Communications in advance of the posting;
- Employees are prohibited from making disparaging, discriminatory, or defamatory comments when discussing the Company or the employee's superiors, co-workers, and/or competitors.

That this case settled in not surprising. At issue is the overreaching of the policy's language. Presumably, the employer's prohibition from making comments, including negative comments, regarding wages, hours, working conditions, supervision, or co-workers was considered by the Acting General Counsel as restricting employee rights. The National Labor Relations Act grants the following rights to employees:

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ATTORNEYS AT LAW

- Right to self-organization
- Right to form, join, or assist labor organizations
- Right to bargain collectively through representatives of their own choosing
- Right to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection
- Right to refrain from any or all of such activities (except to the extent membership in a labor organization is required as a condition of employment or otherwise modified by state law)

Employer intended or unintended restrictions on employees' statutory rights to engage in union and/or concerted activities because of overbroad and/or ambiguous rules and policies is one of the most litigated matters before the Board. By our own research and tracking, there have been more than 60 reported Board decisions and 40 General Counsel Advice Memoranda following the seminal case in 1998, *Lafayette Park Hotel,* 326 NLRB 824, concerning the verbiage of employer policies and consequent restrictions on employee rights. Periodic review of employee handbook text, policies, and rules is critical not only to avoid NLRB charges, investigations, and related litigation but, more importantly, to prevent unions from leveraging unfair labor practice charges and related litigation to generate employee support for organizing. For a copy of Nixon Peabody's case tracking on this issue, contact johnraudabaugh@nixonpeabody.com.

National Labor Relations Board—Protected concerted activity revisited

On January 28, 2011, in a 2-1 decision, the NLRB held in *Parexel International, LLC* that the discharge of an employee who had not yet engaged in protected concerted activity to complain about wages was, nonetheless, unlawful. The employee reportedly inquired about another employee's wages and was subsequently terminated. The majority reasoned that discharging an employee who might complain in the future necessarily restrained and coerced the employee in the exercise of her statutory rights. The Board considered its ruling as a necessary protection against employer "nip-in-the-bud" or "preemptive strike" actions to prevent protected activities. The Board majority reasoned that "[i]t is beyond dispute that an employer violates Section 8(a)(1) by threatening to terminate an employee in order to prevent her from exercising her Section 7 rights, for example, by discussing wages with coworkers….It follows that an employer similarly violates Section 8(a)(1) by simply terminating the employee in order to be certain that she does not exercise her Section 7 rights." Obviously, this decision is troubling and requires employer action.

Managers and supervisors should be counseled regarding this decision. It remains to be seen whether this decision will survive judicial review. To hold employers accountable for what an employee might do in the future is unprecedented. Discipline should be undertaken for employee actions or behaviors in violation of company rules and policies and unrelated to possible future comments or actions by the employee under review.

National Labor Relations Board—Special remedies for failure to bargain

In *Gimrock Construction, Inc.*, decided January 28, 2011, a 2-1 Board majority imposed special remedies in a case of an employer's continuing refusal to bargain despite a court order. Rather than petitioning the Court for a modification of its order or initiating contempt proceedings, the Board ordered the company to bargain at least 16 hours a week until an agreement or lawful impasse is reached, or the

parties mutually agree to a hiatus. The Board also ordered the employer to file a progress report with the Board's Regional Office every 30 days.

National Labor Relations Board—Proposed rulemaking governing notification of employee rights under the National Labor Relations Act

Comments are due on or before February 22, 2011, regarding the NLRB's December 22, 2010, Notice of Proposed Rulemaking concerning the mandatory posting of a notice of employee rights under the National Labor Relations Act. A similar rulemaking was finalized by the U.S. Department of Labor effective May 20, 2010, implementing President Obama's January 30, 2009, Executive Order 13496 requiring nonexempt Federal departments and agencies to require government contractors and subcontractors to post notices informing employees of their rights under Federal labor law to form, join, and assist labor organizations or to refrain from so doing. Nixon Peabody represents the Society for Human Resource Management regarding the notice posting rulemaking responses.

National Labor Relations Board—Invitation for amicus briefing regarding union access to employer property

On November 12, 2010, the NLRB invited briefing regarding standards to apply regarding union access to employer private property. At issue in *Roundy's*, Case No. 30-CA-17185, was whether the employer violated the National Labor Relations Act by denying access for union handbillers while permitting other individuals, groups, and organizations access for charitable purposes. Briefs were due to be filed by January 24, 2011. Nixon Peabody filed a brief on behalf of the Center for Union Facts.

National Labor Relations Board—Acting general counsel instructed to sue four states, state responses, and NLRB response

On January 6, 2011, the NLRB authorized NLRB Acting General Counsel Lafe Solomon to file lawsuits against the States of Arizona, South Carolina, South Dakota, and Utah to enjoin the enforcement of recently approved State Constitutional Amendments requiring secret ballot elections for private sector decisions regarding union representation. The Acting General Counsel notified the four State Attorney Generals in writing on January 14 of the Board's intention to file lawsuits to enjoin enforcement of such laws. At issue is the National Labor Relations Act's authorization for employees to "select or designate" labor organizations to represent them for purposes of collective bargaining. The Board has long recognized both secret ballot elections and voluntary recognition based on evidence of majority support as acceptable methods for employer recognition of an exclusive bargaining representative. The four State Attorney Generals responded in writing on January 27 announcing their intention to defend their state's actions and specifically commenting that "[o]ur amendments support the current federal law that guarantees an election with secret ballots *if* the voluntary recognition option is not chosen." [Emphasis added]. In response, the NLRB's Acting General Counsel replied by letter February 2 noting their "unanimously expressed…opinion that the state amendments all can be construed in a manner consistent with federal law" and, therefore, "this matter can be resolved without the necessity of costly litigation."

National Labor Relations Board—Acting general counsel recommends new approach to NLRB deferral to arbitration

In a January 20, 2011, Memorandum, the Acting General Counsel urged the NLRB to adopt a new approach regarding deferral to arbitration. Specifically, the NLRB is urged to no longer defer to any arbitration decision regarding issues arising under Section 8(a)(1) or 8(a)(3) unless it is clear that the statutory rights to engage in union and concerted activity or to encourage or discourage union membership were adequately considered by the arbitrator.

National Labor Relations Board—Acting general counsel reports fiscal year 2010 results

On January 10, 2011, preliminary operating results for fiscal year 2010 were released. Reportedly, there was a 10 percent increase in representation case filing, a 6 percent increase in initial representation elections, and a 3.8 percent increase in unfair labor practice filings. Unions won 69.2 percent of the elections conducted in the first half of the fiscal year. Regional offices achieved settlement in 95.8 percent of cases found to have merit to proceed to hearing. The Acting General Counsel prevailed in prosecuting 91 percent, in whole or in part, of cases before administrative law judges.

Legislative Branch/Congress

By letter dated February 1, 2011, 47 Republican Senators notified President Obama of their objections to his January 26, 2011, renomination of Craig Becker as a Member of the National Labor Relations Board to fill the remainder of a five-year term expiring December 16, 2014. The letter notes in part that:

> He has led the Board to re-open and reverse settled decisions, made discrete cases a launching point for broad changes to current labor law, and used an 18 year-old petition to initiate a rulemaking proposal that likely exceeds the Board's statutory authority….Of equal concern, Mr. Becker assured Senators at his confirmation hearing that he would recuse himself from any Board matter in which his previous union employers were a party, for at least two years. Yet, when asked to recuse himself in 13 pending cases involving former employers, he refused in 12 of them. Disregard for the NLRB's appearance of impartiality is of great concern.

Becker was nominated on July 9, 2009, but failed to win confirmation when a February 2010 Senate vote to end debate on his nomination fell 8 votes short of the required 60 to proceed. In March 2010, 41 Republicansenators petitioned the President not to recess appoint Becker. On March 27, 2010, Becker was recess appointed to serve until the end of the Senate's 2011 session. Becker has served on the Board since April 5, 2010.

On February 11, 2011, the House Committee on Education & the Workforce, Subcommittee on Health, Employment, Labor and Pensions will conduct a hearing, "Emerging Trends at the National Labor Relations Board." For fiscal year 2010, the NLRB had a budget of $287 million, a $20 million increase over fiscal year 2009.

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