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LABOR AND EMPLOYMENT

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The use by employees of communications media (including Facebook, blogs, and other social media, and employer-owned email systems) and traditional media (including television) continues to raise concerns for employers. In general, employers should keep in mind that, although a technology may be new, the old rules still apply. Here are five recent examples:

1. Facebook Posts by Employees Critical of Employer May Be Protected Activity Under NLRA

The National Labor Relations Board ("Board") has generated a lot of publicity over its intent to issue complaints concerning the discipline of employees for their use of social media when that use constitutes concerted activity protected by the National Labor Relations Act ("NLRA"). Now, two Board administrative law judges ("ALJs") have issued the first decisions on such complaints.

In the first case, *Hispanics United of Buffalo, Inc.,* NLRB No. 3-CA-27872 (Sept. 2, 2011), the ALJ held that an employer had violated the NLRA by terminating five employees for posting on Facebook complaints about a co-worker's criticism of their job performance. Even though the case arose in a non-union workplace, the ALJ found that the posting by an employee of her concern about the co-worker's criticism, in which she solicited other employees to comment and which four employees did, constituted protected concerted activity. The ALJ emphasized that under the NLRA, employees have, in addition to the right to form or join labor organizations, the right to ". . . engage in other concerted activity for the purpose of collective bargaining or other mutual aid and protection." As a result, the employer's decision to terminate the five employees for that posting, which the employer admitted was the sole reason for the termination, violated the NLRA. The ALJ recommended that the Board order reinstatement with full back pay for the terminated

employees. The ALJ rejected the employer's defense that the Facebook posting violated the company's anti-harassment policy.

In a separate case, *Karl Knauz Motors Inc.*, NLRB No. 13-CA-46452 (Sept. 28, 2011), the ALJ found that a posting by an auto salesperson about an accident at a dealership at which he was not employed, but was owned by his employer, was not protected activity because it did not involve a discussion with other employees and had no connection with any of the employee's terms and conditions of employment. Thus, the ALJ found that the employer's decision to fire the salesperson for this posting did not violate the NLRA.

These two cases highlight the careful analysis that employers must now make before disciplining or discharging employees for what they post on the ever-multiplying forms of social media. Specifically, employers should determine the following:

a) Are the employees involved protected by the NLRA? ("Supervisors and managerial employees," as defined by the Board, are not protected.)

b) Does the content of the posting involve terms and conditions of employment (such as wages, hours, benefits, or working conditions) or supervisors?

c) Does the posting involve co-workers, such as by soliciting their comments and/or support?

If the answer to all of these questions is "yes," such postings may well be protected activity under the NLRA and any discipline imposed for the positions taken may be subject to challenge before the Board.

2. "New" Board Finds That Employer Violated NLRA by Disciplining Employee for Sending Union-Related Emails Through Company's Email System

In this case, the employer maintained a policy prohibiting the use of its internal communications system to solicit or proselytize for commercial ventures, religious, or political causes or outside organizations or other non-job related solicitations. The employer knew that employees were sending and receiving personal emails, such as party invitations, baby announcements, offers of sports tickets, and the like, on the company's email system, but it did not reprimand them for doing so. However, the employer disciplined one of its employees, who also was the president of the union representing its employees, for violating the policy by sending a union-related email to coworkers over the company's email system.

In its initial decision in December 2007 (*The Guard Publishing Co.*, 357 NLRB 1110 (2007)), the Board found that the employer did not violate the NLRA and had not discriminatorily enforced the policy. The Board held that in order to prove unlawful discrimination, the employer's actions must involve the disparate treatment of activities or communications of a similar character because of their union or other protected status. The Board concluded that the fact that the employer had allowed employees to use its email system for purely personal purposes did not require it to allow employees to use it for union purposes.

On review, the U.S. Court of Appeals for the DC Circuit found that the employer had inconsistently enforced the company's policy by disciplining the union official for using the company's email system for union solicitation, while allowing employees to email non-union related messages of a personal nature. The DC Circuit Court noted that the company's policy did not itself draw a distinction between personal and organizational solicitation. See

Guard Publishing Co. v. NLRB, 571 F.3d 53 (DC Cir. 2009).

On remand, a "new" Board – one with a majority of three liberal democrats – accepted the ruling of the DC Circuit Court and held that the company violated the NLRA by discriminatorily enforcing the policy. See *The Guard Publishing Co.*, 357 NLRB No. 27 (July 26, 2011).

Going forward, employers can expect that this Board will measure whether an employer has discriminatorily enforced email policies against union-related solicitations by examining whether a company has permitted the use of its email system for personal messages and solicitation, beyond the Board's recognized exception for charitable solicitations under its "isolated beneficent acts" rule.

Of particular concern will be whether an employer can prohibit the use of its email system by employees to circulate pro-union solicitations during union-organizing campaigns. The new Board is likely to take the position that employers will violate the NLRA if they prohibit employees from using company email systems to circulate pro-union materials or discipline employees who do so while allowing the company email system to be used for personal messages. To avoid such a result, employers need to carefully draft email policies to prohibit the personal use of company email systems and to regularly and consistently enforce the policy. Some employers may determine that such a rule is undesirable or impossible to enforce. As an alternative, employers may consider implementing rules governing the use of company email systems that prohibit or limit the number of attachments to personal emails or that limit the number of addressees on personal emails. Of course, the employers will need to regularly and consistently enforce such rules.

3. Discussion of Wage Dispute in TV Interview Found to Be Protected Activity

The Board has found that an employer violated the NLRA by firing 26 employees after they appeared on a local TV broadcast during which they made statements that their employer believed misrepresented its products and pay practices. See *MasTec Advanced Technologies*, 357 NLRB No. 17 (July 21, 2011).

The Board found that the employees' appearance on the TV program grew out of their opposition to a new compensation program implemented by their employer. The employees had protested to management, and, after they were unable to convince their employer to change the new policy, they decided to make their complaint public and contacted a local TV station. In the broadcast, the employees complained about the losses that the new pay system was causing them, and they alleged that they had been told to lie to customers to avoid charge backs to their pay under the system. The company terminated these employees after the interview was aired.

The Board found that there was no dispute that the employees' conduct, involving a collective protest of a wage dispute, was activity protected by the NLRA. It is important to note that there was no union involved in the dispute. The issue before the Board was whether the statements were so disparaging of the employer that they lost the protection of the NLRA. The Board followed its longstanding rule that employee communications made to a third party in an effort to obtain his or her support are protected when the communication indicates that it is related to an ongoing labor dispute with the employer. However, the Board recognized that such statements lose the protection of the NLRA if they are disloyal, reckless, or maliciously untrue. In the Board's view, statements are "maliciously untrue" if they are made with knowledge of their falsity or with reckless

disregard for their truth or falsity.

In this case, the Board found that the employees' statements to the media were accurate representations of what they had been told to tell customers and fairly represented their experiences with the new pay system. The Board concluded that the employer had violated the NLRA by terminating the 26 employees and ordered that they be offered reinstatement and given back pay.

It is easy to see the new Board applying the rule of this case to situations in which employees use any of the many forums available in social media to garner support for their complaints about their workplace. Employers faced with such use of social media by their employees will need to examine whether the posting constitutes activity protected by the NLRA before taking disciplinary action, and whether the nature of the posting, including the pictures and language used, are so egregiously disloyal, reckless, or malicious that the posting has then lost the protection of the NLRA.

4. The Workplace Is Still for Working: Employers May Promulgate and Enforce Rules Limiting Personal Use of Social Media During Working Time

Faced with a boom in the use of social media through increasingly smaller and more powerful personal devices (such as smart phones and iPads) and the personal use by employees of company-owned communication systems to access both the Internet and social networking sites, employers should update their policies to control such uses and ensure that their employees are spending their working time productively.

Two recent arbitrator's rulings support employer actions in enforcing social media policies. In one case, the arbitrator ruled that the employer had "just cause" to terminate an electrician who tapped into the company's Internet service to download first run-movies onto his own laptop while at work. The arbitrator found that the employee's use of the company's Internet system had violated company rules prohibiting theft or misappropriation of company property, the misuse of company property because the downloading of the movies was illegal, and the unauthorized entry into company property. *Hayes International*, 129 LA 559 (2011). In a second case, an arbitrator ruled that a federal agency had just cause to discipline an employee for playing computer games during working time, in violation of the agency's policy. *Federal Bureau of Prisons*, 127 LA 686 (2011).

Although both of these cases involved labor arbitrations under union contracts, all employers should consider drafting and implementing policies specifically addressing the limits on employee use of the employer's electronic communication systems. While specific provisions will vary from company to company, a social media policy should normally include the following:

- A written policy
- A signed acknowledgement form, including consent to monitoring and access to stored communications
- Definitions, *e.g.,* "social media," confidential and/or proprietary information, working time, Company-issued equipment/devices
- Fair, consistent monitoring and enforcement
- The scope of monitoring, *e.g.,* viewing Facebook profiles of existing employees, monitoring use of social media on Company-issued equipment/devices
- Possible disciplinary actions
- Periodic redistribution
- Training

- A clear process for reporting complaints/non-compliance
- A clear communication of prohibited activities

5. EEOC Cautions Employers on Using Social Media in Hiring Decisions

Surveys now reflect the tremendous increase in the use of social media to perform pre-hire background checks on employees. A survey cited in *The New York Times* reported that 75 percent of recruiters research candidates online, and 70 percent of recruiters report that they have rejected candidates on the basis of online information. BNA reports that, at an EEOC training workshop, Edward Loughlin, a trial attorney with the EEOC's Washington, D.C., Field Office, noted that employers can access through social media a great deal of information that they could not access before and that social media might reveal information showing membership in protected classes. He cautioned that, in reviewing adverse actions in an employment claim, the EEOC will apply the same rules that are applied under traditional Title VII analysis, whether the information was obtained through social media or more traditional means.

Employers need to set guidelines for their HR staff on the use of social media in the hiring process. The guidelines should make clear that recruiters should not search online for information that they could not seek on an application or in an interview, such as race, age, religion, disability, union support, and any other class or activity protected by law. Since online searches may inevitably produce such information, guidelines and procedures that exclude such information from the decision-making process should be put in place. Employers may want to consider delaying such screenings to the post-offer stage.

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