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# Management Update

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## NLRB Claims Firing Employee Over Facebook Post is Illegal

While it's not surprising that companies want to prohibit employees from using their social media sites to disparage the employer or disclose confidential business information, the National Labor Relations Board (NLRB) claims overly broad social networking policies violate federal labor law. The Board recently filed an unfair labor practice complaint against an ambulance service, claiming the company discharged an employee for making disparaging comments about her supervisor on her Facebook page, in violation of her right to engage in protected concerted activity. The Board also claims the company's social media policy is overly broad and interferes with the employees' right to engage in protected concerted activity. *See In re American Medical Response of Connecticut, Inc.*, Case No. 34-CA-12576 (filed October 27, 2010).

In this case, the employee was asked to prepare a response to a customer's complaint about her work. The Board claims the employee was unhappy because the company refused her request to have a union representative help her prepare the response. Later, the employee posted negative comments about her supervisor on her Facebook page from her home computer. Co-workers who viewed her page posted comments supporting the employee and criticizing the supervisor.

The NLRB claims the company fired the employee because of her Facebook postings and because these postings violated the company's social media policy. The company claims the employee was discharged for multiple, serious complaints about her behavior, including negative personal attacks about a co-worker posted on her Facebook page.

According to the Board's complaint, the employee engaged in concerted activity with other employees when she criticized her supervisor on her Facebook page and the company violated her Section 7 right to engage in protected concerted activity when it fired her for these postings. Additionally, the Board claims the company's Blogging and Internet Posting Policy, which prohibits employees from "making disparaging, discriminatory or defamatory comments when discussing the Company or the employee's superiors, co-workers and/or competitors" and 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" is overly broad and interferes with employees' exercise of their Section 7 rights.

Section 7 of the NLRA protects employees' right to discuss their employment among themselves. The NLRB's acting General Counsel takes the position that discussions on Facebook are no different from, and entitled to no less protection than, those that take place at the water cooler. Still, the Act does not protect all employee statements. On its own Facebook page, the NLRB states that a four-point test applies to determine when Facebook comments lose protected concerted status under the NLRA: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way, provoked by an employer's unfair labor practice.

***Employers' Bottom Line:***

While this is the first unfair labor practice complaint filed by the Board based on an employer's social media policy, it is not likely to be the last. Employers should use caution when considering discharging or disciplining employees based on comments made on social media sites such as Facebook or blogs. Additionally, employers may want to review their social media policies to ensure that the language, especially any non-disparagement language, is not overly broad. Employers should also consider including a statement that the provisions of the social media policy will not be construed or applied in a way that interferes with employees' rights under federal labor law. We will keep you updated on any developments in this case.

## Senate Rejects Paycheck Fairness Act

The Senate has voted against proceeding to a floor debate on the Paycheck Fairness Act (PFA), which means this legislation is dead, at least for now. Supporters of the bill needed 60 votes to invoke cloture and proceed to consideration on the Senate floor. The Senate voted 58 to 41 against cloture.

The PFA would have, among other things, required employers to report workers' race, gender and salaries to the government. It also would have imposed more burdensome standards on employers defending pay discrimination claims on the basis that the pay differential is based on a factor other than sex and would have permitted employees to recover compensatory and punitive damages in successful Equal Pay Act lawsuits.

President Obama had expressed support for this bill, which had previously been passed by the House of Representatives.

## Changes to Grandfathered Plan Rules Announced

The triple threat of federal agencies (Department of Labor, Department of Treasury, and Department of Health and Human Services) first published guidance in the form of interim final regulations on "grandfathered" health plans under the health care reform law (the "Affordable Care Act") on June 17, 2010. Since then the agencies have issued Frequently Asked Questions on September 20, 2010, October 8, 2010, October 12, 2010 and October 28, 2010, each containing responses to questions regarding the implementation of the Affordable Care Act, including clarifications on rules related to grandfathered plans. On November 15, 2010, the agencies released an amendment to the interim final regulations providing some relief to fully insured group health plans.

### *Amendment*

In response to comments received on the interim final regulations, the agencies determined that an amendment is necessary to the grandfathered plan rules. Under the interim final regulations, a fully insured group health plan would lose its grandfathered status if it changed issuers or policies after March 23, 2010 regardless of whether or not the benefits or terms under the policy had actually changed in any significant way. The amendment to the interim final regulations removes this restriction and allows a group health plan or employer to enter into a new policy, certificate or contract of insurance without the plan losing its grandfathered status if certain conditions are met. This amendment, like the interim final regulations, applies separately to each benefit package under the health plan. However, it does not apply to individual policies.

In order for a fully insured group health plan to maintain its grandfathered status after a change in insurer or policy, the plan must not make any other changes that would result in a loss of grandfathered status under the interim final regulations (e.g. any increase in a percentage cost-sharing requirement such as coinsurance, etc. Please see our Legal Alert, "Anticipated Health Care Reform Grandfathered Plan Regulations Released," dated June 23, 2010, available on our web site at http://www.fordharrison.com/shownews.aspx?Show=6300, for a complete list of changes that will result in a loss of grandfathered status.) Additionally, the group health plan must provide any new insurance company with documentation of the prior health plan coverage sufficient to determine if any change in the new policy, certificate or contract of insurance is being made that would result in a loss of grandfathered status.

***Effective Date***

The amendment applies to group health insurance changes which become effective on or after November 15, 2010. Therefore, any change of insurer or policy that became effective prior to November 15, 2010 will not be subject to the amendment and would result in a loss of grandfathered status.

***Employers' Bottom Line***

This amendment is a welcome change for employers with a fully insured group health plan or with any fully insured benefit options under its health plan. It allows flexibility to change insurance carriers or insurance policies without the loss of grandfathered status as long as such changes do not result in one of the six prohibited changes under the interim final regulations for grandfathered health plans. Employers with fully insured plans who avoided making certain insurance policy changes (other than the 6 prohibited changes for grandfathered plans) that would reduce cost but result in a new policy being issued, may want to revisit those decisions in light of this amendment. Unfortunately, this amendment may have come too late, as a practical matter, for calendar year plans to make any changes for the 2011 plan year.

If you have any questions regarding this article, please contact the author, Daniel Sulton, dsulton@fordharrison.com, any member of Ford & Harrison's Employee Benefits Practice Group, or the Ford & Harrison attorney with whom you usually work. You may also visit the health care reform section of the Ford & Harrison website, http://www.fordharrison.com/HealthcareReform.aspx, for more helpful resources and tools on health care reform.

## NLRB Will Require Electronic Posting of Notices

In a 3-1 decision issued October 22, 2010, the National Labor Relations Board (NLRB) held that respondents who have been found to have committed unfair labor practices must post remedial notices electronically if they regularly communicate with their employees and members electronically. See *J Picini Flooring*, 356 NLRB No. 9. Accordingly, the Board revised its current notice-posting language, which requires posting in all places where notices to employees or members are customarily posted, to expressly encompass electronic communication formats.

Generally, when the Board finds that an employer or union has committed an unfair labor practice, it requires the respondent (i.e. the employer or union) to post a notice informing employees/union members of their rights under the Act, the violations found by the Board, the respondent's obligation to cease and desist from such unlawful conduct in the future, and the affirmative action to be taken by the respondent to redress the violations. The Board's standard practice is to require respondents to post remedial notices for a period of 60 days "in conspicuous places including all places where notices to employees [members] are customarily posted." This provision has traditionally been applied to require posting of paper copies at fixed locations, usually on bulletin boards as well as at time clocks, department entrances, meeting hall entrances, and dues payment windows.

In *J Picini Flooring*, the Board noted that e-mail, postings on internal and external web sites, and other electronic communication tools are overtaking, if they have not already overtaken, bulletin boards as the primary means of communicating a uniform message to employees and union members. Thus, given the increasing reliance on electronic communications and decreasing reliance on paper communications such as bulletin boards, the Board determined that in addition to physical posting, notices should be posted electronically, on a respondent's intranet or internet site, if the respondent customarily uses such electronic posting to communicate with its employees or members. Similarly, notices should be distributed by e-mail or other electronic means if the respondent customarily uses e-mail or other electronic means to communicate with its employees or members. The Board also held that " a policy concerning communication of remedial notices should apply equally to union and employer respondents. The policy we announce today, by its terms, applies to all respondents, employer and union, without differentiation." *Id.* at p. 3, fn. 11.

The determination of whether electronic posting will be required in a particular case will be made in compliance proceedings. The new rule will apply to all currently pending cases as well as future cases.

## Employee Not Insulated from Discipline by Filing Harassment Complaint

The Eighth Circuit recently upheld the dismissal of a retaliation and sexual harassment complaint filed by an employee who voluntarily resigned several months after she was suspended for violating the employer's sexual harassment policy. *See Alvarez v. Des Moines Bolt Supply, Inc.* (Nov. 17, 2010). In this case, the employer investigated a complaint by Alvarez that a co-worker had sexually harassed her. As a result of the investigation, the employer determined that both Alvarez and the co-worker violated company policy by engaging in "verbal and physical conduct of a sexual nature." Accordingly, the employer suspended both employees for five days without pay. When the co-worker returned, he was transferred to another department and did not harass Alvarez again.

Alvarez claims that she was sexually harassed by other co-workers when she returned from her suspension; however, she did not report these allegations to her employer. Alvarez subsequently resigned and sued the employer for sex discrimination and retaliation under Title VII and state law. The trial court granted summary judgment in favor of the employer and the Eighth Circuit affirmed this decision.

The Eighth Circuit held that Alvarez failed to show that the employer's reason for suspending her (violation of the company's sexual harassment policy) was pretext for retaliation. The court noted that the employer was not required to establish that Alvarez violated its sexual harassment policy; only that it had a good faith belief that she did so. Thus, even if a fact finder could have disagreed with the employer's determination, it was not liable for discrimination as long as it honestly believed that Alvarez violated company policy.

The court also held that Alvarez could not show that the employer suspended her because of her sexual harassment complaint rather than because she violated the company's sexual harassment policy. Alvarez argued that if she had never complained, the employer would never have conducted the investigation that resulted in her suspension. The court held, however, that filing a harassment complaint does not insulate an employee from the consequences of violating company policy. "That Alvarez's complaint was the genesis of the investigation that led to her suspension does not, in and of itself, tend to show that she was a victim of unlawful retaliation."

The court also rejected Alvarez' argument that the employer did not act in good faith reliance on its internal investigation because the employer had reason to believe the reports of her misconduct were false. The court noted that an internal investigation, like a judicial proceeding, often produces conflicting evidence and requires that the employer make judgments about credibility and the weight to be given various pieces of information. "That an employer must choose among competing inferences does not mean that there inevitably is a genuine issue of fact concerning the employer's good faith."

The court pointed out that after the employer investigated Alvarez's allegations, it disciplined both Alvarez and the male co-worker she claimed harassed her. Had the employer only disciplined the male co-worker, despite finding that Alvarez also engaged in misconduct, the co-worker could have sued the employer for disparate treatment based on sex. The court noted that there may have been two reasonable responses for the employer under the circumstances, but "an employer who investigates allegations of workplace misconduct is entitled to latitude in evaluating the information gathered, as long as the employer acts in good faith."