Inside The Beltway

Keeping You Informed

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Critical developments in labor and employment law

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Executive Branch/Administration: National Labor Relations Board
New remedies, social media, pro-union results—be prepared!

Remedial NLRB notices and dissemination through employer email systems

In *J. Picini Flooring*, 356 NLRB No. 9 (October 22, 2010), the Board split 3-1 along party lines in embracing electronic communications to enhance communication of remedial notices informing "employees concerning the violations found by the Board, the remedies ordered, and the underlying rights of the employees." The majority reasoned that "[e]lectronic communications are now the norm in many workplaces, and it is reasonable to expect that the number of employers communicating with their employees through electronic methods will continue to increase….Given the increasing reliance on electronic communication and the attendant decrease in the prominence of paper notices and physical bulletin boards, the continuing efficacy of the Board's remedial notice is in jeopardy." While this decision involves the use of an employer's email system for the limited purpose of informing employees of a federal agency's decision/order, it may well be one step closer to extending employee access to an employer's email system for union solicitation, eventually overturning *Register Guard*, 351 NLRB 1110 (2007), the former Bush Board's decision upholding an employer's property interest in a computer system and restricting or prohibiting employee use for non-company, business purposes. Current NLRB Chairman Liebman dissented in *Register Guard* noting that "[g]iven the unique characteristics of e-mail and the way it has transformed modern communication, it is simply absurd to find an e-mail system analogous to a telephone, a television set, a bulletin board, or a slip of scrap paper."

Employee rights to criticize employers on social media

On October 27, 2010, NLRB Region 34 (Hartford, Connecticut) issued a complaint against American Medical Response of Connecticut, Inc., NLRB Case No. 34-CA-125767, for terminating an employee who criticized her supervisor on her Facebook page.

The NLRB issued a press release regarding the matter on November 2, 2010, and a live television interview with NLRB Acting General Counsel Lafe Solomon was held the same day. The filing of the complaint has attracted significant media attention, even though the substance of the matter will not be heard until a hearing on January 25, 2011.

At issue in this case is the legitimacy of the employer's Employee Handbook rules addressing employee conduct, employee solicitation, and use of social media. As alleged in the Complaint, the employer's policies under review include:

> *Blogging and Internet Posting Policy* – "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."
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> *Standards of Conduct* – Prohibiting "Rude or discourteous behavior to a client or coworker; use of language or action that is inappropriate in the workplace whether racial, sexual or of a general offensive nature."
>
> *Solicitation and Distribution Policy* – "It is the policy of the Company to prohibit solicitation and distribution by non-employees on Company premises and through Company mail and e-mail systems, and to permit solicitation and distribution by employees only as outlined below; Solicitation of others regarding the sale of material goods, contests, donations, etc., is to be limited to approved announcements posted on designated break room bulletin boards."

The restriction on employees' Section 7 rights to engage in union and/or concerted activities because of overbroad and/or ambiguous rules and/or policies continues to be one of the most frequently litigated matters before the Board. *Palms Hotel & Casino*, 344 NLRB 1363 (2005); *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004); *Lafayette Park Hotel*, 326 NLRB 824 (1998); 29 U.S.C. §157.

The Complaint appears inconsistent with the Advice Memorandum in Sears Holdings (Roebucks), Case No. 18-CA-19081, issued on December 4, 2009. There, the NLRB Associate General Counsel, Division of Advice, recommended dismissal of a pending charge, concluding that an employer's social media policy did not violate its employees' Section 7 rights. The company's policy prohibited employees from discussing "in any form of social media" the "[d]isparagement of company's or competitors' products, services, executive leadership, employees, strategy, and business prospects." The Advice Memorandum concluded that the policy "cannot reasonably be interpreted in a way that would chill Section 7 activity." [Emphasis added]. However, the current Board Chairman uses the much stricter standard of whether an employer's rule could possibly chill employees' exercise of their Section 7 rights. *Guardsmark, LLC*, 344 NLRB 809, 813 (2005)(Liebman dissent). Regardless of the standard used concerning employee comments disparaging the employer's product or service quality, it has been the law for nearly 60 years that such remarks are unprotected and discipline or discharge for such remarks is lawful. *NLRB v. Electrical Workers Local 1229* (Jefferson Standard Broadcasting), 346 U.S. 464 (1953).

Ultimately, this case offers the current Board an opportunity not only to adopt strict standards preventing employer restrictions on employee communications, but to also address the right of employees to solicit on non-working time utilizing employer provided email systems. Interestingly, on October 22, 2010, the British Columbia Labour Board found lawful an employer's discharge of an employee for posting a Facebook comment that "was very egregious in that it named the Employer and attempted to encourage people not to spend money at the Employer's business." *West Coast Detail & Accessory Centre*, BCLRB No. B190/2010.

The case will be heard before an NLRB Administrative Law Judge on January 25, 2011.

A further discussion of the NLRB complaint and its impact on the use of social media in the workplace will be a forthcoming in an Employment Law Alert by Nixon Peabody attorney Renee M. Jackson.

Interest on backpay awards to be compounded daily

Backpay awards under the National Labor Relations Act were reevaluated in *Kentucky River Medical Center*, 356 NLRB No. 8 (October 22, 2010). In a unanimous decision, backpay will now include daily compounding of interest utilizing the Internal Revenue Service adjusted prime rate for underpayment or overpayment of taxes. As reported, the Board has ordered simple interest on backpay awards since 1962 and has altered the calculation period over the years. Also of interest is the Board's response to the contention that it should address the compound-interest issue through rulemaking rather than adjudication. In reply, the Board noted that "[t]he Supreme Court has held that the 'choice between rulemaking and adjudication lies in the first instance within the Board's discretion'" citing *NLRB v. Bell Aerospace Co.*, 416 NLRB 267 (1974). Rulemaking provides parties advance notice of an agency's interest in making change and an opportunity to provide comment to the proposed rule. Adjudication often results in surprise by altering precedent or announcing a new legal interpretation to be applied to future cases. As discussed previously, the current Board is reportedly considering shorter election periods and equalizing or providing union access to workplaces to campaign, changes in policy it may make through adjudication.

Right to secret ballot to contest employer voluntary recognition of card-check and recognition of union by corporate successor

The Board invited amicus briefs in the pending *Lamons Gasket* case to reconsider the 45-day notice requirement announced in the 2007 *Dana* decision to provide employees an opportunity to affirm or reject an employer's voluntary recognition of a union based on a majority of signed cards. 355 NLRB No. 157 (August 27, 2010); *Dana Corp.*, 351 NLRB 434 (2007). On the same day, the Board also invited briefing in *UGL-UNICCO Service Company*, to revisit yet again the issue of continuing union recognition in a successorship situation. 355 NLRB No. 155. Nixon Peabody filed amicus briefs on behalf of U.S. Senator Orrin Hatch and on behalf of the National Association of Manufacturers and 39 additional associations. The briefs may be accessed on the NLRB website.

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