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Does Your Nonprofit's Internet Policy Comply with Federal Labor Law?

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A recent **complaint** issued by a Regional Director of the National Labor Relations Board ("NLRB") poses a new challenge for employers attempting to control their employees' use of the Internet. Facebook, LinkedIn, Twitter, blogs, and other Internet postings have grown exponentially in recent years, both at home and at work. Many employers have adopted Internet policies to protect their organizations from disparagement and legal problems arising from employee postings. Those policies need to be carefully reviewed in light of recent developments in federal labor law.

Until now, the NLRB has held that employers have the right to maintain reasonable workplace policies to maintain order in the workplace and avoid liability from employee actions that affect the public. The Board has balanced these employer rights against the right of employees, both union and non-union, to engage in "concerted activity" for their "mutual aid and protection" under the National Labor Relations Act. Under a 2004 case called Lutheran Heritage Village, the NLRB upheld workplace rules limiting public statements by employees, so long as such rules do not explicitly restrict rights to engage in protected activity (such as organizing) and are aimed solely at establishing a "civil and decent work place." In another case decided in 2007 involving The Register-Guard newspaper, the NLRB upheld against union attack an employer email policy that prohibited "non-job related solicitations."

More recently, the NLRB's Office of General Counsel issued an advice memorandum in 2008 upholding the social media policy of Sears Holdings, which had been challenged by the International Brotherhood of Electrical Workers ("IBEW"). Sears' policy prohibited, among other things, the "disparagement of company's or competitors' products, services, executive leadership, employees, strategy and business prospects." Relying on Lutheran Heritage Village, the General Counsel dismissed the IBEW complaint, finding that there was no evidence that Sears had used its policy to discipline any employee for engaging in protected activity, nor was the policy established in response to the union campaign.

However, the composition of the NLRB has changed dramatically since the above decisions were issued, and there is now a new General Counsel as well. A majority of the Board's current membership consists of lawyers who previously represented labor unions. They have begun to overrule past precedents and issue new decisions that are generally viewed as more favorable to union interests.

Consistent with these changes, the recent complaint issued by a Regional Director of the NLRB in Hartford, Connecticut against a company called American Medical Response may portend a shift in the Board's treatment of social media policies. The Regional Director declared that American Medical Response violated the law by firing an employee who posted negative comments about her supervisor on Facebook. The company's Internet posting policy prohibited employees from making disparaging, discriminatory or defamatory comments about the company or its supervisors on public websites.

The allegations in the Regional Director's new complaint appear to challenge the NLRB precedent and case law described above with regard to social media / Internet / email / computer use policies. The policy which is the subject of the NLRB complaint appears to share the same characteristics as many workplace Internet policies that have been previously upheld.

It should be noted that the new Regional Director complaint does NOT establish binding policy of the NLRB. The complaint must be reviewed in a trial before an Administrative Law Judge (unless it is settled first), and the judge's decision would have to be appealed to the NLRB itself for a final decision to be issued. Nevertheless, the issuance of the new complaint sends an ominous message to

employers regarding the legal status of previously recommended Internet policies. Reinforcing this message of impending change, the Office of General Counsel took the unusual step of publicizing the Regional Director's complaint in a **national press release** issued on November 2, 2010.

The NLRB may also be in the process of further restricting the right of employers to control union solicitation of workers, by either co-workers or outside union organizers, via email and the Internet. Previous holdings by the Board under the Bush Administration such as the Register-Guard case, which seemed to permit common sense restrictions of non-work-related email and Internet usage by and to employees, appear to be high on the list of the new Board majority for reversal or modification. Policies which block employee access to certain Internet sites may also come under renewed scrutiny.

What should employers do now?

At a time when the NLRB's views appear to be in flux, and the final outcome is unknown, it is hard for employers to tell whether their current policies comply with the law and whether changes are needed. Because NLRB rulings apply equally to non-union employees, it is advisable for all employers to review their Internet and email usage policies and to consider whether any of them could be misinterpreted as interfering with employee rights under the labor laws. Employers may need to include new disclaimers or otherwise scale back those policies which appear most likely to be construed as interfering with employee rights.

Employers should be particularly careful during a union organizing campaign to consider whether disciplinary enforcement of Internet or email policies is likely to provoke NLRB complaints and should consult with labor counsel before terminating an employee for violation of any Internet or email policy.