You Can't Say That! The Dangers of Overbroad Social Media Policies

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Social media use is exploding and the prevailing attitude of users seems to be “post now, think later.” In this climate, employers undoubtedly should develop and implement policies to protect their reputation and brand in the marketplace. But, like their employees posting online, if employers go too far in their statements they may face unforeseen consequences.

In December of last year, our firm alerted you to one such unforeseen consequence: an unfair labor practice charge from the National Labor Relations Board (NLRB). This alert provides an update on the status of that case and identifies a new case that may yield even more interesting precedent.

Earlier Reported NLRB Case Settles

In our earlier alert, we reported that American Medical Response (AMR) allegedly fired

an employee for her disparaging Facebook posts about a supervisor, to which several of her Facebook "friends" who were also co-workers added their comments. AMR's decision to fire the employee was based on a violation of its company handbook, which reportedly contained a policy on blogging and Internet posting that prohibited employees from making "disparaging, discriminatory or defamatory comments when discussing the company or the employee's superiors, co-workers and/or competitors." The NLRB filed a complaint against AMR asserting that AMR's policies and disciplinary actions were unfair labor practices, based on its theory that employees have a protected right to discuss their wages, hours, and working conditions while not at work. On the eve of a scheduled administrative hearing to address the NLRB charges, a National Labor Relations Authority regional director approved an undisclosed settlement pursuant to which AMR reportedly will revise its policies. AMR previously reached a settlement with the employee involved.

New NLRB Case Filed

If, like us, you were looking to this case to provide some judicial guidance on how labor laws will apply in social media cases, don't despair. The NLRB has already filed another unfair labor practice charge against Student Transportation of America (NLRB Reg. 34, No. 34-CA-12906, union charged filed 2/4/11) for maintaining and enforcing policies in its company handbook that infringe on employees' rights, including its broad social media policy that prohibited "the use of electronic communication and/or social media in a manner that may target, offend, disparage, or harm customers, passengers, or employees; or in a manner that violates any other company policy." Unlike the AMR case, the complaint against Student Transportation of America contains no allegation that an employer improperly disciplined any specific employee. As such, the case

presents a more limited question: Are employers effectively barred from restricting certain employee speech in social media, even when no disciplinary measures are taken to enforce the policy?

What Should You Do?

While social media policies often include broad provisions to limit negative, offensive, or disparaging statements or images relating to employment, employers should take the time now to review their policies for overbroad statements regarding employee speech. This review should include (1) the company handbook, (2) any policies on confidentiality or nondisclosure, workplace ethics, company loyalty, computer or information systems use, or social media use, and (3) any other company statements that bear on employee conduct and that could run afoul of the NLRB's current enforcement approach. Employers should bear in mind that having appropriate policies and offering employee training on social media use can increase the likelihood that employee time spent on social media will be a positive experience rather than a source of liability. Employers can also consider other tips on social media pitfalls that we provided in an earlier alert.

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