Who Cares about Social Media?

You can put your hands down!

Amid the flurry of "social media" alerts you are receiving on what seems like a daily basis, we want to make sure one voice that non-union employers can sometimes tend to ignore is heard – the National Labor Relations Board (NLRB).

In addition to trying to make sure much of the now defunct Employee Free Choice Act is enacted "administratively" through its case decisions and "rules," the NLRB is also intensely focused on making sure employers do not overstep what it considers to be appropriate boundaries regarding the implementation and enforcement of their social media policies.

The NLRB's interest in such policies is generally to make sure they are not so broadly drafted OR applied so as to abrogate both union and non-union employees' rights provided under the National Labor Relations Act (NLRA) to participate in concerted activity. "Protected concerted activity" can be communications regarding the terms and conditions of employment, seeking mutual aid or protection relating to an employment issue, preparing for a meeting with management or raising concerns with management. It must be more than just an employee's own criticism of his/her supervisor or comments regarding an individualized issue the employee has with the employer and/or his/her co-workers.

The latest manifestation of this "focus" is a decision issued on Friday, September 2 by an NLRB Administrative Law Judge which held that the termination of five employees due to posting comments criticizing another co-worker on their personal Facebook pages (on their own time and computers) was unlawful. *Hispanic United of Buffalo, Inc.*

The employer's position was that the critical postings violated its anti-harassment policy. The policy at issue contained the typical language most of you are used to seeing "prohibiting comments, conduct, etc. which is directed at an employee based on race, age, gender, religion, etc. or creating an intimidating, hostile or otherwise offensive work environment or otherwise interfering with an individual's work performance or employment opportunity."

The NLRB Administrative Law Judge (ALJ) did not find that this policy itself was unlawful. Instead, the ALJ found that the five terminated employees had really not violated this policy through their personal Facebook posts – even though the criticized employee had seen "and been hurt by" them. The posts did not make any reference to any protected class mentioned in the employer's harassment policy and were made by employees who rarely interacted with the criticized employee at work.

Accordingly, the ALJ likened the posts to the criticized employee overhearing others talking about her during a break or at a local "watering hole" after work and found they did not warrant termination. The ALJ went on to find that because the five employees' criticisms of their co-worker involved discussions of overall staffing needs over which one of the five had requested a meeting

with management, the Facebook posts constituted "protected concerted activity." This finding provided the basis for not only the reinstatement (with back pay) of the five terminated employees but an order by the ALJ that the employer post a notice of employee rights under the NLRA and of its violations of the same.

The *Hispanic United of Buffalo, Inc.* decision is unique procedurally because it is the first one which is based on an actual ALJ hearing rather than just an unfair labor practices charge. However, the holding is not as shocking to employer senses as some of the other social-media-focused decisions which were recently outlined in a press release issued by the NLRB's General Counsel (click here to read the press release).

The general themes arising from this press release were three-fold:

(1) Blanket prohibitions on posting "offensive," "disparaging/negative," "embarrassing," "sensitive," "inappropriate," or even "personal" or "private" information in social media policies generally run afoul of the NLRA.

(2) Blanket prohibitions even on using the employer's name, logo or location(s) (including photographs reflecting any of the same) also generally run afoul of the Act.

(3) The NLRB's interpretation of "protected activity" under the NLRA is increasingly broad.

One illustrative example from among the 14 cases summarized in the NLRB General Counsel's recent press release involved a car salesman who had posted extremely harsh criticisms of a sales event which was put on by his employer on his personal Facebook page. The employee attached various video clips to support his criticisms – including one of a car which had accidentally been driven into a nearby pond the day before the event which had nothing to do with the event itself but which the employee "just thought was funny."

The employer, who was obviously embarrassed by the posts after they were brought to its attention by a competing car dealer, terminated the salesman for "being disloyal."

The NLRB found that this termination was unlawful because the car salesman's Facebook posts constituted "concerted activity" which was protected by the NLRA. The Board's basis for this decision was that "other salesmen shared the terminated employee's negative opinion of the sales event," "this opinion had been shared with management during a staff meeting following the event," and "because the salesmen worked purely on commission, a sales event they found to be 'subpar' constituted a 'term and condition' of their employment, because the event could negatively affect their sales/commissions."

It is this type of decision which has prompted this alert and others like it. **If as a non-union employer you believe the EEOC or a local judge will be the only ones to potentially scrutinize your employment decisions, think again.**

The overall message of the NLRB General Counsel's twenty-four-page press release "summarizing" the Board's "intense focus" on employer proscriptions on employee social media use is that Board scrutiny of **both** the implementation and application of your social media policies is gaining momentum and is here to stay.

We would thus urge you to contact Bill Trumpeter or any member of our Labor and Employment Practice Group (1) for review and assistance drafting your social media policies and (2) regarding any termination or other disciplinary action decision you are contemplating which involves social media.

As the inundation of information on this issue indicates, the law in this area is literally changing DAILY! So, the fact that "a lawyer signed off on" your social media policy six months ago, etc., does not mean you are out of the woods. There are some disclaimers and other specific language the NLRB has indicated it wants to see in the numerous decisions it has issued in the past few months. Failure to incorporate these into your social media policy could mean having to reinstate even a non-

union employee (with back pay!) if your policy is found to be "overly broad" or its application "unlawful" under the NLRA. At that point, the NLRB will "help" you "redraft" your social media policy after ordering you to post a notice explaining that your prior policy and/or your application of it violated the law.

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