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New Guidance for Nonprofits Regarding Social Media Policies and Punishment

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In our last alert on this subject,[1] nonprofit employers were reminded that rapidly developing law in the area of disciplining employees for voicing workplace gripes in social media such as Facebook or Twitter warranted caution before punishment of such behavior, as well as a review of policies that might be found to unlawfully impinge on employee rights under the National Labor Relations Act ("NLRA"). Two recent developments – the issuance of guidance by the Acting General Counsel of the National Labor Relations Board ("NLRB") and the issuance of the first decision by an administrative law judge finding a violation of the NLRA for Facebook-related firings – provide important additional instruction.

As we indicated in our last alert on this topic, because nonprofits are typically not unionized, they have often overlooked the NLRA as a possible limitation on their right to discipline or terminate employees at will. But nonprofits do so at their peril, as these new developments make clear that nonprofits seeking to enforce work rules or restrain employee criticism of them or their policies in social media must take into account the provisions of the NLRA, regardless of whether the nonprofit is unionized.

Cognizant of the growing scope of the issues regarding the legitimate and protected use of social and other media, the NLRB's Acting General Counsel on August 18, 2011 released a report discussing cases involving social media. The report provides very helpful guidance for nonprofits on what policies and punishment for postings may be problematic. For example, the NLRB report discusses the following findings in particular cases:

- Employees were unlawfully discharged for responding to the Facebook posting of a co-worker discussing working conditions, even though the employee who initiated the cyber conversation considered her co-workers' comments to be cyber-bullying and harassment.
- A policy that prohibited employees from posting pictures of themselves depicting their company in any way, including uniforms, corporate logos, or vehicles, was overbroad because it could be interpreted to prohibit employees from posting pictures of themselves engaged in concerted protected activity, such as picketing or other protests against their employer.
- A bartender who complained on Facebook to his stepsister, a non employee, that he had not had a raise in five years, said he was doing "waitress" work without tips, and called the customers rednecks and stated that he hoped they "choked on glass as they drove home drunk" was lawfully fired because the employee did not discuss the posting with his co-workers and there was no evidence that any co-workers responded to it.
- An employee was lawfully discharged after posting profane comments on Facebook critical of store management because the employee's postings were merely an expression of individual gripes as opposed to protected concerted activity. In this case, at least two co-workers responded to the posting; however, their messages reflected that the posting was individual and not group activity.
- A policy prohibiting employees from making disparaging comments when discussing the company or its supervisors was unlawful because the policy did not make clear that it did not prohibit protected concerted activity.
- The discharge of a recovery specialist in a residential facility for homeless individuals who posted demeaning comments concerning her employer's clientele was lawful because there was no evidence of protected concerted activity: the comments did not mention any terms or conditions of employment, the posting was not discussed with any co-workers, and the comments were not for the purpose of inducing group activity or an outgrowth of collective concerns of the employee or her

co-workers.

In the wake of the NLRB's guidance document, on September 2, 2011, a NLRB administrative law judge issued the first adjudicated decision involving social media-based discipline. In the case, *Hispanics United of Buffalo, Inc.*, a nonprofit that renders social services to economically disadvantaged clients in Buffalo, New York was found to have committed unfair labor practices when it discharged several employees for Facebook postings – made on their own computers outside of working hours – that expressed criticism of their working conditions and of a domestic violence advocate who worked for the nonprofit. The advocate complained about the postings to the nonprofit's executive director, who terminated the employees based on the contention that the postings constituted cyber-bullying and harassment in violation of the nonprofit's policies. The ALJ found the comments protected and rejected the contention that the employees were bullying the advocate or that they harassed her in violation of the nonprofit's policies. Consequently, the ALJ concluded that the employees had not engaged in conduct that converted their concerted activity from protected to unprotected status.

The NLRB's recent report and the *Hispanics United of Buffalo* decision provide helpful guidance to nonprofits not wishing to become potential NLRB cases, including the following:

- Communications that are not concerted are generally not protected. However, the cases highlight that a finding of concerted activity may turn on evidence not readily available to the employer, so caution is warranted.
- Communications that are concerted (*i.e.*, that are not merely an individual gripe) on matters of mutual concern to employees are likely to be found to be protected by the NLRA.
- Communications that are protected do not become unprotected simply because the comments are communicated via the Internet and/or because they may be read by nonemployees as well.
- Communications that are protected do not become unprotected just because they contain some critical (about the employer) or otherwise objectionable language.
- A work rule that, reasonably interpreted, would tend to "chill" employees in the exercise of their rights under the NLRA is likely to be found unlawful by the NLRB if challenged. Such a "chilling" effect may be found to exist if a rule explicitly restricts protected activities or, if not, if employees would reasonably construe the rule to prohibit protected activity, the rule was promulgated in response to union activity, or the rule has been actually applied to restrict protected activity.

The spate of cases before the NLRB, including *Hispanics United of Buffalo,* and its recent report on social media cases, reiterate the need for nonprofits to: (1) review their relevant employment policies to ensure that they are not overbroad and do not constitute potential unfair labor practices in and of themselves; and (2) proceed cautiously when determining whether to discipline an employee because of his or her comments in postings on Facebook, Twitter or other social media in order to avoid potential unfair labor practice claims.

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[1] **Nonprofits Beware: Your Employees' Blogs, Facebook Posts, and Twitter Tweets May Be Protected by the National Labor Relations Act**