LEGAL UPDATES

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Social Media Cases and the National Labor Relations Board

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As the social media phenomenon continues to grow, its impact has been felt in the area of employee rights under the National Labor Relations Act (NLRA) as enforced by the National Labor Relations Board (NLRB). As we previously reported, policies adopted in response to the phenomenon and actions taken to enforce those policies have led to a number of cases filed with the NLRB claiming violations of the NLRA. These cases have, in turn, led to reports by the Acting General Counsel of the NLRB and the U.S. Chamber of Commerce. An analysis of these cases is instructive for employers as they address these difficult issues.

On August 18, 2011 the Acting General Counsel for the NLRB issued a Memorandum OM 11-74, "Report of the Acting General Counsel Concerning Social Media Cases." This memorandum, a copy of which is available here, is important reading for employers developing and enforcing policies on employee commentary in the social media. While social media cases have been the focus of much attention in the news media, they also have a great deal of practical impact upon the workplace. What is clear from a review of the report is that the NLRB is still taking a pro-employee viewpoint in interpreting not only an employee's actions and their postings on Facebook or Twitter, but also in reference to Internet and blogging policies of employers. Generally, these situations are analyzed as to whether the employer's actions violate Section 7 of the NLRA, which protects an employee's right to engage in "protected concerted activities" or the underlying polices are overly broad so as to infringe on protected rights under the NLRA.

Postings by employees on the web are initially reviewed under the NLRB's long-standing *Myers Industries'* standard in ascertaining whether the activity is "concerted." In other words, the focus is on whether or not the posting is in reference to a singular complaint of an individual employee towards

management or working conditions, or something that is "with or on the authority of other employees and not solely by and on behalf of the employee himself." Obviously, what often happens with these postings is that co-workers voice approval of the postings, which commonly places the activity in the area of concerted activity. So the next issue becomes whether this activity is "protected." The NLRB has been reviewing these postings under the *Atlantic Steel* test, which holds as protected, postings which are not opprobrious (publically disgracing the employer). Historically the NLRB has defined that term quite narrowly so that, for example, calling your supervisor a "scumbag" still results in the statement being protected.

In terms of workplace policies governing Internet postings and blogging, the NLRB continues with its view that such workplace policies arguably infringe upon concerted protected activity and therefore violate the NLRA. This is not inconsistent with prior NLRB decisions. For example, simply having a policy prohibiting employees from making disparaging comments when discussing the company or employee's supervisors, co-workers or competitors, has been found unlawful. The same is true for a policy prohibiting disrespectful conduct towards others. The safe harbor is normally some disclaimer language in such policies where such rules of this nature do not apply to Section 7 activity.

This issue has also drawn the attention of the U.S. Chamber of Commerce which published its Survey of Social Media Issues before the NLRB on August 5, 2011. A copy of that survey is available at www.uschamber.com/reports/survey-social-media-issues-nlrb.

A review of these two sources suggests the following issues are the most common:

Employer policies that are perceived to restrict employee discussions of wages, disciplinary action, disparagement of the company or its managers

Disciplinary actions taken because of social media postings

The employer's failure to bargain with the union on social media policies

Inappropriate comments by the union during organizational efforts

What This Means to You

The phenomenal growth of social media over the last several years has impacted a wide variety of employment practices ranging from privacy rights, hiring, Federal Trade Commission monitoring of employee testimonials and endorsement, and now labor relations, including situations where the employees are not represented by a union. As with all of these other areas, it behooves the prudent employer to carefully examine the legal impact of the use of social media in making employment decisions. Policies which might impact the use of social media must be carefully drawn and carefully administered to avoid legal issues. Policies impacting employee speech should be evaluated in the

factual context of whether they impact activities protected under the NLRA and should contain appropriate disclaimers that their promulgation and application are not intended to violate or interfere with employees' Section 7 rights. Before disciplinary action is taken based on information gathered from social media, the acts of the employee should be weighed against the right to engage in protected activity protected by the NLRA.

Contact Info

Should you have further questions about these pending changes, please contact your Husch Blackwell attorney.

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