Social Media: Recent NLRB Attacks on Employer Social Media Policies

Under the National Labor Relations Act (“NLRA”), union and nonunion employees enjoy certain rights under §7 of the Act to engage in “concerted activities” for their mutual aid and protection. The National Labor Relations Board (“NLRB”) has long held that this language provides protections for employees to engage in various activities, discussions, etc. regarding the terms and conditions of employment. In the past couple of years, however, the NLRB has focused on employer social media policies, and in doing so, has held the language in §7 also provides for employees to engage in protected “concerted activities” outside of the workplace, on social media, and in other online venues. This focus has been part of an employee-friendly trend, in which the NLRB has struck down employer social media policies as unlawful by finding those policies have a chilling effect on protected employee activities such as discussions on employment conditions, wages, or hours.

To determine whether an employer’s policies, including a social media policy, violate the NLRA, the NLRB applies a two-step analysis to determine whether the policy complies with the NLRA. First, the Board examines whether the policy explicitly restricts §7 protected activities, in which case the policy is unlawful on its face. Second, if the policy does not explicitly restrict §7 protected activities, the Board then analyzes whether (1) an employee would reasonably construe the language to prohibit §7 activities; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of §7 rights.

Applying that framework, the NLRB has stepped up its efforts to target social media policies by finding those policies use vague and/or overbroad terms that unlawfully encompass protected activities. According to the NLRB, the overbroad language of many social media policies results in a chilling effect on legitimate employee activities, even where the policies are not intended to do so. In light of the NLRB’s focus in this area, it is increasingly important for employers to revisit their social media policies with closer scrutiny to ensure the policies comply with the NLRA.

Recent NLRB Decisions

On August 22, 2014, the NLRB determined that an employee's use of the “Like” Facebook button constituted protected activity under the NLRA. In the consolidated case of Three D LLC d/b/a/ Triple Play Sports Bar and Grille, 361 NLRB No. 31, the NLRB affirmed an Administrative Law Judge’s (“ALJ”) finding that current employees’ discussions about their employer’s tax withholdings constituted protected activity under the NLRA. Interestingly, those
comments included derogatory comments and profanities directed towards the company’s owners, including a “Like” by one of the company’s employees. The NLRB held those employee comments, and the employee’s use of the “Like” button, constituted protected activities under the NLRA. According to the NLRB, the employee’s use of the “Like” button signaled the employee’s approval of the Facebook discussion and was therefore protected.

In addition to finding the employee’s activity protected under the NLRA, the NLRB also attacked the employer’s social media policy and found the employer’s “Internet/Blogging” policy that prohibited “inappropriate discussions” was overly broad and therefore unlawful under the NLRA. That policy provided that employees who engaged in “inappropriate discussions about the company, management, and/or co-workers” would be subject to disciplinary action. In its decision, the NLRB advised employers to provide examples in their policies of what was deemed to be “inappropriate” conduct that the policy prohibited.

Another recent decision also targeted an employer’s policy on social media. In Professional Electrical Contractors of Connecticut, Inc., the policy at issue prohibited “employees from taking photographs or making recordings at the workplace without prior authorization by management.” No. 34-CA-071532 (June 4, 2014). The General Counsel argued that this policy implicated social media communications and thereby prohibited employees from engaging in § 7 protected activity. To support this position, the General Counsel argued that this policy would bar employees from creating or preserving evidence that could be used in employment related matters, including NLRB cases. In noting that a “legitimate conflict of principles” existed, the ALJ called for further guidance from the NLRB but agreed with the General Counsel that the policy was “too broad” and thus constituted a violation of § 8(a)(1) of the NLRA. The ALJ required the employer to rescind or modify the policy language and provide employees with an updated employee handbook that contained the policy.

Next, in Kroger Co. of Michigan, No. 07-CA-098566 (April 22, 2014), an ALJ analyzed an employer’s social media policy and found that policy “would have a reasonable tendency to chill employee conduct protected by the” NLRA. In Kroger, a facial challenge was made to Kroger’s online communication policy because the employer required a specific disclaimer to be made every time an employee identified themselves as a Kroger employee and conveyed “work-related information.” The required disclaimer stated, “[t]he postings on this site are my own and do not necessarily represent the postings, strategies or opinions of the Kroger Co. family of stores.” The ALJ found the policy requiring that disclaimer was “manifestly broader than its legitimate interest” because it was “unduly burdensome” on employees and had the effect of chilling protected § 7 speech.
The above decisions are a part of an increasing trend by the NLRB to police employers’ social media policies. Unfortunately, the NLRB has taken a very broad approach in deciding whether activity prohibited in employers’ social media policies could “reasonably [be] construed” to prohibit §7 protected activity. As such, it is critical that employers review their social media policies to ensure they conform to the NLRB’s current views on policies it deems ambiguous and/or overbroad.

Before the recent decisions outlined above, the NLRB’s Office of General Counsel issued three reports in response to employers basing employment decisions on employee’s use of social media. That guidance provides that, in determining whether a social media policy will pass the NLRB’s muster, employers should specifically define the prohibited conduct and provide context to avoid running afoul of the NLRA. For example, in its guidance issued on May 30, 2012, the General Counsel found a bullying provision in a social media policy to be lawful because sufficient context satisfied the “reasonableness” requirement so as not to abridge employee’s rights in regards to engaging in protected §7 activity. The policy banned “‘statements slanderous or detrimental to the company’ that appeared on a list of prohibited conduct including ‘sexual or racial harassment’ and ‘sabotage.’” As the guidance suggests, an employer might avoid NLRB scrutiny by providing specific examples of unprotected conduct that are prohibited by the social media policy and further demonstrate that the employer does not intend to affect the employees’ rights to engage in §7 protected activity.

Additionally, the General Counsel found that in each of the three social media policies it reviewed that included a “savings clause,” the provisions failed to cure the ambiguities or unlawful provisions in the policy. An example of one of the “savings clauses” at issue included the following language: “This Policy will not be construed or applied in a manner that improperly interferes with employees’ rights under the National Labor Relations Act.” Thus, employers cannot not rely on a “savings clause” alone to negate unlawful provisions in the policy or to communicate to employees that the employer is not infringing on their rights to engage in §7 activity.

Unfortunately, some of the NLRB’s previous guidance is now in conflict with recent ALJ decisions. For example, some employers like Kroger require employees to use a disclaimer when they reference the employer in social media. In its guidance memoranda, the Office of General Counsel previously stated that disclaimers that ban employees from making statements that are either made in the employer’s name or could “reasonably be attributed to the Employer” without prior authorization are lawful because they do not hinder employees from engaging in §7 protected activity. In discussing the legality of such disclaimers, the General Counsel approved a disclaimer that banned the employer from representing “any opinion or statement as to the policy
or view of the [Employer] or of any individual in their capacity as an employee or otherwise on behalf of the [Employer].” The General Counsel further reasoned that a disclaimer is appropriate to protect an employer from an employee’s “unauthorized postings made to promote its product or services.” Yet, the ALJ in the *Kroger* decision found such a disclaimer unlawful. While it is not clear which view will prevail, employers must be cautious in requiring disclaimers so they are not overbroad or too onerous for employees.

Given the growing focus of the NLRB in the social media arena, employers must carefully draft or revise social media policies to avoid overbroad and ambiguous prohibitions on employee activity. Before taking any adverse employment action based on a violation of a social media policy, employers must also carefully examine the social media activity to determine the risk of it being construed as protected and the NLRB finding the action unlawful.

### EEOC’s Stance on Background Checks

The Equal Employment Opportunity Commission (“EEOC”) has again inserted itself into the employer’s hiring process. In this instance, however, the EEOC’s focus has been on the issue of employee background checks, a topic most employers do not associate with a risk of discrimination. Most employers view the background check as a necessary and legitimate part of the employment process, that is, if an applicant or prospective employee has a criminal history, the logical conclusion would be to hire a similar candidate who lacks a criminal background. However, the EEOC has recently filed suit against various employers claiming those background checks result in a disparate impact on certain individuals with criminal histories.

Although it is a regular practice for employers to conduct criminal background checks of prospective employees, employers must ensure that all employment decisions are in compliance with anti-discrimination laws. In the background check context, employers may violate those laws when an applicant’s criminal history has the effect of discriminatorily excluding a class of people from employment opportunities. But, an employer can insulate themselves from liability by demonstrating that an applicant’s criminal history is job related and consistent with business necessity.

The EEOC previously took the position that an employer may rely on an applicant’s criminal history in making an employment decision in two situations to satisfy the business necessity standard. First, an employer may rely on an applicant’s criminal history when it validates the criminal conduct screen in accordance with the Uniform Guidelines on Employee Selection Procedures. Alternatively, to establish that an applicant’s criminal history is job related and consistent with business necessity, the EEOC relies on several factors that were articulated in the Eighth Circuit case, *Green v. Missouri Pac. R. Co.* See 549 F.2d 1160 (8th Cir. 1977). The factors include: (1) the nature and gravity of the offense; (2) the amount of time that has passed.
since the offense was committed; (3) the essential functions of the position at issue; and (4) how any prior criminal history could affect the applicant’s ability to perform the tasks of the position.

On March 10, 2014, the EEOC and the Federal Trade Commission (FTC) released joint guidance regarding requests for background checks for job applicants. In that guidance, the EEOC encourages employers to be cautious in using background information that could “significantly disadvantag[e] individuals of a particular race, national origin, or another protected characteristic.” Thus, employers should be cautious in relying on background checks that could in effect have a “disparate impact” and that are not “job related and consistent with business necessity.” Additionally, the EEOC encourages employers that find out through a background check that an applicant has a criminal history to provide the applicant with the opportunity explain why he or she should not be excluded from the position at issue. Furthermore, the EEOC requires employers to retain all employment or personnel records for the later of one year after the records were made or the conclusion of the case.

In addition to providing that recent guidance, the EEOC has stepped up efforts in targeting employers for their use of background checks in evaluating applicants. In 2013, the EEOC brought suits against BMW and Dollar General for their use of background checks in screening applicants. In each case, the EEOC alleges that BMW’s and Dollar General’s use of criminal background information had a disparate impact on black job applicants in violation of Title VII. In BMW, the EEOC alleges that the company’s blanket exclusion without an individualized assessment of the “nature and gravity of the crimes, the ages of the convictions, or the nature of the claimants’ respective positions” violates Title VII. Regarding Dollar General, the EEOC claims that the company’s background check policy runs afoul of Title VII because it conditions all of its job offers on the background check. The EEOC asserts in each case that the use of background checks is not job related and not consistent with business necessity.

In addition to the guidance provided by the EEOC, employers must comply with the Fair Credit Report Act (FCRA), which is enforced by the Federal Trade Commission (FTC). Pursuant to the FCRA, before receiving background information, an employer is required pursuant to the FCRA to notify the applicant that background information may be used in making an employment decision. An employer must provide such notification separately from the employment application and receive an applicant’s written permission for the employer to conduct a background check. The employer must also certify to the company that is providing

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1 See “Background Checks What Employers Need to Know” http://www.eeoc.gov/eeoc/publications/background_checks_employers.cfm.
For years in Missouri, courts recognized an exclusive causation standard for workers’ compensation retaliation claims under Missouri statute. That meant a plaintiff could succeed on his or her claim only if he or she could show that a workers’ compensation claim following a workplace injury or illness represented the only reason for the challenged adverse employment action (e.g., termination of employment). And, for years, plaintiffs’ attorneys shied away from taking on such cases given the high bar for success.

On April 15, 2014, that changed. In Templemire v. W & M Welding, Inc., the Supreme Court of Missouri found that “to make a submissible case for retaliatory discharge under [Missouri statute], an employee must demonstrate his or her filing of a workers’ compensation claim was a ‘contributing factor’ to the employer’s discrimination or the employee’s discharge.” The Templemire decision overruled decades of caselaw and moves workers’ compensation retaliation under the “contributing factor” standard plaintiffs already enjoy for common law retaliation and discrimination claims under the Missouri Human Rights Act.
As a result, there has been a significant uptick in lawsuits alleging workers’ compensation retaliation. That flood is only expected to increase. Employers can help stem the tide by incorporating anti-retaliation reminders into workers’ compensation policies and safety programs. They may also ensure that those managers involved in processing and administering workers’ compensation claims are not the same as those involved in employment decisions.

Large Awards Provided to Whistleblowers under the Dodd-Frank Act

In a time when the SEC has handed out large awards to whistleblowers for providing information that leads to a successful enforcement action, employers need to examine their potential exposure for noncompliance with federal security laws. Under § 922 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, the SEC will pay whistleblowers who voluntarily provide the SEC with “original information” that leads to a successful enforcement action and yields monetary sanctions in excess of $1 million. In return, whistleblowers receive 10-30% of the total monetary sanctions the SEC enforces from the action. To qualify for an award, the “original information” must be either “derived from independent knowledge or analysis of a whistleblower; not known to the Commission from any other source; or not exclusively derived from an allegation made in a judicial or administrative hearing.” Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203 § 922(a)(3).

The Act, which took effect in August of 2011, is far-reaching because there is a broad range of persons who can qualify as a whistleblower including competitors, consultants, joint venture partners, shareholders, spouses, and non-U.S. residents. One limitation on who qualifies as a whistleblower is that persons who have a compliance or internal audit function with the employer at issue are not eligible to receive an award. However, exceptions exist that do allow compliance and internal audit personnel to qualify for an award if either (1) 120 days have passed since the damaging information has been provided to certain persons within the company, such as the audit committee or a chief legal officer; or (2) there is a “reasonable basis to believe” that disclosure is essential to prevent substantial injury to the company or shareholders.

In the last two months, the SEC has provided whistleblowers with significant awards for information that led to successful securities law enforcement action. In August of 2014, a compliance or internal audit professional was awarded $300,000, which was 20 percent of the amount the SEC recovered under the action. Then, in September 2014, the SEC granted the largest award to date under the Dodd-Frank framework when it awarded $30 million to a non-

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5Id.
U.S. resident for providing information that led to successful SEC enforcement action. This latest award is one among 13 other awards with the second largest award providing $14 million to the whistleblower. The sheer size of these awards demonstrates the incredible exposure to which companies can be subjected if they run afoul of SEC regulations.

Lawson: Supreme Court Expands SOX Protection to Privately Held Contractors or Subcontractors

On March 4, 2014, Lawson v. FMR LLC, the Supreme Court of the United States handed down a decision that significantly broadens the scope of employees protected from retaliation when they blow the whistle for Sarbanes-Oxley (“SOX”) violations. 571 U.S. ___ (2014). In response to the Enron scandal, Congress enacted § 1514A of SOX to encourage employees to blow the whistle on questionable accounting practices and expose fraud to protect shareholders. The two plaintiffs in Lawson alleged they were retaliated against for expressing accounting concerns in the mutual fund industry. Notably, almost all mutual fund companies are structured so that they do not have any employees and instead rely on independent investment advisors. Consequently, the Supreme Court was tasked with defining who belonged in the “protected class” of individuals who are shielded from retaliation pursuant to § 1514A. Specifically, the Supreme Court was charged with analyzing whether § 1514A protected only persons employed by a public company or if protection also extended to employees of privately held contractors and subcontractors who performed work for the public company.

The Supreme Court broadly interpreted § 1514A by holding that protections extend to employees of public companies as well as employees of private contractors and subcontractors that serve the public company. In reaching that conclusion, the Supreme Court generally relied on the explicit language of SOX and the policy rationales for enacting SOX in response to the Enron scandal. By looking to the explicit text of SOX § 1514A, the Court reasoned that a broad interpretation of “employee” was warranted. The relevant portion of § 1514A relied upon in reaching the conclusion states:

No company with a class of securities registered under section 12 of the Securities Exchange Act of 1934…or any officer, employee, contractor, subcontractor, or agent of such company, may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment…which the employee reasonably believes constitutes a violation

(Emphasis added). Additionally, the Court employed an ordinary meaning approach in enlarging the definition of “employee” by reasoning that in practice the prohibited conduct described in § 1514A includes actions an employer takes against its own employees. The Court also noted that contractors are generally not in a position to retaliate against public company employees for
whom they perform work for. Therefore, by looking at the express language of § 1514A and the parallel anti-retaliation provision of AIR 21, the Court held that a broad interpretation of “employee” was warranted.

Second, the Court returned to the facts of the Enron scandal and recognized the wide participation of outside professionals in assisting to perpetuate fraud. The Court emphasized the fact that, in the aftermath of Enron, investigations uncovered numerous instances where contractors suffered adverse actions in response to expressing concerns over Enron’s accounting practices. Therefore, the Court stated it was safe to conclude that Congress intended for contractors who work for public companies to engage in whistleblowing because they are in the best position to report fraudulent behavior and thus are entitled to receive the protections of § 1514A.

The implications of the Lawson decision are far reaching because SOX’s whistleblower protections now apply not only to public company employees but also private employees who perform work for public companies. Section 1514A now applies to a large number of private companies previously unaffected by SOX regulation. Employers must be aware of the broadening reach of § 1514A and ensure they provide adequate whistleblowing protections.

With the recent developments above, the importance of fostering an internal environment that encourages reporting and resolving retaliation and compliance issues cannot be understated. Such an environment likely includes: (1) robust anti-retaliation and compliance policies; (2) thorough communication to and training for all employees on those policies and compliance efforts; (3) a multi-avenue reporting procedure that allows employees to raise concerns to appropriate members of management without fear of reprisal; and (4) a hotline for reporting issues anonymously. But, those policy steps are not enough. Employers also must consider establishing standard practices or guidelines for handling the investigation of retaliation and whistleblower issues to minimize delays in determining the merits of a complaint and enacting appropriate remedies (if any are needed). Management must have both the tools and the power to get the process started and bring it to a conclusion. An employer’s responsiveness can help avoid dissatisfaction with the internal process and the creation of an issue warranting external action and the significant penalties that can come with it.
EEOC Lawsuits Targeting Employer Wellness Programs

Employers have increasingly focused on employee health as a means to lower medical costs, decrease employee absences, increase employee productivity, and provide better service to customers. To achieve these objectives, many employers offer employee wellness programs. Employers encourage employee participation in wellness programs by providing incentives such as insurance premium reductions, reductions in co-pays or other cost-sharing mechanisms, or direct payments of cash or gift cards.

Unfortunately, it is possible that when implemented incorrectly such a wellness program may violate the Americans with Disabilities Act ("ADA"). As most employers are aware, the ADA prohibits employer from discriminating against employees who suffer from a disability, as defined by the Act. However, the ADA also prohibits employers from requiring a current employee to answer medical or disability-related questions or complete a medical exam, unless the questions or exam are job related and consistent with business necessity. 42 U.S.C.A. § 12112(d). In the latter situation, it is possible that employee wellness programs may run afoul of the ADA.

The EEOC has affirmed employer’s efforts to encourage employee participation in wellness programs where such participation is “voluntary.” Participation is “voluntary” if the employer neither requires participation nor penalizes employees who refuse to participate in the wellness program.6 However, the EEOC has sued two employers for their wellness programs by asserting that employee participation in the wellness programs is not voluntary and thus violates the ADA.

In May 2014, the EEOC sued Flambeu, Inc., a Wisconsin-based plastics manufacturing company, for its wellness program, which required employees to submit to biometric testing and a “health risk assessment.” According to the EEOC, employees who failed to participate in Flambeu’s wellness program jeopardized having their medical insurance cancelled, were subject to “disciplinary action” for failing to complete testing, and were required to pay a full premium to remain covered. The employee in the suit, Dale Arnold, failed to complete either the biometric testing or health risk assessment and, as a result, Flambeu cancelled his medical insurance and required him to pay 100% of the premium cost of his medical insurance. Conversely, employees that completed the wellness program requirements were only required to pay 25% of their premium and did not have an involuntary cancellation of their coverage.

In another recent suit, the EEOC claimed Orion Energy Systems Inc., another Wisconsin company, violated the ADA by terminating the employment of Wendy Schobart after she failed to participate in a wellness program. Pursuant to Orion’s wellness program, the penalty for failing to participate in the wellness program consisted of a $50-per-month nonparticipation fee and also required the employee to pay his or her full monthly insurance premium. In its suit, the EEOC alleges that Orion violated the ADA because the wellness program required Ms. Shobart to submit to medical exams and respond to inquiries that were not “job-related and consistent with business necessity.” Additionally, the EEOC asserts the company terminated Ms. Shobart in retaliation for complaining about the wellness program’s terms.

Through the lawsuits, the EEOC provides employers with additional guidance on what constitutes “involuntary” participation in wellness programs. However, participation that the EEOC considers to be “voluntary” under the brief definition referenced above remains uncertain. The EEOC had been scheduled in June 2014 to provide additional guidance in a proposed rule discussing the extent the ADA allows financial inducements or penalties in wellness programs, but it has not issued the promised guidance. In the meantime, employers are left with limited guidance on how best to draft wellness policies that pass muster under the ADA.

While helpful guidance from the EEOC may be lacking, there are some solutions to reduce an employer’s risk of suffering the same fate as the companies listed above. Employers may link their wellness programs to bona fide benefit plans to take advantage of a safe harbor provision under the ADA. Under the safe harbor provision, the ADA exempts specified insurance plans from the ban that prohibits employers from asking employees disability-related inquiries or requiring a medical examination. The exemption allows employers to pursue the health objectives of wellness plans without running afoul of the ADA’s prohibitions against medical and disability-related disclosures that are not job-related and consistent with business necessity. The Eleventh Circuit provides an example of such an approved bona fide employee benefit plan in Seff v. Broward County, 691 F.3d 1121, 1224 (11th Cir. 2012). The wellness program at issue in Seff required employees to complete a biometric screening and “health risk assessment questionnaire” to identify certain diseases. Id. at 1222.

Additionally, employers must refrain from imposing sanctions and penalties on employees for refusing to participate in wellness programs. Instead, employers should provide employees with incentives to participate in wellness programs, such as reductions to health premiums. As outlined in the two cases above, the EEOC has attacked employer wellness programs where the employee is placed in a situation where they are forced to choose between complying with the wellness program by participating in medical exams and disclosing medical information or being subject to a financial penalty for noncompliance. The EEOC has characterized this coerced participation as “involuntary.” Commentators also point out that the EEOC strategically pursued these two wellness programs because they both impose a large
financial penalty on employees who refuse to participate, such as a 100% shifting of the premium payment to the employee, or terminating the employee for failing to comply with their wellness program. Consequently, employers should only encourage voluntary employee participation in such programs and should refrain from imposing penalties or sanctions for failing to participate in such programs.

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