A Timely Analysis of Legal Developments

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In This Issue:

November 2010

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NLRB Posts Frightening Message in Facebook Case

By Gavin Appleby and Philip L. Gordon

Labor law experts, including experienced labor law attorneys at Littler Mendelson, have been predicting for some time that the National Labor Relations Board (NLRB or "the Board"), now dominated by three appointed union lawyers, would take aim at employer policies that restrict employees' use of social media. In what appears to be the first shot in an approaching battle, the NLRB's Office of General Counsel issued a press release on November 2, 2010, announcing that the Board's Hartford Regional Office had filed a complaint alleging that American Medical Response of Connecticut, Inc. (AMR) violated the National Labor Relations Act (NLRA) by terminating an employee for posting negative comments about her supervisor on her Facebook page.

The Nature of the NLRB's Complaint Related to Social Networking Activity

According to the Hartford Region's complaint, AMR denied the employee's request for union representation made after her supervisor asked her to prepare an investigative report concerning a customer complaint about her job performance. Later that day, the employee, using her home computer, made negative comments about her supervisor on her Facebook page. Coworkers who visited the page posted comments supportive of the employee and critical of the supervisor.

Like many companies, AMR has a social media policy that prohibits employees from disparaging the company and its supervisors in social media posts, even when posting while off-duty and using a personal computer. Specifically, AMR's policy provides as follows: "Employees are prohibited from making disparaging, discriminatory or defamatory comments when discussing the Company or the employee's superiors, co-workers and/or competitors." Although the complaint is silent on this point, it appears that unlike some employers, AMR did not include in its policy a statement that the policy would not be construed or applied in a manner that interferes with employees' rights under the NLRA.

The NLRB's complaint charges that AMR's application of its policy unlawfully interfered with the employee's right under Section 7 of the NLRA to engage in "concerted,

protected activity," *i.e.*, to communicate with coworkers about the terms and conditions of employment. Notably, Section 7 protects employees' protected, concerted activity *regardless of whether their workplace is unionized*. Further, and perhaps most problematically, the NLRB's complaint is noteworthy because it appears to allege that merely having in place an anti-disparagement social networking policy, like AMR's, violates Section 7 even if the employer does not actually apply the policy to impose discipline.

The Theory Behind the Complaint

The complaint against AMR is essentially based on prior NLRB theory that actions and policies that infringe on protected, concerted activity are inherently unlawful. Thus, confidentiality policies that would, for example, facially restrict employees from sharing pay information or discussing the substance of grievances or open door complaints may violate the NLRA. The current NLRB also has been critical of employer discipline based on inappropriate language or actions by employees, if such language arises in the context of employee concerns. In the August 2010 case of *Plaza Auto Center, Inc.*,[1] for example, the NLRB ruled in favor of an employee who was fired for calling the owner of the company that employed him an "F'ing mother F'ing," an "F'ing crook," and "an a__hole," and adding that the manager was stupid, nobody liked him, and everyone talked about him behind his back." According to the NLRB, such language was not sufficient to fall outside the concept of protected, concerted activity. Like the AMR situation, the *Plaza Auto* case arose in a nonunion context.

The Legal Context to These NLRB Cases and the Risk They Present to Employers

Whether AMR ultimately will be found to have violated the NLRA is very much an open question. While current labor law supports the assertion that a work rule or policy that prohibits all criticism of an employer is presumptively invalid, numerous cases suggest that employers do not violate the NLRA by disciplining employees whose negative comments rise to the level of disparagement or disloyalty. The Board has historically looked to a four factor analysis set forth in *Atlantic Steel*, 245 NLRB 814, 816 (1979), for determining whether conduct otherwise concerted in nature was so egregious as to lose the protection of the Act. In *Atlantic Steel*, the Board identified four factors to be balanced in the determination: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way, provoked by an employer unfair labor practice.

The analysis in *Atlantic Steel* obviously is subject to considerable interpretation, depending on one's perspective. However, if the comments in *Plaza Auto* are the type that now will be protected by the current NLRB, then inappropriate postings on Facebook will have to be judged carefully. Discipline based on lesser levels of disparagement ("my boss can be a jerk" or "my manager is a fat pig") appears likely to be found unlawful since the underlying behavior is less disparaging, while discipline for more egregious comments may be legitimate. Note, however, that the protected comments in *Plaza Auto* would be considered significantly egregious to many, but they arose in a heated workplace meeting. How the NLRB would judge similar comments on a Facebook posting is uncertain. Further, comments are protected under the NLRA only if they are relate to a term or condition of work and are concerted in nature (*i.e.*, they involve more than one employee, thus making the coworkers' Facebook postings in the AMR case significant).

The complaint filed against AMR shows how rapidly the current Board is pushing the boundaries of the NLRA. Less than a year ago, an NLRB General Counsel's advice memo supported the legality of an employer policy prohibiting "disparagement" of the company or its officers and employees in any form of social media. That policy, the General Counsel advised, provided sufficient examples and explanation for "a reasonable employee to understand that it prohibits online sharing of confidential intellectual property or egregiously inappropriate language and not Section 7 protected complaints."

What Should Companies Do Given this New Development?

Given the novelty of the issues raised by the Hartford Region's complaint and the current make-up of the NLRB, employers need to tread cautiously before taking adverse action against an employee for posting negative comments about the employer on social media sites, particularly when the employee's conduct might constitute protected, concerted activity. However, the *AMR* case could be a long way from being resolved. Absent a settlement, the complaint that has been filed will be heard by an administrative law judge, after which an appeal can be taken to the NLRB and then to a federal court of appeals. That process could easily take two years or more.

In the meantime, employers should evaluate whether to revise policy language similar to AMR's now, to wait until the issues raised by the Hartford Region's complaint are resolved, or to take a middle course. Specifically defining a social networking policy to ensure compliance with the Board's current view of protected, concerted behavior will be difficult – to date, the Board's perspective can fairly be characterized as broad, but not enough cases have been issued to determine where the line in the sand has been drawn, or even to give meaningful examples of what behavior is protected and what is not.

A good middle course would entail adding language to the employer's social media policy explaining that the policy will not be construed or applied in a manner that interferes with employees' rights under Section 7 of the NLRA. However, whether the Board would find that language sufficient to avoid "chilling" the rights of employees who use social media to discuss work also is uncertain. Nevertheless, adding such language would be wise given the uncertainties that lie ahead with the current NLRB and the increasingly work-related nature of social media. Also wise would be a careful analysis by the employer and its counsel of discipline issues that arise from social media and other speech-related situations that involve work and are concerted in nature.

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[1] *Plaza Auto Center, Inc. and Nick Aguirre*, Case No. 28-CA-22256 (August 16, 2010).