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A recently issued report from the NLRB's Acting General Counsel provides guidance to both union and non-union employers for creating and enforcing social media policies.

The NLRB and Social Media: General Counsel's New Report Offers Employers Some Guidance

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Within the last year, the National Labor Relations Board's Acting General Counsel – who decides which unfair labor practice charges to prosecute against employers and unions – has taken a great interest in employee use of social media and employer responses to such use. For example, last October, he issued a complaint against AMR of Connecticut for terminating an employee after she referred to her supervisor on Facebook as a "scumbag," a "dick," and a "17" (AMR's code for a psychiatric patient). While that case settled before it was litigated, the NLRB's Acting General Counsel also has issued numerous other complaints against employers for disciplining employees in response to their off-duty posts on social media complaining about their employers, their supervisors, their wages, and other working conditions. Social media cases have become such a "hot button," the Acting General Counsel has mandated that these cases be submitted to his Division of Advice for a determination of whether or not a complaint should issue.

Like the AMR matter, most of the cases in which a complaint has been authorized have settled before trial. Therefore, without these cases being heard by the NLRB, it has been very difficult for employers to ascertain how to comply with federal labor law during this burgeoning era of social networking. On August 18, 2011, however, the Acting General Counsel released a report, entitled *Report of the Acting General Counsel Concerning Social Media Cases*, which summarizes the theories behind many of the social media cases he and the Division of Advice have addressed within the last year. The Report also discusses general parameters employers should consider when creating and enforcing their social networking policies. Although the Report is not by any means the last word on the subject, and, while the NLRB has yet to rule on the myriad issues relating to employee use of social media under the National Labor Relations Act, the Report does provide some guidance for employers to follow when treading through these murky waters.

Employees May Not Be Disciplined for Social Networking Activity Protected by the NLRA

Section 7 of the NLRA protects employees who engage in "concerted activities for the

purpose of collective bargaining or other mutual aid or protection." Importantly, this federal statute does not just protect employees who engage in union activities or work in a unionized environment. It also protects other forms of employee conduct undertaken for their "mutual aid or protection" including, for example, a group of non-union employees complaining to management about their wages or working conditions, participating in a strike or work stoppage, or attempting to enlist public support to improve their terms or conditions of employment. The NLRB's standards for determining whether an employee, or group of employees, is engaged in protected Section 7 activity have evolved over many years. With the explosion of social networking sites such as Facebook and Twitter, questions have arisen as to the extent to which an employee's online postings fall under NLRA protection. The Acting General Counsel's Report illustrates how the NLRB's traditional principles for determining whether employees are engaged in "protected, concerted activity" will apply to employees' social networking activities and their employers' social networking policies.

Under the NLRA, conduct is considered "protected" and "concerted" where an employee: acts together with or on the authority of other employees; seeks to initiate, induce, or prepare for group action; or brings "truly group complaints" to the attention of management. Section 7 of the NLRA also protects an employee's activities if they are the logical outgrowth of work-related concerns expressed by employees collectively. On the other hand, conduct is not protected, concerted activity if the employee is engaging in activity "solely by and on behalf of the employee himself." Similarly, employee comments that are "mere griping" as opposed to "group action" do not fall within Section 7. The Report generally follows this framework in evaluating whether an employee's social media conduct is protected, concerted activity.

Cases where the Acting General Counsel's Division of Advice found that an employee's online posts constituted protected, concerted activity involved topics such as: employee job performance; staffing levels; protests of supervisory actions; criticisms of an employer's promotional event that employees believed would negatively impact their sales commissions; and shared employee concerns about their employer's income tax withholding practices. As the Report makes clear, online postings that could be considered a "direct outgrowth" of earlier employee discussions or complaints, or an invitation to coworkers to engage in further action or complaints over their working conditions, will most likely be viewed as protected, concerted activity. In those cases where the Division found an employee's use of social media to be protected, the electronic discussions typically came after face-to-face employee discussions or shared concerns about their working conditions.

Recently, one of the social media cases in which the Acting General Counsel issued a complaint against an employer was tried before an Administrative Law Judge (ALJ) of the NLRB. The employer, Hispanics United of Buffalo (HUB), had discharged five employees because they posted comments on Facebook about a coworker who had repeatedly criticized their job performance in conversations and text message exchanges with several of them. The Acting General Counsel argued that the employees' Facebook posts constituted protected, concerted activity and, therefore, that HUB unlawfully fired these employees for making these posts. In response, HUB contended that it discharged the employees on the grounds their posts constituted bullying and harassment in violation of its harassment policy. In his decision, which issued on September 2, 2011, the ALJ agreed with the Acting General Counsel that the employees' terminations violated Section 7. The ALJ concluded that the employees' Facebook communications were protected, concerted activity because they implicated a mutual work-related concern – their reaction to a coworker's criticisms of their job performance. The ALJ found that the discussions alone were sufficient to constitute protected, concerted activity even though there was no express evidence the employees intended to take further action or were trying to change their working conditions. According to the ALJ, it was enough that the employees discussed matters affecting their employment amongst themselves. The ALJ further decided that the employees did not engage in conduct that forfeited the NLRA's protection. He pointed out that they posted their comments on a Saturday, a nonwork day, and that none of them used HUB's computers in making these posts. He also concluded that the evidence failed to establish that any of the employees' posts constituted harassment of their coworker.

In contrast, as the Acting General Counsel's Report discusses, an employee who complains about work on Facebook or Twitter, but only with family, friends, or other non-coworkers, is not engaged in protected, concerted activity. For example, in one case, the Division of Advice found that a bartender who made negative comments on Facebook about his employer's tipping policy was not engaged in concerted activity because he directed his comments to his relative and only made them by and on behalf of himself. Similarly, the

Division concluded that an employee who made inappropriate comments to her non-coworker friends on Facebook about her employer's mentally disabled clients was not engaged in concerted activity. In another case, a reporter's Twitter postings critical of his newspaper's sports department headlines and a local TV station did not relate to his or other employees' working conditions, nor did he discuss or seek to discuss his concerns with any of his coworkers. As such, these tweets were not "concerted." The Division also found that an employee who posted negative comments about her employer on her senator's Facebook page was not acting in concert with her coworkers and, thus, her posts were not "concerted."

Additionally, individual gripes about the workplace posted online do not constitute concerted activity even if such posts result in coworkers expressing emotional support or sympathy. In one case discussed in the Report, an employee posted several complaints on Facebook about his store's management. The comments were not specifically directed to fellow employees, even though some who read the posts told him to "hang in there." The Division concluded that the employee's posts were not concerted activity because he was merely complaining about his individual situation and was not attempting to induce group action.

Moreover, even if comments are "concerted," they may still be deemed "unprotected" based on their opprobrious content. However, with the current NLRB, this is a very difficult standard for employers to meet. Indeed, the Report discusses two cases where the Division of Advice concluded that employees' use of expletives and other derogatory remarks in their postings when referring to their supervisors and management was not so egregious as to lose the NLRA's protection. One such case is the AMR case mentioned above, where the employee referred to her supervisor on Facebook as a "scumbag," a "dick," and a psychiatric patient. In the other case, an employee referred to one of the employer's owners on Facebook as "such an asshole," and her coworker asserted that the owners could not even do paperwork correctly.

Employer Policies Governing Social Networking by Employees Must Be Narrowly Tailored

The Report further underscores the importance of employers drafting social networking policies that are not overbroad and do not infringe on employee Section 7 rights while using social media. In *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), the NLRB articulated a two-step approach to determine whether an employer's handbook or work rule violates the NLRA. First, if the rule explicitly restricts protected activity, it is unlawful. Second, if the rule does not explicitly restrict protected activity, it is still unlawful if: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights. Over the years, the NLRB has applied this analysis to invalidate employer work rules and policies governing many forms of employee conduct both on and off the job.

As discussed in the Report, the Division of Advice applies *Lutheran Heritage's* two-step analysis in determining whether employer social networking policies were lawful. In one case, the Division concluded that a social media policy was overbroad and therefore unlawful because it prohibited employees from posting pictures of themselves in any media, including the internet, that depicted the company in any way, including by wearing a company uniform or corporate logo. Applying the *Lutheran Heritage* test, the Division opined that the rule could be interpreted as prohibiting an employee from engaging in protected activity, such as posting a picture of employees carrying picket signs depicting the company's name or wearing a t-shirt or other apparel portraying the company's logo in connection with a protest over working conditions. The Division concluded that another portion of the employer's policy prohibiting employees from making disparaging comments when discussing the company or the employee's superiors, coworkers, or competitors also was unlawful because the rule was ambiguous and did not contain any limiting language informing employees that it did not apply to Section 7 activity.

Similarly, in two other cases, the Division of Advice concluded that employer policies were unlawfully overbroad because the rules could reasonably be construed to prohibit an employee from engaging in activity protected by Section 7. Those policies prohibited employees from using a blog or the internet to engage in "inappropriate discussions" about the company, management, or coworkers or talking about company business on their personal accounts; posting anything that they would not want their manager or supervisor to see or that would put their job in jeopardy; disclosing inappropriate or sensitive information about the employer; posting any pictures or comments involving the company or its employees that could be construed as inappropriate; and using the company name, address, or other information on their personal profiles. The Report pointed out that none of these rules set forth any definition, guidance, or examples as to what communications were specifically prohibited or any limitations on what was covered.

In another case, the Division determined that a hospital's social media policy was overly broad to the extent that it prohibited employees from: using any social media that may "disregard the rights and reasonable expectations as to privacy or confidentiality of any person or entity;" posting any communication that "constitutes embarrassment, harassment or defamation of the hospital or of any hospital employee, officer, board member, representative, or staff member;" and making any statements that "lack truthfulness or that might damage the reputation or goodwill of the hospital, its staff, or employees." In a case involving a supermarket chain, the Division found unlawful the employer's new social media and communication policy that precluded employees from revealing personal information about their coworkers without their consent and from using the employer's logos and photographs of the employer's store without written authorization because these rules impermissibly prohibited employees from discussing their wages and other working conditions with their coworkers and others and from portraying the employer's logo in connection with any protests involving their working conditions.

Although, as noted above, the Report indicates that the overbroad social networking policies did not contain any definitions, guidance, examples, or other limiting language to inform employees that the policies do not apply to Section 7 activity, it remains an open question whether an otherwise overly broad social media policy will withstand NLRB scrutiny if it contains a disclaimer that the policy does not apply to or will not be interpreted as infringing upon Section 7 rights. Concerning for employers is the NLRB's recent decision in *Jurys Boston Hotel*, 356 NLRB No. 114 (2011), where the NLRB set aside the results of an election decertifying a union merely because the employee handbook contained overbroad rules prohibiting employee solicitation, distribution, loitering, and the wearing of buttons and insignia. In that case, the handbook had a general NLRA disclaimer. In addition, the employer clarified, during the election campaign, that the rules did not apply to NLRA protected activity and the rules were not enforced against any employees. However, the disclaimer and the clarification were not enough in the eyes of the NLRB.

Nonetheless, social networking policies that are narrowly tailored and precisely written, using clearly defined terms to avoid any ambiguity, are more likely to be deemed lawful. For example, the Division of Advice found that an employer's policy prohibiting employees from "pressuring their coworkers to connect or communicate with them through social media" was valid as it "was narrowly drawn" and "sufficiently specific in its prohibition" as to clearly apply "only to harassing conduct." Therefore, the policy "could not reasonably be interpreted to apply more broadly to restrict employees from attempting to 'friend' or otherwise contact colleagues for the purposes of engaging in protected concerted or union activity." Similarly, the Division found that a grocery store chain's rule restricting employee contact with the media was lawful where the stated purpose of the rule "was to ensure that only one person spoke for the company," and the rule could not reasonably be interpreted to prohibit employees from speaking with reporters on their own behalf with respect to their working conditions.

Implications for Employers

The current Acting General Counsel of the NLRB appears to be taking a very aggressive approach to employers' social media policies and attempting to find cases to present to the NLRB from which the Board can fashion specific rules and guidelines in this arena. In so doing, the Acting General Counsel appears to be expanding the law to give employees extremely broad latitude to use social media to communicate about their employers, supervisors, wages, and working conditions. Although the Report provides helpful guidance for employers on how to craft their policies in a manner that avoids infringing on employees' Section 7 rights, the actual limits on an employer's ability to regulate its employees' social networking activities have yet to be fully developed or addressed by the NLRB or by the federal appellate courts that will review its decisions.

Employers should continue to closely monitor legal developments in this area and review and, where appropriate, revise their social networking policies with the assistance of experienced labor counsel. If an employer's social media policy, or for that matter any personnel policy, work rule, or employee handbook provision, contains any language that could be construed to infringe on its employees' ability, during their nonwork time, to communicate with their coworkers, a union, the public, or others about their wages or other terms or conditions of employment, the employer should revise the policy to make it clear it does not apply to activity protected by Section 7. In addition, before taking disciplinary action against employees because of their social networking activities, employers and their labor counsel should consider whether the employees' activity constitutes protected, concerted activity under the NLRA.

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