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Developing Social Media Policies That **Survive NLRB Scrutiny**

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Over the past few years, the National Labor Relations Board (NLRB or the Board) has taken an active role in attempting to shape (i) employer social media policies and (ii) employer use of social media in making employment related decisions.

This trend is likely to continue. In fact, in a January 2014 interview with Law360, the Chairman of the NLRB, Mark Pearce, and Board Member, Philip A. Miscimarra, explained that the NLRB intends to continue focusing on social media cases, and even noted that the Board's social media caseload has increased its public profile.[1] Given the NLRB's general stance on these issues, recent NLRB decisions, and the NLRB's stated intention to continue focusing on such cases, employers must take steps to ensure that their social media policies will pass NLRB scrutiny, while still protecting themselves in situations where an employee has posted unfavorable comments about the employer on social media.

Social Media Policies

Over the past few years, the NLRB has issued three separate reports in which it provided guidance to employers regarding social media policies. In the most recent report, the Board examined the social media policies of a number of different employers.[2] In a number of these cases, the Board's General Counsel's office found that certain provisions of the social media policies at issue were unlawful under §8(a)(1) of the National Labor Relations Act (NLRA) because they interfered with an employee's right to engage in protected, concerted activity under §7 of the NLRA.[3] In reaching these decisions, the NLRB applied a two-part analysis to determine if a social media policy violated the NLRA. First, the Board reviewed the social media policy to determine if it explicitly restricted §7 protected activities. If the policy contained such explicit restrictions, it was unlawful on its face. If the social media policy did not explicitly restrict §7 protected activities, the Board then analyzed whether (i) employees would reasonably construe the language in the policy to prohibit §7 activity; (ii) the policy was enacted in response to union activity; or (iii) the policy was applied to restrict the exercise of §7 rights.[4] If the answer to any of these questions was yes, then the policy was unlawful under the NLRA. In addition to setting forth the foregoing analysis, the Board also issued a sample social media policy for employer reference.[5]

Applying the framework set forth in the NLRB's reports on social media policies, the Board has continued to scrutinize employer social media policies and has struck down such policies where they explicitly restrict (or could potentially restrict) an employee's §7 activities. For example, in *Dish Network,*[6] the NLRB adopted an Administrative Law Judge's (ALJ) decision in which the ALJ, consistent with the Board's reasoning in the social media reports, found that the employer's social media policy was unlawful because it violated an employee's §7 rights. Specifically, the ALJ found that the employer's social media policy, which prohibited employees from making "disparaging or defamatory comments about DISH Network," was unlawful because such restrictions on negative commentary about an employer tend to chill an employee's §7 rights. Likewise, the ALJ found that the employer's policy

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of banning employees from engaging in negative electronic discussions during "Company time" was also presumptively invalid because it failed to clearly convey that union solicitation can still occur during breaks and other nonworking hours at the company.

Similarly, in *Butler Medical Transport*,[7] an ALJ found an employer's social media policy to be unlawful. In particular, the ALJ analyzed the employer's social media policy which, among other things, instructed employees to "refrain from using social networking [sites] which could discredit Butler Medical ... ."[8] In reviewing this policy, the ALJ found that the policy was unlawful under the NLRA because employees could reasonably construe the policy to prohibit §7 activity. Specifically, the ALJ found that "[t]he rule on its face is broad enough to prohibit posting and distribution of papers regarding wages, hours and other working conditions [and] [i]t can reasonably be read to apply to non-work time and non-work areas."[9]

As exemplified by these recent decisions, the Board is continuing to review employer social media policies and is more than willing to strike down such policies as unlawful if there is any potential restriction of employees' §7 rights.

Adverse Employment Actions

With respect to employer use of social media to make employment related decisions, the NLRB's decisions in *Karl Knauz Motors*,[10] and *Hispanics United of Buffalo*,[11] detail how the Board will analyze social media-related terminations in the future.

In *Karl Knauz Motors*, an ALJ held that certain Facebook postings by an employee did not constitute protected, concerted activity under §7 and, therefore, the employee's termination was not unlawful.[12] In reaching this decision, the ALJ reviewed the Facebook posts at issue, which included criticism of events held by the employer and making fun of a car accident which occurred on the employer's related property. The ALJ found that since the employer terminated the employee for the comments made about the car accident, the termination was lawful. Specifically, the ALJ found that making fun of a car accident which occurred on a related property had "no connection to any of the employees' terms and conditions of employment" and, therefore, the posts were not protected under §7 of the NLRA.[13]

In *Hispanics United*, the NLRB ordered the employer to reinstate five workers that it previously terminated based on comments the workers posted on their respective Facebook pages. In reaching this decision, the NLRB delineated the standard that it will use when determining whether social media posts constitute protected, concerted activity under §7. The NLRB looked to past precedent, specifically, its two *Meyers Industries*[14] decisions from the 1980s. In these decisions, the Board held that an employee termination violates the NLRA if the following four elements are established: (1) the activity engaged in by the employee was "concerted" within the meaning of §7; (2) the employer knew of the concerted nature of the employee's activity; (3) the concerted activity was protected by the NLRA; and (4) the discipline or discharge was motivated by the employee's protected, concerted activity. In determining whether the activity was "concerted" activity, the NLRB again looked to the *Meyers Industries* decisions, which defined concerted activity as that which is "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself"[15] and includes "circumstances where individual employees seek to initiate or to induce or to prepare for group action, as well as individual employees bringing truly group complaints to the attention of management."[16] Applying these definitions, the NLRB found that the Facebook posts were protected, concerted activity because one of the terminated employees specifically solicited comments from her fellow co-workers about perceived complaints from another co-worker. The Board interpreted this solicitation as the employees taking a first step toward group action to defend themselves against accusations that they reasonably believed a co-worker was going to make to management.

With *Karl Knauz Motors* and *Hispanics United* as guidance, the Board has continued to issue orders finding employer workplace decisions premised upon an employee's social media postings to be unlawful. For instance, in *Butler Medical*, the ALJ found that the employer's termination of an employee based upon postings he made on Facebook to be unlawful.[17] In the postings at issue, the employee discussed issues at work, including the condition of the employer's vehicles, and he also suggested that

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a former coworker contact an attorney about his recent termination from the company. This Facebook conversation was delivered to the employer and the employee was terminated.

The ALJ found that the termination violated the NLRA because the Facebook posting constituted protected, concerted activity. Indeed, the ALJ found that since the employee at issue was advising a former coworker to contact an attorney regarding his belief that he was terminated for complaining about the condition of the employer's vehicles, and since the condition of the employer's vehicles was a matter of mutual concern among employees, the employees were making common cause regarding a matter of concern to most employees. Therefore, the Facebook posting was protected, concerted activity and the termination of the employee was unlawful.

Likewise, in *Design Technology Group*,[18] the NLRB found that a termination premised upon a Facebook posting was unlawful because the employees' Facebook conversation was protected, concerted activity. In this matter, the employer terminated a number of employees who took to Facebook to complain about the conduct of a supervisor, the safety of the neighborhood they worked in, and the concerns they had about working late. One employee also mentioned that he could bring in a California labor law book to determine if the employer was violating California law. The Board found these complaints to be protected, concerted activity under §7 because the complaints related to the terms and conditions of employment and, therefore, the termination of the employees was improper.

Best Practices

In light of these recent NLRB decisions, the NLRB has signaled that (i) the Board will continue to review social media policies with a critical eye and will not hesitate to strike down policies as unlawful, and (ii) the Board will continue to take an expansive view regarding whether postings on social media will be considered protected, concerted activity. Given the NLRB's current position, employers are well advised to take certain steps to ensure that their social media policies pass muster, while continuing to protect themselves in situations where an employee has posted unfavorable comments about the employer on social media.

First, given the NLRB's stated position on social media policies, and its provision of a sample policy for employers, employers should review their current social media policy and compare it against the NLRB's sample policy, to ensure that it does not infringe on an employee's §7 rights and that the policy would pass NLRB scrutiny if challenged.

Second, given the NLRB's recent decisions regarding social media-related terminations, employers must be extra cautious when taking adverse action against an employee for postings the employee made on a social media website. This means that employers, before terminating an employee for social media posts, should closely review and investigate the posts at issue to determine if they are indeed related to the employees' terms and conditions of employment. If the social media posts are related to the terms and conditions of employment, terminating the employee for these posts would run afoul of the NLRA.

Finally, if a situation arises where the decision is made to terminate an employee for reasons unrelated to social media postings, but the employee has made social media postings related to the terms and conditions of employment, the employer should make it clear that the termination is not related to the negative social media postings. This can be accomplished by clearly delineating, in a termination letter or otherwise, the reasons for the termination.

In conclusion, given the NLRB's stated intent to continue its focus on social media issues, employers must take care to ensure that their social media policies and practices do not infringe on employee §7 rights.

1. See Abigail Rubenstein, "NLRB Chairman Lays Out Approach to Social Media Cases," Law360 (Jan. 21, 2014, 8:34 PM), http://www.law360.com/employment/articles/502701?nl_pk=28762f1d-ec1c-43a0-b672-eac751481d71.
2. See NLRB, Office of the Gen. Counsel, Report of Acting General Counsel Concerning Social Media Cases (May 30, 2012) (hereinafter NLRB Report), available at http://mynlrb.nlrb.gov/link/document.aspx/09031d4580a375cd.
3. Section 8(a)(1) of the NLRA makes it an "unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [S]ection 7."
4. See NLRB Report at 3.
5. Id. at 22-24.
6. 359 N.L.R.B. 108 (2013).
7. *Butler Med. Transp.*, 05-CA-097810, JD-58-13 (Sept. 4, 2013).
8. Id. at 7.
9. Id.
10. 358 N.L.R.B. 164 (2012).
11. 359 N.L.R.B. 37 (2012).
12. On Sept. 28, 2012, the NLRB affirmed the ALJ's findings with respect to the employee terminations.
13. *Karl Knauz Motors*, 358 N.L.R.B. at *11.
14. *Meyers Indus.*, 268 NLRB 493 (1983) (*Meyers Industries I*) and Meyers Indus., 281 NLRB 882 (1986) (*Meyers Industries II*).
15. *Hispanics United*, 359 N.L.R.B. at *2 (quoting *Meyers* Industries I, 268 NLRB at 497).
16. *Hispanics United*, 359 N.L.R.B. at *2 (quoting *Meyers Industries II*, 281 NLRB at 887).
17. *Butler Med. Transp.*, 05-CA-097810, JD-58-13 (Sept. 4, 2013).
18. 359 N.L.R.B. 96 (2013).