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Employers: Be aware of the NLRB when Implementing and Enforcing Social Media Policies

Working Together

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Many employers adopt policies that restrict employee internet conduct that could impact the company's business. While it is prudent to provide employees with clear rules in this area, employers must be wary of aggressive National Labor Relations Board activity in this arena.

The NLRB is specifically targeting nonunion and unionized companies alike for policies and conduct that tend to chill employees from exercising their rights under the National Labor Relations Act ("NLRA"). The NLRA grants both union and non-union employees the right to engage in "concerted activities for the purpose of . . . mutual aid or protection." The Act prohibits employers from interfering, restraining or coercing employees who exercise these rights, or from discriminating against employees because of their protected activity.

Two decisions issued by administrative law judges from earlier this year provide some helpful guidance for employers implementing and enforcing social media policies. In both cases, the employers took exception to the rulings and appealed to the National Labor Relations Board in Washington. The Board has yet to issue a decision in either case.

The first case, UPMC, et al v. SEIU Healthcare Pennsylvania, 2013 WL 1741981 (April 19, 2013) cautions employers not to implement overly broad and ambiguous social media policies. In that case, a NLRB administrative law judge examined an electronic mail and messaging policy that prohibited employees from using the company's electronic technology in a way that is "disruptive, offensive to others, or harmful to morale" or "to solicit employees to support any group or organization, unless sanctioned by management." The judge determined that the policy violated the NLRA because the distinction between the type of non-work use that was prohibited and that which was permitted was stated in "broad and ambiguous terms" (namely, "disruptive," "offensive," and "harmful to morale") and there were "no illustrations or guidance" that would assist employees in interpreting them.

Likewise, the decision World Color Corp. v. Graphic Communications Conference of the Internal Brotherhood of Teamsters, 2013 WL 3964783 (July 31, 2013) provides a cautionary tale for employers who are contemplating disciplining an employee for his/her social media use. In that case, a terminated employee accused his employer of violating his NLRA rights after he was laid off. The employee claimed that his supervisor, who was also a close friend, told him that he was being re-assigned to another printing press

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operation because of his postings on Facebook. The supervisor testified that he did not recall such a conversation. Likewise, the employer maintained the reassignment was made as a result of a joint decision by the shift supervisors and had nothing to do with Facebook, social media or the Union. After considering the evidence, the judge found against the employer. The judge determined that the employer had violated the NLRA even though the employee's alleged Facebook postings were not offered into evidence and there was no other evidence (beyond the supervisor's alleged statement) to suggest that the employer interfered with the employee's right to "engage in concerted activity for the purpose of . . . mutual aid or protection."

While we must stay tuned to see if the employers' efforts to overturn the administrative law judges' decisions are successful, the take-away for employers from these and other NLRB decisions is to keep the following in mind when implementing and enforcing social media policies:

- Avoid broad and ambiguous language that could be interpreted as preventing employees from engaging in protected concerted activity and from collectively discussing their wages, hours and working conditions.
- Narrowly tailor the social media policy and use specific examples of prohibited conduct to show that the purpose of the policy is to protect the employer's legitimate business interests rather than to interfere with employee rights.
- Provide proper training on social media policies to all supervisors and employees so they know what to expect.
- Finally, keep in mind that an employer may face liability if it disciplines an employee for social media communications and the communications criticize, complain or comment on the employee's wages, hours and working conditions. Before disciplining an employee for inappropriate social medial activity, consider whether the posting may be protected under the NRLA.

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