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Employment: New NLRB Report on Social Media Limits

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On January 24, 2012, National Labor Relations Board (NLRB) General Counsel Lafe E. Solomon issued his second report summarizing 14 social media and networking cases. The cases addressed the lawfulness of employers' social media policies and discharges of employees based on use of social media, specifically Facebook. The report and accompanying press release make clear that the NLRB considers this an emerging area of law upon which it hopes to develop a consistent approach.

In the press release, the NLRB noted that the January 24 report "underscores two main points" from an NLRB report issued August 18, 2011:

- Employer policies should not be so sweeping that they prohibit the kinds of activity protected by federal labor law, such as the discussion of wages or working conditions among employees.
- An employee's comments on social media are generally not protected if they are mere gripes not made in relation to group activity among employees.

Importantly, it appears from several cases that the NLRB is taking the position that broad policies – such as those which use undefined terms like "appropriate" and "professional" or which have blanket restrictions on use of social media – can reasonably be construed to violate an employee's rights under Section 7 of the NLRA and are unlawful. Yet the NLRB also seems to be pointing employers to a simple solution. In at least two places, it notes that the policy or rule at issue did not contain limiting language clarifying that it did not restrict Section 7 rights or that it excluded Section 7 activity. The NLRB, however, has not gone so far as to state that such language would automatically or presumptively render a broad policy lawful.

Employers need to be aware that this area of law is unsettled. In particular, the line between employees' mere gripes and protected concerted or group activity is quite blurred. For example, whether an employee is engaged in concerted activity when posting on Facebook a complaint about the terms and conditions of his employment, may depend on the response by coworkers. Accordingly, before disciplining an employee, employers should carefully review the posts at issue, the circumstances surrounding those posts, and the response, if any, of co-workers. This is an exercise best done in coordination with employment counsel.

At a minimum, employers should review their social media and social networking policies to be sure they include language carving out an exception for Section 7 activity and should remove or define terms such as "appropriate" and "professional." There are various ways such terms can be defined, but the easiest may be by example. Again, this should be conducted in conjunction with advice from employment counsel.

Employers should be reviewing their policies, practices and procedures to address these quickly developing issues in the workplace. It may also be a good time for employers to give their handbooks a "state-of-the-art" update if they have not already done so.

Both the January 24, 2012 and the August 18, 2011 reports are available through the NLRB website: – Click Here – and – Click Here for PDF document –.

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