Employment Practice Update

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Employee Postings on Social Media May Be Protected Under the NLRA

By Christopher B. Lunny and Angela D. Miles

The National Labor Relations Board ("NLRB") has been tackling the issue of when the use of social media constitutes "concerted activity" by employees and when that concerted activity is protected under the National Labor Relations Act ("NLRA"). On August 18, 2011, the NLRB's Acting General Counsel issued a report summarizing the theories behind many of the social media cases they have addressed within the last year. The report discusses the proper scope of social media rules and policies for the workplace.

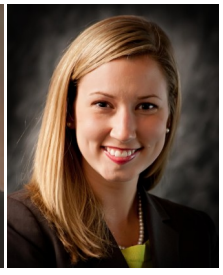
Generally, employees have the right under the NLRA to be free from reprisal for discussing the terms or conditions of their employment with coworkers. That type of speech is protected "concerted activity" because by doing so, the employees are essentially seeking to join together for mutual aid or protection. As a result, employers who discipline employees for collectively complaining about their wages, hours and conditions of employment may violate Section 8(a)(1) of the NLRA.

> **"… an employer must tread carefully in seeking to promulgate policies which regulate the social media activities of employees."**

Cases where the Acting General Counsel's office 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. 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 activity as well. Significantly, employee postings were deemed protected notwithstanding the employees' use of expletives, insults and other derogatory remarks when referring to their supervisors and management. The defamatory nature of the statements also had no impact on their protected status.

In fact, on September 2, 2011 – in the first ruling of its kind – an NLRB Administrative Law Judge ("ALJ") determined an employer unlawfully discharged five employees after they posted comments on Facebook® discussing their reaction to a coworker's criticisms of their job performance. The ALJ concluded that the employees' discussions alone were sufficient to constitute protected concerted activity even though there was no indication the employees intended to take further action or were trying to change their working conditions. Notably, the employees posted their comments on a Saturday (a non-workday) and none of them used the employer's computers in making the posts. Regardless, the ALJ concluded that the postings were protected activity.

Simply put, an employer must tread carefully in seeking to promulgate policies which regulate the social media activities of employees. A rule categorically prohibiting employees from discussing their employment on social media may easily constitute an infringement on employees' Section 7 rights. A flat prohibition on inappropriate online discussions about the company, management and/or coworkers will likely suffer a similar fate, particularly if the policy does not include any definition of "inappropriate" or expressly exclude Section 7 activity. Employer social media policies should be narrowly drawn and should expressly state that nothing in the policy is intended to infringe on employee Section 7 rights under the NLRA. Similarly, employers should carefully consider the content of employee postings before disciplining employees for their social networking activities. If you have any questions regarding the NLRA or employee use of social media, please contact our office at (850) 425-6654.



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This article is meant to provide a brief overview and points of discussion regarding employment and labor law topics. Should a particular issue arise or should you desire additional consultation to protect your firm, the advice of a competent counsel should be sought.