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Act Now Advisory: NLRB Acting General Counsel Issues Follow-Up Report on Social Media Cases

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On January 25, 2012, the National Labor Relations Board's ("NLRB") Acting General Counsel ("AGC") Lafe Solomon issued a second report on unfair labor practice cases involving social media issues. We discussed his earlier report in our *Act Now* Advisory of October 4, 2011.

The new report covers an additional 14 cases, all of which fall into the same two categories as the cases discussed in the earlier report, namely: (1) termination of employees resulting from statements made in social media forums about their working conditions or their employers; and/or (2) claims that an employer's social media policy violates the National Labor Relations Act (the "Act") because its prohibitions may "chill" employees in the exercise of their rights under the Act to engage in concerted activity for their mutual aid and protection. Again, the report emphasizes that the Act's provisions apply to workplaces where the employees are not represented by a union and where there is no union activity, as well as to unionized employees.

All of the cases addressed in the report are at the earliest stages of litigation, and thus, represent only the view of the General Counsel's office on these issues. They do spotlight, however, the refinement of the AGC's views on social media and, because the AGC has the authority to determine whether a complaint will be issued, they offer employers additional guidance on how to approach both the drafting and the enforcement of their social media policies in order to avoid litigation.

All but one of the reported cases involve non-union workforces. This fact underscores the intent of the current NLRB to establish its relevance in non-union workplaces — and with the NLRB's requirement that all employers, whether union or non-union, post Notices advising employees of their rights under the Act,[1]

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employers can expect the number of cases in this area to grow significantly.

Review of Social Media Policies

The AGC continues to take the position that broad prohibitions and restrictions on employees' use of social media forums violates the Act. Thus, in the reported cases, the AGC argues that a social media policy violates the Act if it includes any of the following, without use of specific limiting definitions or examples:

- Prohibitions on making disparaging comments about the company;
- Requirements that discussions about terms and conditions of employment be made in an "appropriate manner;"
- Prohibitions of disrespectful conduct or inappropriate conversation;
- Broad prohibitions on the disclosure of confidential, sensitive, or non-public information to anyone outside the company, without prior approval of the employer; or
- Prohibitions on unprofessional communications that could negatively impact the employer's reputation.

In a new twist, the AGC has taken the position that if an employer requires employees, in their use of social media, to obtain employer approval to identify themselves as employees of the company and further, to expressly state that their opinions are their own and not the company's, this will "significantly burden" the employee's exercise of their rights under the Act to discuss working conditions and criticize the company's employment policies and practices. Thus, the AGC maintains that such requirements constitute an unfair labor practice ("ULP") and violates the Act.

In the AGC's view, an otherwise "overbroad" prohibition can be remedied by including specific examples that make clear that the policy is not intended to limit the rights of employees to discuss with coworkers or outsiders (*e.g.,* unions)issues affecting their terms and conditions of employment. For example, the AGC found lawful a social media policy that prohibited the following conduct:

The use of social media to post or display comments about coworkers or supervisors that are vulgar, obscene, threatening, intimidating, harassing or a violation of the Employer's workplace policies against discrimination, harassment, or hostility on account of age, race, religion, sex, ethnicity, nationality, disability or other protected class, status or characteristic.

The AGC opined that because the rule includes specific examples of the types of plainly egregious conduct it was intended to prohibit, the policy could not reasonably be construed as potentially limiting or restricting conduct protected by the Act.

Similarly, the AGC took the position that an appropriate definition of confidential information that clearly identified the types of information the employer sought to protect would not be construed as unlawfully limiting protected activity. The rule in question prohibited employees from disclosing in social media:

Confidential and/or proprietary information, including personal health information of customers or participants, or product launch and release dates and pending reorganizations.

Most troubling, however, is the AGC's position that a "savings clause," which provided that

the policy could not be interpreted or applied so as to interfere with employees' rights to self-organize, form or assist labor organizations . . . . or to engage in other concerted activities for the purpose of . . . mutual aid and protection . . .

did not cure an overbroad policy that directed employees not to identify themselves as employees of the employer in their social media postings unless they described terms and conditions of employment in an "appropriate manner." The AGC concluded that employees could not reasonably be expected to know that the language of the savings clause encompasses discussions the employer deems inappropriate. The AGC's view, however, has not yet been tested before an Administrative Law Judge or considered by the NLRB itself.

Terminations in Response to Use of Social Media

The AGC continues to find that discussing terms and conditions of employment on social media sites may be protected activity, provided that a posting constitutes "concerted activity," and is not merely an individual gripe.

In making this distinction, the AGC considers such factors as: whether coworkers responded to the posting; whether the posting generated on-line discussions among employees about working conditions; whether the posting sought to initiate or induce coworkers into group action; and whether the posting was a continuation of earlier group action, such as a follow-up to a group grievance or complaint raised with management. In four of the cases discussed in the report, the AGC found that, in the absence of evidence of the concerted nature of the posting, the employees' comments were individual "gripes" or "venting" about coworkers or supervisors, and thus, were not protected by the Act.

The AGC articulated what appears to be a new test[2] to be used in determining whether an employee's posting on a social media site is so egregious as to be outside the protection of the Act. The new formulation is a modification of the NLRB's existing test under its Atlantic Steel ruling,[3] which is used to determine whether statements by employees made in the workplace have lost the protection of the Act. The new test looks at three factors:

1. The subject matter of the posting (was it otherwise protected activity?)
2. Was the comment provoked by the employer's unfair labor practices?
3. The impact of the posting on the employer's reputation and business.

The third factor considers the likelihood that the posting will be seen by third parties. Here, the General Counsel would turn to its traditional test to determine whether the statement is defamatory or disparaging of the employer's products or business policies. The NLRB's standard for determining whether an employee's statement is defamatory includes an examination of whether the statement was made with malice, *i.e.*, with knowledge of its falsity or in reckless disregard of its truth or falsity. The AGC acknowledged that the NLRB will find statements that disparage an employer to have lost the protection of the Act where

they constitute a sharp, public, disparaging attack upon the quality of the company's product and its business policies in a manner reasonably calculated to harm the company's reputation and reduce its income

(emphasis added). In none of the cases reported on by the AGC was the posting at issue found to be defamatory, and thus, unprotected under this stringent standard.

In this "new" test, the AGC appears to discount the fourth factor in the Atlantic Steel test, whether the nature of the comment was disruptive of workplace discipline. The AGC bases this distinction on his contention that because social media postings are made outside the workplace, they are inherently not disruptive of workplace discipline unless they are accompanied by verbal or physical threats.

What Employers Should Do Now

All employers, especially non-union employers, must be concerned with the NLRB's new focus on broad enforcement of employees' rights under the NLRA. With regard to social media policies, employers are encouraged to:

1. Review their policies to:
    1. Ensure that they do not include any express prohibitions on employees discussing their terms and conditions of employment (in social media or otherwise);
    2. Confirm that their policies do not include broad or vague prohibitions on the use of social media by employees that could be reasonably interpreted to prohibit discussion of terms and conditions of employment; strongly consider use of specific definitions, limiting language, and examples to clarify the reach of the applicable policy; and
    3. If a disclaimer is included, consider using plain English that can easily be understood in explaining any exceptions to the specific prohibitions of such policy.
2. In deciding whether to discipline, terminate, or otherwise take adverse action against an employee for social media postings, carefully review with counsel whether the employee's actions may constitute concerted activity protected by the Act.

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ENDNOTES:

[1] As of this time, employers will be required to post the Notice by April 30, 2012. The part of the Board's Final Rule requiring the posting has survived an initial challenge in federal court. *Nat'l Assn. of Mfrs. v. NLRB,* __F. Supp.2d__, 2012 WL 691535 (D.D.C. Mar. 2, 2012). As of this writing, no party has filed an appeal, but one is likely.

[2] Whether this test is appropriate has not yet been determined. Neither the NLRB nor any Administrative Law Judge has ruled on its application.

[3] 245 N.L.R.B. 814, 816-17 (1979).

Resources

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