CLIENT ALERT

NLRB Clarifies Its Position Regarding Employees' Social Media Usage

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On January 24, 2012, the National Labor Relations Board ("NLRB" or "Board") Acting General Counsel, Lafe Solomon, released a new Report of the Acting General Counsel Concerning Social Media Cases ("Report"). The Report summarizes the NLRB's recent handling of fourteen charges involving employers' social media policies and the discipline issued to employees under those policies. Highlighting the NLRB's continued focus on what Mr. Solomon acknowledges is a "hot topic" in labor and employment law, the Report updates his prior August 2011 analysis. The new Report expands on a number of trends discussed in the August 2011 report regarding the manner in which the NLRB is approaching these cases. Most notably, the Board found, for the first time, two employer social media policies that, on their face, did not violate the National Labor Relations Act ("NLRA"). Additionally, the Report announces what appears to be a new hybrid test for determining whether an employee's social media activity loses the protection of the NLRA. Although the law around employee social media usage is constantly changing and evolving, this latest NLRB Report provides some clarity as to the position that the NLRB will take going forward and its continued interest in attempting to regulate employer responses in this developing area of the law.

The NLRB noted that it addressed the facial validity of the employer's social media policy in seven of these fourteen recent charges, finding that two of the policies complied, in its view, with the NLRA, while five did not. The keys in the NLRB's analysis of each of these policies were the specificity of the policies and the context in which they were applied.

For example, in one of the two cases where the NLRB found the policy valid, the Report observed that the employer's original policy that "prohibited discriminatory, defamatory, or harassing web entries about specific employees, work environment, or work-related issues on social media sites" was overbroad and infringed on the employees' Section 7 rights to engage in protected, concerted activity. The NLRB focused on what it called "broad" terms like "defamatory entries," which could be applied, and had been applied by this particular employer, to curtail otherwise protected communications by employees regarding working conditions. The employer, however, later amended the policy to more specifically prohibit "the use of social media to post or display comments about coworkers or supervisors or the Employer 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 NLRB found that this recasting of the policy provided the appropriate context to understand the "reasonableness" of the policy. In doing so, it cited its decision in *Tradesman International*, 338 NLRB 460 (2002), holding that provisions of an employment policy that forbade "statements which are slanderous or detrimental to the company," and included a list of prohibited conduct including "sexual or racial harassment" and "sabotage," would not be "reasonably understood to restrict Section 7 activity."

Similarly, the five social media policies that, according to the Board, violated the Section 7 rights of employees tended to use broad terms capable of a number of different meanings without providing any context for those statements. For example, where one such provision banned employees from disclosing the employer's confidential or proprietary information without including examples of the information subject to that ban, the NLRB determined that the provision was overbroad. The Board reasoned that this policy could reasonably be construed to improperly prevent employees from discussing their wages – a long-protected

activity. The requirement in another policy that the employees communicate through social media in a "professional" and "appropriate" manner was deemed overbroad, as employees would construe these terms in a manner that would improperly chill their free discussion of their working conditions.

It appears, from the Report, that merely adding a statement that the policy is not intended to interfere with the exercise of an employee's Section 7 rights will not rescue an otherwise overbroad policy. This "savings clause" did not prevent the NLRB from finding overbroad a policy that "provided that employees should generally avoid identifying themselves as the Employer's employees unless discussing terms and conditions of employment in an appropriate manner." The NLRB observed that even with the additional clause regarding Section 7 rights, the employees subject to this particular policy would not be able to determine the nature of discussions that the employer deemed "inappropriate," and would "reasonably construe the language to prohibit Section 7 activity."

In addition to providing context for the NLRB's position on the validity of various employer social media policies, the Report also highlighted what is likely to become the NLRB's new test for deciding whether the action for which an employee was disciplined was so out of line that it lost the protection of the NLRA. In so doing, the NLRB acknowledged that it was creating a sort of hybrid test adapted from two longstanding tests, both of which address certain characteristics of social media but, as the NLRB admits, neither addressed perfectly.

In this particular charge, after several employees complained offline about working conditions and the attitude of one manager, in particular to both management and the employer's management consultant, the charging party brought her complaints to Facebook with a posting about the amount of "drama" at that production plant. This post touched off a conversation between the charging party and two other employees in the comments section of her post. There, the charging party and at least one other employee continued to complain about working conditions in general, and the manager in particular. None of the employees used any vulgar language in their comments, nor did they include any libelous statements about the employer or the manager. The charging party's employment was subsequently terminated as a result of her posts.

In analyzing the employer's termination of the charging party's employment, the NLRB acknowledged that neither the Supreme Court's decision in *NLRB v. IBEW, Local No. 1229 (Jefferson Standard)*, 346 U.S. 464 (1953), nor the NLRB's test outlined in *Atlantic Steel*, 245 NLRB 814 (1979), precisely addressed the new age of social media and the nature of employee conduct that was sufficiently opprobrious to warrant losing protection under the NLRA. The Board noted that *Jefferson Standard* usually applies to employee communications meant as an appeal to third parties regarding a labor dispute and whether such communications are "so disparaging of the employer or its product" to lose the NLRA's protection. *Atlantic Steel*, on the other hand, generally applies to communications between employees and supervisors, and "specifically focuses on whether the communications would disrupt or undermine shop discipline." In the social media age, an employee's complaints about management on Facebook or Twitter may be both a communication directed at third parties, but also at management, and may affect the workplace.

In this particular case, the NLRB applied what it called a "modified *Atlantic Steel* analysis that considers not only disruption to workplace discipline, but that also borrows from *Jefferson Standard* to analyze the alleged disparagement of the employer's products and services." The NLRB found that the charging party's Facebook comments were protected activity under the NLRA because they clearly involved terms and conditions of employment and were made with the intent of engaging in concerted activity. Further, the nature of the comments was not so vulgar, or accompanied by physical or verbal threats, so as to lose the

protection of the NLRA. The NLRB also considered the fact that third parties may have viewed the comments on Facebook, and the potential impact on the employer's reputation or business, but found that the statements were not defamatory or otherwise sufficiently disparaging to lose protection of the NLRA. This is the only charge addressed in the Report in which this new hybrid test was applied. Whether the NLRB will apply this test more broadly and, if so, the results that it will reach going forward, remain to be seen. In any event, employers should keep this analysis in mind as they are considering disciplining employees for their social media usage.

In sum, the roadmap for employers seeking to create new social media policies, or revise existing policies, in a manner likely to be found compliant with the NLRA in the Board's eyes can be found in this Report. Employers can expect that the NLRB will continue to focus on this developing area of the law, especially in light of the fact that the NLRA applies to most employers in this context, not just those that are unionized. As the use of social media continues to explode, employers must remain aware of the Board's aggressive policing of this corner of the law and should carefully consider the Board's position before disciplining any employees for using social media to complain about any aspect of their employment.

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