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Legal Update

December 2010

Limits on Limiting Off-Duty Conduct On and Offline

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The National Labor Relations Board ("NLRB") recently made headlines by filing a complaint against an employer for firing an employee who, while off-duty and using her own personal computer, criticized her supervisor on Facebook. This case, which has been dubbed the "Facebook Firing," highlights the inherent tension between an employee's right to privacy off the job and an employer's right to prevent off-duty conduct that may harm its business or reputation.

Like the laws enacted in a number of states prohibiting employers from regulating certain off-duty activities, the NLRB's complaint signals that all employers – even those without a unionized workforce – must think carefully when implementing policies that affect employees' off-duty activities. While the Facebook Firing garnered headlines because it is among the first case of its kind to arise in the social media context, its teachings apply to both online and offline conduct. The case demonstrates that the NLRB intends to treat conversations on Facebook the same as conversations by the water cooler (even though, on the Internet, millions more people may be "listening"). This Legal Update describes potential new limits on employers' regulation of employee activities out of the workplace.

The Facebook Firing

In the Facebook Firing case, the NLRB contends that the employer, American Medical Response of Connecticut, Inc., engaged in an unfair employment practice when it fired an employee for disparaging her supervisor on the employee's personal Facebook page. According to the NLRB's complaint, the employee posted her remarks after her supervisor denied the employee's request for union assistance in responding to a customer's complaint. The employee's co-workers responded to her Facebook posting and added supportive comments which, in turn, prompted the employee to post additional allegedly disparaging remarks. American Medical fired the employee for violating the company's Internet policy prohibiting employees from making disparaging remarks against the company or supervisors.

The NLRB alleges that the firing constituted an unfair labor practice because the employee was engaged in concerted activity protected under the federal National Labor Relations Act ("NLRA"). The NLRA – which protects employees whether or not they are unionized – prohibits employers from interfering with employees' rights to discuss with co-workers the terms and conditions of their employment. The activity

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is "concerted" if two or more employees act together in an attempt to improve working conditions. The NLRA also prohibits employers from creating policies or taking actions that have the "chilling" effect of discouraging employees from engaging in protected activities. The supervisor's denial of the employee's request for union assistance, combined with the subsequent dialogue among co-workers (as opposed to a posting by one individual) on Facebook, may explain why the NLRB views the Facebook postings as protected concerted activity and the firing as an unfair labor practice. Also, the NLRB contends American Medical's policy prohibiting employees from disparaging the company and requiring company permission to reference the company is too broad and "chills" employees' right to discuss working conditions.

The Facebook Firing case is still in its infancy and a ruling is months, if not years, away. Nevertheless, the case signals that an employer's ability to regulate employees' online activities is limited – even if the employee is off-duty and the activity negatively portrays or impacts the employer's business. This, however, does not mean that employers' hands are always tied when it comes to disciplining employees for publicly criticizing their employer. The employee's conduct must rise to the level that would be protected under the NLRA.

Policy Proposals

On the heels of the media coverage, the NLRB – on its Facebook page – posted the following four point test to assist employers in determining whether the employee's conduct is protected: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way, provoked by an employer's unfair labor practice. This test confirms that an employee's personal gripe against his or her employer is likely not protected. Rather, the communications among co-workers must concern the terms and conditions of employment to be protected. Whether the postings in the Facebook Firing rise to the level of protected activity is hotly contested and will ultimately be determined by the courts.

To avoid violating the NLRA, employers would be wise to use the NLRB's four point test as a guidepost, review their social media policies, and seek legal counsel if they have any doubts. A policy that prohibits employees outright from communicating about the company or requires pre-posting approval is likely invalid. A narrower policy, however, that explains the employer's lawful goals and allows for protected speech and activities should pass muster.

In addition to reviewing their social media policies, employers should also confirm they are not violating the NLRA or state laws for restricting other legal off-duty conduct that may negatively reflect on business. For example, an employment rule prohibiting employees from discussing wages or salaries would not only run afoul of the NLRA but also violates the Illinois Equal Pay Act. Similarly, many states, including Illinois, prohibit employers from disciplining or discriminating against employees for

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smoking or drinking alcohol off the job and off of employer premises. Employers should consult with counsel when reviewing policies and before disciplining an employee for off-duty conduct that may be protected by the NLRA or state law.

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