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One Minute Memo®

NLRB Issues Complaint Over Facebook Blogging

The National Labor Relations Board (Board) recently issued an unfair labor practice complaint alleging that American Medical Response, Inc. (AMR) unlawfully terminated a union-represented employee who posted negative remarks about her supervisor on her personal Facebook page. The remarks drew supportive responses from some of the employee's co-workers, and led to further negative comments about the supervisor from the employee.

The Board contends that the employee's firing violated her right under Section 7 of the National Labor Relations Act (NLRA) to protest her working conditions. Additionally, the Board appears to allege that AMR's blogging and internet posting policies inappropriately restrict employees from communicating complaints about their jobs. The complaint appears to contend that the portions of AMR's policies that prohibit employees from making disparaging remarks when discussing the company or its supervisors, or prevent employees from depicting AMR on the internet without its permission, are illegal. A hearing in the case is scheduled for January 2011 before a Board Administrative Law Judge.

By issuing a national press release to announce the AMR complaint, the Board is putting employers on notice that it will closely examine employer handbooks, and particularly their social media policies, to determine whether they discourage employees from discussing their work environment with other employees, or from communicating their views on unionization. Moreover, the AMR complaint signals that the Board's new Acting General Counsel is departing from current Board law in assessing violations of such rights by an employer's handbook policies.

In 2009, the NLRB General Counsel's Division of Advice issued an advisory memorandum in which it concluded that an employer's social media policy highly similar to AMR's was lawful under the NLRA. In that case, the employer's social media policy prohibited, among other things, "[d]isparagement of company's or competitors' products, services, executive leadership, employees, strategy, and business products." The Division of Advice concluded that the policy was legal because, in context, it was part of a larger policy which prohibited egregious conduct such as discussing the employer's proprietary information, explicit sexual references, disparagement based on race or religion, obscenity, profanity, or references to illegal drugs.

The policy also stated explicitly that it was designed to protect the employer and the employees' interests rather than to "restrict the flow of useful and appropriate information." As a result, the Division of Advice determined, consistent with existing Board principles, that the policy would not "reasonably tend to chill employees in the exercise of their Section 7 rights [to protest working conditions or advocate for unionization]." Nor did it find that the policy was promulgated in response to union organizing activity or was applied for the purpose of doing so.

In a series of dissents, however, Board Chairman Wilma Liebman has taken issue with how the Board's "reasonable tendency to chill" protest or union activity test has been applied to employer policies which she considers to be too vague in prohibiting certain employee communications. For example, she recently contended that employees might construe an employer policy which barred "slanderous or detrimental" statements about an employer to encompass protected statements regarding unionization.

The new Acting General Counsel's AMR complaint appears to reflect an adoption of Chairman Liebman's position now that she commands a 3-1 pro-labor majority on the Obama-appointed Board. There seemingly is little meaningful difference between the policy the Division of Advice found lawful in 2009 and the policies at issue in AMR, which include that "[e]mployees are prohibited from making disparaging, discriminatory or defamatory comments when discussing the Company or the employee's superiors, co-workers and/or competitors." Similar to the 2009 case, AMR's broader standards of conduct also prohibited "rude or discourteous behavior to a client or co-workers" and "[u]se of language or action that is inappropriate in the workplace whether racial, sexual or of a general offensive nature."

The AMR complaint underscores the need for employers – union and non-union alike – to be aware of the Board's heightened interest in challenging social media and other policies that do not make sufficiently plain that they do not cover complaints or statements regarding employment terms and conditions, or communications about unionization. Common policies that the current Board may view as vague or overbroad are easy potential targets, regardless of the employer's intent in implementing them.

Employer policies that should be reviewed include confidential information, electronic media, social media, blogging, internet, solicitation, e-mail usage, customer communication, bulletin board posting, internal grievance, no-disparagement, off-duty conduct, and wage discussion policies. The ability of an employer to determine exactly what types of policies the Obama Board will permit may have to wait until a decision is issued in the AMR case. Even then, there is the possibility that a reviewing federal appellate court may disagree with what appears to be a significant change in Board law.

To further add to the uncertainty of the law in this area, the Division of Advice recently issued another memorandum involving the discipline of employees because of their Facebook postings. Although this memorandum is not yet publicly available, we understand that the Division of Advice again determined that the employer's disciplinary actions were not a violation of the NLRA.

We will continue to monitor the Board's views on social media and other handbook policies and will provide updates on significant developments.

For more information, please contact the Seyfarth attorney with whom you work, or any Labor and Employment attorney on our website.

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