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ALERT

NLRB Settles Facebook Discharge Case

Little Guidance Provided; Employers Advised to Exercise Caution

By Bennett Pine

In our December 2010 *Employment Law Insider Alert*, we highlighted the prosecution by the National Labor Relations Board (NLRB) of a Connecticut ambulance service that had terminated an employee for posting negative comments about her supervisor and employer on Facebook from her home computer. NLRB prosecuted on the basis that the employee's Facebook posting and subsequent postings by co-workers constituted "protected concerted activity."

On February 7, 2011, on the eve of a hearing on the case, the NLRB announced that a settlement had been reached.

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Case Background

According to the NLRB, its Hartford regional office issued a complaint against American Medical Response (AMR) of Connecticut on October 27, 2010, alleging that the discharge violated federal labor law because the employee was engaged in protected activity when she posted the comments about her supervisor, and responded to further comments from her co-workers. Under the National Labor Relations Act, employees may freely discuss the "terms and conditions" of their employment with co-workers and others, during non-working time.

The NLRB complaint also alleged that the company maintained overly broad rules in its employee handbook regarding blogging, Internet posting and communications between employees, and that it had illegally denied union representation to the employee during an investigatory interview shortly before the employee posted the negative comments on her Facebook page.

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The Settlement

In the settlement by NLRB Hartford Regional Director Jonathan Kreisberg, AMR agreed to revise its overly broad rules to ensure that they do not improperly restrict employees from discussing their wages, hours and working conditions with co-workers and others while not at work, and that they would not discipline or discharge employees for engaging in such discussions.

The company also promised that employee requests for union representation will not be denied in the future and that employees will not be threatened with discipline for requesting union representation. The allegations involving the employee's discharge were resolved through a separate, private agreement between the employee and the company.

Caution for Employers

Unfortunately, the settlement of the AMR case meant that the board did not, as expected by many employers and commentators, take the opportunity to establish "bright light" rules clearly articulating the application of the NLRB's 75-year-old "concerted activity" protections in the context of contemporary Internet and social media communications by employees.

However, synthesizing the NLRB's complaint and the resulting settlement, the message seems clear that the NLRB intends to protect employees' rights to discuss their wages, hours and working conditions with co-workers and others while they are off-duty, and that the protections will apply whether such communications take place at the water cooler, on a bulletin board or on a social media venue such as Facebook.

Significantly, these employee protections apply whether or not the employer's workforce is unionized. Employers violate the NLRB if they discharge or otherwise punish workers because of statements or criticisms they make on social media that the board views as protected, concerted activity.

As a result of the lack of clear guidance from the NLRB, employers need to exercise care to be sure that their email, Internet, social media and related policies do not impermissibly interfere with employees' rights to discuss their wages, hours and working conditions or otherwise to engage in concerted activities while not "at work." As previously indicated, it may be prudent for employers to include protective disclaimer language in any Internet or social media policy to the effect that the policy is not to be applied or interpreted in any manner that interferes with employee rights under the National Labor Relations Act.

Conclusion

Until clear standards defining precisely what Internet, website or email communications constitute protected, concerted activity, employers are urged to exercise caution before imposing discipline or discharge as the result of such employee communications.

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