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DECEMBER 2010

LABOR & EMPLOYMENT
>> ALERT

# NLRB CHALLENGES FACEBOOK FIRING

On October 27, 2010, the Regional Director of the National Labor Relations Board's (NLRB) Hartford, Connecticut field office issued a complaint (Complaint) alleging that an ambulance service, American Medical Response of Connecticut, Inc. (AMR), illegally terminated an employee who posted negative remarks about her supervisor on her own Facebook profile.

Specifically, the Complaint alleges that AMR violated Section 8(a)(1) of the National Labor Relations Act (NLRA or the Act) by interfering with the employee's right to engage in protected concerted activity under Section 7 of the Act. Although a hearing on the case before an administrative law judge is not scheduled until January 25, 2011, even in advance of a ruling, the Complaint should prod employers of both unionized and non-unionized workforces to review their social media policies to ensure that they do not run afoul of the Act.

## BACKGROUND

According to the Complaint, Dawnmarie Souza, an employee of the ambulance service, was asked to prepare a report concerning a customer's complaint about her work. Souza requested representation from her union in order to assist her in preparing the report, but her request was denied. Later that same day, Souza accessed her Facebook profile from her home computer and posted negative comments about her supervisor. For example, in addition to describing her supervisor in unflattering and sometimes vulgar terms on her Facebook profile, Souza also wrote about "how the company allows a 17 to be a supervisor." The 17 reference is AMR's jargon for a psychiatric patient. Souza's remarks drew supportive responses from her co-workers and led to further negative comments about the supervisor.

Shortly thereafter, AMR terminated Souza for violating the company's Internet policies. Specifically, AMR's "Blogging and Internet Posting Policy" prohibits employees from, among other things, "making disparaging, discriminatory or defamatory comments when discussing the company or the employee's superiors, co-workers or competitors."

In the Complaint, the NLRB not only took issue with AMR's allegedly illegal termination of Souza, but also with the company's overly-broad social media policy. The NLRB contends that this policy has been "interfering with, restraining and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act in violation of Section 8(a)(1) of the Act."

### THE BOTTOM LINE

The NLRB's recent action should remind employers of the importance of a properly drafted social media policy and the need to exercise caution when disciplining employees for comments they post on social media websites.

The case will be heard before a NLRB Administrative Law Judge, who will issue a written decision. That decision may be appealed to the five-Member Board in Washington for a final decision, and that decision is subject to judicial review.

## "CONCERTED ACTIVITY"

Section 7 of the NLRA guarantees both unionized and non-unionized employees, "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives

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of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." The protections afforded by Section 7 apply to most non-supervisory employees in the workplace, regardless of whether it is unionized. Section 7 guarantees employees the right to engage in concerted activities even when no union activity is involved and even when no collective bargaining is being contemplated by the workforce.

However, to be protected under Section 7, an employee must engage in concerted activity for the purpose of "mutual aid or protection" of employees. The NLRB and courts traditionally have interpreted this language as protecting an employee's right to discuss the terms and conditions of his or her employment with other employees. However, for an employee's activity to be "concerted," the action must be engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself. An employee's conduct is not "concerted" unless it is engaged in with or on authority of other employees.

In the case of Souza, it is likely that the NLRB views her Facebook communications with other employees as being no different than the face-to-face discussions amongst co-workers concerning working conditions that employees traditionally have had in a break room during lunch or off a company's premises after the end of a shift. More generally, the NLRB believes that AMR's Internet policy goes too far in restricting employees' ability to communicate amongst themselves regarding working conditions. The Board probably views this matter as involving nothing more than the straightforward extension to social media of protection of other forms of employee communications that Section 7 traditionally has been held to encompass. A challenging aspect for companies is that social media services are inherently open and collaborative forums.

## CONCLUSION

In light of this complaint – and it only is a complaint for now – employers should reexamine their social media policies to make sure that they do not violate the protections of the NLRA. Employers should consider ensuring that these policies only target specific types of prohibited conduct, rather than generally banning employees from posting on the Internet about the company. For example, a company likely would not be in violation of Section 7 merely by prohibiting employees from defaming the company or sharing trade secrets or confidential company or client information on the Internet. Similarly, a company may seek to properly restrict electronic postings about co-workers, including supervisors, which would not comply with the employer's policies prohibiting harassment and discrimination, and otherwise requiring a respectful working environment.

In addition to reviewing their social media policies, employers also need to be cognizant of the risks involved in taking disciplinary action against employees on account of their Internet postings where "protected concerted activity" might be involved. Because this area of the law truly is in its infancy, employers faced with this scenario should be sure to involve HR and legal personnel before taking any adverse employment action.

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