Sills Cummis & Gross P.C.

Client Alert **Employment & Labor**

The NLRB's Second Report on Social Media Leaves Open Questions for Employers

Employers attempting to draft social media policies have very little guidance from the courts as to what the courts consider proper parameters of a social media policy with respect to privacy rights of employees. The limited cases in this area do caution that the policies must be related to a reasonable employer interest, such as protecting confidential information or preventing harassment. So, most employers who have social media policies have inserted such language into their policies, permitting them to take adverse action against employees if employees are identifying themselves online with their employer, and are making posts that are "harassing" or may "breach confidentiality." However, in the last year, employers have realized that some of this language will be deemed unacceptable by the National Labor Relations Board, ("NLRB"), which has begun to see social media as the new "water cooler."

On October 27, 2010, the NLRB, in *In re American Medical Response of Connecticut, Inc.*, filed a highly publicized unfair labor practice complaint against American Medical Response of Connecticut, Inc. ("AMR"), claiming that the company violated the National Labor Relations Act ("the Act") when it disciplined and then terminated an employee who posted disparaging remarks about her supervisor on her Facebook page. Her remarks at the time drew supportive posts from colleagues. The NLRB alleged that the employer's decision to terminate based on the employee's social

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media posts violated the employee's rights to engage in "concerted activity" protected by Section 7 of the Act. Under a settlement AMR reached with the NLRB, the company agreed to change its blogging and Internet policy that barred workers from disparaging the company or its supervisors. The company also agreed to revise a policy that prohibited employees from "depicting the company in any way over the Internet without permission."

Since that settlement was reached last year, the NLRB has issued two reports that purportedly attempt to provide employers with some consistent guidance as to the proper parameters of social media policies and enforcement. Last August, the NLRB's Acting General Counsel issued the first summary report of NLRB social media cases, and on January 24, 2012, the NLRB issued an updated Operations Management Memorandum summarizing decisions regarding social media policies and social media cases filed with the NLRB in the past year.

The NLRB's stance on termination cases gleaned from this report is far less troubling than is its analysis of acceptable policy language. With respect to termination decisions, the NLRB is consistently finding that when an employee complains on Facebook about salary, lack of promotions, layoffs, discrimination, supervisors, discipline, or mismanagement, and other employees join in the complaints because they are Facebook "friends," this is no different than complaints around the water cooler or on a picket line, and therefore an employer cannot fire the employees for making such complaints. The terminations that were found to be acceptable are based upon more general rants (*e.g.,* "I hate my employer") that do not contain specific complaints and do not engender co-worker support.

However, the policy language analysis by the NLRB provides less guidance to employers as the NLRB has approved very few social media policies. The majority of the language reviewed in the latest report was rejected, including prohibitions on employees:

1. Making disparaging remarks about the company through social media,

2. Identifying themselves, without permission, as employees of the company on social media,

3. Using social media to engage in communications that could harm the reputation of the company,

4. Disclosing, without approval, confidential information about the company on social media, and

5. Posting on social media discriminatory, defamatory or harassing web entries about employees, the work environment or work issues.

Even the use of "savings clauses" in the policies, which provided that the policies would not be interpreted to interfere with employees' rights to organize, was found to be insufficient to validate the policies.

The only policy language specifically upheld by the NLRB included the following:

1. Prohibiting the use of social media to post comments about supervisors or co-workers that were "vulgar, obscene, threatening, intimidating, harassing or a violation of the employer's workplace rules against discrimination or harassment,"

2. Requiring employees to confine their posts to matters unrelated to the company, unless such posts were necessary to ensure compliance with securities regulations or other laws,

3. Prohibiting employees from disclosing proprietary information like launch dates, pending reorganizations, personal health information, and promotional content, and

4. Requiring employees to post disclaimers that the views expressed in their posts were their own.

Lessons for Employers

The following takeaways from this NLRB report apply to **all employers**, regardless of whether their workforces are currently unionized:

1. Employers must be careful and precise in drafting policy language to ensure that the prohibitions on social media postings do not (i) implicate mere "disparagement," (ii) seek to prevent employees from complaining about their employers, or (iii) prohibit employees from saying things online that may

be embarrassing to the company from a public relations perspective, but rather should be used solely to protect actual employer, client or employee confidential information and prevent illegal, actionable harassment.

2. Employers must be careful before taking disciplinary action based on their employees' social media posts.

3. All supervisors and human resources personnel should be trained so that they also are aware of the NLRB's restrictions on social media prohibitions.

4. Employers would be well-advised to consult with counsel on the drafting of polices, the training of supervisors, and certainly prior to making any disciplinary decisions based upon social media posts.

For additional information regarding the NLRB's second report on social media, please feel free to contact one of the attorneys in our Employment and Labor Practice Group.

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