Sills Cummis & Gross P.C.

Client Alert **Employment & Labor**

Recent Social Media Developments Impacting Employers

NLRB: Latest Decisions Addressing Social Media Policies and Activities

Within the past several months, the National Labor Relations Board ("NLRB") has issued four precedent-setting opinions addressing the legality of an employer's use of social media as a basis for taking adverse employment action. These decisions apply to both unionized and non-unionized workforces.

The key issue in each of these cases was whether the employer's actions compromised the right of employees to engage in "protected concerted activities" for the purpose of their "mutual aid and protection." However, as noted in a prior alert, recent federal case law could void all NLRB decisions dating back to January 4, 2012 (including those discussed below). Until there is clarity the NLRB decisions continue to be significant in shaping social media use, policy and practice.

On April 19, 2013, the NLRB, in *Design Technology Group, LLC*, found that an employee's Facebook posts that criticized a manager's handling of employee concerns were a "classic connected protected activity" under the National Labor Relations Act ("the Act").

In that case, workers had approached their manager about closing the store they

worked in at 7 PM instead of 8 PM, because of safety concerns. The manager advised that she would discuss those concerns with corporate officials, but the issue was never resolved. Subsequently, two employees posted messages on Facebook that were critical of how the manager handled that issue. Another employee showed the manager those posts and six days later, both employees who made the critical Facebook posts were fired by the manager.

The NLRB determined that the Facebook posts were part of the employees' efforts to convince their employer to close the store earlier in the evening, based on their concerns about working late in an unsafe neighborhood. The NLRB found that those posts were protected under the Act and that the employees' terminations constituted unfair labor practices.

Design Technology comes on the heels of three other NLRB social media rulings issued late last year.

In *Hispanic United of Buffalo* (December 14, 2012), the NLRB held that the termination of five employees for violating an employer's policies on the basis of their social media activity was unlawful. In that case, five employees posted comments on Facebook that were critical of a co-worker who was scheduled to meet with and complain to management about their work performance. The employer terminated the five employees for "bullying and harassing" the co-worker in violation of its policies.

Hispanics United of Buffalo applied settled NLRB law regarding oral communications among co-workers to the social media context. Under NLRB precedent, employees' comments regarding the terms and conditions of their employment are protected if their comments are "concerted" -- meaning they are "'engaged in, with or on the authority of other employees," not only by "one employee on behalf of himself." Finding the actions of these employees to be protected, the NLRB set a relatively low threshold for interpreting social media activity as protected concerted activity under the Act.

The *Hispanics United* decision is especially controversial because it may conflict with an employer's competing obligation under federal and state discrimination laws to prevent workplace harassment. And, the decision may ultimately be in conflict with workplace anti-bullying laws in those states where such legislation is being actively considered.

In *Karl Knauz Motors, Inc.* (September 28, 2012), the NLRB ordered another employer to rescind its social media policy. In that case, the employer terminated the employee for multiple reasons, including violation of the employer's "Courtesy" rule requiring employees to be "courteous, polite and friendly" to customers, vendors, suppliers and fellow employees and not to use "language which injures the image or reputation of the Dealership."

The NLRB held that the "Courtesy" rule violated the NLRA because employees could "reasonably construe its broad prohibition against 'disrespectful' conduct and 'language' which injures the image or reputation of the Dealership as encompassing Section 7 activity." However, the NLRB upheld the employee's termination, finding it was not motivated by protected concerted activity, but rather was solely based on the employee's Facebook postings that did not relate to the terms and conditions of his or any other employee's employment. The NLRB did not address whether other posts would be protected by the Act.

In *Costco Wholesale Corp.* (September 7, 2012), the NLRB ruled that an employer's overbroad social media policy violated the National Labor Relations Act because it prohibited employees from posting statements "that damage the Company, defame any individual or damage any person's reputation or violate the policies outlined in the Costco Employee Agreement." The NLRB ordered Costco to rescind the policy based on its finding that the policy inhibited employees from engaging in protected concerted activity.

NJ Legislative Update: Proposed Law Seeks to Protect Employee and Job Applicant Passwords

A-2878, a bill that prohibits employers from requiring, or requesting, a current or prospective employee to reveal, as a condition of employment, his or her user name, password or other means of accessing the employee's personal social media account, has passed both houses of the NJ Legislature and is awaiting further action by Governor Chris Christie. While it is not clear as of this writing whether Governor Christie will sign or veto this bill, the implications to employers of this potential new law are far reaching.

If enacted, this bill would prohibit employers from even asking an employee or prospective employee whether he or she has a profile on a social media site. In addition, the bill would prohibit employers from requiring prospective employees

to waive or limit any protection granted to them under the law as a condition of applying for or receiving an offer of employment. It provides for a $1,000 civil penalty for the law's first violation and $2,500 for each subsequent violation. If Governor Christie signs this bill into law, New Jersey would join other states that have enacted legislation preventing employers from requesting social media access information, including Arkansas, California, Delaware, Illinois, and Michigan, though it would be the first state to prevent employers from inquiring if employees or applicants have a social media account.

Notably, the bill does not prevent employers from performing their own online search to determine if a prospective or current employee is on a social media site. Accordingly, if a social media account is publically available, an employer would not run afoul of this proposed law by independently viewing an employee's or prospective employee's social media account. This type of activity could have other potential pitfalls associated with it however, such as learning protected class information about applicants.

We will continue to monitor the signing status of this bill.

What These Decisions and the Prospective NJ Statute Mean to Employers

In light of the foregoing, we recommend the following:

- Employers should review and consider revising social media polices and hiring practices to address the NLRB decisions, the new NJ legislation, if enacted, and EEO issues associated with searches on applicants.
- With respect to policies, employers should ensure that prohibitions placed on employees' communications do not prohibit employees' rights to engage in protected concerted activity.
- Employers should continue to exercise caution when disciplining or terminating any employee based on his/her social media activities and should also consider training its managers in this area so that they do not inadvertently run afoul of these laws.
- It is important to consult with counsel to consider whether an employee's comments or posts would be deemed to be protected concerted activity under the Act before any disciplinary action is taken by the employer based on those comments or posts.

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If you have any questions regarding any of the foregoing developments or would like assistance or guidance on implementing changes to policies, notices, forms or employment contracts impacted by same, please contact any of the following Sills Cummis & Gross attorneys.

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