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Employment Law Commentary

Social Media and the NLRB: Tread Carefully

By Susy Hassan

The National Labor Relations Board ("NLRB") has been increasingly active in issuing guidance on the interrelation of social media use and employee protections under the National Labor Relations Act ("NLRA"). In the past two months, there have been two significant developments in this area of law.

First, on August 18, 2011, the NLRB's Office of the General Counsel released a report discussing the outcome of fourteen cases its Division of Advice has investigated this year involving social media use in the employment context. While the report does not reflect actual decisions of the NLRB, it does indicate the thinking of the NLRB's Chief Attorney who sets guidelines for what cases will be presented to the NLRB for litigation and decision.

Second, on September 2, 2011, a NLRB Administrative Law Judge ("ALJ") issued the first post-hearing decision regarding employee social media use and NLRA rights in a case that was also the subject of the General Counsel's report. This recent decision, *Hispanics United of Buffalo, Inc.*, NLRB ALJ, No.3-CA-27872, was decided against the employer and resulted in the ordered reinstatement of five employees who were found to have been unlawfully discharged for their use of social media to discuss the terms and conditions of their employment.

Taken together, *Hispanics United* and the August NLRB report shed light on two major issues in this area of law:

- When does employee social media use constitute "protected concerted activity" under the NLRA?
- Where is the line drawn between a valid and invalid employer social media policy?

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Protected Concerted Activity

Pursuant to Section 7 of the NLRA, employees have the right to communicate with one another about the terms and conditions of their employment. When such a communication qualifies as protected "concerted activity," an employee cannot legally be disciplined for partaking in it. In the context of social media, the question is when a particular use, such as a Facebook posting, falls under the ambit of Section 7's definition of protected "concerted activity."

NLRB Office of Advice

Six of the decisions chronicled in the General Counsel's report focused on this issue and offer some guidance as to what kinds of social media use may qualify as protected activity. To begin with, social media use is more likely to qualify as protected concerted activity where the employee discusses the terms and conditions of his or her employment in a manner that is meant to induce or further group action. The General Counsel appears more inclined to characterize social media use in this fashion when it is either directed to fellow co-workers or grows out of an earlier discussion about terms and conditions of employment among co-workers. For example, in the third case summarized in the General Counsel's report, an employee was terminated for posting photographs and commentary on his Facebook page that criticized a sales event held by the employer. The report indicates that, despite the fact that the employee "posted the photographs on Facebook and wrote the comments himself," the social media use qualified as concerted because the employee was "vocalizing the sentiments of his coworkers and continuing the course of concerted activity that began when the salespeople raised their concerns at the staff meeting."

On the other hand, employee social media use is unlikely to rise to the level of protected concerted activity where it is best characterized as an individual complaint about working conditions specific to the employee, and is not directed to co-workers or meant to induce group action. For instance, in the sixth case summarized in the General Counsel's report, the Board concluded that an employee's Facebook post complaining about the employer's tipping policy in response to a question from a non-employee did not amount to protected concerted activity. Although the employee was discussing the tipping policy, a term or condition of his employment, the Board found no evidence of concerted activity because the employee did not discuss the posting with his coworkers, none of them responded to the posting, there had been no employee meetings or any attempt to initiate group action regarding the tipping policy, and the posting did not grow out of the employee's conversation with a co-worker.

The report also suggests that employee comments that are "maliciously false," a seemingly high standard, will not be protected under the NLRA and that offensive or inappropriate comments about an employer's *clients* are also unlikely to be protected. For instance, in the eighth case summarized in the General Counsel's report, the Board concluded that an employee's Facebook posts referring to the employer's mentally disabled clients did not qualify as protected concerted activity, not only because the conduct was not concerted, but because the posts "did not mention the terms or conditions of employment" and were better characterized as communications to her "personal friends about what was happening on her shift."

Hispanics United ALJ Decision

The ALJ decision in *Hispanics United* is consistent with the general guidelines gleaned from the General Counsel's report and also resulted in the same conclusion as that summarized therein. In this case, five employees were terminated for complaining on Facebook about a co-worker's allegations of poor job performance. The ALJ found that the terminations were unlawful because the social media use qualified as protected, concerted activity in that it was a discussion between co-workers about the terms and conditions of their employment. The employer was ordered to reinstate all five employees.

This decision highlights that an employer is only liable for violating an employee's right to engage in concerted activity where it is established that the employer in fact knew of the "concerted nature of the activity." *Hispanics United of Buffalo, Inc.*, NLRB ALJ, No.3-CA-27872 at page 7. Further, the case confirms a focal point of the General Counsel's report that "individual action is concerted so long as it is engaged in with the object or initiating or inducing group action" and that the "object of inducing group action need not be express." *Id.* Lastly, by citing to established NLRB precedent outside the social media context, *Hispanics United* is a good reminder that while the medium of communication is a new one, much of the substantive analysis in the social media context will remain the same.

Employer Social Media Policies

The second major issue in this area of law relates to where the line is drawn between a valid and invalid employer social media policy. The report suggests that policies will be found to be invalid where they are overbroad in the sense that they would effectively prohibit employees from engaging in protected activity. For example, the General Counsel found a policy overbroad where it prohibited "inappropriate discussions" about the company, its managements, or its employees because this prohibition encompasses protected concerted activity. Employers should not only avoid overbroad prohibitions that could be interpreted to prohibit protected concerted activity, but should also consider including a disclaimer in their social media policies specifically indicating that none of the prohibitions contained in their policy should be interpreted to interfere with employee rights under the NLRA.

Whether employee social media use is considered protected concerted activity and whether an employer social media policy runs counter to the NLRA are fact dependent issues and require analysis on a case-by-case basis. However, as the General Counsel investigates more

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cases and continues to issue guidance, and as the NLRB continues to issue case decisions, the law in this area will quickly develop and produce more tangible guidelines for employers to consider.

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Here at Morrison & Foerster, across all of our practice groups, we are seeing complex, cutting-edge legal issues arising out of social media. In an effort to stay on top of these emerging issues, and to keep our clients and friends informed of new developments, we launched the newsletter *Socially Aware: The Social Media Law Update*. If you wish to subscribe to *Socially Aware*, please send an email to sociallyaware@mofo.com. To review earlier issues of *Socially Aware*, visit us at http://www.mofo.com/sociallyaware/.

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