NLRB Issues Report Presenting Recent Case Developments Arising In The Context Of Social Media

OCTOBER 1, 2011

On August 18, 2011, Lafe E. Solomon, the Acting General Counsel of the National Labor Relations Board issued a periodic report of cases the General Counsel's office considers as having raised significant legal or policy issues. In this particular report, Mr. Solomon presented recent case developments arising in the context of social media including the protected and/or concerted nature of employees' Facebook and Twitter postings, the coercive impact of a union's Facebook and YouTube postings, and the lawfulness of employers' social media policies and rules including policies restricting employee contacts with the media. The provisions of the National Labor Relations Act ("NLRA" or the "Act") discussed here apply to all employees - both union and nonunion. All of the cases discussed in the report were decided upon a request for advice from a Regional Director of the NLRB.

A review of the cases identified by Mr. Solomon highlights what employers have already come to know: social media - Facebook, Twitter, YouTube, and the like - are a potential minefield for unfair labor practice charges as they all posit potential opportunities for employees to engage in concerted activity that is protected by the Section 7 of the Act. What distinguishes the cases where the Regional Directors found violations are the degree to which the online conduct was "collective" and whether it was geared toward the terms and conditions of employment. Further, enforcement of social media policies by employers has lead to findings that certain provisions which arguably could interfere with concerted activity are unlawfully overbroad under the Act. The lesson for employers is to carefully draft their social media policies to ensure compliance with the Act and to consider employees' protected rights when enforcing the policies' provisions.

A summary of the cases described in the Acting General Counsel's report is below:

Employees' Facebook Postings About Job Performance And Staffing Were Protected Concerted Activity

In this case, the Regional Director found that where five co-workers posted and commented on Facebook about an employee's criticism of the co-workers' job performance and the employer's staffing practices, and were terminated following the employee's complaint of "cyber bullying," the co-workers were engaged in "concerted activity". The Regional Director distinguished the "concerted activity" of the co-workers who were acting in concert with each other from the acts of a single employee (whose Facebook postings would not be concerted activity). The Regional Director further held that the discharged co-workers were engaged in protected activity because the comments implicated working conditions, and that the co-workers were engaged in concerted activity for "mutual aid or protection" under Section 7 of the Act as the comments implicated the terms and conditions of employment and were initiated in preparation of a meeting with the employer to discuss matters related to these issues. Thus, the Regional Director held that the co-workers were entitled to the Act's protection.

Internet And Blogging Standards And Discharge Of Employee For Facebook Posting Were Unlawful

In this case, the Regional Director held that an internet and blogging policy that prohibited employees' from making disparaging comments about their supervisors did not contain limiting language that it did not apply to Section 7 activity. Accordingly, the policy was unlawful and an employee who called her supervisor a "scumbag" on Facebook was engaged in activity protected by Section 7 as "[i]t is well established that the protest of supervisory actions is protected conduct under Section 7."

Employees' Facebook Postings Were Part Of Protected Concerted Conduct Related To Concerns Over Commissions

In this case, the Regional Director held that a luxury car salesman employee who posted Facebook photos of an event at the dealership where he worked, disparaging his employer for providing cheap refreshments, was engaged in concerted activity protected under Section 7 even though he acted alone in posting the photos. The Regional Director found that the salesman was expressing the sentiment of his co-workers who were concerned that their employer's austerity (serving hot dogs and water at a luxury car event) would cost them in commissions. The Regional Director found that the salesman was engaged in concerted, protected activity, as he was discussing the terms and conditions of his employment with his co-workers.

Employees' Facebook Postings About Tax Withholding Practices Were Protected Concerted Activity

In this case, the Regional Director held that employees of a sports bar who complained of an unexpected tax bill due to what they considered were their employer's deficient payroll practices were engaged in protected concerted activity when they posted such comments to Facebook. The Regional Director further held that an employee who "liked" a comment from a former co-worker referring to a management employee by a derogatory term was also engaged in protected activity as the comments and the "liking" of others' comments was concerted activity protected by the Act inasmuch as the discussions concerned the terms and conditions of employment. The Regional Director further held that the employer's actions of sending a letter from its attorney to the employees demanding that the employees removed their purportedly defamatory comments from Facebook under the threat of legal action was an unfair labor practice under Section 8(a)(1) of the act and that the employer had no protection from the purported comments as they were just the employees' opinions and factually true. Finally, the Regional Director found that the company's policy prohibiting disparaging the employer through electronic discussion (text, email, internet chat), without a carve out for Section 7 activity, was not lawful.

Employee Who Posted Offensive Tweets Was Not Engaged In Protected Concerted Activity

In a decision favorable to employers, the Regional Director found that a newspaper did not commit an unfair labor practice and its reporter did not engage in protected concerted activity when he used a twitter account to air grievances at work. The reporter identified himself as an employee of the newspaper on his Twitter profile and was encouraged by the newspaper to use Twitter to promote his stories. He was counseled by the newspaper's human resources department, however, not to air his grievances concerning the paper's copy editors and other editorial staff via Twitter. When he refused their coaching, he was discharged. The Regional Director found that the reporter was not

engaged in concerted activity, he acted alone, and was not engaged in protected activity as his "tweets" were not about the terms and conditions of his employment.

Bartender Who Posted Facebook Message About Employer's Tipping Policy Was Not Engaged In Protected Activity

In another win for employers, the Regional Director found that a bartender who complained of his employer's tipping policy on Facebook was not engaged in protected concerted activity under the Act. In distinguishing this case from the previous decision concerning a *group* of restaurant employees discussing the terms and conditions of their employment on Facebook, the Regional Director held that the bartender - although engaged in a discussion of the terms and conditions of his employment - did not discuss the posting with his coworkers *and none of them responded to the posting*. Thus, the Regional Director found that the activity was not "concerted."

Employee Who Posted On Her Senator's "Wall" Was Not Engaged In Concerted Activity

In this case, a dispatcher who worked for a private company that provided medical and nonmedical emergency and nonemergency services to municipalities commented on her U.S. Senator's Facebook page in response to his post that several communities had been awarded federal grants for their fire departments. The employee wrote on the Senator's "wall" that she worked for a private company that the government contracted emergency services to because it was the "cheapest" and that she knew the state would be looking for other "cheap" contractors like her employer, who paid $2 an hour less than the national average and only had two fire trucks for an entire county. Incidentally, the dispatcher's husband also worked for the employer as an EMT. The Director held that her termination for making these comments was lawful because there was no concerted activity and the employee was not discussing the terms and conditions of her employment. Rather, the employee acted alone (she did not even discuss her concerns with her husband) and her complaints did not concern her employment; she was merely expressing her disagreement with how emergency services were handled in her state to her Senator. The Regional Director found that there was no violation of the Act with respect to her termination for violating her employer's code of ethics and business conduct policy and revealing its confidential information.

Employee Who Made Facebook Comments About Mentally Disabled Clients Was Not Engaged In Concerted Activity

In this case, the Regional Director found that a nonprofit homeless shelter did not violate the Act when it terminated its employee for poking fun at its residents on her Facebook page. The employee engaged in a Facebook conversation, on her public "wall," with her friends where she made disparaging remarks about the residents of the facility and indicated that it was "spooky" spending the night in a "mental institution." The Regional Director found that the shelter lawfully terminated the employee's employment as the employee did not engage in protected activity in concert with any other employees. She was not expressing collective concerns over her employment; rather, she was merely joking with friends at the residents' expense.

Employee's Facebook Postings About Manager Were Individual Gripes, Not Concerted Activity

In this case, the Regional Director found that a retail store did not violate the Act when it terminated an employee for making disparaging remarks about her Assistant Store Manager. The Regional Director differentiated this case from other cases where protected concerted activity had occurred by analyzing the employee's statements, noting that she was not organizing her co-workers or seeking to engage in collective activity over the terms and conditions of her employment. The

employee, the Regional Director found, was merely expressing her own frustration over an individual dispute with her Manager, the type of "gripes" that are not protected by the Act.

Union Violated Section 8(b)(1)(A) By Posting "Interrogation" Videotape On YouTube And Facebook

In this case, the Regional Director found that a union had engaged in unlawful coercion when several of its representatives visited a nonunion jobsite and interrogated nonunion employees about their immigration status. The union then posted an edited version of the interrogation on both Facebook and YouTube. The Regional Director found that the nonunion employees had Section 7 rights against interference from the union with their work for a nonunion employer. The Regional Director further found that the union's threats to contact immigration authorities and have the employees deported was unlawful coercion. The Regional Director concluded that the union had engaged in an unfair labor practice.

Provisions Of Employer's Social Media Policy Were Overly Broad

In this case, the Regional Director held that a hospital's social media policy was overbroad where it restricted the hospital employees from using social media that might violate the privacy and confidentiality rights of "any person or entity; prohibited any communication that constitutes embarrassment, harassment, or defamation of the hospital, its officers, board members, and employees; and generally restricted statements that "might damage the reputation or goodwill of the hospital, its staff, or employees." The Regional Director found these policies overbroad in their application to a nurse who, along with others, complained on Facebook of having to work more to compensate for co-workers who had a pattern of calling in sick. The Regional Director found that the policies prohibited protected concerted activity, such as the nurse's Facebook discussion with her colleagues of the working conditions at the hospital.

Employee Handbook Rules On Social Media Policies Were Overly Broad

Similar to the above case, the Regional Director found another employer's social media policy overbroad where it prohibited employees from using the employer's name, address, and other information on their personal profiles. The Regional Director concluded that this prohibition unlawfully restricted employees from using social media to find and communicate with each other to exercise their Section 7 rights. The Regional Director further found that general restrictions such as prohibiting the posting of pictures and the disclosure of "inappropriate or sensitive" information about the employer, lest the employee "put their job in jeopardy," absent limitations or examples of what would be covered by the Act, could reasonably be interpreted as an unlawful prohibition of the employees' right to discuss the terms and conditions of their employment.

Policy's Bar On Pressuring Co-Workers To Use Social Media Was Lawful, But Other Prohibitions Were Too Broad

In this case, the Regional Director found that a policy prohibiting employees from pressuring co-workers to "friend" them on social media was lawful as it was narrowly tailored to prevent harassment. The Regional Director held that two other provisions of the policy, however, were overbroad. The first provision prohibited disclosure of co-workers, customers, or information about the employer, a supermarket, without consent. The second prohibited the use of the employer's logo. The Regional Director concluded that these policies could reasonably be interpreted as interfering with employees' Section 7 rights to discuss the terms and condition of their employment. The Regional Director further held that the restriction on the use of the company logo was

overbroad, as it may prohibit employees from, for example, posting pictures of employees' picket signs during a strike.

Employer's Rule Restricting Employee Contacts With Media Was Lawful
The final case dealt with a grocery store chain's media policy of channeling requests through its corporate relations department to ensure that "one person spoke for the company." The Regional Director found that the policy did not limit the employees' right to discuss the terms and conditions of their employment with the media, as the policy was narrowly tailored to media inquiries seeking comment *from the employer*. The policy did not, the Regional Director found, apply to employees speaking on *their own behalf* to members of the media.

Additional Information:

For additional information, please contact any of the following members of the Group:
Maynard A. Buck: 216.363.4694 or mbuck@beneschlaw.com
Joseph N. Gross: 216.363.4163 or jgross@beneschlaw.com
Peter N. Kirsanow: 216.363.4481 or pkirsanow@beneschlaw.com