

NLRB to Prosecute Charge Regarding Employer's Social Media Policy

November 8, 2010

The National Labor Relations Board (NLRB or the Board) has announced its intention to prosecute a charge that an employer's social media, blogging, and Internet posting policy violates the National Labor Relations Act (NLRA).

On November 2, the NLRB issued a press release concerning an unfair labor practice complaint issued by its Hartford regional office, which alleges that an employer violated the NLRA by terminating an employee who posted negative remarks about her supervisor on her personal Facebook page. *See American Medical Response of Connecticut, Inc.*, Case No. 34-CA-12576 (Region 34, NLRB). The NLRB alleges that the employee's Facebook posting was protected concerted activity under the NLRA, and, therefore, the employer could not lawfully terminate the employee for posting such remarks.

In addition to the charge of unlawful termination, the NLRB is alleging that the employer's blogging and Internet posting policy is "overly broad" and violates the NLRA because it prohibits employees from posting disparaging remarks about the company and its supervisors or from depicting the company on the Internet without the company's permission. The NLRB claims that these provisions of the policy unlawfully interfere with employees' exercise of their right to engage in protected concerted activity under the NLRA.

Although the facts of this case are in dispute and have yet to be tried before an Administrative Law Judge, the Board's decision to pursue a claim that the policy is "overly broad" is significant and is indicative of a theory that could impact all employers covered by the NLRA.

Protected Concerted Activity under the NLRA

As a general matter, Section 7 of the NLRA protects the rights of workers in both union and nonunion settings to communicate with each other about wages, hours, and other terms and conditions of employment. To that end, the NLRA restricts employers from interfering with employees' attempts to "improve their lot as employees through channels outside the immediate employee-employer relationship." *Eastex, Inc. v. NLRB*, 437 U.S. 556, 566 (1978).

The NLRB has held that an employer's general policies or standards of conduct may violate the NLRA if they would "reasonably tend to chill employees in the exercise of their Section 7 rights." *Lafayette Park Hotel*, 326 N.L.R.B. 824, 825 (1998). If a policy can reasonably be read to have such a chilling

effect, the Board may hold that an employer's mere maintenance of the policy is an unfair labor practice, even if there is no evidence of its actual enforcement. *Id.*

In the *American Medical Response* case, by prosecuting not only an allegation that the employer's Internet posting and blogging policy was unlawfully enforced, but also an allegation that the policy is "overly broad," the Board demonstrates that it may pursue similar facial challenges to Internet or social media policies even in the absence of a charge that the policy has been unlawfully enforced.

What This Means for Your Company

All private sector employers should take note of this issue, regardless of whether their workforce is represented by a union. Employers should review their Internet and social media policies to determine whether they are susceptible to an allegation that the policy would "reasonably tend to chill employees in the exercise of their Section 7 rights." In addition, employers should consider whether disciplining an employee for violating such a policy could lead to a charge that the discipline violates the NLRA. An employee who is disciplined for engaging in conduct that is protected by the NLRA may challenge the discipline by filing an unfair labor practice charge, even if the employee is not represented by a union.

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