Morgan Lewis

Social Media, Waivers, and the NLRA

Doreen S. Davis
Joseph E. Santucci, Jr.
Morgan, Lewis & Bockius LLP

January 19, 2012

Agenda

- Social Media
- Waivers

The NLRB and Social Media

- Facebook, LinkedIn, and Twitter are the 21st century water cooler.
- The NLRB treats "social media" complaints about employers the same as it treats more traditional complaints about employers.
  - Employee appeals to outside parties concerning employment conditions are concerted if made in the context of employees acting on behalf of other employees or if made as part of a labor dispute.
  - Postings about employment conditions will generally be considered to be "protected" activity, although expressions of individual gripes are not protected.
  - Protection can be forfeited if the communication is "so disloyal, reckless, or maliciously untrue as to lose the Act's protection."

American Medical Response of Connecticut, Case No. 34-CA-12576 (Oct. 5, 2010)

- AMR employee wrote on her Facebook page, "Love how the company allows a 17 to be a supervisor," referring to AMR's code for a psychiatric patient, and called her boss a "scumbag as usual."
- Employee was terminated.
- NLRB complaint claimed that AMR violated Section 7 of the NLRA.
  - Right to engage in "concerted activities" for "mutual aid or protection."
  - AMR's policy: "Employees are prohibited from making disparaging, discriminatory, or defamatory comments when discussing the Company or the employee's superiors, co-workers, and/or competitors."
  - NLRB position is that employees are allowed to discuss the conditions of their employment with coworkers—at a water cooler or a restaurant or on social media.
- AMR settled the dispute and agreed to amend its policy.

Thompson Reuters Corp., Case No. 2-CA-39682 (Apr. 2011)

- In February 2010, reporter Deborah Zabarenko sent a tweet re: Reuters: "One way to make this the best place to work is to deal honestly with Guild members."
- Reuters verbally disciplined her for the tweet.
- NLRB alleged that Reuters unilaterally implemented an unlawful social media policy that chilled employees' rights to discuss working conditions and improperly applied the policy to Zabarenko.
- Dispute was settled, with Reuters agreeing to adopt a new social media policy.

Lee Enterprises d/b/a Arizona Daily Star, Case No. 28-CA-23267 (Apr. 21, 2011)

- NLRB General Counsel concluded that the newspaper did NOT violate the NLRA when it terminated a reporter for posting inappropriate and unprofessional tweets (concerning Tucson's homicide rate) after being repeatedly told not to do so.
- No written social media policy.
- Some oral statements by management may have prohibited activities protected by Section 7.

Hispanics United Facebook Case, Case No. 3-CA-27872 (Sept. 2011)

- Five employees posted angry and defensive Facebook comments in response to coworker criticism of their performance. Examples include:
  - "Lydia Cruz, a coworker feels that we don't help our clients enough at HUB. I about had it! My fellow coworkers how do u feel?"
  - "What the f … Try doing my job I have 5 programs"
  - "What the Hell, we don't have a life as is, What else can we do???"
- Employees were terminated for violating discrimination and harassment policies.
- ALJ decision, September 2, 2011: employer violated Section 8(a)(1) and employees are entitled to reinstatement with back pay.

Karl Knauz Motors, Inc., Case No. 13-CA-46452 (Sept. 2011)

- Employee Handbook had policies covering (a) Bad Attitude, (b) Courtesy, (c) Unauthorized Interviews, and (d) Outside Inquiries Concerning Employees.
- Salesman upset with quality of food at sales event posts pictures on his Facebook page of people holding hot dogs, water, and chips.
- Salesman also posts pictures of an accident that occurred at a commonly owned dealership under the caption "This is your car. This is your car on drugs."
- Dealership discharges the employee. Salesman had 95 "Facebook Friends," approximately 15 of whom were fellow employees.
- ALJ dismisses claim of unlawful discharge, but finds that three of the four policies were unlawful.

Drafting a Social Media Policy

- Policy may be challenged as unlawful under the NLRA even if it does not explicitly restrict Section 7 activity, if:
  - Employees would reasonably construe the policy to prohibit Section 7 activity;
  - The policy was promulgated in response to Section 7 activity; or
  - The policy is applied in a manner that restricts Section 7 activity.

    See Lutheran Heritage Village-Livonia, 343 NLRB 646, 647 (2004); *Sears Holdings* Advice Memo, 18-CA-19081 (Dec. 4, 2009).

Drafting a Social Media Policy (cont'd)

- Specific provisions that may be challenged under the NLRA:
  - Does the policy generally prohibit disparagement of the company or management?
    - *Or are the anti-disparagement provisions limited to the company's products or services?*
  - Does the policy prohibit posting about wages or other terms and conditions of employment (e.g., as confidential information)?
    - *Or can the confidentiality provisions be reasonably read to address only other types of confidential information?*

Drafting a Social Media Policy (cont'd)

- Does the policy prohibit posting false or misleading information?
  - *As opposed to "maliciously false"?*
- Does the policy prohibit "abusive" or "harassing" posts?
  - *Or is the policy limited to threats or sexual and other unlawful harassment?*
- Does the social media policy incorporate other policies that may be challenged under the NLRA?

Enforcement of Social Media Policies

- Are employees allowed to use company computers and Internet access to engage in personal social media activity?
  - Is such use limited to “non-work time”?
- How will the social media policy be enforced?
  - Does the company monitor employees’ social media activity?
  - Potential surveillance issues
  - Consistent penalties for violations

What Policies May Be Overly Broad?

- Example #1: Policy prohibits "[c]arrying of tales, gossip and discussion regarding company business or employees."
  - NLRB found policy overly broad. Employer disciplined employees for violating policy and terminated an employee who, on Facebook, complained of discipline. *Qualitest Pharmaceuticals*, Case No. 10-CA-38757, Feb. 2011.
- Examples #2-4: Policy prohibits (a) pressuring coworkers to connect via social media, (b) revealing coworkers' personal information, and (c) using company logo or pictures.
  - NLRB found (a) was sufficiently specific and intended only to prevent harassment and not concerted activity, but that (b) was overly broad because it could cover discussion of terms and conditions of employment and (c) "would restrain an employee from engaging in protected activity," for instance by posting a picture of employees picketing the store.

Key Points on Social Media

- Review/revise language in corporate policies:
  - Codes of Conduct
  - Computer/Internet Usage Policies
  - Social Media/Blogging Policies
  - Off-Duty Conduct Policies
- Application of policies to specific statements:
  - Do the statements have a relationship to working conditions?
  - Do the statements violate any other corporate policies, such as anti-harassment policies?
  - Past enforcement and consistent application of policies

NY MCLE Credit Information

In order to receive NY MCLE credits for this webcast, please write down the following alphanumeric code:

C1526.36

You will be asked to provide this code to our MCLE credit administrator after the webcast.

Morgan Lewis

Waivers and the NLRA

- What is a waiver in the employment context?
  - An agreement that requires employees to waive their rights to bring employment-related claims in a court of law and to bring such claims only in arbitration. Many waivers also contain language prohibiting arbitrators from hearing class and collective action claims.
- Are class and collective action waivers enforceable?
  - The Supreme Court held that such waivers were enforceable under the Federal Arbitration Act (FAA) in *Gilmer v. Interstate/Johnson Lane*, 500 U.S. 20 (1991).

Waivers and the NLRA (cont'd)

- What can the NLRB possibly have to say about agreements to arbitrate employment law claims?
  - Section 7 of the NLRA grants employees the right to engage in "protected concerted activity."
  - The NLRB has taken the position that participating in class and/or collective action lawsuits constitutes "protected concerted activity."
- Does it matter if the employees are nonunion?
  - Section 7 of the NLRA applies to all workers, so its protections extend to nonunion employees as well.

Waivers and the NLRA (cont'd)

- First "Wave" of NLRB Waiver Decisions
  - In 2006, the NLRB first held that "maintaining a mandatory arbitration policy as a condition of employment" violated the NLRA. *See U-Haul Company of California, Inc.*, 347 NLRB 375, 377 (2006).
  - The NLRB reasoned that broad language purporting to require arbitration of "any other legal or equitable claims and causes of action recognized by local, state, or federal law or regulations" in U-Haul's arbitration policy would unlawfully "inhibit employees" from filing unfair labor practice charges with the NLRB. *Id.*
  - The NLRB reached similar decisions in other cases during this time period. *See, e.g.*, *Bill's Electric*, 350 NLRB 292, 296 (2007).

Waivers and the NLRA (cont'd)

- How did employers respond to the *U-Haul* decision and its progeny?
  - Because the NLRB's decisions were based on overly broad language regarding what claims were subject to arbitration, many employers responded by simply clarifying that their waivers did not prevent employees from filing unfair labor practice charges with the NLRB.

GC Memorandum 10-06

- In 2010, the NLRB's then-General Counsel – the position responsible for the prosecution of all claims before the NLRB – issued a Guidance Memorandum to the NLRB's Regional Directors. GC Memorandum 10-06.
- Recognizing the Supreme Court's *Gilmer* decision, the GC Memorandum conceded that class and collective action waivers did not violate the NLRA and that "an employer may lawfully seek to have a class action complaint dismissed on the ground that each purported class member is bound by his or her signing of a lawful *Gilmer* agreement/waiver." *Id.* at 2.

GC Memorandum 10-06 (cont'd)

- The GC Memorandum did, however, suggest limitations on the scope and enforcement of waivers:
  - Waivers "may not be drafted using language so broad that a reasonable employee could read the agreement . . . as conditioning employment on a waiver of Section 7 rights."
  - Waivers must "make[] clear to employees . . . that they will not be retaliated against for concertedly challenging the validity" of waivers via "class or collective actions seeking to enforce their employment rights."
  - An employer may not threaten, discipline, or discharge an employee for filing or joining in a class or collective action, regardless of whether that employee has signed a waiver.

GC Memorandum 10-06 (cont'd)

- So what were the practical takeaways from the GC Memorandum?
  - Class and collective action waivers do not violate the NLRA.
  - The NLRA requires that employees be allowed to file class or collective actions challenging the enforceability of a waiver, but it does not prevent a court from dismissing such actions because the relevant employees signed waivers.
  - Employers cannot discipline, threaten, or discharge employees who file or join class or collective actions challenging the enforceability of waivers.

Federal Court Opinions

- In addition to the GC Memorandum, every federal court that has considered whether class and collective action waivers violate the NLRA has rejected that argument.
  - *Grabowski v. C.H. Robinson*, --- F. Supp. 2d ----, 2011 WL 4353998, at *7-8 (S.D. Cal. Sept. 19, 2011)
  - *Valle v. Lowe's HIW, Inc.*, No. 11-1489-SC, 2011 WL 3667441, at *5 (N.D. Cal. Aug. 22, 2011)
  - *Palacios v. Boehringer Ingelheim Pharm.*, 2011 WL 6794438, at *3 (S.D. Fla. Apr. 19, 2011)
  - *Slawienski v. Nephron Phamaceutical Corp.*, No. 10-CV-0460-JEC, 2010 WL 5186622, at *2 (N.D. Ga. Dec. 9, 2010)

D.R. Horton

- In a decision issued on January 3, 2012, the NLRB held that the GC Memorandum 10-06 was an incorrect statement of the law and that the federal court opinions cited in the previous slide are wrong. *D.R. Horton, Inc.*, 357 NLRB No. 184 (2012).
- The NLRB held that the NLRA does prohibit employers from requiring employees to waive their rights to maintain class or collective actions in both judicial and arbitral forums. *Id.*
- As we will discuss later, there are serious flaws, both procedural and substantive, with this decision.

D.R. Horton (cont'd)

- In *D.R. Horton*, the NLRB held that class and collective action waivers violate the NLRA regardless of whether they inhibit employees from filing unfair labor practice charges.
- The NLRB analyzed the NLRA, the FAA, and the Norris-LaGuardia Act, and determined that:
  - Class and collective action waivers violate an employee's right to engage in protected concerted activity under Section 7 of the NLRA.
  - The FAA does not conflict with the NLRA or the Norris-LaGuardia Act on this point, but even if it did, the NLRA and the Norris-LaGuardia Act would control because they were signed into law after the FAA.

D.R. Horton: Limitations

- The NLRB explicitly limited its decision to situations in which a class and collective action waiver was a required condition of employment.
- The decision only applies to employees, not supervisors, managers, or independent contractors.
- The NLRB reserved judgment as to whether its holding would apply where a waiver:

  (1) allowed an employee to bring class and collective actions in arbitration; and/or

  (2) was not a required condition of employment.

Problems with *D.R. Horton*: Procedural

- There are serious questions regarding the validity and enforceability of *D.R. Horton*:
  - First, the decision was made by only two members of the NLRB (which is supposed to have five members) and appears to have been made without delegation to a three-member panel, which would render the decision null and void.
  - Second, NLRB decisions are not self-enforcing, and thus *D.R. Horton* is not currently binding on the litigants in that case, let alone other employers. When and if the NLRB petitions a court of appeals for enforcement of its decision, D.R. Horton will likely file a cross-petition seeking to have the decision set aside.

Problems with *D.R. Horton*: Substantive

- *D.R. Horton* is wrongly decided for multiple reasons:
  - First, the NLRB bases its holding on its interpretation of the FAA and the Norris-LaGuardia Act. The NLRB's interpretation of these statutes is not only wrong, it is also not entitled to any deference as a matter of law.
  - Second, under *Gilmer*, there is no question that the FAA requires enforcement of class and collective action waivers. The NLRB's argument that *Gilmer* does not require enforcement of a waiver that would impair an employee's substantive rights under the NLRA is based on a misreading of dicta in *Gilmer.*

Problems with *D.R. Horton*: Substantive (cont'd)

- Third, by forbidding individual employees from waiving their rights to file class or collective actions, the NLRB is infringing employees' right to refrain from concerted activity under Section 7 of the NLRA. Moreover, by allowing unions, but not individuals, to enter into waivers, the NLRB is unlawfully discriminating against nonunion employees.
- Fourth, the Norris-LaGuardia Act, which the NLRB held to have repealed parts of the FAA when it was enacted, is completely inapplicable to class and collective action waivers.

Practical Advice

- Don't panic.
  - The *D.R. Horton* decision faces an uphill battle to become law anywhere outside of the NLRB.
  - At least one court has already refused to rely on *D.R. Horton* and granted a motion to compel arbitration despite the NLRB's decision. *See LaVoice v. UBS Fin. Servs., Inc.*, 11 Civ. 2308 (S.D.N.Y. Jan. 13, 2012).

Practical Advice (cont'd)

- Consider making your waiver optional rather than a condition of employment.
  - Even if *D.R. Horton* were to become the law of the land, the NLRB explicitly reserved judgment as to whether a waiver that was not presented as a condition of employment violated the NLRA.
  - If signing a waiver is optional, or is presented as a condition for receiving some benefit other than employment/continued employment, it falls outside of the *D.R. Horton* decision.

Presenters

Doreen S. Davis
212.309.6076
ddavis@morganlewis.com
Twitter: @laborlawlady

Joseph E. Santucci, Jr.
202.739.5398
jsantucci@morganlewis.com