

Morgan Lewis

Social Media Webinar Series:
Social Media, Unions and the NLRB

June 8, 2011

Introduction

- Jonathan Fritts, Washington Office
- Ross Friedman, Chicago
- Joe Ragaglia, Philadelphia

Social Media Webinar Series

Upcoming Webinars

- June 22: **Social Media: New Employment Risks in the World of Electronic Information and Technology**
- June 29: **Social Media in eDiscovery**

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Social Media and the NLRA

- National Labor Relations Act (“NLRA”)
- Trap for the Unwary
- Doesn’t Just Pertain to Employers who have Unions

Section 7 Rights Under the NLRA

- ✓ Right to self-organization.
- ✓ Right to form, join or assist labor organizations.
- ✓ Right to bargain collectively.
- ✓ Right to engage in other concerted activities for mutual aid or protection.
- ✓ Right to refrain from any and all such activities.

Section 8(a)(1) and (3)

- It shall be an unfair labor practice for an employer (1) to interfere with, restrain or coerce employees in the exercise of the rights guaranteed in Section 7; (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization.

What If...



Mark and Sandra are discussing their compensation when Sam points out to them that the Company has a policy prohibiting disclosure of salaries. He disciplines them for violating the Company policy.

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Concerted Activity

- Liberal construction of “concerted.”
- Action “with or on the authority of” fellow workers. Meyers Industries, 281 NLRB 882 (1986).
- Calculated to induce, prepare for or otherwise relate to some kind of group action. Belle of Sioux City, 333 NLRB No. 13 (2001).

Concerted Activity (cont'd)

- Action of a single employee can be concerted if the concerns expressed by the individual are a logical outgrowth of the concerns expressed by the group. NLRB v. City Disposal Sys., Inc., 465 U.S. 822 (1984); Belle of Sioux City, 333 NLRB No. 13 (2001).

Concerted Activity (cont'd)

- Activity need not *actually* be concerted to be construed as such by the Board.
- In NLRB v. Mike Yurosek & Son, 310 NLRB 831 (1993), four employees individually refused to work overtime, all for the same reason. There was no group discussion beforehand, nor was there a concerted protest.

Concerted Activity (cont'd)

- The Board held that conduct *implying* a common goal can be concerted, even where employees act individually and do not discuss their actions beforehand.

Protected Activity

- Activity for “mutual aid or protection.”
- “Mutual aid or protection” is also broadly construed to encompass communications about virtually any subject that can fairly be said to bear a relationship to employees’ interests as employees. Eastex, Inc. v. NLRB, 437 U.S. 556 (1978).

Protected Activity (cont'd)

- Not all concerted conduct for mutual aid or protection is protected by the Act.
- Concerted conduct can be expressed in so intolerable a manner so as to lose its protection under the Act. NLRB v. Thor Power Tool Co., 351 F.2d 584 (7th Cir. 1965).

Protected Activity (cont'd)

- Extreme, outrageous or offensive conduct may also lose its protection under the Act.
- PPG Industries, Inc., 337 NLRB No. 176 (2002) (use of vulgar and offensive language – “they’re f***ing you, they’re screwing you” – while soliciting authorization cards is not protected).

Protected Activity (cont'd)

- Note, however, that the Board has generally held that “unpleasantries” uttered during otherwise protected concerted activity does not strip away the Act’s protection.
- Timekeeping Systems, 323 NLRB 244 (1997) (referring to company officials as “a-holes,” “despotic” and “tyrannical” does not render conduct unprotected).

Non-Employees Prohibited From Entering Premises

Persons not employed by the Company may not, at any time, solicit or distribute literature or other printed material on Company property for any purpose. For the purposes of this policy, Company property includes the retail store, the adjacent sidewalks, and the adjacent parking lots.

No Solicitation Policies – Working Time is for Work

Employees may not, at any time, solicit in selling areas or distribute literature in any working or selling area of the store.

“Working time” is the time employees are engaged, or should be engaged, in performing their work tasks for the Company. It includes the working time of both the employee doing the soliciting or distributing and the employee being solicited or to whom such literature is distributed. “Working time” does not include the time when employees are properly not performing their duties; for example, scheduled meal times and breaks. “Selling area” means any area of the store, including the entranceway, in which products are displayed, or customers are allowed access.

If you have any questions as to the meaning of “working time,” “work areas,” or “selling areas,” please inquire to _____.

The NLRB and Social Media

National Labor Relations Board
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The NLRB and Social Media

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ALJ finds parts supplier unlawfully discharged 20 immigrant employees in Minnesota after they refuse
www.nlr.gov

An NLRB administrative law judge has found that parts supplier Supply Technologies LLC unlawfully required employees to sign up for a comprehensive grievance and arbitration system that would eliminate their rights under the National Labor Relations Act, and then discharged 20 employees when they re

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The NLRB is an independent federal agency that administers the primary law...

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The NLRB and Social Media

The screenshot shows the Twitter profile for the National Labor Relations Board (@NLRB). The browser address bar shows the URL <http://twitter.com/#1/nlr>. A blue banner at the top of the page reads: "Welcome to #NewTwitter! Read up on what's new. You can still access old Twitter for a limited time." The Twitter navigation bar includes the Twitter logo, a search bar, and links for Home, Profile, Messages, and Who To Follow. The profile header features two versions of the NLRB seal: a large circular one on the left and a smaller one on the right. The name "NLRB" is displayed in large blue letters, with the handle "@NLRB" and location "Washington, DC" below it. The bio reads "National Labor Relations Board" and includes the website <http://www.nlr.gov>. A green "Following" button is visible. Below the header, there are tabs for "Tweets", "Favorites", "Following", "Followers", and "Lists". Two tweets are shown: one from 9 hours ago with a link to <http://1.usa.gov/jQG4PL>, and another from 2 Jun with a link to <http://1.usa.gov/mCYbKj>. On the right side, a sidebar shows "About @NLRB" with statistics: 235 Tweets, 184 Following, and 1,533 Followers. It also lists "You and @NLRB" with a user "ML" and "Similar to @NLRB" with links to WorkingAmerica, IBEW, and CWAUnion.

The NLRB and Social Media

- 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 protected if made in the context of a “labor dispute.”
 - For a “labor dispute” to exist, only thing required is “a controversy that relates to terms or conditions of employment . . . The presence of an organizing union or a collective bargaining relationship is not required.”
 - Protection can be forfeited if the communication is “so disloyal, reckless, or maliciously untrue as to lose the Act’s protection.”

The First “Social Media” Case

- *Endicott Interconnect Tech.*, 345 NRLB 448 (2005).
 - After a layoff, employee said in a newspaper article that the business had “gaping holes.”
 - After being warned, same employee posted in a public online newspaper forum that “this business is being tanked by a group of people that have no good ability to manage it. They will put it into the dirt...”
 - After second incident, the employee was fired.

The First “Social Media” Case

- Board held that:
 - the layoff was a “labor dispute,” under the broad meaning of that term.
 - the comments were not “so misleading, inaccurate, or reckless, or otherwise outside the bounds of permissible speech” to lose protection
- Board noted that it had permitted “far more offensive comments” in similar circumstances.

NLRB E-mail case

- *The Register Guard*, 351 NLRB 1110 (2007).
 - 3-2 Board majority held that an employer’s e-mail system was “company property” and the employer could restrict employee use as long as the restrictions were not discriminatory.
 - New Board majority likely to change this rule to test involving balancing of Section 7 rights with employer’s legitimate business rights.

The AMR Facebook Case

- Complaint issued October 2010
- On her Facebook page, employee called supervisor a “scumbag,” “dick,” and a mental patient.
- Other co-workers commented on the posting.
- Employee terminated.
- Settlement – February 2011 – changes to social media policy; private settlement of termination.

The Social Media NLRB Wave

- **Build.com – charge filed February 2011**
 - Employee terminated for posting negative comments about supervisor on Facebook.
 - Settled with payment in lieu of reinstatement, and posting notifying employees of right to post comments about terms and conditions of employment on social media.
- **Hispanics United of Buffalo – complaint issued May 18**
 - Employee posted on Facebook that other employees did not do enough to help clients. Other employees responded, defending themselves.
 - Five who responded terminated for harassing original poster.
 - Hearing scheduled for June 22

The Social Media NLRB Wave

- Karl Knauz Motors – complaint issued May 20
 - On Facebook, employee complained about company's handling of a sale that affected compensation.
 - Employee terminated.
 - Hearing scheduled for July 2011.

The NLRB Social Media Wave

- *Arizona Daily Star* – No complaint issued
 - Reporter posted a series of “tweets” critical of other reporters, as well as joking (but classless) comments about crime in Tucson.
 - Employer warned, then terminated employee.
 - Division of Advice – no violation because the tweets did not relate to terms and conditions of employment, and did not seek to involve other employees.

What If

What If...



Susan writes a blog about the Company that divulges unflattering information about a customer. She does this on her own time and personal computer. Tom, her manager, writes her up and puts this in her personnel file.

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What if

- Is visiting a union website unlawful surveillance?
- Is informing an employee that you saw his picture on the union website unlawful surveillance?
- Is “friending” on Facebook or “following” on Twitter unlawful surveillance?

Should You Have a Social Media Policy?

- Benefits of a Policy
 - Put employees on notice of prohibited activity
 - Provide guidance to management
- But... possibility that policy will be challenged under NLRA

Drafting a Social Media Policy

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

- Employer has a policy that states:
- To the extent the Internet or social media is accessed or used at work or on Company computer equipment or via Company –paid access methods, the use of Internet services should be limited to the conduct of Company business.

What if

- Employer Policy states:
- Employees are strictly prohibited from
 - Sending, receiving or storing offensive, obscene or defamatory material;
 - Annoying or harassing other individuals

What if

- Employer policy states:
- Employees must seek and obtain a co-worker's permission before identifying or referring to that co-worker online, and should not post any photos or divulge any personal information about others that would be considered a breach of privacy and confidentiality

Magic Bullet?

- This policy should not be construed as attempting to interfere with employee rights that may be protected under the National Labor Relations Act [federal, state] or other laws and regulations.

Why Is This Important?

Internet Usage Fun Facts

- 30 million Facebook comments made every hour; 1 in 10 have shared links.
- Average Facebook participant is on Facebook for almost an hour every day.
- 300,000 people joining Twitter every day.

Unions Are Ahead of the Social Media Curve

- Organizing, Boycotting and Corporate Campaigns
 - Blogs
 - Links
 - Video
 - Share personal stories
 - Information Gathering
 - Efile your taxes and Your Authorization Card?

Used to Educate

Communication is key to union organizing campaigns

–From CWA website:

“To get a union started, the first thing you need to do is talk to your co-workers. Do they share the same concerns you have? Or, do they have other issues? Is there a common theme to these concerns such as lack of respect and dignity; lack of a voice in the workplace; unfair treatment; and/or wages and benefits lower than other people working in the same industry?”

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Used to Inform

facebook Search Home Profile Find Friends Acc

USW Local 15009 Like
Non-Profit Organization

Wall USW Local 15009 · Most Recent

USW Local 15009
USW **USW Applauds Obama Administration Success Ending China Subsidies In Wind Energy Sector Following Sec**
www.usw.org
United Steelworkers
16 hours ago · Share
2 people like this.

Tracy Hutchison
Groovy tune!

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www.youtube.com
On 6/04 US Uncut DC holds a rock concert "dancin'" at

People You May Know

Jordan Goldberg
15 mutual friends
Add as friend

Daniel Leshtz
18 mutual friends
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Sponsored Create a

Discover new bands faster
Get super-quick downloads using AT&T High Speed Internet Without Home Phone only \$19.95/mo.

Chicago Bucket List
partners.livingsocial.com
365 Things to do in Chicago

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Photos
Discussions
Video

About
We have 224 members in our Local and we work at

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READY TO RETIRE A 401K=50.00
I SAY DAN AND MAXIE IT'S TIME YOU
TWO RESIGN YOUR AN EMBARRASMENT
TO THE INDUSTRY ANDF THE COMPANY!

September 29, 2008 5:53 PM

[trunkkeys](#) said...

One news story should be concerned with who is in there working on the aircraft structures? Is it possible that office workers and other unskilled salaried types are attempting to drill precision holes and install precision hardware in critical Aircraft structural components heading towards Airbus, Lockheed and Gulfstream, without proper training. Maybe the FAA should run an audit. Look at whoever is buying off inspections first, their stamp will be smoking...

September 29, 2008 8:07 PM

[led by the spirit](#) said...

Good point. Can anybody update whats going out there? live too far away to find out.
I picket on sundays and will post a comment then.Im curious if anybody saw any skulls and if we know them.The plant was lights out this past sunday,how bout now?
Any info is greatly appreciated.There is alot of folks monitoring this site for info.Thank and stand United and Strong my Brother's and Sister's

September 29, 2008 8:48 PM

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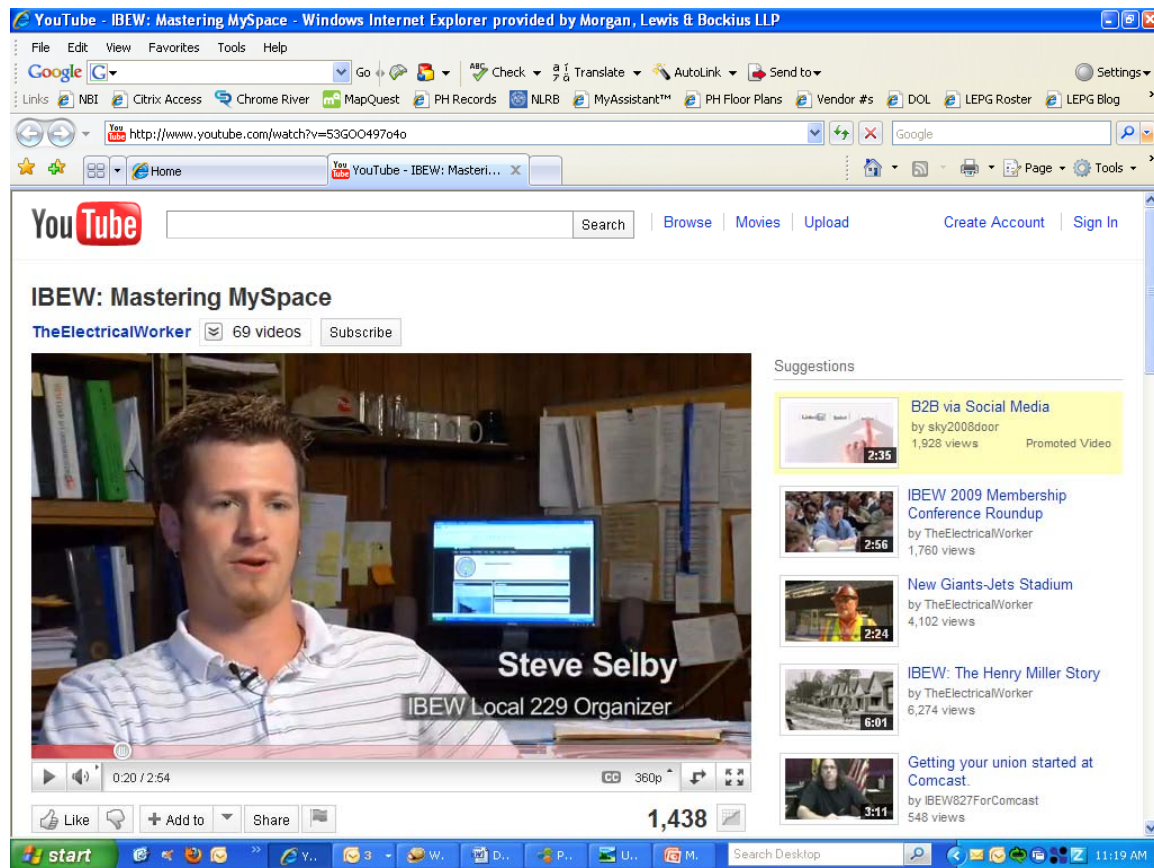
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Used To Organize



Employers Need to Do the Same

■ Negotiations Website

– At Vote Included the following:

- BAFO
- Calculator
- Recent Postings
- Other Postings
- Media Statements
- Strike Facts
- Videos
- Registration for Email Notification of website update



Questions?