

Client Alert

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NLRA Implications of an Overly Broad Social Media Policy

Hartford, Connecticut has suddenly found itself on the cutting-edge of a significant development under federal labor law. The Hartford Regional Office of the National Labor Relations Board recently issued a complaint against American Medical Response of Connecticut, Inc. accusing the ambulance company of illegally terminating an employee because she posted negative comments about her supervisor on her Facebook page. This case, *American Medical Response of Conn.*, NLRB No. 34-CA-12576, may be ground-breaking as it represents the first time the NLRB has asserted that employee statements on a social media networking site may constitute protected activity under the National Labor Relations Act.

Employees, union and non-union alike, are covered by Section 7 of the NLRA, which expressly preserves the right to engage in “concerted activities for the purpose of . . . mutual aid or protection.” Such activity includes efforts to improve terms and conditions of employment through channels outside the immediate employer-employee relationship. This case will test whether employee conduct in banding together on a social media site to express workplace-related complaints, as occurred on the AMR employee’s Facebook page, is protected by Section 7.

In the AMR case, the employee’s supervisor asked the employee to prepare an investigative report in response to a client complaint about the employee’s performance. The supervisor denied the employee’s request to have a union representative assist her with the report. According to the NLRB complaint, the employee later went home and utilized her home computer to post negative comments about her supervisor on her Facebook page, which reportedly included several vulgarities ridiculing the supervisor and a reference to

him as a psychiatric patient. Her colleagues responded by posting comments supportive of the employee. These in turn prompted additional negative comments from the employee. AMR terminated the employee, according to the NLRB complaint, on account of her Facebook postings.

The NLRB complaint alleges that AMR violated the NLRA by maintaining an overly broad social media policy and terminating the employee for her protected, concerted activity. According to the NLRB complaint, AMR’s policy prohibits employees “from posting pictures of themselves in any media, including but not limited to the Internet, which depicts [AMR] in any way . . .” unless the employee receives written approval in advance, and “from making disparaging, discriminatory or defamatory comments when discussing [AMR] or the employee’s superiors, co-workers and/or competitors.”

As reported by the New York Times, the NLRB’s acting General Counsel views this as a “fairly straightforward case under the [NLRA] – whether it takes place on Facebook or at the water cooler, it was employees talking jointly about working conditions . . . and they have the right to do that.” While that premise is generally correct, the NLRB may be overlooking one key aspect of Facebook – whether the employee’s page and posts were open to a wider public audience than just her co-workers. If so, the matter may not be as straightforward as the NLRB would like to believe. Outlandish comments that extend beyond an individual’s co-workers, and that publicly disparage an employer so as to be disloyal, may exceed the bounds of protected activity under the NLRA. We will have to wait for more details to emerge from the AMR hearing now scheduled for January 2011 to learn whether this potential wrinkle bears on the end result and to evaluate the impact this case may have on all employers.

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However, one thing is certain. Employers at this stage should be responsive to the NLRB's allegation that AMR's social media policy is too broad as written because it prohibits all disparaging comments about AMR and its employees. While the comments the AMR employee posted may ultimately be found to be so disparaging as to be disloyal, negative comments that do not go to that extreme will likely remain protected under the NLRA. Another aspect of the policy challenged by the NLRB is the prohibition against posting any pictures depicting AMR without advance approval, since such pictures presumably do not carry a negative connotation. Consequently, any employer with a social media policy should take the time now to review it and, in order to avoid a charge that the policy alone

violates the NLRA, revise it to state that the policy will neither be construed nor applied in a way that interferes with employees' rights to communicate with one another about work-related issues. Employers should also take great care when determining whether to discipline an employee for social media activity, giving due consideration to whether the employee's conduct may constitute protected, concerted activity, in order to minimize the chance that the policy is applied in a manner that interferes with an employee's Section 7 rights. Lastly, for enforcement purposes, employers should remember that supervisors and managers are not covered by the NLRA. Consequently, employers have considerably more leeway in addressing social media issues with these employees.

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