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As social networking continues to revolutionize the way we connect and communicate, the law is still evolving in the area of employer regulation of employee use of social media. A recent National Labor Relations Board (NLRB) settlement with American Medical Response of Connecticut, Inc. (AMR) resolved a complaint alleging that: (1) AMR illegally discharged an employee for posting negative comments about her supervisor on her Facebook page, which drew support from her co-workers, and (2) AMR's blogging and internet posting policy contained unlawful provisions, including one that prohibited employees from making disparaging remarks when discussing AMR or its supervisors and another that prohibited employees from depicting AMR in any way over the Internet without its permission.

NLRB settlement with American Medical Response restricts employer conduct

The context for this settlement is Section 7 of the National Labor Relations Act (NLRA) which protects the right of employees to engage in "concerted activities" for their "mutual aid and protection." Under the terms of the settlement reached between NLRB and AMR, AMR agreed "to revise its overly-broad rules to ensure that they do not improperly restrict employees from discussing their wages, hours and working conditions with co-workers and others while not at work, and that they would not discipline or discharge employees for engaging in such discussions. The company also promised that employee requests for union representation will not be denied in the future and that employees will not be threatened with discipline for requesting union representation." The NLRB did not disclose how AMR would revise its policies and provides no real guidance for employers looking to draft appropriate social media policies.

Settlement has implications outside the unionized workplace

It is not commonly understood that Section 7 of the National Labor Relations Act (NLRA) protects the rights of employees to act together, ***with or without a union,*** to improve their working terms and conditions, effectively allowing them discuss their pay, benefits and other work-related issues with each other, not just directly with their employer, so long as the purpose is their mutual aid and protection. Employees may challenge employer regulation of their conduct on the basis that it restricts their Section 7 rights by filing a complaint with the NLRB claiming that the conduct constitutes an "unfair labor practice."

NLRB decisions have found an employer's general policies or standards of conduct constituted an unfair labor practice. In *Lutheran Heritage Village—Livonia,* 343 N.L.R.B. 646 (2004), the NLRB developed a two-step inquiry for determining whether the maintenance of a personnel policy violates the NLRA. First, the personnel policy is unlawful if it explicitly restricts activities protected by Section 7 of the NLRA. Second, if the personnel policy does not explicitly restrict Section 7 activities, then the policy is only unlawful if: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights.

Earlier decision on employer polices reached a result more favorable to the employer

In an Advice Memorandum issued by the NLRB on December 4, 2009, the NLRB found that Sears Holdings' social media policy did not violate Section 7 of the NLRA. The policy prohibited "[d]isparagement of company's or competitors' products, services, executive leadership, employees, strategy, and business prospects." The NLRB's Division of Advice found that the policy provided

sufficient context to preclude a reasonable employee from construing the policy as a limit on Section 7 activities.

The Sears Holdings' social media policy is similar to AMR's policy, which provided that employees are "prohibited from posting pictures of themselves in any media, including but not limited to the Internet, which depicts the Company in any way, including but not limited to a Company uniform, corporate logo or an ambulance, unless the employee receives written approval … in advance of the postings" and "are prohibited from making disparaging, discriminatory or defamatory comments when discussing the Company or the employee's superiors, co-workers, and/or competitors." It is unclear why these two seemingly similar policies led to different responses from the NLRB. One possible explanation is that Sears Holdings had not terminated or otherwise disciplined any employee for violation of that policy. Another possible explanation is that the current NLRB is taking a more aggressive stance on these types of policies.

Preparing social media policies

Employers should examine personnel policies relating to e-mailing, social media, Internet usage, solicitation, non-disparagement and other similar policies to determine whether they could be challenged for violating their employees' rights under Section 7 of the NLRA. Employers can restrict their employees from making disparaging or untrue statements that damage the reputation of the managers and/or the company; however, they must be clear that employees are not restricted from criticizing or disparaging their companies or supervisors if their aim is to improve wages, benefits or working conditions. Additionally, before disciplining an employee for violation of a social media policy or such similar policy, employers should assess whether the employee's actions could be protected under Section 7 of the NLRA.

If you have questions about this *Alert*, please contact one of the attorneys listed above.

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