CLIENT ALERT: NLRB Prosecutes Employer for Discharging Employee Who Posted Negative Comments on Facebook

Seizing on an issue that could affect nearly any employer with a blogging or social media policy, the General Counsel of the National Labor Relations Board ("NLRB"), through one of its Regional Directors, recently issued a Complaint against an employer who terminated an employee, at least in part, for having posted on Facebook negative comments about her supervisor.

The case is scheduled to go to trial in January 2011, and if it is not resolved outside of trial, it is quite likely to come before the full NLRB in Washington next year. If the case does reach the full NLRB there may be a ruling on whether an employer can limit an employee's right to post critical comments regarding company personnel on social media sites or elsewhere on the internet – even if a union is not in the picture.

Factual Background

The employer had received a customer complaint regarding the employee's work. The employee was allegedly called in by her supervisor to answer questions regarding the matter. The NLRB Complaint states that when the employee requested union representation at the interview the employer refused, and threatened her with discipline for making the request.

After returning home from work, the employee posted a negative comment regarding her supervisor on Facebook. She allegedly then received supportive comments from some of her co-workers, and went on to post additional negative comments about her supervisor.

Legal Issues

The National Labor Relations Act prohibits an employer from discharging, disciplining, or otherwise discriminating against, an employee who engages in "protected concerted activity." Such activity generally includes discussions with co-workers as to wages, benefits, and other terms and conditions of employment. The NLRB alleges that the employer fired the employee for posting the negative comments about the supervisor on Facebook, and that this is unlawful interference with protected, concerted employee activity. The employer denies this, stating that the employee was discharged for multiple serious issues, not simply the negative posting.

Of particular interest is the fact that the employer has a handbook containing policies that prohibit employees from certain kinds of blogging or internet postings. Among other things, the handbook bars employees from making "disparaging, discriminatory or defamatory comments when discussing the company or the employee's superiors, co-workers and/or competitors." The NLRB Complaint alleges that such a rule is unlawful on its face.

This issue has unusually broad ramifications about employee use of internet social media and employer attempts to restrict that activity. The NLRB is typically considered a watchdog over union-management relations, but the National Labor Relations Act actually protects the right of all employees – union and non-union – to engage in "protected, concerted activity." The concept of protected, concerted activity includes employees simply discussing work-related issues, concerns or complaints, even in a completely non-union setting. "Water cooler" chit-chat has become internet social media chit-chat. If the NLRB rules that employees' disgruntled discussions about supervisors via Facebook are under the umbrella of protected, concerted activity, then *all* employers, whether or not their employees are represented by a union, have to be concerned about how they react to and attempt to regulate employee activity on the internet. This will have implications for the specific contents of employee handbooks and policies already in place. Until the case is decided, employers should be careful in drafting, promulgating and enforcing policies as to blogging, postings on social media sites, etc.

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