Legal Implications of Social Media

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Social Media and the National Labor Relations Act

- The National Labor Relations Act protects the rights of employees to act together to address conditions at work, with or without a union. This protection extends to certain work-related conversations conducted on social media, such as Facebook and Twitter.

Section 7 and Section 8(a)(1)of the National Labor Relations Act (the Act or the NLRA)

- Section 7 of the National Labor Relations Act (the Act) guarantees employees "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, **and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection**," as well as the right "to refrain from any or all such activities.“ (emphasis added)
- Section 8(a)(1) of the Act makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7" of the Act.
- For example, an employer may not discharge, constructively discharge, suspend, layoff, fail to recall from layoff, demote, discipline, or take any other adverse action against employees because of their protected, concerted activities.

Communication Among Employees

- The Supreme Court, in Republic Aviation, long ago approved the Board's established presumption that a ban on oral solicitation on employees' nonworking time was "an unreasonable impediment to self-organization," and that a restriction on such activity must be justified by "special circumstances" making the restriction necessary in order to "maintain production or discipline." 324 U.S. at 803–804.
- Communication among employees is a foundation for the exercise of their Section 7 rights. See Central Hardware Co. v. NLRB, *407 U.S. 539, 542-543 (1972).*

Social Media Defined

- Social media include various online technology tools that enable people to communicate easily via the internet to share information and resources. These tools can encompass text, audio, video, images, podcasts, and other multimedia communications.
- Cases concerning the protected and/or concerted nature of employees' social media postings and the lawfulness of employers' social media policies and rules have been presented to the National Labor Relations Board (NLRB) for consideration.
- These issues and their treatment by the NLRB continue to be a "hot topic" among practitioners, human resource professionals, the media, and the public.

Social Media

- Many cases have arisen involving all aspects of social media including Facebook, Twitter, YouTube, etc.
- Existing standards concerning workplace rules are applied.
- Policies may violate the law if it would "reasonably tend to chill employees in the exercise of Section 7 rights."
- Standard protected concerted activity analysis is applied.

Social Media (continued)

- Recent developments have presented emerging issues concerning the protected and/or concerted nature of employees' Facebook, YouTube and Twitter postings, the coercive impact of a union's Facebook and YouTube postings, and the lawfulness of employers' social media policies and rules, including employer's policies restricting employee contacts with the media.

Use of Social Media Can Be Protected Concerted Activity Under The National Labor Relations Act

- Even if employees are not represented by a union, federal law gives employees covered by the National Labor Relations Act the right to band together with coworkers to improve their lives at work - including joining together in cyberspace, such as on Facebook.
- Using social media can be a form of "protected concerted" activity. Employees have the right to address work-related issues and share information about pay, benefits, and working conditions with coworkers on Facebook, YouTube, and other social media. But just individually griping about some aspect of work is not "concerted activity": what employees say must have some relation to group action, or seek to initiate, induce, or prepare for group action, or bring a group complaint to the attention of management.

Protected Concerted Activity

- In the Meyers cases, the Board explained that an activity is concerted when an employee acts "with or on the authority of other employees and not solely by and on behalf of the employee himself." Meyers Industries(Meyers I), 268 NLRB 493, 497 (1984), revd. sub nom. Prill v. NLRB, 755 F.2d 941 (D.C. Cir. 1985),cert. denied 474 U.S. 948 (1985), on remand Meyers Industries (Meyers II), 281 NLRB 882 (1986), affd. sub nom. Prill v. NLRB, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988).
- The definition of concerted activity "encompasses those circumstances where individual employees seek to initiate or to induce or to prepare for group action." Meyers II, 281 NLRB at 887.

Employer Policies and Rules

- Employee use of social media as it relates to the workplace is increasing, raising various concerns by employers, and in turn, resulting in employers' drafting new and/or revising existing policies and rules to address these concerns.
- These policies and rules cover such topics as the use of social media and electronic technologies, confidentiality, privacy, protection of employer information, intellectual property, and contact with the media and government agencies .

Employer Policies and Rules (continued)

- An employer violates Section 8(a)(1) of the Act through the maintenance of a work rule if that rule "would reasonably tend to chill employees in the exercise of their Section 7 rights." Lafayette Park Hotel, 326 NLRB 824, 825 (1998), enfd. 203 F.3d 52 (D.C. Cir. 1999).
- The Board uses a two-step inquiry to determine if a work rule would have such an effect. Lutheran Heritage Village–Livonia, 343 NLRB 646, 647 (2004).
- First, a rule is clearly unlawful if it explicitly restricts Section 7 protected activities. If the rule does not explicitly restrict protected activities, it will only violate Section 8(a)(1) upon a showing that:(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.

Protected Concerted Activity

AMR of Connecticut, out of NLRB Region 34, Hartford, Connecticut.

Otherwise known as the first "Facebook" case.

Complaint alleged that employee's discharge violated 8(a)(1) because she was engaged in protected activity when she posted comments about her supervisor and responded to comments about her supervisor on Facebook.

The complaint also alleged an overly broad rule regarding blogging, internet posting and communications between employees.

Employer agreed to revise its rules. The discharge was resolved through private agreement.

Karl Knauz Motors, Inc. d/b/a Knauz BMW, 358 NLRB No. 164 (2012)

- The Board found that the firing of a BMW salesman for photos and comments posted to his Facebook page did not violate federal labor law. The question came down to whether the salesman was fired exclusively for posting photos of an embarrassing accident at an adjacent Land Rover dealership, which did not involve fellow employees, or for posting mocking comments and photos with co-workers about serving hot dogs at a luxury BMW car event. Both sets of photos were posted to Facebook on the same day; a week later, the salesman was fired.
- The Board agreed with the Administrative Law Judge that the salesman was fired solely for the photos he posted of a Land Rover incident, which was not concerted activity and so was not protected.

Hispanics United of Buffalo, Inc., 359 NLRB No. 37 (2012)

- The Board found that it was unlawful for a non-profit organization to fire five employees who participated in Facebook postings about a coworker who intended to complain to management about their work performance.
- In its analysis, the Board majority applied settled Board law to social media and found that the Facebook conversation was concerted activity and was protected by the National Labor Relations Act.

Three D, LLC d/b/a Triple Play Sports Bar and Grille, 361 NLRB No. 31 (2014)

- Board (Miscimarra, Hirozawa and Schiffer) found that the Employer violated Section 8(a)(1) by discharging two employees for their participation in a Facebook discussion involving claims that employees unexpectedly owed additional state income taxes because of the Employer's withholding mistakes.
- Former employee posted: "Maybe someone should do the owners of Triple Play a favor and buy it from them. They can't even do tax withholding correctly!!! Now I OWE money . . .WTF!!!" A current employee liked this posting. Another current employee posted: " I owe too. Such an asshole."
- The Board applied the **Jefferson Standard** and **Linn** tests: Did the employees' conduct amount to disloyal disparagement of their employer so as to fall outside the protection of the Act or were the statements uttered "with knowledge of its falsity, or with reckless disregard of whether it was true or false."

Triple Play Sports Bar and Grille

- Board found that comments at issue did not even mention, much less disparage the employer's products or services. The Board also found that the comments were not defamatory. The Board then found that the Employer violated Section 8(a)(1) by discharging the two employees because of their protected concerted activity.
- Majority concluded that rule was overbroad under **Lutheran Heritage** because employees would reasonably interpret the rule as proscribing discussion of terms and conditions of employment deemed "inappropriate" by the Employer. Majority noted that unlawful actions in this case indicated to employees that the savings clause did not protect them.
- Dissenting, Member Miscimarra found policy to be lawful: "Nobody can seriously disagree that the two listed infractions—disclosing 'confidential and proprietary information' and 'inappropriate discussions' 'may' violate one or more laws 'and' be proper grounds for discipline." He accused the majority of unfairly combining prongs one and three of **Lutheran Heritage** and he would give effect to the savings language.

Richmond District Neighborhood Center, 361 NLRB No. 74 (2014)

- The National Labor Relations Board found that employees were engaged in concerted activities when they continued to express their concerns about the Center's programs on Facebook. However, employees lost the protection of the Act for comments that advocated insubordination.

Echostar Technologies, LLC, Case 27-CA-066726, JD(SF)-44-12 (2012), adopted by the Board in the absence of exceptions

- Rule on social media that employees may not make "disparaging or defamatory comments about EchoStar, its employees, officers, directors, vendors, customers, etc." was overbroad since it may intrude on employees' Section 7 rights.
- The savings clause of talk to Human Resources if you have questions did not remove the chill of the rule.
- ALJ also finds bad a rule prohibiting employees from use of personal social media with EchoStar resources and/or on company time.

Pier Sixty, LLC,
362 NLRB No. 59 (2015)

- The National Labor Relations Board agreed with the Administrative Law Judge that the Employer violated Section 8(a)(3) and (1) by discharging an employee because of his protected, concerted comments made in a posting on social media.
- The employee had vented his frustration with a supervisor's treatment of the servers by posting from the employee's iPhone the following message on his personal Facebook page:
- Bob is such a NASTY MOTHER FUCKER don't know how to talk to people!!!!!! Fuck his mother and his entire fucking family!!!! What a LOSER!!!! Vote YES for the UNION!!!!!!!
- The employee's post was visible to his Facebook "friends," which included some coworkers, and to others who visited his personal Facebook page. The employee deleted the post on October 28, the day after the election.

Social Media and the National Labor Relations Act

- General Counsel of the NLRB has issued guidance in:

  OM 11-74 dated August 18, 2011

  OM 12-31 dated January 24, 2012; and

  OM 12-59 dated May 30, 2012.

OM 11-74

- The first report, issued on August 18, 2011, described 14 cases. In four cases involving employees' use of Facebook, the Office of General Counsel found that the employees were engaged in "protected concerted activity" because they were discussing terms and conditions of employment with fellow employees. In five other cases involving Facebook or Twitter posts, the activity was found to be unprotected. In one case, it was determined that a union engaged in unlawful coercive conduct when it videotaped interviews with employees at a nonunion jobsite about their immigration status and posted an edited version on YouTube and the Local Union's Facebook page. In five cases, some provisions of employers' social media policies were found to be overly-broad. A final case involved an employer's lawful policy restricting its employees' contact with the media.

OM 12-31

- The second report, issued January 25, 2012, also looked at 14 cases, half of which involved questions about employer policies. Five of those policies were found to be unlawfully broad, one was lawful, and one was found to be lawful after it was revised. The remaining cases involved discharges of employees after they posted comments to Facebook. Several discharges were found to be unlawful because they flowed from unlawful policies. But in one case, the discharge was upheld despite an unlawful policy because the employee's posting was not work-related. The report underscored two main points regarding the NLRB and social media:
- Employer policies should not be so sweeping that they prohibit the kinds of activity protected by federal labor law, such as the discussion of wages or working conditions among employees.
- An employee's comments on social media are generally not protected if they are mere gripes not made in relation to group activity among employees.

OM 12-59

- The third report, issued May 30, 2012, examined seven employer policies governing the use of social media by employees. In six cases, the General Counsel's office found some provisions of the employer's social media policy to be lawful and others to be unlawful. In the seventh case, the entire policy was found to be lawful. Provisions were found to be unlawful when they interfered with the rights of employees under the National Labor Relations Act, such as the right to discuss wages and working conditions with co-workers.

Examples of Cases Considered in the Three Reports:

Social Media Case No. 1

- Employer rule prohibited "making disparaging comments about the company through any media, including online blogs, other electronic media or through the media."
- GC concluded that rule was unlawful because it could be reasonably construed to restrict Section 7 activity.
- Charging Party initiated a Facebook discussion with co-workers because the Employer transferred her to a less lucrative position. The discussion generated complaints about working conditions.
- The Employer's termination of CP was unlawful because it was in response to her protected concerted activity
- In addition, the discharge was unlawful because it was pursuant to an overly broad non-disparagement rule.

Social Media Case No. 2

- CP was disciplined by her supervisor. At lunch break, CP posted on Facebook an expletive and the name of the Employer's store. A coworker later liked the posting. Several days later, CP posted again that the ER did not appreciate its employees. Coworkers who were friends on Facebook did not respond and this did not result in any work-related conversations. CP was discharged for her Facebook postings.
- GC concluded that CP's Facebook postings were merely an expression of an individual gripe since there was no evidence that she was seeking to induce group activity.
- However, GC found that the Employer social media policy violated the Act. The policy, which provided that in external social networking situations, employees should avoid identifying themselves as the Employer's employees unless discussing such terms in an "appropriate manner," was overly broad.
- Appropriate or inappropriate manner means that employees could reasonably conclude that the rule prohibited protected activity, including criticism of the Employer's labor policies, treatment of employees and terms and conditions of employment

Social Media Case No. 3

- Bartender posted to Facebook that a coworker/bartender was a "cheater" who was screwing over customers. This was later explained that the bartender was using a mix instead of the premium alcohol to make a drink.
- This was **not** protected because protests over the quality of service provided by employer have only a tangential relationship to employees terms and conditions. See, e.g., **Five Star Transportation, Inc**., 349 NLRB 42, 44 (2007), enfd. 522 F.3d 46 (1st Cir 2008).
- However, in this case, Employer's policy, which prohibited "disrespectful conduct" and "inappropriate conversations," was overly broad because it could be construed to prohibit Section 7 activity.

Social Media Case No. 4

- The Employer's policy prohibited the use of social media to post or display comments about coworkers or supervisors of the Employer that are vulgar, obscene, threatening, intimidating, harassing or a violation of the Employer's workplace policies against discrimination, harassment, or hostility on account of age, race , religion, sex, ethnicity, nationality, disability or other protected class, status or characteristic.
- The Board has found that a rule forbidding "statements which are slanderous or detrimental to the company" that appeared on a list of prohibited conduct including "sexual or racial harassment" and "sabotage" would not reasonably be understood to restrict Section 7 activity. **Tradesmen International**, 338 NLRB 460, 460-62 (2002).
- GC found the rule here was lawful because it would not reasonably be construed to apply to Section 7 activity.

General Principles

- Rules that are ambiguous as to their application to Section 7 activity and that contain no limiting language or context to clarify that the rules do not restrict Section 7 activity are unlawful.
- Rules that clarify illegal or unprotected conduct, such that they cannot reasonably be construed to cover protected activity, are not unlawful.

Examples of Valid Rules

- Employer's rule prohibited "inappropriate postings that may include discriminatory remarks, harassment and threats of violence or similar inappropriate or unlawful conduct."
- Rule was found lawful since it prohibited plainly egregious conduct, such as discrimination and threats of violence, and there was no evidence that the Employer used the rule to discipline Section 7 activity.

Examples of Valid Rules (continued)

- " Be respectful Always be fair and courteous to fellow associates, customers, members, suppliers or people who work on behalf of the [Employer]. Also keep in mind that you are more likely to resolve work-related complaints by speaking directly with your co-workers or by utilizing our Open Door Policy than by posting complaints to a social media outlet. Nevertheless, if you decide to post complaints or criticism, avoid using statements, photographs, video or audio that reasonably could be viewed as malicious, obscene, threatening or intimidating, that disparage customers, members, associates or suppliers, or that might constitute harassment or bullying. Examples of such conduct include offensive posts meant to intentionally harm someone's reputation or posts that could contribute to a hostile work environment on the basis of race, sex, disability, religion or any other status protected by law or company policy."
- Analysis: In certain contexts, the rule's exhortation to be respectful and "fair and courteous" in the posting of comments, complaints, photographs or videos could be overly broad. However, the rule here provides sufficient examples of plainly egregious conduct so that employees would not reasonably construe the rule to prohibit Section 7 conduct.

Examples of Valid Rules (continued)

- Maintain the confidentiality of [Employer] trade secrets and private or confidential information. Trade secrets may include information regarding the development of systems, processes, products, know-how and technology. Do not post internal reports, policies, procedures or other internal business-related confidential communications."
- Analysis: Employees have no protected right to disclose trade secrets. Moreover, the Employer's rule provides sufficient examples of prohibited disclosures (i.e., information regarding the development of systems, processes, products, know-how, technology, internal reports, procedures, etc.) for employees to understand that it does not reach protected communications about working conditions.

Purple Communications, Inc.
361 NLRB No. 126 (2014)

- Employee use of email for statutorily protected communications on nonworking time must presumptively be permitted by employers who have chosen to give employees access to their email systems.
- Applies only to employees who have already been granted access to the employer's email system in the course of their work and does not require employers to provide such access.
- An employer may justify a total ban on nonwork use of email, including Section 7 use on nonworking time, by demonstrating that special circumstances make the ban necessary to maintain production or discipline. Absent justification for a total ban, the employer may apply uniform and consistently enforced controls over its email system to the extent such controls are necessary to maintain production and discipline.
- Decision does not address email access by nonemployees, nor does it address any other type of electronic communications systems, as neither issue was raised in this case.