Writing On The Wall — The NLRB's NY Facebook Case

Law360, New York (May 23, 2011) -- In its latest effort to address social media in the workplace, the National Labor Relations Board announced in a May 18 press release that it had filed a complaint against a New York nonprofit organization alleging that it unlawfully terminated five employees who complained about working conditions on Facebook.

According to the complaint filed by Buffalo Regional Director Rhonda Ley, Hispanics United of Buffalo's termination of five employees who criticized workload and staffing conditions on Facebook constituted an unfair labor practice.

The case involves an employee who, in advance of a meeting with management about working conditions, posted to her Facebook page a coworker's allegation that employees did not do enough to help the organization's clients. The initial post generated responses from four other employees who defended their job performance and criticized working conditions, including workload and staffing issues. After learning of the posts, Hispanics United discharged all five employees, claiming that their comments constituted harassment of the employee originally mentioned in the Facebook post.

Expert Analysis

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To the extent employers are confronted with or become aware of social media posts that violate company policy, they should consult with counsel to evaluate the offending conduct in light of the National Labor Relations Board's emerging position on this issue, says Scott Faust of Proskauer Rose LLP.

The complaint alleges that the Facebook discussion was protected concerted activity under Section 7 of the National Labor Relations Act because it involved a conversation among fellow employees about the terms and conditions of their employment, including their job performance and staffing levels. A hearing is scheduled for June 22, 2011.

In its recent settlement of a similar case involving an employer in Connecticut, American Medical Response (AMR), the NLRB warned employers against maintaining policies that restrict the right of workers to discuss jobs conditions with coworkers using social media.

Unlike the AMR case, the NLRB complaint against Hispanics United does not allege that the employer maintained an unlawful policy; the complaint focuses exclusively on the employer's termination of the five employees who participated in the Facebook conversation. Moreover, whereas the AMR case involved unionized employees, the five employees terminated by Hispanics United were non-union employees — illustrating the fact that Section 7 rights extend to all employees, whether unionized or not.

The Hispanics United complaint also follows closely on the heels of a highly publicized case involving Twitter, in which the NLRB declined to issue a complaint against the Arizona Daily Star. Based on the Hispanics United complaint and the Board's press release announcing issuance of the complaint, however, it appears that the factors that led the board to decline to issue a complaint in the Arizona Daily Star case — which involved a single employee's inappropriate and offensive Twitter posts on subjects unrelated to terms and conditions of employment — are not present in the Hispanics United case.

The Hispanics United complaint further reinforces the board's focus on social media issues in the workplace. Indeed, Acting General Counsel Lafe Solomon has indicated that there were social media cases pending in every region. Further, citing significant policy issues and lack of precedent, an April 12, 2011, memorandum issued by the acting general counsel directed regional directors to submit all cases involving "employer rules prohibiting, or discipline of employees for engaging in, protected concerted activity using social media, such as Facebook or Twitter" to the Division of Advice before taking any action.

Given the board's focus on social media issues and the apparent volume of pending cases implicating these issues, this will continue to be a rapidly developing area to which employers should pay close attention. As these developments unfold, all employers, whether union or non-union, should review their existing electronic communication and social media policies to clarify that they are not intended to restrict employee rights under the National Labor Relations Act to discuss terms and conditions of employment and workplace matters of mutual concern.

Further, to the extent employers are confronted with or become aware of social media posts that violate company policy, they should consult with counsel to evaluate the offending conduct in light of the board's emerging position on this issue. The board seems intent on expanding the scope of protected concerted activity, and until the lines become clearer, employers must exercise care when enforcing their existing policies and making disciplinary decisions.

--**By Scott A. Faust, Proskauer Rose LLP**

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A version of this article first appeared in the Proskauer's Labor Relations Update blog.