HARRANG LONG GARY RUDNICK P.C.
ATTORNEYS AT LAW

ALERT: SOCIAL MEDIA AND EMPLOYMENT LAW

September 15, 2011

NLRB General Counsel Releases Report on Social Media Cases

The use of social media by employees has been the focus of a recent National Labor Relations Board (NLRB) report by the Acting General Counsel released to the public on August 18, 2011. Recent case developments addressing social media use show that employers must be careful when taking action against employees based on their use of social media, including blogs, text messages, Twitter, Facebook, YouTube, and other new forms of online communications. Many employers are asking, "Can we take any action against employees who hurt our business with their social media activity?"

Key points from the NLRB report speak to this question and are summarized below.

Social Media Posts Where Employer's Action Was ***Unlawful***

In one case, the NLRB found that a nonprofit social services provider unlawfully discharged five employees who had posted comments on Facebook about a coworker's poor job performance. In another case, the NLRB found that a salesperson for a luxury automobile dealership was unlawfully discharged for posting–on his personal Facebook page–photographs and commentary criticizing a sales event held by his employer. In each case, the NLRB deemed the "Facebook wall" discussion a protected "concerted activity" under Section 7 of the National Labor Relations Act (NLRA) because several employees participated in the discussion and/or the discussion was a

For employers in business and government alike, employees are your most valuable, and often most expensive, asset. How you handle employment issues can have a significant impact on your bottom line. Our labor and employment attorneys provide creative, strategic legal counsel – targeted to your mission and business environment. We can help ensure the most proficient use of human resources, prevent costly disruptions, and help you identify and address issues before they become costly claims or lawsuits.

We specialize in providing labor and employment advice, counseling and litigation services to public and private employers.

Labor and Employment Team:

Mark Amberg
Sharon Rudnick
Jens Schmidt
Jeffery Matthews
Joshua Stump
Hwa Go
Andrea Nagles
Kate Watkinson
John Cathcart-Rake
Andrea Coit

Portland • Eugene • Salem
harrang.com • 800.315.4172

direct outgrowth of earlier conversations between the employees.[1] The NLRB also found that the employees were engaged in protected activity for "mutual aid or protection" under Section 7 of the NLRA because the posts were directly related to terms and conditions of employment, i.e., coworker job performance, pay, staffing/workload issues.

Social Media Posts Where Employer's Action Was ***Lawful***

In another case, the NLRB found that a restaurant employer did not violate the NLRA for discharging a bartender for posting a message on his personal Facebook page criticizing the employer's tipping policy where the post at issue was a complaint against the employer made by only one individual, did not involve other employees, and was not a "logical outgrowth" of prior group activity by employees. The NLRB sided with the employer and found that although the Facebook post addressed terms and conditions of employment, i.e., wages, the employee had not engaged in protected "concerted activity" under the NLRA because the Facebook post was made "solely by, and on behalf of, the employee himself."

The NLRB also found that a newspaper employer did not violate the NLRA for discharging a reporter for posting inappropriate tweets to a work-related Twitter account. The employee's tweets criticized a local television station and the employer viewed the tweets as potentially damaging to the goodwill and reputation of the newspaper. The NLRB concluded that the employee's Twitter posts did not involve protected concerted activity under the NLRA because they did not relate to terms and conditions of his employment or involve other employees in issues related to employment. The NLRB found the employer had acted lawfully by disciplining the employee for his social media activity, particularly because the employee disregarded the employer's directive to refrain from posting comments through social media outlets that could damage the company.

Your Company's Social Media Policy

The NLRB also took issue with overly broad social media policies that could reasonably be construed as prohibiting "protected employee activity" under the NLRA. In one case, the NLRB found that a company's blogging and internet policy was overly broad because it prohibited employees from making disparaging remarks when discussing the company or supervisors and from depicting the company in any media without the company's permission. The Board also struck down a company policy subjecting employees to discipline for engaging in "inappropriate discussions" about the company, management, or coworkers using social media. The NLRB found these companies' social media policies violated the NLRA because they prohibited employees from engaging in protected activity and did not contain sufficient limiting language informing employees that the policies did not apply to concerted activities protected under the NLRA. "Concerted activities" protected by the NLRA may include employees' discussions about wages and other terms and conditions of employment, as well as employees' criticisms of labor policies or workplace treatment.

However, in another case the NLRB deemed lawful a company policy that precluded employees from pressuring their coworkers to connect or communicate via social media, because the policy was sufficiently specific and applied only to harassing conduct. The NLRB concluded that the policy could not reasonably be interpreted to restrict employees from engaging in activity protected by the Act.

---

1 Section 7 of the NLRA gives non-supervisory employees (not limited to union members) the right to engage in, or to refrain from engaging in, concerted activities for the purpose of collective bargaining or other mutual aid or protection. 29 U.S.C. § 157.

The full report released by the Acting General Counsel for the NLRB on social media cases can be found at: http://www.employerlawreport.com/uploads/file/OM_11_74_Report_of_the_Acting_General_Counsel_Concerning_Social_Media_Cases_doc[1].pdf.

Employers should keep in mind that the "concerted activity" protections provided to non-supervisory employees under Section 7 of the NLRA can apply to both union and non-unionized work forces so long as the employer is a covered employer under the NLRA.

Employers with questions about how the NLRA and other laws may impact the ability to take action against an employee for inappropriate social media posts or who would like assistance with drafting or interpreting social media policies are encouraged to contact one of our labor and employment attorneys.

Portland
1001 SW Fifth Avenue
16th Floor
Portland, OR 97204-1116
503.242.0000
503.241.1458 (fax)

Eugene
360 E 10th Avenue
Suite 300
Eugene, OR 97401-3273
541.485.0220
541.686.6564 (fax)

Salem
333 High Street, NE
Suite 200
Salem, OR 97301-3632
503.371.3330
503.371.5336 (fax)

harrang.com
800.315.4172