DAMNED IF YOU DO, DAMNED IF YOU DON'T

DRAFTING SOCIAL MEDIA POLICIES IN VIEW OF SECTION 7 OF THE NATIONAL LABOR RELATIONS ACT

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Businesses are relying on social media websites more than ever to compete in today's economy. This trend is evidenced by the millions of corporate Facebook and LinkedIn accounts, Twitter postings and corporate blogs that have sprung up over the past few years and that are being used by businesses to promote their products and services, conduct public relations campaigns, and recruit and screen potential employees. Clearly, social media is no longer just a personal pastime; it is now a necessary and integral tool for businesses to grow and survive in the global marketplace.

However, social media sites also present substantial liability to businesses if misused by employees. Potential claims can include: harassment, discrimination, retaliation, defamation, invasion of privacy, misappropriation of confidential proprietary information or trade secrets, violation of non-compete agreements, tortious interference and wage and hour violations, among others. Simply put, the dangers posed by social media sites are potentially unlimited, and are only likely to increase in the future.

To protect employees, confidential and proprietary information and other interests, and to avoid, or at least diminish, the likelihood of having a claim filed against them, many employers have implemented social media policies to discourage employees from misusing social media sites. These policies typically prohibit employees from: 1) discussing on any social media site an employer's proprietary information; 2) making explicit sexual references regarding coworkers; 3) discriminating against coworkers; and/or 4) disparaging the company, its competitors or its employees. These policies also often warn that violations of the policy could result in disciplinary action up to and including termination.

While many employers have implemented social media policies to ward off potential liability, they may have unwittingly stumbled into another trap—interfering with employees' rights under Section 7 of the National Labor Relations Act (NLRA).[1]

Section 7 of the NLRA, in relevant part, provides:

> Employees shall have 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, and shall also have the right to refrain from any or all of such activities….[2]

Section 7 protects the rights of employees to discuss working conditions where they are not represented by a union, do not have a collective bargaining agreement, and even if they have no intention of forming a union.[3] Additionally, under Section 8(a)(1) of the NLRA, an employer commits an unfair practice where it interferes with, restrains, or coerces employees in the exercise of the rights guaranteed in Section 7.[4] An employer can violate Section 8(a)(1) where it merely maintains work rules that potentially interfere with its employees' Section 7 rights even in the absence of enforcing them.[5] "[T]he appropriate inquiry…is whether the rules would reasonably tend to chill employees in the exercise of their Section 7 rights."[6]

In determining whether a company's rules or policies infringe on Section 7 rights and violate Section 8(a)(1), the National Labor Relations Board (NLRB) applies a two-step inquiry.[7]

First, the NLRB inquires whether the rule under review explicitly restricts Section 7 protected activities.[8] If so, then the employer is deemed to have committed a Section 8(a)(1) violation. If the answer is no, the NLRB then inquires whether: 1) the employees would reasonably construe the rule to prohibit Section 7 activity; 2) the rule was promulgated in response to union activity; or 3) the rule was applied to restrict the exercise of Section 7 rights.[9] Where the answer to any of these questions is in the affirmative, the NLRB may deem the rule unlawful even though it does not explicitly forbid union activity. However, the NLRB has indicated work rules should be read reasonably and in context; that particular phrases should not be read in isolation; and, that violations will not be found simply because a rule could conceivably be read to restrict Section 7 activity.[10]

In 2008, the NLRB's Division of Advice, the agency's think-tank, considered whether Sears Holdings, Inc.'s social media policy violated Section 7 of the NLRA.[11] Sears' social media policy specifically prohibited the dispar-

agement of the company's or its competitor's products, services or business prospects, and discouraged employee participation in protected union organizing activity. The Division of Advice applied the standards set forth in *Lafayette Park Hotel* and *Lutheran Heritage Village-Livonia*, and reasoned:

> Like the rule in *Tradesmen International*, the challenged provision of the Employer's Social Media Policy can not reasonably be construed to apply to Section 7 Activity. The Board's exhortation against reading phrases in isolation prevents us from surgically exercising one piece of the policy for close examination. While the ban on "disparagement of company's … executive leadership, employees [or] strategy …" could chill the exercise of Section 7 rights if read in isolation, the Policy as a whole provides sufficient context to preclude a reasonable employee from construing the rule as a limit on Section 7 conduct. The Policy covers a list of proscribed activities, the vast majority of which are clearly not protected by Section 7. As in *Tradesmen International,* the rule appears in a list of plainly egregious conduct, such as employee conversations involving the Employer's proprietary information, explicit sexual references, disparagement of race or religion, obscenity or profanity, and references to illegal drugs. The Policy preamble further explains that it was designed to protect the Employer and its employees rather than to "restrict the flow of useful and appropriate information." Taken as a whole, as in *Tradesmen International*, the Policy contains sufficient examples and explanation of purpose for a reasonable employee to understand that it prohibits the online sharing of confidential intellectual property or egregiously inappropriate language and not Section 7 protected complaints about the Employer or working conditions. This conclusion is bolstered by evidence showing that employees continued to discuss the Union campaign on the s-tech listserv after the Employer implemented the Policy.[12]

Based on the foregoing, the Division of Advice concluded no employee could reasonably construe Sears' social media policy as prohibiting Section 7 activities, as there was no evidence that Sears implemented the policy in response to protected activities or to discipline Section 7 activity. It reached this conclusion despite the fact that if read in isolation the policy *could* have a chilling effect on employee behavior. Thus, the division's memorandum, although not binding and non-precedential, signaled to employers that the NLRB's approach to social media issues would be pragmatic.

Unfortunately, the NLRB's pragmatic and realistic approach for interpreting social media policies may be short-lived as evidenced by the board's recent press release forewarning same. Specifically, the board announced that its regional office in Hartford, Connecticut, had issued an unfair labor practice complaint alleging that American Medical Response of Connecticut (AMR) unlawfully promulgated and implemented a social media policy and unlawfully terminated employee Dawnmarie Souza for insulting her supervisor on Facebook and inciting responses from other employees.[13] AMR's social media policy, in pertinent part, prohibits employees from making disparaging remarks when discussing the company or its supervisors, and also bars employees from depicting AMR in any way on the Internet without company permission.

While the fate of this unfair labor practice complaint will be unknown for many months as the case proceeds through the NLRB's administrative process, there is a substantial likelihood that AMR's social media policy and its application could be deemed unlawful.

This outcome seems likely for several reasons.

First, President Barack Obama has significantly reconstructed the NLRB's composition with pro-labor members since its holding in *Lutheran*. Second, the new Obama board has reversed a number of Bush-era NLRB decisions and repeatedly articulated a pro-labor agenda. Third, there is precedent for the NLRB to rule that disparaging comments on a social media website constitute protected concerted activity under the NLRA.[14] Fourth, and perhaps most important, the board's current chairperson, Wilma Liebman, has issued several dissenting opinions that strenuously opposed the board's approval, under the "reasonable tendency to chill" union activity test, of employer policies that she believed were too vague in prohibiting certain employee communications. For instance, she has argued that employees might construe an employer policy that prohibited slanderous or detrimental statements about an employer to include protected statements regarding unionization.[15]

Therefore, due to the current board's composition and leadership, there is a substantial likelihood that the NLRB will reverse the approach set forth in *Sears* and find AMR's social media policy violates its employees' Section 7 rights.

In light of the uncertainty and danger created by the *AMR* case, employers are probably feeling they are damned if they do and damned if they don't when it comes to issuing and enforcing social media policies that protect employees and company interests while not violating other employee rights.

However, businesses should not despair, as inactivity is an employer's worst enemy. Rather, they can take reasonable steps to confront the current challenge including, but not limited to:

1. Defining 'social media usage' and what activities are subject to the social media policy.
2. Issuing and enforcing social media policies that prohibit derogatory, defamatory or disparaging communications about the company or its employees through a proper social media policy, but include a disclaimer that the policy is not intended to interfere with or restrict employees' Section 7 or any other rights under the NLRA.
3. Ensuring their social media policies do not prohibit or deter non-supervisory employees from engaging in concerted activities under the NLRA (*e.g.*, discussing wages, workplace safety or other terms and conditions of employment with fellow employees).
4. Informing employees that all other company rules of conduct apply to their use of social media including: anti-discrimination and harassment

See ***Social Media*** *on page 40*