Labor and Employment Alert: NLRB's Acting General Counsel Issues Second Report on Social Media Cases

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Recognizing that the increased use of social media by employees commenting on work-related matters has led to many complex issues for employers, the Acting General Counsel (AGC) issued its first report in August 2011 summarizing cases involving social media issues. As the complexities of this issue are far from resolved, the AGC has now issued a second report summarizing 14 new social media cases that the AGC has considered.

The AGC's second report (pdf), issued on January 24, 2012, focuses significant attention on (1) whether an employee's use of social media to comment on various work-related issues constitutes concerted protected activity; and (2) whether employer policies seeking to impose limitations on an employee's ability to comment on work-related issues are overly broad or could reasonably be interpreted to prohibit comment on Section 7 protected speech.

The 35-page report may be well worth the read for labor professionals struggling to understand the extent to which employee comments in a public forum can be regulated and/or subject to disciplinary action. For those with less time or interest, however, some of the more noteworthy highlights in the report are summarized below.

Of the 14 cases briefed in the AGC's report, seven of them address whether employer policies limiting employee communications are overly broad. In five of the seven cases, the AGC determined that the following policy language was overly broad and thus unlawful:

- Employer rule prohibiting "making disparaging comments about the company through any media, including online blogs";
- Employer rule that employee discussion of terms and conditions must be in an "appropriate" manner, without defining "appropriate";
- Employer work rule prohibiting "insubordination or other disrespectful conduct" and "inappropriate conversation"; and
- Employer policy prohibiting disclosure of confidential, sensitive or non-public information concerning the company without further

definition.

However, in two of the cases analyzed, employer social media policies withstood scrutiny where the employer's rule specifically listed plainly egregious conduct that was prohibited (vulgar, obscene, threatening, intimidating, harassing, and/or unlawful discriminatory comments) and limited employee disclosure of confidential information to matters protected by federal law, like securities or health information laws.

Eleven of the 14 cases summarized by the AGC addressed whether an employee was properly terminated because of on-line forum posts. In five of the 11 cases, the AGC determined that the employee was discharged for engaging in protected concerted activity:

- Employee initiated Facebook discussion because Employer transferred her to a less lucrative position, which included discussion of potential for class action lawsuit;
- Employee posted comments on Facebook complaining about being reprimanded for her involvement in fellow employees' work-related problems;
- Employee posted message on Facebook about the promotion of a coworker she believed to be unfair; post led to three responses from co-worker "friends" discussing the promotion and mismanagement concerns;
- Employee engaged in Facebook conversation with other employees concerning negative attitude of Operations Manager and "drama" he caused at work; and
- Employee made numerous on-line posts related to labor issues, unfair labor practice charges filed, and critical of employer's management style, which elicited supportive responses from numerous employees.

On the other hand, in six of the 11 cases, the AGC found that the employee was not unlawfully terminated for engaging in the following types of conduct. For example:

- Employee Facebook posts griping about her supervisor reprimanding her for failing to perform a task she was not instructed to perform;
- Employee Facebook post complaining about her coworker's job performance where it had a very limited connection to the terms and conditions of her employment;
- Employee's angry, profane comments on Facebook ranting against her coworkers that they blamed her for everything and she hated them.
- Employee Facebook post that her coworker's annoying habit was driving her nuts and she was "about to beat him with a ventilator."

Labor relations professionals should continue to keep several points in mind when attempting to determine the landscape of social media cases in light of the AGC's August 2011 and January 2012 reports:

- The AGC's reports only summarize conduct that the AGC *believes* violates the law. Until the complaints make their way to the NLRB, it is unknown whether the NLRB will agree with the AGC's conclusions;
- Whether a violation of Section 7 exists is an extremely fact intensive question. Each employment action and policy must be examined on its own set of facts and circumstances; and

- Employer policies regarding employee conduct and use of social media should be crafted from the perspective of what conduct a "reasonable" employee would understand as being limited. Policies restricting employee posts should avoid overly broad language, ambiguous words, and undefined terms.

Read more from the Vorys on Labor blog.