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Bob's practice is focused in the areas of litigation and labor & employment. For over 25 years he has worked with clients developing best practices, drafting and negotiating employment agreements and separation agreements, and has advised clients on discipline and discharge, harassment, wage-hour compliance, disability, privacy, non-competition, and reduction-in-force matters. Bob also conducts workplace training, including anti-harassment training, and employment law audits.

SOCIAL MEDIA POLICIES AND PROTECTED CONCERTED ACTIVITY UNDER THE NATIONAL LABOR RELATIONS ACT

As use of Facebook and other social networking sites continues to rise, many employers are adopting social media policies with rules for employees to follow when using social media in ways that may affect the employers' business interests. For example, such policies may prohibit blogging or postings that include any confidential or proprietary business information or that contain defamatory or discriminatory statements regarding co-workers or customers. Many social media policies go further and also prohibit disparaging and/or negative comments about the employer, management, co-workers or customers. A recent case has raised concern that such broad policies may be challenged as unlawful to the extent they restrict legally protected employee communications.

Some employers are surprised to learn that the National Labor Relations Act ("NLRA"), 29 U.S.C. §150 et seq., poses a legal risk for employers when they restrict certain employee activities. Section 7 of the NLRA gives employees the right to form, join or assist a union, and **to engage in other concerted activities for** the purpose of collective bargaining or **other mutual aid or protection**. Section 7 rights apply to both unionized and **non-unionized** workforces. Further, the National Labor Relations Board ("NLRB") and courts have interpreted the words "for ... other mutual aid or protection" broadly to include **individual employee** activities that may benefit other workers.

On November 2, 2010, the NLRB issued a press release announcing that its Hartford Regional Office had filed a complaint against American Medical Response of Connecticut, Inc. ("AMR") alleging, among other things, that AMR had maintained and enforced an overly broad blogging and internet posting policy. *American Medical Response of Connecticut, Inc.*, No. 34-CA-12576. The case involves an AMR employee who, after work hours and from her home computer, posted a negative remark about her supervisor on her personal Facebook page. The remark drew supportive responses from some co-workers and led to further negative comments by the employee about the supervisor. AMR learned of the postings and later discharged the employee for the postings and her violation of AMR's social media policy.

AMR's social media policy stated: "Employees are prohibited from making disparaging, discriminatory or defamatory comments when discussing the Company or the employee's superiors, co-workers and/or competitors." It also stated: "Employees are prohibited from posting pictures of themselves in any media, including ... the Internet, which depicts the Company in any way..." without AMR's permission. According

to the NLRB's Office of the General Counsel, such social media policy provisions "constitute interference with employees in the exercise of their right to engage in protected concerted," and therefore violate Section 7 of the NLRA. The employee's discharge also violated the NLRA, according to the complaint.

Many labor and employment lawyers see the AMR complaint and the Office of General Counsel press release as signaling that broad social media policies will be more prone to attack as violating the NLRA. The fact that a majority of the Board members are now "pro-labor" appointees has heightened concern among management lawyers that the attack on AMR's social media policy is part of a trend towards more vigorous and aggressive enforcement of the NLRA.

Note, however, that the complaint only reflects the position of the Office of the General Counsel; there has been no Board determination that AMR violated the NLRA. The case is scheduled for a hearing before an Administrative Law Judge on January 25, 2011. Indeed, just one year ago the NLRB's Office of the General Counsel issued an Advice Memorandum in *Sears Holdings*, C.A. 18-CA-19801, which **approved** an employer's social media policy containing language similar to that contained in the AMR policy and recommended dismissal of a complaint alleging that the policy violated Section 7 of the NLRA. The policy prohibited employees from discussing "in any form of social media" the "disparagement of company's or competitors' products, services, executive leadership, employees, strategy, and business prospects." In contrast to the AMR case, there was no evidence that the policy had been utilized to discipline any alleged Section 7 activity. In recommending dismissal of the complaint, the Advice Memorandum stated: "Taken as a whole, the [social media 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."

Although it may be too early to draw any conclusions about the significance of the AMR case, the case does give employers good reason to re-evaluate their social media policies. Employers should consider whether it is really necessary to include broad language prohibiting employees from "disparaging" or "criticizing" the employers or their management. Employers should ensure that their policies are clear regarding the types of communications prohibited, as the policy was in the *Sears Holdings* case. Employers should include in their policies language that the policies will not be construed or applied in a manner that interferes with employee rights under Section 7 of the NLRA. Finally, every employer should give careful consideration to its legal risks before discharging or taking any adverse action against an employee for posting negative comments about the employer or its management (including supervisors) on social media sites.

If you have any questions about these issues or any other labor and employment-related issues please do not hesitate to contact any members of the Labor & Employment Group.

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