NLRB SOCIAL MEDIA UPDATE:

INFORMATION EVERY BUSINESS NEEDS TO KNOW,

EVEN IF IT'S NOT A UNION SHOP

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The first time someone told me that a claim had been filed with the National Labor Relations Board ("NLRB") against a non-unionized company, my reaction was, "But the National Labor Relations Act doesn't apply to a non-union shop." While that may be true for many provisions of the NLRA, most private-sector employers – union or non-union – must comply with the requirement that employees be allowed to engage in concerted activity for the purpose of improving their terms and conditions of employment. Since social media is the new water cooler, this means that the NLRA may be implicated anytime an employee posts online comments about his or her terms and conditions of employment.

What are Section 7 Rights, and Why Should Businesses Care?

The National Labor Relations Act includes at Section 7 a protection for employee discussions of terms and conditions of employment. Such discussions are protected for almost all private sector employees, without regard to whether they work in a unionized

workplace. The protection applies to discussions among employees, but not discussions by an employee solely with non-employees. The importance of Section 7 in the context of social media is that the NLRB interprets Section 7 rights to apply in any setting where the employee is *likely* to be conversing with co-workers, even if non-employees can also be a part of the conversation.

In an understandable effort to protect company reputations, many employers have started including social media policies in their employee handbooks. The NLRB has analyzed several of these policies in recent years, and the guidance offered by the NLRB is best described as "murky". Although the overarching rule is that a policy that appears to chill the exercise of Section 7 rights will likely not survive a challenge, the NLRB's analysis sometimes leads to confusing and inconsistent outcomes. This paper will attempt to make some sense of the NLRB's rulings to date.

The NLRB's Composition During the Obama Era Creates Challenges for the Interpretation of its Rulings

Those who have followed the NLRB over the past few years are already aware that the NLRB began flexing its muscles with respect to company social media policies at the same time as it has faced challenges in the Senate and the federal courts. Until this summer, the NLRB had been functioning for some time without a quorum of members appointed by Senate vote, instead operating with members who were recess appointees by President Obama, as a result of the general gridlock in Washington, D.C. The question of the constitutionality of decisions issued during the "recess appointment" era is currently pending before the U.S. Supreme Court, with two Courts of Appeals having

ruled that those decisions are unconstitutional.[1] Pending the Supreme Court's ruling, we are left with uncertainty.

Meanwhile, the NLRB has recently been reconstituted with the full five members authorized by law: three appointed by Democrats and two appointed by Republicans. The current NLRB is expected to continue on the same course as it followed during the "recess appointment" era: dismantling certain Bush-era policies and adopting a variety of policies that are expected to be generally employee- and union-friendly. Since there will be no dispute that those decisions, once issued, will have been issued by a properly-appointed Board, they will be immune from the constitutionality challenge currently pending in the Supreme Court.

In the social media realm, the "recess appointment" Board issued several decisions that look upon with disfavor any employer policies that could be interpreted as chilling conversations among co-workers regarding the terms and conditions of their employment. Regardless of how the Supreme Court rules on the pending challenge from the "recess appointment" era, it is likely that the newly reconstituted full Board will choose to adopt rulings to those issued during the "recess appointment" era. Thus, companies are well-advised to try to comply with even the NLRB's "recess appointment" rulings.

[1] Although neither of the challenged decisions pertains to a social media policy, the Supreme Court's decision regarding the constitutionality of those appealed decisions will resolve the constitutionality of all other NLRB decisions issued during the "recess appointment" era, including some pertaining to social media that are discussed in this paper.

Summary of Recent NLRB Rulings Rejecting Social Media Policies

The only recent decisions by the full Board regarding social media policies have rejected as violative of Section 7 all employer efforts to draft a social media policy. Although these decisions are binding only as to the parties to the case (unless withdrawn by the Board or overruled by a court), they have precedential value with respect to people and entities that are not parties to the specific case.

In a decision issued April 30, 2013 against Dish Network, the "recess appointment" Board held that Dish Network's social media policy violated Section 7 rights by barring defamatory statements regarding Dish Network, and by banning employees from engaging in negative electronic discussion during company time. Both prohibitions were found to have the effect of chilling discussion among employees of their terms and conditions of employment. The policies rejected by the NLRB are as follows:

> DISH Network regards Social Media—blogs, forums, wikis, social and professional networks, . . . as a form of communication . . . . When the company wishes to communicate publicly . . . it has well-established means to do so. Only those officially designated by DISH Network have the authorization to speak on behalf of the Company through such media.
> . . . .
> You may not make disparaging or defamatory comments about DISH Network, its employees, officers, directors, vendors, customers, partners, affiliates or our, or their, products/services.
> . . . .
> Unless you are specifically authorized to do so, you may not
> . . . .
> ☐ Participate in these activities with DISH Network resources and/or on Company time.

In a decision issued January 25, 2013 against DirecTV, the "recess appointment" Board found that these social media policies violated the National Labor Relations Act:

> Never discuss details about your job, company business or work projects with anyone outside the company, especially in public venues, such as seminars and conferences, or via online posting or information-sharing forums, such as mailing lists, websites, blogs, and chat rooms.
>
> Company information is fundamental to our success. Company information can consist of information such as contract terms, marketing plans, financial information, details about our technology, employee records and customer account information.

The NLRB concluded that, because these policies prohibited discussion of the employee's job and of employee records, a reasonable employee might conclude that any discussion of wages or other terms and conditions of employment was also prohibited. Thus, these policies violated Section 7 rights. The fact that the policies also encompassed information that could be the permissible subject of a confidentiality obligation did not save the policies.

DirecTV had a separate intranet policy that stated, "Employees may not blog, enter chat rooms, post messages on public websites or otherwise disclose company information that is not already disclosed as a public record." The NLRB concluded that this language also violated Section 7 rights because "company information" was separately defined to include employee records, with the effect being that public dissemination to co-workers of information regarding wages and other terms and conditions of employment was prohibited by this policy.

In a decision issued September 7, 2012 against Costco, the "recess appointment" Board found that this social media policy violated the National Labor Relations Act:

> Any communication transmitted, stored or displayed electronically must comply with the policies outlined in the Costco Employee Agreement. Employees should be aware that statements posted electronically (such as [to]online message boards or discussion groups) that damage the Company, defame any individual or damage any person's reputation, or

> violate the policies outlined in the Costco Employee Agreement, may be subject to discipline, up to and including termination of employment.

The NLRB determined that this policy violated the National Labor Relations Act because, "employees would reasonably conclude that the rule requires them to refrain from engaging in certain protected communications (i.e., those that are critical of [Costco] or its agents)". The NLRB noted that, had the policy been accompanied by limiting language establishing that the intent was only to protect against the publication of malicious, unlawful, or abusive language, the policy might have passed muster. Without such limiting language, there was no reason for employees to conclude that this policy was not intended to chill discussion of terms and conditions of employment, and thus the policy violated Section 7 rights.

Each of the decisions addressed above was issued by the full "recess appointment" Board. But, the NLRB also issues lower-level rulings. A ruling by an Administrative Law Judge ("ALJ") is one step below a decision by the full Board. Like a decision by the full Board, an ALJ ruling is binding on the parties and of precedential value as to non-parties unless it is overruled by the full Board or a court.

In Butler Medical Transport LLC and Michael Rice and William Lewis Norvell, decided September 4, 2013 (after the properly appointed Board took office), an ALJ found that an employee's termination for having recommended in a private Facebook posting that a former employee seek legal counsel or consult with the NLRB regarding a recent termination was a violation of the NLRA. Butler Medical attempted to justify the termination by relying on a policy set forth as one of many bullet points on a document that is distributed to new hires. The offending bullet point, which was deemed by the

ALJ to be a social media policy, required employees to promise that they "will refrain from using social networking sights (sic) which could discredit Butler Medical Transport or damages (sic) its image." The ALJ determined that this bullet point had the effect of chilling discussion by current employees of the terms and conditions of their employment on a social media site, thereby violating Section 7.

An Advice Memorandum is an opinion issued to a party with general advice regarding a specific policy, at a level below a formal ruling by either an ALJ or the full Board. The most recent publicly-available NLRB Advice Memorandum regarding a social media policy was issued in March 2012 pertaining to Giant Food. This Advice Memorandum rejected the following social media policies:

> Do not disclose, either externally or to any unauthorized Associate any confidential information about the Company or any related companies … or about other Associates, customers, suppliers or business partners.
>
> Do not use any Company logo, trademark or graphics, which are proprietary to the Company, or photographs or video of the Company's premises, processes, operations, or products, which includes confidential information owned by the Company, unless you have received the Company's prior approval.

The problem with the first policy quoted above was that it was considered too vague and would preclude disclosure of information about compensation and other terms and conditions of employment since such information could be regarded by employees as "confidential".

The problem with the second policy quoted above was that it would have precluded the posting of photographs or videos of, for example, the company's premises or logo even if the photograph or video represented a commentary on terms and conditions of employment, or even if the photograph or video was of an event held to

discuss terms and conditions of employment. Since postings that exercise Section 7 rights could include, for example, electronic leaflets, cartoons, or photographs of picket signs depicting the company logo, or use the company name, graphics or trademark for other non-commercial communications, a broad prohibition against the use of such intellectual property could have the effect of chilling the exercise of Section 7 rights. Businesses that wish to protect such intellectual property would be well-advised to provide clear examples of acceptable and unacceptable uses of such intellectual property in any social media policy in order to improve the likelihood that it will survive a challenge before the NLRB.

Importantly, a "savings clause" stating that the two Giant Foods policies quoted above were not intended to infringe Section 7 rights *did not protect them*.

A Guidance by the NLRB is a general summary provided by the NLRB of its positions without respect to a specific issue. Guidances are intended to be advisory, but they are not binding. Although compliance with one's interpretation of a Guidance is not a safe haven, it may be helpful to an employer to demonstrate efforts to comply with a Guidance. The NLRB has, to date, issued three Guidances regarding social media in an apparent effort to assist companies in drafting acceptable social media policies. Unfortunately, the general consensus among attorneys who have closely read the Guidances is that they merely muddy the waters further, appearing at times to split hairs in establishing which social media policies are acceptable and which are not. Counsel are nevertheless encouraged to read the Guidances to try to further interpret the NLRB's views on social media before drafting a social media policy.

With these considerations in mind, the next section of this paper will discuss specific language that has been approved by the NLRB and then propose some general guidelines that businesses may wish to follow in drafting a social media policy.

Language that May Have Been Blessed by the NLRB

In the Advice Memorandum issued March 21, 2012 pertaining to Giant Food that is discussed above, the NLRB approved a portion of the challenged social media policy. Specifically, the NLRB authorized language that prohibited employees from defaming the company's products or services, concluding that comments regarding only a company's products and services (as contrasted with comments about other employees or management) are not protected under Section 7.

In the same Advice Memorandum, the NLRB approved of a policy requiring employees to speak up if they discovered any violation of the company's social media policy. The NLRB concluded that, *once improper restrictions in the social media policy (as are discussed above) were removed*, there was nothing wrong with requiring employees to report violations of a *lawful* social media policy. Naturally, employers should be careful to implement such a reporting requirement *only* after fully vetting the rest of the social media policy.

Suggested Guidelines for Crafting a Social Media Policy

Based on the most recent Board decisions, ALJ opinions, Guidances and Advice Memoranda issued by the NLRB, and assuming that the newly reconstituted Board will follow the same trends as the "recess appointment" Board, the following suggestions may help businesses to avoid the NLRB's wrath:

- An employee's disclosure of information that is subject to protection under trade secret law, copyright law, or the attorney client privilege can be prohibited by the employer so long as the prohibition is clearly explained so that employees are unlikely to interpret any restriction as an infringement on Section 7 rights;
- Employees can be prohibited from defaming the employer's products or services, so long as the prohibition clearly carves out defamatory remarks about compensation and other terms and conditions of employment;
- Employees can be prohibited from attributing their personal comments to their employer;
- Employees can be admonished to use their best judgment in deciding what to post;
- Employees can be admonished to always be fair and courteous to co-workers, customers, and others;
- Employees can be encouraged to always be truthful;
- Employees can be reminded that the employer's anti-harassment policy applies online just as it applies to face to face communications with co-workers, and that posts that would constitute harassment of a co-worker if said in person will still be considered harassment if posted online;
- The use of a "savings clause" asserting that Section 7 rights are not intended to be violated by the social media policy will not "save" an otherwise unlawful social media policy – but in a close case the inclusion of such a clause may help to protect the employer;

- Under no circumstances can the employee (even a non-union employee) be prohibited from discussing the terms and conditions of his/her employment, including but not limited to compensation and safety issues; and
- Policies that include clear examples of permitted and prohibited conduct that adhere to the Board decisions, ALJ opinions, Advice Memoranda and Guidances discussed above are more likely to be approved by the NLRB.

Conclusion

Employers are advised to tread carefully and monitor the NLRB closely as we navigate the changing mores of social media.