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## Deciphering the NLRB's Stance on Social Media Issues

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The National Labor Relations Act was enacted in 1935 to protect trade unionists from unfair labor practices by employers, and afford employees a greater ability to organize and collectively bargain. Social media entered the scene approximately 60 years later, when society (including the labor work force) recognized the ease and benefit of engaging in collective activity without ever leaving one's computer keyboard.

Almost one year ago, in October 2010, those two paths collided at an intersection where the National Labor Relations Board (NLRB) stands as crossing guard to regulate employer decisions and conduct in the social media context. After nearly a year of ambiguity, the NLRB's Office of the General Counsel offered some clarity on Aug. 18, 2011<sup>1</sup> in [a memorandum summarizing recent case developments](#). That memorandum had a specific aim in mind:

Recent developments in the Office of the General Counsel have presented emerging issues concerning the protected and/or concerted nature of employees' Facebook and Twitter postings, and the lawfulness of employers' social media policies and rules. ...I hope that this report will be of assistance to practitioners and human resource professionals.<sup>2</sup>

From the August 2011 memorandum, and with the benefit of 12 months of hindsight, one can start to see an emerging road map for navigating through this social media web. While many of the complaints and rulings over the past year suggest that the NLRB will continue to take a broad and expansive view of employees' rights to post and engage in social media in a manner that touches on workplace issues, the administrative interpretations have not yet been subject to the appeals process. Thus, we must reserve any rush to identify bright-line rules until the judiciary, and possibly the legislature, cast their votes on this burgeoning administrative activism. In the meantime, this article offers an analytical framework for employers to begin to determine whether their employment-related decisions based on employee use of social media may run afoul of the act.

### The Issue

In the movie "The Social Network," Justin Timberlake's character aptly said: "We used to live on farms, then in cities. Now we live on the Internet." For employers, the key is not to bury your head in the sand and pretend social media does not exist. Nor should employers pretend they can simply prohibit employees from engaging in social media activity. Instead, it is critical for employers to learn how to manage social media use, and give careful consideration to their own conduct before pulling the trigger on an employment decision based on social media activity.

Social media has not only made it easier for employees to post opinions, seek assistance from others, and update their current dining location, it has also made it easier to share common experiences and engage with others in a way that has never been seen before, and certainly was not anticipated when the act was passed. Therein lies the issue.

Section 7 of the act provides that employees of both union and non-union workplaces "shall have the right...to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection[.]"<sup>3</sup> As a corollary to that benefit, Section 8 of the act makes it an "unfair labor practice" for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 of this Act[.]"<sup>4</sup> Just as courts have grappled with the application of such traditional claims as defamation and harassment to conduct that takes place through social media, the NLRB has started to look at whether adverse employment action (e.g., refusal to hire, discipline, or

terminate) taken as a result of an employee's social media post or conduct constitutes an interference with the right to engage in "concerted activities" for the employee's "mutual aid or protection."

### Firing the First Salvo

The NLRB's role in this development can be traced back to the complaint it filed in [American Medical Response of Connecticut Inc.](#)<sup>5</sup> In that case, the employee went home from work and posted, among other things, how her boss was a "scumbag as usual," as well as other comments about her working environment. Those comments prompted "supportive responses from her co-workers," which then resulted in additional negative comments being posted by the employee. The employee was called into the office and terminated for her posts. Since the act protects employees who engage in "concerted activities" for their "mutual aid or protection," the NLRB filed a complaint and alleged that the employee's Facebook postings constituted protected activity, and that the employee was unlawfully terminated for engaging in protected concerted activities with her co-workers.

Unfortunately, from a legal observer's standpoint, the parties fully settled the case in February 2011, only one day before a hearing on the complaint was scheduled. But that complaint proved to be only the tip of this administrative iceberg, as the NLRB has continued to defend its position through several other cases.

### The Analytical Framework

There are two primary types of employer conduct that have been the subject of the NLRB cases summarized in the August memorandum. The first involves a claim that adverse action taken against an employee based on his or her social media activity violates the act. The second involves a claim that an employer's social media workplace policy in general violates the act. We address each of these in turn.

**Employment Decisions Based on Social Media Activities.** The past year has seen a four-step process emerge to assist employers in determining whether adverse employment decisions based on social media activity may be considered to be in violation of the act.

**Step 1**—Is the employee's social media activity "concerted"? It is critical to remember that Section 7 of the act only protects employee conduct if it is "concerted." In that regard, the NLRB defined the term concerted in two cases in the mid-1980s, known as [Meyers I](#) and [Meyers II](#). In *Meyers I*, the NLRB determined that employee activity is concerted if it is engaged in "with or on the authority of other employees, and not solely by and on behalf of the employee himself."<sup>6</sup> Some criticism ensued with that definition, and two years later the NLRB had another opportunity in *Meyers II* to refine its position, holding that the definition provided in *Meyers I* "proceeds logically from such an analysis insofar as it requires some linkage to group action in order for conduct to be deemed 'concerted' within the meaning of Section 7."<sup>7</sup> The NLRB made it clear that one should not simply look at the purpose or subject matter of the particular action, but whether there is some tie "to the notion of action taken in 'concert.'"<sup>8</sup>

The following are examples of employee activity that the NLRB has deemed to be concerted:

- Postings by an individual to survey co-workers about workplace issues, resulting in conversations among co-workers.<sup>9</sup>
- An individual sharing a concern with co-workers about an employer's administration of income tax withholding.<sup>10</sup>

On the other hand, the following activity was not deemed to be concerted because the social media activity did not involve other employees:

- Facebook conversation with a relative about a restaurant's compensation and tip practices, where the employee referred to customers as "rednecks" and stated he hoped they choked on glass as they drove home drunk.<sup>11</sup>
- Employee posted comments on a Senator's Facebook wall, referring to his employer's contracts with fire departments and complaining about certain practices.<sup>12</sup>
- Employee posted comments which, although prompting co-worker responses, involved only "personal griping" about an individual dispute between employee and his supervisor.<sup>13</sup>

One potential problem with the question of whether activity is concerted may potentially lie, not with the employer's conduct or even the employee's conduct, but with the fortuitousness of whether co-workers choose to respond to the post in the first instance. In any case, if the social media activity is deemed to be concerted, proceed to Step 2.

**Step 2**—If the answer to Step 1 is "yes," is the concerted activity "protected"?

Employee activity is "protected" if it generally refers to or implicates the terms and conditions of the workplace. The NLRB seems to have adopted a broad view of the types of postings and discussions that implicate working conditions,

requiring one to analyze both the statements on their face, as well as the context in which they were made. The following are examples of activity that the NLRB has considered to be protected:

- Employee sought input from a fellow employee about a dispute with a co-worker advocate who indicated that employees should have the organization's executive director settle their differences.<sup>14</sup>
- Employee posted concerns about the impact that an employer's choice of food and beverage at an auto sales event might have on commissions received from sales.<sup>15</sup>

Examples of activity that was deemed not to constitute protected activity include:

- Newspaper reporter tweeting about public safety beat matters, and city homicides, in language containing sexual references, and also criticizing area television station.<sup>16</sup>
- Employee engaging in Facebook conversation about being "spooked" by being alone on an overnight shift as a recovery specialist in a mental institution, and making derogatory comments about some of the resident mental patients.<sup>17</sup>

If the employee's activity is deemed to be protected, proceed to Step 3.

**Step 3**—If the answers to Steps 1 and 2 are "yes," did the employee nevertheless lose the act's protection?

At this stage, even if the employee has technically engaged in protected concerted activity, one must still determine whether the employee nevertheless "crossed the line" by being so disloyal, and making a statement so reckless or maliciously untrue as to lose the protection of the act. That standard is rooted in two separate decisions by the U.S. Supreme Court in 1953<sup>18</sup> and the NLRB in 1979.<sup>19</sup>

In [Jefferson Standard](#), the Supreme Court upheld the NLRB's finding that employees in that case "deliberately undertook to alienate their employer's customers by impugning the technical quality of the product."<sup>20</sup> And, in [Atlantic Steel](#), the NLRB identified four factors used to determine whether the employee crossed the line: "(1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way, provoked by an employer's unfair labor practice."<sup>21</sup>

Notably, the Supreme Court recognized that one cannot ignore "the underlying contractual bonds and loyalties of employer and employee" and that "insubordination, disobedience or disloyalty is adequate cause for discharge."<sup>22</sup> However, employee conduct that is objectively innocuous and not overtly opprobrious will generally not result in a finding that the employee has lost the act's protection.

If the employee still has the act's protection after Step 3, proceed to the final Step 4.

**Step 4**—Can the employer meet its burden of demonstrating that it would have taken the adverse action against the employee even in the absence of the protected concerted activity?

This last step is akin to the burden imposed on employers in the normal course of an employment discrimination case. Thus, if the employee's social media activity constitutes protected, concerted activity (Steps 1 and 2), and if the employee's conduct did not cross the line so as to lose the act's protection (Step 3), the employer may be able to avoid liability if it can show that the employment decision made, or adverse action taken, is based on a legitimate business reason other than the employee's protected concerted activity.

#### Employer Policies

As discussed above, it is not just the employer decision in a particular situation that is raising the ire of the NLRB. The NLRB has also been looking at employers' social media policies to determine whether they are overbroad and impermissibly vague, and chill employees in the exercise of their rights under the act. This issue rests on a "reasonableness" analysis, and generally looks at the following: (1) whether the workplace policy explicitly restricts rights protected under the act; and (2) if the policy does not explicitly restrict rights, whether it may be reasonably construed to prohibit protected rights.<sup>23</sup>

Examples of language that the NLRB has suggested may violate the act:

- Prohibiting employees from making disparaging, discriminatory or defamatory remarks while discussing the company or other employees, or from posting pictures of themselves that depict the company in any way.<sup>24</sup>
- Prohibiting employees from discussing or disclosing any information about wages, performance evaluations, or other employer information concerning the employee or others.<sup>25</sup>

• Prohibiting employees from "taking things to a newspaper," rather than addressing issues internally and requiring that the employer "speak with one voice."<sup>26</sup>

It will be interesting to see how the NLRB's interpretations hold up in the inevitable appellate process. However, from a best practices standpoint, and until further guidance is available, it is worth putting certain "catch all" language in any social media policy, such as: (1) nothing in this policy is intended to chill employee rights under the law; or (2) any conflict between the language in this policy and the current state of the relevant law will be decided in favor of the law.

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Endnotes:

1. NATIONAL LABOR RELATIONS BOARD, Office of the General Counsel, Division of Operations-Management, Report of the Acting General Counsel Concerning Social Media Cases, Memorandum OM 11-74 (Aug. 18, 2011), accessible at [www.nlr.gov](http://www.nlr.gov).

2. August 2011 Memorandum at 1.

3. 29 U.S.C. §157.

4. 29 U.S.C. §158(a)(1).

5. Case No. 34-CA-12576 (Oct. 27, 2010)

6. *In re Meyers Industries*, 268 NLRB 493, 497 (1984).

7. *In re Meyers Industries*, 281 NLRB 882, 884 (1986).

8. *Id.*

9. *Houston Med. Ctr.*, Case No. 10-CV-38688.

10. [BaySys Tech., LLC](#), Case No. 05-CA-36314 (May 27, 2011).

11. [JT's Porch Saloon & Eatery, Ltd.](#), Case No. 13-CA-46689 (July 7, 2011).

12. *Rural Metro*, Case No. 25-CA-25030 (July 19, 2011).

13. [Wal-Mart](#), Case No. 17-CA-25030 (July 19, 2011).

14. [Hispanics United of Buffalo Inc.](#), Case No. 3-CA-27872 (May 9, 2011).

15. [Karl Knauz Motors Inc. d/b/a Knauz MNW](#), Case No. 13-CA-46452 (May 20, 2011). On Sept. 28, 2011, an Administrative Law Judge determined after a hearing that, while such posts did constitute protected activity, the employer offered sufficient evidence that the employee was fired as a result of other postings that did not reasonably implicate his working conditions.

16. [Lee Enterprises Inc. d/b/a Arizona Daily Star](#), Case No. 28-CA-23267 (April 21, 2011).

17. [Martin House](#), Case No. 34-CA-12950 (July 19, 2011).

18. *NLRB v. Local Union 1229 (Jefferson Standard)*, 346 U.S. 464 (1953).

19. *In re Atlantic Steel Co.*, 245 NLRB 814 (1979).

20. *Jefferson Standard*, 346 U.S. at 472.

21. *Atlantic Steel*, 245 NLRB at 816.

22. 346 U.S. at 473, 475.

23. [Lutheran v. Heritage Village-Livonia](#), 343 NLRB 646 (2004).

24. *American Medical Response of Connecticut Inc.*, Case No. 34-CA-12576 (October 5, 2010).

25. [Innovation Ventures d/b/a Living Essentials, LLC](#), Case No. 25-CA-031722.

26. *BaySys Tech., LLC*, Case No. 05-CA-36314 (May 27, 2011); *Sodexo Inc.*, Case No. 09-CA-46032.

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