NLRB SETTLES FACEBOOK CASE AND ALSO EXPANDS INDIVIDUAL EMPLOYEE PROTECTIONS

Two developments from the NLRB in the past week are of great significance for all private employers, whether or not a union is involved. These developments both involve individual employee rights to engage in concerted activity free of employer interference.

FACEBOOK CRITICISM OF SUPERVISION LEADS TO LITIGATION - AND SETTLEMENT

The NLRB's famous "Facebook Case" (American Medical Response of Connecticut, LLC) that we reported on in our November 9, 2010 Employment Law News Alert was settled this week just before the trial was set to begin. The case involved the discharge of an ambulance driver who posted negative comments about a supervisor on her personal Facebook page. The NLRB alleged that the company had maintained an overly broad policy in its handbook regarding blogging, Internet posting and communications between employees. The settlement was private and the exact terms were not disclosed but, among other things, the company agreed to rescind and revise its overly-broad rules to insure that they do not improperly restrict employees from discussing their wages, hours and working conditions with co-workers and others while not at work, and that they would not discipline or discharge employees for engaging in such discussions.

The settlement leaves open the question of exactly what rules or policies about Social Media and Internet usage are acceptable. What is known is that the rules that the NLRB was prepared to litigate are not that unusual. Many employers have very similar rules and policies. Nevertheless, the employer agreed to rescind and modify its rules as part of the NLRB settlement.

SOCIAL MEDIA RULES THAT WERE THE PROBLEM

Here are the rules in relevant part that the NLRB alleged were unlawfully broad in its original complaint:

Blogging and Internet Posting Policy

- Employees are prohibited from posting pictures of themselves in any media, including but not limited to the Internet, which depicts the Company in any way, including but not limited to a Company uniform, corporate logo or an ambulance, unless the employee receives written approval from the EMSC Vice President of Corporate Communications in advance of the posting;
- Employees are prohibited from making disparaging, discriminatory or defamatory comments when discussing the Company or the employee's superiors, co-workers and/or competitors.

Standards of Conduct

- Rude or discourteous behavior to a client or coworker;
- Use of language or action that is inappropriate in the workplace whether racial, sexual or of a general offensive nature.

Solicitation and Distribution Policy

- It is the policy of the Company to prohibit solicitation and distribution by non-employees on Company premises and through Company mail and e-mail systems, and to permit solicitation and distribution by employees only as outlined below.
- Solicitation of others regarding the sale of material goods, contests, donations, etc., is to be limited to approved announcements posted on designated break room bulletin boards.

What Employers Should be Doing Now

In light of this development, it would be prudent to review any existing Social Media and Internet Usage policies. Consideration might be given to adding language that would make it clear that nothing in the policy should discourage or interfere with employee rights under the National Labor Relations Act. However, until the NLRB makes a final definitive ruling in some later case, even this carve-out language may not be effective in avoiding litigation.

EMPLOYER'S "PRE-EMPTIVE STRIKE" TO PREVENT AN EMPLOYEE FROM ENGAGING IN PROTECTED CONCERTED ACTIVITY IS UNLAWFUL

In a further expansion of the protected rights of an individual employee to talk about wages, hours and working conditions the NLRB held, in a 2 to 1 decision last week, that the discharge of an LPN who talked about another employee's wages was an unlawful "pre-emptive strike" to prevent future protected concerted activity. (Parexel International, LLC)

Discussion of Another Employee's Wages

In this case, the LPN was told falsely by another employee that the employee and his wife had received raises and that he and his wife were being favorably "looked after" by their supervisor because they were from South Africa. The LPN then told her manager what the other employee had said and suggested that the "whole unit should quit and come back with a raise." (The LPN had suggested this to the manager because the LPN had been led to believe that the other employee, who had left employment just a month before had returned with a raise in pay.) A few days later, the LPN was summoned to a meeting with her manager and Human Resources. In the meeting, it was stated that management was concerned with the rumor, believed to have been started by the LPN, that South African employees were being treated more favorably. They then asked if the LPN had discussed this with anyone else, to which she replied that she had not. Six days later the LPN was discharged. Although the LPN had previous performance problems, the timing was certainly poor. This poor timing supported the NLRB's conclusion that the LPN would not have been fired but for her discussion with the other employee about the other employee's wages.

A Question of "Pre-emptive Strike"

The question in the case was whether it was unlawful for this employer to launch a "pre-emptive strike" to prevent the LPN from engaging in protected concerted activity with others. Under the National Labor Relations Act (NLRA) it is an unfair labor practice for a private employer (whether unionized or not) to interfere with, restrain or coerce employees in the exercise of their right to "engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection."

For decades the NLRB has held it would be an unfair labor practice to discharge an employee if:

- the employee was actually engaged in concerted activity, meaning that the activity was engaged in with or on the authority of other employees and not solely on their own behalf;
- the employer knew of the concerted activity;
- the activity was protected by the NLRA; and
- the discharge was motivated by the protected concerted activity.

Actual Concerted Activity is Unnecessary

In this case, however, the NLRB went way beyond what seemed to be settled precedent and stated, "For purposes of deciding this case, we assume...that [the LPN] had not yet engaged in protected activity at the time of her discharge." In other words, the NLRB no longer requires there actually to be protected concerted activity for a discharge to be unlawful. It is enough, according to the NLRB, that if an employer acts to prevent protected concerted activity - "to nip it in the bud" - then that action interferes with and restrains the exercise of employee rights and is therefore unlawful. The NLRB held that the employer's intent in this case was to suppress protected concerted activity and therefore the discharge was unlawful. The LPN was ordered to be reinstated with back pay from a discharge that occurred in 2006.

What this Decision Means for Private Employers

For many years the basic understanding was that individual gripes about wages, hours and working conditions were not concerted and that only group gripes were protected by law. Now, purely individual complaints that form the basis for a discharge decision can give rise to an NLRB complaint that the discharge was intended to stifle future protected concerted activity. For this reason in making discipline or discharge decisions, private employers must be very cautious to avoid any mention of or connection to an employee's individual complaints about wages, hours or working conditions. Unless there is a clear, legitimate reason for the discharge or discipline, employers will be vulnerable to the argument that the action was taken as an unlawful "pre-emptive strike."

Should you have questions, please contact your regular Hall Render attorney or a member of our Employment and Labor Section.