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Thursday, May 17, 2012 – Bloomington, Illinois



SOCIAL MEDIA INVESTIGATION: HOW MUCH IS TOO MUCH? THE IMPACT ON EMPLOYEES' PRIVACY RIGHTS AND POINTERS TO AVOID LITIGATION

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SOCIAL MEDIA INVESTIGATION: HOW MUCH IS TOO MUCH? THE IMPACT ON EMPLOYEES' PRIVACY RIGHTS AND POINTERS TO AVOID LITIGATION

Social media has inundated all aspects of business and society and is now the hotbed of labor and employment law litigation. On January 25, 2012, the National Labor Relations Board ("NLRB") released an Operations Management Memo ("OM 12-31"), its second since taking on its first social media case in November of 2011, which sets forth its position concerning "how much is too much" when it comes to monitoring and restricting employees' use of social media sites ("SMS").

In a nutshell, the message is:

Social media policies should be specific and not overly broad such that they might "chill" activity protected by the National Labor Relations Act ("NLRA").

An employee's SMS activity will not likely be protected by the NLRA unless it relates to the workplace and involves other employees.

How employers, attorneys, insurers, the media and the public are to apply this message in practice, while also chartering a myriad of other state and federal statutes and common law principles that might apply, is still being discovered given the evolving nature of the social media cases.

By way of brief background, the NLRA, which applies to most private employers, was originally enacted in 1935 to protect the rights of employees, primarily with respect to unions. Its reach has grown over time. The NLRA created the NLRB which carries out and enforces the Act. On August 30, 2011, the NLRB published a Final Rule in the Federal Register requiring that employers post an 11"-by-17" poster which provides notice of NLRA rights in the work place. See 76 FR 54006; 29 C.F.R. 104.202. The poster can be found on the NLRB's website: nlrb.gov. On April 17, 2012, the NLRB announced that the implementation date of April 30, 2012 would be suspended in light of a district court ruling that questioned the enforcement mechanisms of the NLRA.

Employee rights under the NLRA in the context of SMS cases stem from the NLRB's interpretation of section 7 of the NLRA. 29 U.S.C. § 157. Section 7 of the NLRA states as follows: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."

As it relates to social media, the terms "concerted activity" and "other mutual aid or protection" are the most important. The NLRB's test is whether the activity is engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself. *Meyers*

Industries, Inc. (Meyers I), 268 NLRB 493, 497 (1984). The NLRB will look at whether the employee had discussed postings with his co-workers and whether responses were posted by co-workers. See OFFICE OF THE GENERAL COUNSEL, NATIONAL LABOR RELATIONS BOARD, MEMORANDUM OM 12-31, REPORT OF THE ACTING GENERAL COUNSEL CONCERNING SOCIAL MEDIA CASES (2012) (hereinafter OM 12-31); OFFICE OF THE GENERAL COUNSEL, NATIONAL LABOR RELATIONS BOARD, MEMORANDUM OM 11-74, REPORT OF THE ACTING GENERAL COUNSEL CONCERNING SOCIAL MEDIA CASES (2011) (hereinafter OM 11-74). In the cases where the NLRB did not find concerted activity, the postings consisted of gripes or comments about what happened during work, but did not engage in any group discussion.

"Mutual aid or protection" traditionally has been interpreted as meaning that the employee's comments must be in some way tied to the terms and conditions of employment in order to be protected. "Terms and conditions of employment" has been broadly interpreted to include everything from complaints about a supervisor to the type of food served to potential buyers of luxury automobiles. *Id.*

The NLRB's pursuit of cases involving social media began with the matter of American Medical Response of Connecticut, Inc. ("AMR"), on November 2, 2010. There, AMR fired an employee over negative remarks the employee made about her supervisor on Facebook from her home computer. The posting drew comments from co-workers. The NLRB took the position that this was protected activity though the matter ultimately settled, with the employer agreeing to not discipline or discharge employees for discussing their wages, hours, and working conditions. OM 11-74, *supra* note 4.

On April 27, 2011, the NLRB issued a news release stating that it approved a settlement with Build.com concerning a complaint that an employee was terminated for having posted comments about the company, which drew responses from other employees. The employees were not part of a union. As part of the settlement, the employer agreed to post a notice stating that employees have the right to post comments about terms and conditions of employment on their social networking pages without fear of punishment. *Id.*

On May 24, 2011, the NLRB advised that a complaint had been filed against Knauz BMW, a Chicago area dealership, where one of its salesmen was fired after posting comments on Facebook criticizing the dealership for the quality of food and drink that it offered its customers and after the employee posted comments on Facebook about an accident involving one of its vehicles. Other employees joined in on the comments about the food and drink and expressed concern about how this could have a negative effect on their sales and commissions. The NLRB took the position that the employee was unlawfully terminated because the comments were a discussion of the terms and conditions of employment. On September 28, 2011, the administrative law judge found that there was no violation for the termination of the employee's employment because he was fired for the comments about the accident, which was not a concerted activity. The judge did find the employer in violation of the NLRA because its policies were overly broad. The unlawful provision of the employee handbook included: "No one should be disrespectful or use profanity or any other language which injures the image or reputation of

the Dealership." The other provisions that were found to be unlawful included a prohibition on employees from participating in interviews with, or answering inquiries concerning employees from practically anybody. The NLRB has appealed the ruling regarding the termination.

In the NLRB's recent memo, OM 12-31, it reviewed 14 cases. Half of the cases involve questions about employer social media policies, five of which were found to be unlawfully broad. OM 12-31, *supra* note 4. The NLRB found that it is unlawful for a policy to forbid employees from making "disparaging comments about the company through any media, including online blogs, other electronic media or through the media" because "it would reasonably be construed to restrict" protected section 7 activity. The NLRB also found a policy to violate the NLRA which provided that "employees should generally avoid identifying themselves as the employer's employees unless discussing terms and conditions of employment in an appropriate manner." Additionally, the NLRB found that an employer's disclaimer in a social media policy that nothing in the policy should be construed to prohibit employee rights under the NLRA was not enough to make the overall policy lawful. The NLRB did shine some light on what provisions might be acceptable, including a policy which prohibits the use of social media to "post or display comments about coworkers or supervisors or the employer that are vulgar, obscene, threatening, intimidating, harassing, or a violation of the employer's workplace policies against discrimination, harassment, or hostility on account of age, race, religion, sex, ethnicity, nationality, disability, or other protected class, status, or characteristic." The NLRB also found that an employer could request employees to confine their social networking to matters unrelated to the company if necessary to ensure compliance with securities regulations and other laws. It prohibited employees from using or disclosing confidential and/or proprietary information, including personal health information about customers or patients, and it also prohibited employees from discussing launch and release dates and pending reorganizations.

The other half of the cases addressed in OM 12-31 involved the discharge of an employee after the employee posted comments on Facebook. *Id.* Many of the discharges were ruled to be unlawful because they stemmed from unlawful policies. One of the cases reviewed involved a collections agency that fired a worker for her expletive-laced Facebook post complaining about being transferred to another department. The post rallied support from co-workers. The worker was fired for violating the company's policy against disparaging remarks. The NLRB found that the discharge was unlawful.

The provisions of the NLRA are just one of several restrictions placed upon employers' ability to monitor or restrict employees' use of social networking sites. Chief among them in Illinois is the Personnel Records Review Act. 820 ILCS § 40/0.01, *et seq.* This act applies to businesses with five or more employees. It prohibits employers from gathering or keeping "a record of an employee's associations, political activities, publications, communications or nonemployment activities, unless the employee submits the information in writing or authorizes the employer in writing to keep or gather the information." This prohibition does not extend to:

activities that occur on the employer's premises or during the employee's working hours with that employer which interfere with the performance of the

employee's duties or the duties of other employees or activities, regardless of when and where occurring, which constitute criminal conduct or may reasonably be expected to harm the employer's property, operations or business, or could by the employee's action cause the employer financial liability.

820 ILCS § 40/9.

The Illinois courts have not interpreted this aspect of the Act, much less in the context of social networking sites. It appears to state, on the one hand, that an employer cannot keep any records regarding an employee's associations, political activities and the like, which oftentimes show up on social networking sites, but, if the employer does become aware of other types of activities during work hours or on the employer's premises that interfere with performance, then the employer must keep a record in the employee's personnel file. It also appears to state that employers may keep records so long as the employee authorizes it in writing, which might be integrated into the employers' social networking policy.

The Illinois Eavesdropping Act prohibits eavesdropping, which includes monitoring of electronic communications, unless it is done with the consent of all parties. Again, a social networking policy signed by the employee would help protect against any violations of this Act. 720 ILCS § 5/14-1, *et seq.*

Employers also must be cognizant of the extent to which they use the Internet and social networking sites to screen candidates for open positions. Employers who search social networking sites to perform a background check on an applicant should consider the risks of doing so because the employer might learn information about the applicant's race, age, gender, sexual orientation, religious affiliation, or disability, which could place the applicant in a protected class. For example, the Illinois Right to Privacy in the Workplace Act makes it unlawful for an employer to refuse to hire or discharge any individual, or otherwise disadvantage any individual, because "the individual uses lawful products." 820 ILCS § 55/1, *et seq.* In the context of social networking sites, this might take the form of an applicant or an employee's Facebook page which displays him smoking cigarettes and drinking alcohol. The Illinois Human Rights Act makes it a civil rights violation for an employer to inquire into or to use the fact of an arrest as a basis to refuse to hire a candidate or to treat an employee different than other employees. 775 ILCS § 5/1-101, *et seq.* The fact of an arrest might show up on an individual's social networking site. If an employer decides to conduct a social networking site background check and decides not to hire an individual, if the employer comes across information which places the candidate in a protected class, the employer needs to document an independent basis for not hiring the individual. Or employers can train a specific person to sift through the Internet background check and eliminate any protected class information before giving it to the individual who makes hiring decisions.

There are additional statutes that might come into play, as well as potential common law causes of action that might be filed against an employer for any intrusion on an employee's use of social networking sites, such as intrusion upon the seclusion of another, public disclosure of

private facts, and false light common law claims, negligent hiring if an employer does not conduct a search that would have revealed certain information about criminal propensities for example, the federal Electronic Communications Privacy Act, 18 U.S.C. § 2510, and Stored Communications Act. 18 U.S.C. § 2701, *et seq.* There are additional areas of employment law that are unchartered as of yet. For example, to what extent must an employer become involved in a situation where two employees are friends on Facebook, perhaps one is a supervisor, but they are posting racial slurs or comments that would be considered sexual harassment which could subject the employer to liability. Until specific laws are passed and courts issue a consistent line of opinions, companies and their attorneys may be faced with uneven results when considering how to deal with social media.

Each case needs to be dealt with on a case-by-case basis and discussed with legal counsel. The employer might be in a position where the employer must weigh the risks and benefits of taking certain actions and choosing to violate the National Labor Relations Act over the potential for being sued for racial discrimination or sexual harassment under Title VII of the Civil Rights Act of 1964. 42 U.S.C. § 2000e-2.

This area of law is still developing since most laws were drafted before social networking became popular, but employers can lessen any expectation of privacy that employees might have, and violations of privacy, by taking the following steps:

- Establish a SMS policy that is specific and not overly broad. For example, it is permissible to prohibit the disclosure of "confidential information" so long as "confidential information" is defined.
- Have the employee sign an acknowledgment of receipt and agreement to the SMS policy.
- Include a provision that, if an employee identifies the employer on the employee's SMS, the employee should include language which makes it clear that the postings are the employees' personal views and that the employee is not a spokesperson for the employer.
- Incorporate by reference other existing policies including anti-harassment, anti-discrimination and non-disclosure policies.
- Require a written acknowledgement by employees that they are responsible for the content of their Internet postings during work hours, and/or when using employer-owned computers and smart phones, and whenever their posting associates them in any way with the employer (including any private page that specifically identifies them as an employee of the company).
- Limit employee access to social media during the scope of work and when using employer-provided equipment.

- Make sure that employees are informed that a violation of the company's social networking policy could lead to discipline, including termination.
- Although you cannot rely upon a NLRA disclaimer to rescue an overly broad SMS policy, you should still include one.
- Enforce the policy.

These materials were prepared with the assistance of Joseph V. Pumilia, law clerk, Heyl, Royster, Voelker & Allen.



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Jana Brady joined the firm's Rockford office following graduation from law school in 2003 and became a partner in 2012. She focuses her practice on the defense of civil litigation and federal practice, particularly in the context of employment law, civil rights, medical malpractice, correctional medicine, insurance coverage, school law, and nursing home cases. She also practices in the areas of health care law and creditors' rights in the context of lien adjudication.

Publications

- Co-author, "Back Away from the 'Like' Button: The Potential for Employers' Liability in the Age of Social Networking," *Illinois Defense Counsel Quarterly Monograph* (2011)
- "Physician Disciplinary Records: TMI?!" *IDC Defense Update*, Vol. 11, No. 8 (2010)
- "What Constitutes an Invalid 'Blanket Consent' Within the Purview of Illinois' Mental Health and Developmental Disabilities Confidentiality Act?" *Northern Illinois University Law Review* (2002)
- "Uninsured and Underinsured Motorist Arbitration: Don't Be Put Off by Setoffs," *DuPage County Bar Association Brief* (2001)
- Assistant editor, *Northern Illinois University Law Review*

Public Speaking

- "A Program on the Extent to Which Employers May Monitor/Restrict Employees" St. Mary's Occupational Health & Wellness (2012)
- "Moot Court Prize Competition Champion, Best Oralist, Best Brief" Northern Illinois University Moot Court (2002)

Professional Associations

- Winnebago County Bar Association
- Illinois State Bar Association
- American Bar Association
- Illinois Association of Defense Trial Counsel (Vice Chair, Employment Law Committee)
- Defense Research Institute
- State Bar of Wisconsin

Court Admissions

- State Courts of Illinois and Wisconsin
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