

Client Alert

Employment Practices Group

October 2011

NLRB'S New Posting Requirements and First Reported Decision Regarding Employees' Social Media Communications

The National Labor Relations Board ("NLRB" or the "Board") is spending much of its time and resources focusing on non-unionized workplaces. The Board recently issued a final rule on Notification of Employee Rights under the National Labor Relations Act ("NLRA"), requiring most private employers to post a notice of employees' rights. In addition, on September 2, 2011, an NLRB administrative law judge ("ALJ") held that employees' Facebook communications with each other regarding employment conditions are protected concerted activity under the NLRA even in a non-union environment. This is the first such decision by an NLRB ALJ. Below are the details of the new final rule and the recent decision.

Private Employers Are Required to Post Notice of Employees' Rights

The NLRB has issued a final rule on Notification of Employee Rights under the NLRA. As of January 31, 2012 (postponed from the original deadline of November 14, 2011), most private employers, regardless of whether unionized, must conspicuously post a notice of employees' right to organize, the NLRB's contact information and a list of unlawful employer conduct. If the employer customarily communicates with its employees about personnel rules via its intranet or website, the notice must also be posted on the employer's intranet or website. Not surprisingly, the notice strongly promotes the benefits of unionization. For employers who are reluctant to post, the rule provides that failure to post may constitute an unfair labor practice *per se*. If that is not enough motivation, the rule also provides that knowingly and willfully failing to post the notice may be considered evidence of unlawful motive in certain proceedings before the NLRB. A copy of the notice is available by clicking [here](#). Translated versions are available and must be posted where at least 20% of employees are not proficient in English.

Action Items for Employers: Employers should immediately obtain the notice and post it no later than January 31, 2012. Employers should consider reviewing their employee handbooks to make sure their policies are consistent with the statements set forth on the notice.

Facebook Postings Considered Protected Concerted Activity: *Hispanics United of Buffalo, Inc. and Carlos Ortiz*

On September 2, 2011, an NLRB ALJ held that a Buffalo, New York not-for-profit employer violated the NLRA when it discharged a group of employees who engaged in a Facebook discussion in which they criticized their supervisor and complained about poor working conditions. The employer discharged five employees on the grounds that their behavior was harassing, and, among other things, caused the supervisor to have a heart attack, creating liability for the employer. The ALJ found that the Facebook communications were protected concerted activity within the meaning of Section 7 of the NLRA, as, in his opinion, the conversations pertained to terms and conditions of

employment, job performance and concerns related to understaffing. While the Facebook postings contained disparaging and harsh remarks about the supervisor and employer, the ALJ found that they were protected nevertheless and ordered that the five discharged employees be reinstated with backpay. The lines between harassing and protected concerted activity continue to become grayer and unsettling for employers.

Action Items for Employers: In monitoring, managing and disciplining employees in connection with their use of social media, employers should consult with counsel and consider whether certain uses of social media are protected by the NLRA. Additionally, employers should have their social media policies reviewed and revised to be certain that their policies do not prohibit activity protected by the NLRA.

For more information on compliance with the NLRA requirements, or any other employment matter, please contact the Olshan attorney with whom you regularly work or one of the attorneys listed below.

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