Employees Gaining Social Media Rights that Employers May Not "Like"

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A 2013 study by Pew Research Center found that sixty seven percent of all adult internet users participate on social networking websites.[1] Social media use in workplace has become a hot button topic in the news and a confusing issue for companies attempting to protect their reputation, minimize workplace bullying, and maximize worker productivity, all while complying with rapidly changing laws governing the issue. A slew of recent administrative rulings, court decisions, and legislative actions nationwide provide some guidance for human resource departments seeking a way through the maze.

A. Facebook "Snooping" and Password Requests

Recent studies show that almost forty percent of employers use social media websites to pre-screen applicants prior to hiring.[2] The majority of the "snooping" occurs on Facebook, the social media website most overwhelmingly used by adults.[3] While many employers simply spy to determine whether the candidate speaks badly of their current employer, lies about qualifications, or otherwise possesses qualities it may not deem desirable in an employee, problems arise when employers snoop and discover that the employer falls into some sort of "protected category" under anti-discrimination statutes, such as discovering a candidate's sexual orientation, disability, or a pregnancy. This opens the door for accusations of illegal discrimination in the hiring process and exposes a company to liability.

Some employers have gone so far as to require applicants to disclose their social media usernames and passwords on employment applications or current employees to disclose such information when the employee is accused of posting something inappropriate on a social media website. For example, in early 2012, it was rumored that a teacher's aide in Michigan posted a picture on Facebook of a coworker with her pants down around her ankles with a caption that read "Thinking of You."[4] The school board terminated the aide after she refused to provide her Facebook login information, claiming confidentiality. Facebook has taken a general stance in favor of privacy and warned employees not to share their passwords with their employers or potential employers.[5]

Lawmakers have moved to protect employee privacy by considering legislation that bans employers from requesting passwords for social media accounts or personal email addresses. The Password Protection Act of 2012[6] was introduced in the United States Senate in mid-2012, which would bar employers from asking for passwords and also make it illegal to retaliate or discriminate against any employee who re-

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fuses to provide passwords upon request. However, passage of the bill has stalled and seems unlikely to become law anytime soon. Therefore, several states have taken action to prohibit this conduct at the state level. California, Delaware, Illinois, Maryland, Michigan, and New Jersey[7] now have laws at the state level that prohibit an employer from forcing employees to fork over their passwords.[8]

These laws, of course, do not inhibit a company's ability to browse a person's social media profile if that person has not made it private to the general public. To avoid potential liability for discrimination lawsuits that could occur if a candidate in a protected class claimed online spying led to his or her not being hired, many employers have wisely implemented employment policies that ban the practice of seeking out information about job applicants on the internet and on social media websites.

B. Protected Workplace Social Media Use

The National Labor Relations Board (NLRB) has issued a series of rulings concerning employees who discuss workplace issues on social media sites such as Facebook or Twitter. The NLRB has found that, in certain circumstances, employees who discuss workplace issues online are engaged in "concerted activity" that is protected by the National Labor Relations Act (NLRA).[9] These NLRB decisions and advice memos provide critical guidance for human resources departments drafting workplace social media policies for their companies.

1. All Workplaces Are Covered by the NLRA

While many employers may assume that the NLRA applies only to unionized employers, several provisions of the Act apply to all workplaces, whether unionized or not. One such provision is Section 7[10] which protects "concerted activities" amongst both union and non-union employees. Specifically, Section 7 states that:

> 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, and shall also have the right to refrain from any or all of such activities . . .

It is a violation of Section 8(a)(1)[11] of the NLRA for an employer to interfere, restrain, or coerce its employees in the exercise of their rights. Thus, if an employee's online activity amounts to "concerted activities" that are protected by Section 7, an employer commits an "unfair labor practice" if it in any way interferes with the exercise of those rights, such as by terminating the employee or subjecting him/her to discipline. The NLRB's rulings over the past two years have begun to carve out exactly what Section 7 rights look like as they pertain to social media use and provide guidance so that an employer can avoid unlawful policies that violate those rights.

2. NLRB Guidance on Social Media Policies

Pursuant to Section 7 of the NLRA, unionized and non-unionized employees are entitled to, without employer interference, organize or engage in other concerted activities for mutual aid or protection. The two landmark cases defining Section 7 rights are *Meyers Industries I*[12] and *Meyers Industries II*.[13] Under *Meyers I*, the Board defined "concerted activity" as that which is "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." In *Meyers II*, the Board expanded the definition to include "circumstances where individual employees seek to initiate or induce or to prepare for group action, as well as individual employees bringing truly group complaints to the attention of management."

With those principles in mind, the NLRB began defining Section 7 rights as they pertain to social media websites. In *Hispanics United of Buffalo Inc.*,[14] the employer had fired five employees who had written postings on Facebook. Specifically, an employee named Marianna Cole-Rivera had posted a status update stating, "Lydia Cruz, a coworker[,] feels that we don't help our clients enough . . . . I about had it! My fellow coworkers how do u feel?" Thereafter, four off-duty coworkers posted messages in response. After Ms. Cruz reported her coworkers' postings to her supervisor, the five employees were terminated for violating the company's "zero tolerance" policy prohibiting "bullying and harassment" of a coworker.

The NLRB upheld the administrative law judge's opinion that, in terminating the five employees, the employer had violated the NLRA. The NLRB found that comments on social media sites that constitute "concerted activities" are entitled to protection under Section 7 of the NLRA. The Board determined that, in making her initial post, Ms. Cole-Rivera sought to alert her workers to a work-related issue, state her frustration about it, and solicit her co-workers' views on the matter. In responding, the four coworkers found "common cause with her, and, together, their actions were concerted within the definition of *Meyers I*, because they were undertaken 'with . . . other employees." Moreover, the NLRB found that these actions were concerted under *Meyers II* because they "were taking a first step towards taking group action to defend themselves against the accusations they could reasonably believe [Ms. Cruz] was going to make to management."

In *Hispanics United*, the Board rejected the employer's argument that it could discharge the five employees because their comments were "unprotected harassment and bullying" in violation of its "zero policy" tolerance. The Board held that, even assuming the comments could be considered "harassment or bullying," a policy that subjects employees to discipline based on a "wholly subjective notion of harassment" is unlawful under the Act.

Similarly, policies that proscribe any and all defamatory or damaging statements are unlawful. For example, in *Costco Wholesale Corporation*,[15] the Board found unlawful a policy that prohibited "statements posted electronically (such as 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 . . ." The Board found this policy overly broad 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 the employer or its agents)."

Finally, in *American Medical Response*,[16] the Acting General Counsel of the NLRB filed a Complaint against a company that had terminated an employee for calling a supervisor who had rejected her request to speak to the union a "scumbag" on Facebook. The employer's policy had forbidden employees "from making disparaging, discriminatory or defamatory comments when discussing the Company or the employee's superiors, coworkers and/or competitors." The complaint alleged that her termination was in violation of Section 8(a)(1) of the NLRA because, in discussing her supervisor with other coworkers on a social site, the employee was engaging in a "concerted activity." In settlement of the complaint, the employer agreed to revise its social media policy so that it did not impede employees from discussing wages, hours and other working conditions with co-workers.

It should be noted that the NLRB has not deemed all employee posts on social media

sites to be "concerted activities" protected by Section 7. In *Karl Knauz Motors, Inc.*,[17] an automobile dealership terminated an employee for two posts he made on Facebook. The NLRB found that the first post, which mocked the low quality food the dealer provided for the launch of a new luxury car, was protected by Section 7. The NLRB noted that, prior to posting, the employee had discussed the issue with the dealer and with coworkers. In contrast, the second post, which was a photo of one of the dealer's cars involved in an accident with a comment that stated "This is your car. This is your car on drugs," was not concerted activity because it had no connection to the terms and conditions of employment and was not discussed with coworkers.

The lesson one may draw from *Karl Knauz Motors* is that, where the subject matter relates to the "terms and conditions of employment" and fellow coworkers join in the discussion (or, alternatively, the employee seeks to involve coworkers in discussion or action relating to the issue), the NLRB will find an employee's social media posting to be protected activity under Section 7. However, where an employee merely posts a complaint on a social media site without involving or attempting to involve his or her coworkers in the discussion, the Board has found that such a post is not "concerted activity" that is protected by Section 7.

C. Best Practices For Social Media Policies

Through its Acting General Counsel, the NLRB has issued three lengthy advice memos that address social media workplace issues.[18] These memoranda provide fairly clear guidance on how to structure an appropriate social media policy that does not unlawfully restrain an employee's rights. The overarching lesson to be learned from these memos that workplace policies regarding social media use cannot restrict or infringe upon activity protected that is protected by the NLRA.

When drafting a social media policy, an employer should specifically define the type of conduct that is prohibited. For example, a confidentiality policy should only limit the disclosure of trade secrets and other proprietary information that an employee has no protected right to disclose. A blanket confidentiality statement that bar employees from disclosing "any" information about the company or "personal information" about coworkers is not lawful because it could preclude an employee from discussing wages or terms and conditions of employment. Similarly, a policy prohibiting employees from "releas[ing] confidential guest, team member or company information" was also deemed unlawful by the NLRB. The Board made this determination because that prohibition could be interpreted as forbidding the release of information regarding conditions of employment. The Board also took issue with provisions instructing employees not to share confidential information with coworkers "unless they need the information to do their job," and to limit discussions regarding "confidential information."

Per the NLRB rulings, a social media policy cannot discourage an employee from discussing terms and conditions of employment or punish an employee for doing so. Examples of unlawful policies are those that prohibit an employee from posting "disparaging comments about the company" or "maintain strict confidentiality. A policy may not dictate that employees should avoid "friending" coworkers, as employees have a Section 7 right to communicate with each other to engage in "concerted activity."

According to the NLRB, even a ban on "offensive, demeaning, abusive, or inappropriate remarks" is unlawful because it is overly broad and uses a subjective standard in determining

offensiveness. Nor may an employer encourage employees to "resolve concerns about work by speaking with co-workers, supervisors, or managers" directly rather than by "posting complaints on the Internet," or direct employees "not to pick fights" or "post anything that they would not want their manager or supervisor to see or sensitive information about the employer." These types of policies are all overly vague and could be seen as chilling an employee's ability to discuss terms and conditions of employment in an effort to seek prepare for group action.

In contrast, the NLRB determined that a policy that prohibited "inappropriate postings that may include discriminatory remarks, harassment and threats of violence or similar inappropriate or unlawful conduct" was lawful. The policy defined "harassment or bullying" to be "offensive posts meant to intentionally harm someone's reputation" or "posts that could contribute to a hostile work environment on the basis of race, sex, disability, religion or any other status protected by law or company policy." The NLRB approved the policy because it defined its terms (rather than leaving "harassment or bullying" to be defined subjectively) and did not include any activity that would be protected by Section 7. In addition, the NLRB found that an employer has a legitimate basis to prohibit these workplace communications.

D. Conclusion

Social media policies that seek to limit disclosure of "any" information about the company, "personal information" about coworkers, or all defamatory statements by employees will not survive a challenge under the NLRA. To the extent that an employer seeks to limit the disclosure of certain company information, it must make certain that its policy seeks to protect the disclosure of trade secrets and other proprietary information that an employee has no lawful right to disclose. Employers must also ensure their policies do not impede employees from discussing wages, hours and other working conditions with co-workers. If an employer wants to limit "harassment or bullying" online, it should use policy language that would limit this prohibition to conduct that would create a hostile work environment as defined by the law. While an employer can create a policy that social media websites cannot be used during work hours, a policy cannot forbid an employee from using social media during non-work hours even in working areas. Finally, though a "savings clause" that gives the employee notice that no Section 7 rights are being violated by the policy may not save an otherwise illegal policy, its inclusion is looked upon favorably by the NLRB.

NOTES:

[1]Maeve Duggan and Joanna Brenner, The Demographics of Social Media Users—2012, Pew Research Center, available at http://pewinternet.org/~/media//Files/Reports/2013/PIP__SocialMediaUsers.pdf.

[2]37 Percent Of Employers Use Facebook To Pre-Screen Applicants, New Study Says, Huffington Post, April 20, 2012, available at http://www.huffingtonpost.com/2012/04/20/employers-use-facebook-to-pre-screen-applicants__n__1441289.html.

[3]See *The Demographics of Social Media Users, note 2*.

[4]Helen A.S. Popkin, *Failing to Provide Facebook Password Gets Teacher's Aide Fired*, NBCNews.Com, available at http://www.nbcnews.com/technology/technolog/failing-provide-facebook-password-gets-teachers-aide-fired-642699#/technology/technolog/failing-provide-facebook-password-gets-teachers-aide-fired-642699.

[5]Lance Whitney, Teacher's Aide Refuses to Share Facebook Access, Is Suspended, CNET.com, April 2, 2012 http://news.cnet.com/8301-1009__3-57408123-83/teachers-aide-refuses-to-share-facebook-access-is-suspended/.

[6]S. 3074 (112th).

[7]As of the time this article was written, New Jersey's legislature has passed the bill and Governor Chris Christie is expected to sign the bill into law.

[8]David Kravets, 6 States Bar Employers From Demanding Facebook Passwords, Wired, January 2, 2013, available at http://www.wired.com/threatlevel/2013/01/password-protected-states/.

[9]29 U.S.C. § 151 et seq.

[10]29 U.S.C. § 157.

[11]29 U.S.C. § 158.

[12]Meyers Industries, 268 N.L.R.B.

493, 115 L.R.R.M. (BNA) 1025, 1983-84 NLRB Dec. (CCH) P 16019, 1984 WL 35992 (1984) (disapproved of by, Ewing v. N.L.R.B., 768 F.2d 51, 119 L.R.R.M. (BNA) 3273, 103 Lab. Cas. (CCH) P 11549, 1984-1985 O.S.H. Dec. (CCH) P 27355 (2d Cir. 1985)) and decision supplemented, 281 N.L.R.B. 882, 123 L.R.R.M. (BNA) 1137, 1986-87 NLRB Dec. (CCH) P 18184, 1986 WL 54414 (1986), judgment aff'd, 835 F.2d 1481, 127 L.R.R.M. (BNA) 2415, 107 Lab. Cas. (CCH) P 10226 (D.C. Cir. 1987).

[13]Meyers Industries, 281 N.L.R.B. 882, 123 L.R.R.M. (BNA) 1137, 1986-87 NLRB Dec. (CCH) P 18184, 1986 WL 54414 (1986), judgment aff'd, 835 F.2d 1481, 127 L.R.R.M. (BNA) 2415, 107 Lab. Cas. (CCH) P 10226 (D.C. Cir. 1987).

[14]Hispanics United of Buffalo, Inc., 194 L.R.R.M. (BNA) 1303, 2012-13 NLRB Dec. (CCH) P 15656, 2012 WL 6800769 (N.L.R.B. 2012).

[15]Costco Wholesale Corp., 193 L.R.R.M. (BNA) 1241, 2012-13 NLRB Dec. (CCH) P 15602, 2012 WL 3903806 (N.L.R.B. 2012).

[16]Case No. 34-CA-12576.

[17]Karl Knauz Motors, Inc., 194 L.R.R.M. (BNA) 1041, 2012-13 NLRB Dec. (CCH) P 15620, 2012 WL 4482841 (N.L.R.B. 2012).

[18]*See* OM-11-74 (available at http://mynlrb.nlrb.gov/link/document.aspx/09031d458056e743); OM-12-31 (available at http://mynlrb.nlrb.gov/link/document.aspx/09031d45807d6567); OM-12-59 (available at http://mynlrb.nlrb.gov/link/document.aspx/09031d4580a375cd).