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Think Twice Before Disciplining Employees For What They Say On The Internet... The NLRB Is Watching

By: Jill Sebest Welch

The National Labor Relations Board ("NLRB") recently issued two complaints against employers for terminating employees who criticized their working conditions on Facebook.

These complaints come on the heels of the settlement of the NLRB's first "Facebook firing" complaint last October against Connecticut-based American Medical Response, Inc. ("AMR"). In that case, an AMR supervisor denied an employee's request for union assistance in responding to an investigatory review. The employee, an emergency medical technician, subsequently posted critical comments about the supervisor on Facebook, to which other employees responded supportively. AMR fired the employee pursuant to its social media policy, which prohibited employees from making "disparaging, discriminatory, or defamatory comments when discussing the Company or the employee's superiors" and depicting the company "in any way" through pictures posted on the Internet. The NLRB alleged that the employee's conduct was protected, concerted activity under Section 7 of the National Labor Relations Act ("Section 7") and that AMR's actions and social media policy were unlawful.

By way of background, Section 7 protects an employee's "right to . . . engage in . . . concerted activities for the purpose of . . . mutual aid or protection," which includes discussing the terms and conditions of employment with co-workers. The AMR case settled privately before a hearing could be conducted, so employers were left without a bright line as to what point employee speech becomes protected speech.

Two recent complaints confirm that the AMR case was not an isolated incident, and that the NLRB is taking very seriously employees' protected speech rights in social media. In a recent case in Illinois, In re Karl Knauz BMW, Case No. 13-CA-046452, the NLRB filed a complaint against a Chicago-based car dealership after it fired a salesman for criticizing the company on Facebook. The employee was displeased with the quality of food served at a customer event, which he and other sales representatives felt would hurt commissions. After posting to Facebook pictures of the allegedly sub-par food and comments disparaging the event, the dealership fired the employee. Similarly, in a

recent case in New York, In re Hispanics United of Buffalo, Inc. Case No. 03-CA-027872, the NLRB issued a complaint against a Buffalo-area non-profit after it fired five employees for "concertedly complaining" on Facebook about their working conditions. One employee alleged in the Facebook post that some of her co-workers did not do enough to assist clients, prompting other employees to join the online discussion to complain about staffing and work load issues.

In all three complaints, the NLRB has contended that the employees' conduct is protected speech under Section 7 as a discussion of his or her terms and conditions of employment. Moreover, the NLRB complaints target both the actual termination of the employees engaged in such activity, and the employers' "overly broad" social media policies. More complaints will no doubt be issued in the near future. In fact, the NLRB's general counsel recently indicated that each of the NLRB's 52 regional offices has a pending social media case. Although it still remains unclear exactly where the line is between protected and unprotected online speech, a few things are clear from the NLRB complaints alone. First, employers should be aware that Section 7 protections apply to both union and nonunion employees alike--although the EMT from Connecticut was a union member, the car salesman from Illinois was not. In addition, a total ban on employees' making critical comments about their supervisors or co-workers through social media is impermissible. NLRB rulings outside the social media context have invalidated policies that could "reasonably be construed by employees to bar employees from discussing with their coworkers complaints about their managers that affect working conditions." KLS Claremont Resort, 344 NLRB 832, 836 (2005). The Board's general counsel has suggested that social media policies are no different, characterizing online employee discussions as the 21st century equivalent of conversations at the office water cooler.

Thus, employers should clearly indicate in their policies that any restrictions on social media usage should not be construed as limiting an employee's right to discuss his or her terms and conditions of employment with co-workers regardless of whether the workplace is unionized. Employers should also take care when disciplining employees for online chatter that relates--even tenuously--to their terms and conditions of employment, including comments that criticize or even insult company superiors. Employers do not need to tolerate speech that defames or harasses co-workers or supervisors for purely personal reasons. Nor do they have to accept speech that disparages company products or reveals confidential information. However, where online dialogue addresses employees' working conditions, and is or has the potential to be joined by other employees, the NLRB will likely view this as protected speech.

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NLRB Attempts To Use Rulemaking Authority To Enact Provisions Of The Legislatively Rejected Employee Free Cho

By: David R. Keller

When appointed to the National Labor Relations Board (NLRB) by the Obama administration, Craig Becker made it quite clear that he intended to use the NLRB's rulemaking process to enact provisions and positions favorable to his long-time friends in Big Labor. In an attempt to make good on that promise, in June 2011 the NLRB proposed new rules governing the filing and processing of election petitions. The proposed rules are essentially an attempt to circumvent

the legislative failure that was the Employee Free Choice Act (EFCA). The NLRB is attempting to sell these new regulations on the basis that they "would simplify representation-case procedures and render them more transparent and uniform across regions, eliminate unnecessary litigation, and consolidate requests for Board review of regional directors' pre- and post-election determinations into a single, post-election request."

The proposed rules would permit parties to file electronic petitions, a change the Board says will "insure that the earliest possible notice of the pendency of a petition is given to all parties." The proposed rules would also shorten the time period for producing certain documents. Employers, for example, would need to produce an electronic voter list within two days (as opposed to seven, under the current rules) after the filing of a petition. Employers would also be required to include in the voter list an employee's name, telephone number, email address, physical address, work location, shift, and classification. Additionally, the rules would reduce the minimum time period between posting of the Board's final notice and the election from three to two work days.

Notably, the proposed rules would expedite the hearing process and "make clear that, ordinarily, resolution of disputes concerning the eligibility or inclusion of individual employees is not necessary in order to determine if a question of representation exists and, therefore, that such disputes will be resolved, if necessary, post-election." Under the new rules, a hearing officer would be required to close a hearing if he or she concludes that "the only issues remaining in dispute concern the eligibility or inclusion of individuals who would constitute less than 20 percent of the unit if they were found to be eligible to vote." NLRB board member, Brian Hayes, was the sole dissenter from the Board's proposal. He contended that the new rules would "impose organized labor's much sought-after quickie election' option, a procedure under which elections will be held in 10 to 21 days from the filing of the petition." He also noted his belief that the rules would "substantially limit the opportunity for full evidentiary hearing or Board review on contested issues."

The Board's proposal will be followed by a 60-day written
comment period, a 14-day reply period, and one public hearing.The Board's complete findings may be found here: http://www.gpo.gov/fdsys/pkg/FR-2011-06-22/pdf/2011-15307.pdf.

Although Congress may seek to intervene with the NLRB to have it reverse course, the likelihood now is that the NLRB will adopt this proposed rule, the effect of which is predicted to take the average time between petition and election from its current 38 days to approximately 20 - 23 days. This will partially accomplish what was intended by the EFCA in that it will give employers less time to communicate with employees about the negatives of unions after a petition is filed and presumably boost the likelihood that a union could win an NLRB election. In 2009, when it appeared that passage of the EFCA was quite possible, we urged employers to modify their employee communications to include discussions of the negatives of unions even when there was no organizing, and to develop Rapid Response Teams which could react with prepared employee communications immediately when union organizing began. While the consequences of a short election cycle are not quite as dire, employers should consider at least developing a Rapid Response Team now. If employers do not engage in ongoing communication about unions as part of their regular Employee Communications Plan, at the very least, they need to be prepared immediately at the commencement of union organizing to roll out a solid communications strategy.

The U. S. Department of Labor (DOL) is also proposing changes which would make it more difficult for employers to respond to union organizing. These involve restrictions on labor lawyers who advise employers during union organizing campaigns. Currently, if an employer's attorney does not communicate directly with employees, but

merely assists an employer with "legal" campaign letters and communication strategies, the attorney is not regulated. The proposed change is that any involvement by the employer's attorney in suggesting or preparing campaign literature or other communications would make the attorney a "persuader" within the meaning of the law, and would require the attorney and his or her firm to file detailed reports, including reporting on their finances, to the DOL. If adopted, these regulations would require labor lawyers to determine whether to meet the burdensome requirements of the DOL in order to continue to assist their clients in organizing campaigns, or to abandon that type of work entirely. This may create a situation where employers cannot lean on their trusted advisors to do the kind of work that is needed in an organizing campaign.

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ERISA Fiduciary Roles Impose Liability Risk And Compliance Obligations

By: Harris T. Booker, Jr., David J. Ledermann and Mark A. Smith

In this era of ever increasing IRS and Department of Labor scrutiny and private litigation involving employee benefit plans of all types, it is crucially important that employers, executives, managers, corporate directors and others with benefit plan responsibilities understand their roles and duties in relation to such plans. Not only are plan sponsors, including businesses and tax-exempt organizations, increasingly the targets of regulatory enforcement actions and lawsuits, but various individuals involved in the implementation and administration of benefit plans are, with growing frequency, held personally liable for errors and omissions that adversely impact plan participants and beneficiaries. Just a few examples of the common situations that can lead to such liabilities include an insufficiently rigorous process for selecting and thereafter monitoring investment choices offered under a participant-directed retirement plan, a failure to offer COBRA continuation coverage to a former employee's dependent under a group health care plan, and the distribution of a pension account to a plan participant without the prior written consent of the participant's spouse.

lan administration errors such as these arise in innumerable contexts under benefit plans of every stripe. Whether an entity or individual may be held liable for the potential harm suffered by a plan participant or beneficiary when an error occurs will often hinge on the party's status as a plan fiduciary with responsibility for the action involved. Liability may be imposed for violations of the laws and principles governing fiduciary conduct whether deliberately or inadvertently committed. Therefore, it is imperative to understand who are the plan's fiduciaries, the scope of each fiduciary's responsibilities with respect to the plan, and the specific duties each fiduciary must observe and perform.

Are You a Fiduciary?

The provision by non-governmental employers of retirement benefits and most employee welfare benefits (e.g., health care, disability coverage, and life insurance) is regulated under the federal Employee Retirement Income Security Act of 1974 ("ERISA"). Under ERISA, fiduciary status is based upon the functions a person performs with respect to an employee benefit plan. Fiduciary status usually begins with the person or entity identified in the plan's governing documents as the plan administrator and, where a plan trust is established, the trustee.

But beyond the plan administrator and trustee, any number of additional plan fiduciaries may exist, including every person who exercises discretionary authority or control over management of the plan or of its assets, or who has any discretionary authority or responsibility in the plan's administration. ERISA also specifically includes as a fiduciary any person who renders investment advice for a fee or other compensation, direct or indirect, with respect to the assets of a plan, or has any authority or responsibility to do so. This investment advisor fiduciary definition, which until now has been interpreted narrowly to include only providers of advice that is both regular and serves as the primary basis of investment decision-making, is currently being reworked by the Department of Labor. The revised regulatory standards are expected to significantly expand, by eliminating the "regular" and "primary" requirements, the class of investment advisors deemed to be ERISA fiduciaries, including potentially many brokers, insurance representatives and others not presently considered fiduciaries under ERISA.

The individual members of a committee that is assigned or that exercises fiduciary responsibilities relative to an employee benefit plan are themselves each fiduciaries to the plan. A retirement plan's fiduciaries, for example, will include all members of any committee involved in deciding the plan's investment policy. Officers and corporate directors may be plan fiduciaries, as will other parties acting under a delegation of discretionary authority from a plan fiduciary. In short, any person who comes within ERISA's functional definition for "fiduciary," may be deemed a fiduciary regardless of whether the person is named as such in the plan's governing documents.

Regulation of Fiduciaries

With the passage of ERISA, Congress established various protections for employee benefit plan participants. These protections include standards of conduct that must be adhered to by plan fiduciaries, as well as specific fiduciary responsibilities for the detailed reporting and disclosure to plan participants and governmental agencies concerning plan provisions, administration and funding. By way of example, the Department of Labor has recently finalized detailed new participant disclosure regulations relating to investment fees, which are applicable to defined contribution retirement plan fiduciaries beginning in 2012. (An article in our next client newsletter will focus in some depth on this particular new source of fiduciary responsibility and potential liability.)

ERISA fiduciaries are subject to a strict duty of loyalty, requiring that they act solely in the interests of plan participants and beneficiaries and for the exclusive purpose of providing benefits to them, and defraying reasonable expenses of administering the plan. In addition, ERISA requires that a fiduciary must act "with the care, skill, prudence and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of like character and with like aims." This standard of care to which ERISA fiduciaries are held is characterized by the courts as "the highest known to the law."

These foregoing generally-stated standards of conduct for ERISA fiduciaries are supplemented by specific "prohibited transaction" rules, which dictate that a fiduciary may not cause the plan to engage in various dealings between the plan and any "party in interest" to the plan. Parties in interest include, among others, plan fiduciaries, persons providing services to the plan, an employer of covered employees, a union whose members are plan participants, relatives of parties in interest, and individuals or corporations having an ownership or employment relationship with a party in interest. Fiduciaries are subject to additional prohibitions against self-dealing and engaging in transactions involving potential conflicts of interest on the part of the fiduciary.

Exemptions from the prohibited transaction rules make allowances for the furnishing by a service provider (by

definition, a party in interest) of services that are necessary to the plan's establishment or operation under a contract or arrangement that is "reasonable" and that appropriately limits the compensation the service provider receives. In the retirement plan context, fiduciary failures to assure the reasonableness of fees paid for investment management, brokerage and recordkeeping services have resulted in litigation, and sometimes judgments, against the responsible fiduciaries. (An article in a future client newsletter will address new plan service provider disclosure requirements, effective in 2012, that must be met to avoid prohibited transaction consequences.) Other prohibited transaction exemptions permit a plan fiduciary to concurrently participate in the plan on a basis consistent with the terms of the plan as applied to all other participants. Additional prohibited transaction exemptions are enumerated in ERISA and individual exemptions may be granted by the Department of Labor upon request, subject to certain conditions, including that the exemption is in the interests of the plan and of the plan's participants and beneficiaries.

Minimizing Fiduciary Liability Risk

An ERISA fiduciary determined to have breached one of these fiduciary duties, may be held personally liable for compensating the plan and for restoring losses suffered by affected participants. Fiduciaries may also be assessed civil penalties and excise taxes in connection with prohibited transactions. To guard against such risks, fiduciaries must understand and fulfill their responsibilities and plan sponsors must proactively implement processes to ensure that plan fiduciaries comply with the duties the law imposes. Individual employees of plan sponsors who are serving in ERISA fiduciary roles should assure themselves that their employer will indemnify them in the event they are found liable for a fiduciary breach, and also assure themselves that the plan sponsor has fiduciary liability insurance in place that covers them while serving in an ERISA fiduciary role. Also, qualified counsel should be consulted regarding a "fiduciary check-up" to help identify and avert potential problems.

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Independent Contractor Misclassification and the Rise in Class Actions

By: Richard L. Hackman

As Congress and state governments look to fill holes created by lowered revenue, they are taking aim at companies using "independent contractors" by increasing regulations and targeting entities such as the trucking industry. In addition to increased regulation, class action lawsuits by "independent contractors" alleging they should be classified as employees have proliferated. In fact, class actions brought by "independent contractors" rose 50% in 2010. Despite this complex atmosphere, companies using independent contractors can take steps to avoid costly fines and legal fees resulting from misclassification.

In April, three Democratic senators introduced the Payroll Fraud Prevention Act (PFPA), a watered-down version of the Employee Misclassification Prevention Act (EMPA), a bill that died in committee last year. Unlike the EMPA, the PFPA does not impose new recordkeeping requirements on companies, but like the EMPA, the new bill seeks to impose fines of up to $5,000 per misclassified employee. Even for smaller employers, these fines can add up quickly and additional penalties for willful behavior can worsen the impact. If this bill passes, companies would be required to inform independent contractors of their status and direct them to the Department of Labor website for filing

misclassification complaints.

Even without the PFPA enacted, federal regulators like the IRS have increasingly turned the spotlight on companies that use independent contractors. The IRS announced it will audit over 6,000 randomly selected businesses during the next three years to detect misclassification. The Teamsters and other labor groups have seen the increased regulation as an opportunity to encourage misclassified independent contractors to unionize.

In addition, as reported previously, on top of the increased federal regulation, Pennsylvania recently adopted the Construction Work place Misclassification Act (CWMA) which requires that independent contractors meet a three-part test to maintain their classification. The test requires an independent contractor to [1] have a written contract to perform services, [2] be free from control or direction over the performance of such services, and [3] be customarily engaged in an independently established trade. Violations of this law can lead to fines of up to $2,500 per employee and criminal prosecution. While this act only affects the construction industry, acts like the CWMA appear to be the growing trend nationwide (e.g., New York passed a similar law in 2010).

With respect to the litigation front, several trucking companies are presently facing class action suits resulting in costly settlements and legal fees. In one recent example, truck drivers in Washington and Oregon received a $2.25 million settlement after claiming 3P Delivery had misclassified them as independent contractors. Among the allegations were that 3P Delivery required drivers to fill out applications, disallowed substitute drivers, and controlled the workload of the drivers. Further, in February 2011, truck drivers classified as independent contractors filed a class action suit against Sears alleging that Sears controlled how the drivers completed their work and required them to purchase or lease trucks with the Sears logo and wear a Sears uniform.

Moreover, for companies in search of "quick fixes," simply having independent contractors sign an agreement acknowledging their status is not the definitive or determining factor in resolving the issue. In the 2010 case of Narayan v. EGL, Inc., the Ninth Circuit Court of Appeals determined that truck drivers who had signed acknowledgements were not actually independent contractors based on the amount of control the company exercised over them.

Despite increasing complexity, the independent contractor classification is still a viable option and continues to be the best option for many companies. However, in order to avoid litigation, it is vital to adhere to the requirements set forth in the regulations and the advice and recommendation of counsel. Specifically, the most important principle is that the independent contractor, and not the company, has the right to control the manner and means by which the work is performed. To that end, companies must recognize that the DOL will look beyond the actual agreement to the substance of these relationships. If your relationship with independent contractors seems inconsistent with any of principles set forth above, it may be time to restructure the relationship to steer clear of potential litigation.

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