
CLIENT EMPLOYMENT LAW ADVISORY

DECEMBER 2010

NLRB OFFICE CLAIMS THAT TERMINATION OF EMPLOYEE FOR FACEBOOK POST CRITICAL OF SUPERVISOR IS UNLAWFUL

The National Labor Relations Act (the "Act") makes it unlawful for an employer to interfere with its employees' protected, concerted activities. Although many people, including employers, are unaware of it, the Act applies to all employers regardless of whether the workplace is unionized or whether any unionization attempt is in progress.

The development and widespread use of social media on the Internet is raising new issues in the application of this law. In one pending case, an employer's social media policy prohibited employees from disparaging or defaming the company, its supervisors, and/or its competitors, even in postings made while off-duty and using a personal computer. The employer terminated an employee who posted negative comments about her supervisor on her Facebook page (to which her coworkers posted comments supporting her and critical of the supervisor) for violating this policy.

An NLRB Regional Office filed a complaint against the employer, **American Medical Response of Connecticut, Inc., Case No. 34-CA-12576 (filed Oct. 27, 2010)**, alleging that the termination violated the Act. The complaint also alleges that the employer's blogging and Internet posting policy itself is "overly broad" and violates the Act because it prohibits employees from posting disparaging remarks about the company and its supervisors or from depicting the company on the Internet without the employer's permission. This, the NLRB contends, unlawfully interferes with employees' right to engage in protected concerted activity.

Although the case is at an early stage and has not yet been ruled upon, it appears to represent a trend by the NLRB, a majority of whose current members are former union attorneys appointed by President Obama. In a nonunion case recently decided by the NLRB, **Plaza Auto Center, Inc. and Nick Aguirre, Case No. 28-CA-22256 (Aug. 16, 2010)**, the Board ruled in favor of an employee who was terminated for calling his employer a series of obscene and vulgar names and stating that his manager "was stupid, nobody liked him, and everyone talked about him behind his back." Even this type of language, the NLRB held, constitutes protected, concerted activity under the Act. The NLRB's attack on social media policies as "overly broad" and unlawful, if successful, could impact virtually every employer throughout the country, whether unionized or not.

ONE RISK OF USING SOCIAL MEDIA SITES TO SCREEN JOB APPLICANTS

Employers are increasingly viewing social media web sites to screen prospective employees. NBC News reports, for example, that more than 77% of employers uncover information about candidates online, and more than 30% of them have eliminated candidates based on that online information. However, there is a significant legal risk in doing so.

In conducting online research about an applicant, an employer may become aware that the applicant belongs to a protected category, a fact the employer would not have been aware of through the general application process. Sites such as Facebook and MySpace enable users to provide profile information about themselves and upload photographs, which are likely to provide information concerning topics such as the individual's race, color, religion, sex, national origin, religion, age, disability, genetic information, military status, sexual preference, and/or marital status.

When an employer is accused of discrimination for failing to hire an applicant who falls within a protected category, the employer often defends itself by pointing out that it was not even aware the applicant was within that category. Where, however, decision-makers at the employer have viewed the applicant's profile on a social networking site, the employer may be unable to deny that it had knowledge of facts that the applicant revealed about himself or herself on the site.

OVERTIME CLAIM FILED FOR TIME SPENT DEALING WITH WORK-RELATED PHONE CALLS, VOICE-MAILS, E-MAILS, TEXT MESSAGES, AND WORK ORDERS

A police officer recently commenced a class action against the City of Chicago to recover overtime pay for "off the clock" time that he spent dealing with work-related phone calls, voicemails, e-mails and text messages on BlackBerry devices and other "personal digital assistants." Allen v. City of Chicago, No. 10-CV-03183 (N.D. Ill. filed Oct. 25, 2010). As the use of these devices is expanding exponentially, this case suggests that there is considerable danger lurking for employers.

Activities such as calling into the office from home are compensable as "hours worked" for non-exempt employees under the Fair Labor Standards Act (the "FLSA"). While there is a *de minimis* rule that excludes small increments of time spent on individual various tasks, when an employee's time spent on such tasks is aggregated, the time can be quite substantial.

There might be two ways of approaching this problem so as not to end up with a surprise FLSA class action. First, an employer may require non-exempt employees to keep accurate records of their "off the clock" time spent on these tasks and to submit these records so that the activities can be counted along with their other work in computing wages. Alternatively, an employer could develop a reasonable estimate of how long these activities take each day and agree with its employees in advance as to how much time it will add to their hours worked to account for handling these duties.

DEPARTMENT OF LABOR GIFT TO THE PLAINTIFFS' BAR: INFORMATION-SHARING ABOUT WAGE-HOUR INVESTIGATIONS

On November 23, 2010, U.S. Department of Labor's Wage and Hour Division posted a notice on its website stating that "[b]eginning on December 13, 2010, when FLSA or FMLA complainants are informed that the Wage and Hour Division is declining to pursue their complaints, they may also be given a toll-free number to contact the newly created [American Bar Association]-Approved Attorney Referral System. In addition, WHD will also provide prompt relevant information and documents on the case to complainants and representing attorneys." The notice can found at <http://www.wageandhourcounsel.com/2010/12/articles/us-department-of-labor/>

Please note that the cases presented in this Advisory are drawn from courts located throughout the United States. They may or may not apply to a given employer based upon regional interpretations of federal law as well as any applicable state or local laws. If you have any questions concerning labor or employment law, please contact Robert I. Gosseen, Esq., who heads this practice area at Ganfer & Shore, LLP, at (212) 922-9250, ext. 288, or your contact at the firm.