



HR & BENEFITS UPDATE

NLRB Settlement Shows Care Necessary When Employers Use Social Networking & Other Policies Restricting Employee Communications

February 7, 2011

Employers should exercise caution when drafting and applying policies regulating employee Facebook or other social networking site, e-mail, or other communications to avoid violating Federal labor laws protecting worker organization rights, as illustrated by a February 7, 2011 settlement agreement reached between a Connecticut ambulance service operator and the National Labor Relations Board (NLRB).

According to the NLRB, Connecticut ambulance service provider American Medical Response (AMR) and the NLRB have agreed to settle a complaint filed on October 27, 2010 that charged AMI with violating the National Labor Relations Act (NLRA) by firing an employee for making derogatory comments about her supervisor on Facebook.

In its complaint against AMR, the NLRB charged that AMR's termination of an employee for making derogatory statements about her supervisor on Facebook violated the NLRA because the employee was engaged in protected activity under the NLRA when she posted the comments about her supervisor, and responded to further comments from her co-workers. The NLRB complaint also charged AMR maintained overly-broad rules in its employee handbook regarding blogging, Internet posting, and communications between employees, and that it had illegally denied union representation to the employee during an investigatory interview shortly before the employee posted the negative comments on her Facebook page.

Under the terms of AMI's settlement with the NLRBⁱ approved February 7, 2011, AMI agreed:

- To revise its employee handbook rules to avoid improperly restricting employees from discussing their wages, hours and working conditions with co-workers and others while not at work in violation of the NLRA;
- Not to discipline or discharge employees for engaging in such discussions; and
- Not to deny employee requests for union representation or threaten employees for requesting union representation in the future.

Federal labor law requires that employers tread carefully when dealing with communications by employees concerning terms and conditions of employment and other union or other organizational activity. Existing federal law limits the actions that employers can take to deter or influence employee choices about whether to support or oppose a union certification campaign, to influence the certification of one union representative over another and to deter or penalize employees for communicating about terms and conditions of employment.

Under the NLRA, for instance, employees generally may discuss the terms and conditions of their employment with coworkers. The protections afforded by the NLRB to employee communications about terms and conditions of employment can apply to both unionized and non-unionized employees and workforces. Subject to certain reasonable restrictions on communications within the workplace allowed by the NLRA, the NLRA generally restricts the ability of an employer to prohibit employees from communicating about terms and conditions of employment.

Worker awareness of these protections has grown in many workplaces as a result of a new policy requiring employers that are government contractors to post notification of NLRA rights in the workplace implemented by the Obama Administration in May, 2010, aggressive union organization efforts in the health care and certain other industries and other developments. As a consequence, health industry and other employers need to exercise care to avoid violating the NLRA and other federal labor laws when designing, communicating and applying social networking, e-mail, internet, and other policies that regulate on or off-duty communications by employees.

To minimize liability risks under the NLRA, employers should consult with qualified labor and employment counsel before discussing or taking other action in response to these activities to minimize risks of unintentionally running afoul of these requirements. Employers should exercise care even if the communication restraint adopted to comply with legally mandated restrictions on communications such as those required by the privacy and security mandates of laws such as the Health Insurance Portability & Accountability Act (HIPAA).

While the NLRA generally permits restrictions on communications required to comply with law, employers need to use care to tailor these restrictions and manage their application to avoid charges of improper interference with employee collective bargaining and organizing rights under the NLRA. Even where the policy is adopted to comply with specific legal mandates or manage particular legal risks, employers should be prepared to demonstrate the legitimacy of the legal need and their tailoring of restrictions on employee communications to meet that need.

For Advice or Other Information

If your organization needs advice or assistance in responding to labor and employment issues in your health care organization or other health care matters, consider contacting the author of this article, Cynthia Marcotte Stamer at (469) 767-8872 or via e-mail [here](#).

Board Certified in Labor & Employment Law by the Texas Board of Legal Specialization, Ms. Stamer is nationally known for her more work, training and presentations, and publications on labor and employment, employee benefits, and other operations, risk management and compliance matters for health industry, insurance and financial services, manufacturing, retail and other businesses.

For more than 23 years, Ms. Stamer has counseled, represented and trained employers and other employee benefit plan sponsors, plan administrators and fiduciaries, insurers and financial services providers, third party administrators, human resources and employee benefit information technology vendors and others on these and other compliance, performance and risk management and operations matters. She also is recognized for her publications, industry leadership, workshops and presentations on these and other human resources concerns and regularly speaks and conducts training on these matters. Her insights on these and other matters appear in the Bureau of National Affairs, Spencer Publications, the Wall Street Journal, the Dallas Business Journal, the Houston Business Journal, and many other national and local publications. For additional information about Ms. Stamer and her experience or to access other publications by Ms. Stamer see [here](#) or contact Ms. Stamer directly.

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