By BARRY R. ELSON

Facebook and Work Place Come Center Stage

Social Media Communications Playing Significant Role in Work Environments

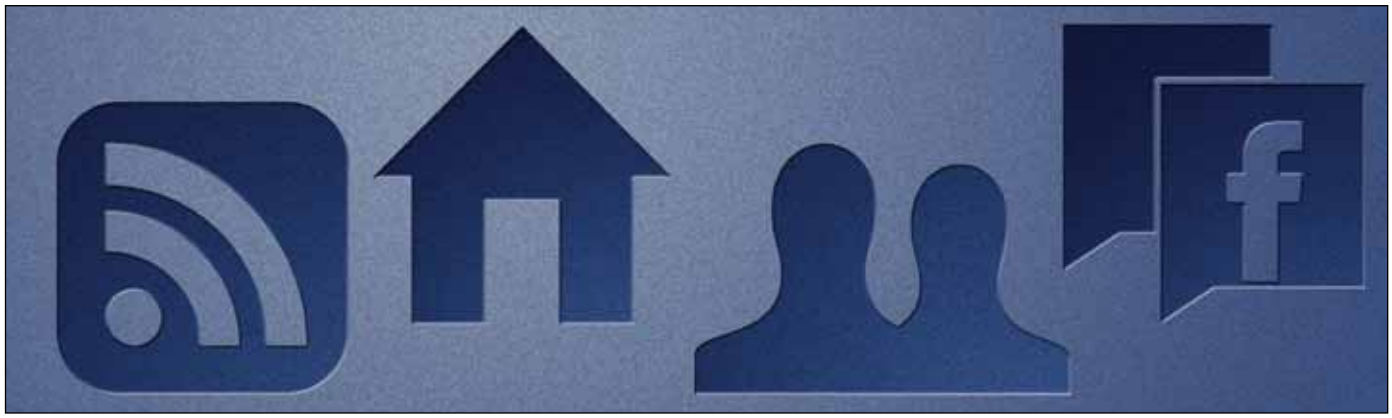
Recently, the General Counsel of the National Labor Relations Board issued a much-discussed administrative complaint against an employer (American Medical Response of Connecticut) that terminated the employment of an employee for writing comments critical of her supervisor on her Facebook page. The NLRB is a federal agency which asserts jurisdiction over businesses "affecting commerce" that for retail establishments is a business with sales of $500,000 annually and more than a "de minimus" amount of business across state lines; in non-retail businesses the criteria is goods or services purchased or sold (directly or indirectly) across state lines in excess of $50,000 annually. An NLRB complaint sets the case for trial and eventually leads to the Board issuing a decision that affirms or changes the legal standards to be applied – "the law."

News of this complaint has set off a frenzy of inquiries to law firms, and the writing of articles and blogs about the described change in the law regarding both employer expectations as to standards of conduct that they can rightfully expect from employees as well as employee "freedom of speech." In actuality, the law has not significantly changed, but rather adapted to changes in society that are necessary to recognize both from employer and employee perspectives. It should be noted that concerted activity does not require a union presence for it to be protected. While there was a union related issue raised in American Medical Response, it related only to an employee's right to representation at an interview which led to her employment termination.

In 1953, in *Jefferson Standard Broadcasting*, the Supreme Court affirmed an NLRB decision that held that an employee could lose the protection of the Act for making disloyal, disparaging and/or injurious statements about the employer or its product when the published statements were not relating to a labor dispute or the employees' working conditions. Further, while the courts have held that the language of the workplace is not the language of "polite society," profanity and disruptive behavior can in some instances cause an employee to lose the protection of the National Labor Relations Act when carried beyond an admittedly amorphous boundary of acceptable behavior. It is worthy of note that the boundary of what is acceptable is not always one where the courts on appeal agree with the NLRB. While the lines of what is or is not concerted protected activity as well as what is beyond the limit of acceptable public criticism is not always crystal clear, *Jefferson Broadcasting* is still good law today.

As we moved into the 21st century however, the context of communications began to change. It has long been held and generally accepted that communication with the public by picket signs or other means of communication such as ads in newspapers, magazines and radio spots were a legitimate means of communication – depending on the nature of the message. The nature of "social media" communication however has now changed the face of communications. This is, in part, dependant on generation, but not completely. A growing number of people in the work force, and not yet in the work force, have spent formative years having Facebook sites and posting news on their sites as well as those of "friends." Communications are often shockingly personal, although the hallmark of these communications has been that they are near instantaneous transmissions of current thoughts, whims, social commentary, personal affronts and grudges, food preferences and on and on. These are often near "real time" communications of thoughts or feelings often without particular purpose. While not true for all, the generation moving into the workforce has grown up with this unguarded or purposeful style of communication. Introduce and overlay the workplace and responsibility and expectations of an employer and two worlds collide.

The NLRB decision to issue a complaint was a product of two different legal principals. First is a duty of loyalty. The duty of loyalty is balanced against the competing social interest of the protections offered by the NLRA; an employer may not discriminate against or restrain or coerce employees



in an effort or effect of preventing them from engaging in "concerted protected activity." This is true in a union and non-union work environment. In a union environment where "just cause" is often the standard applied for review of discipline, the NLRB holdings in cases in the future may affect both arbitrator rulings as well as NLRB review and deferral to those rulings.

The second significant legal principal involved relates to a unionized work environment. Absent provisions in a collective bargaining agreement that provide otherwise, an employer is not permitted to change wages, hours or terms or conditions of employment without negotiation with the employees' union.

On Feb. 7, the NLRB announced that the parties in American Medical Response had reached a settlement and thus there will be no determinative ruling in this matter. The negotiated settlement language however, which required NLRB approval, is significant and a legal marker to be aware of. The language of the NLRB press release includes a statement that "the company agreed to revise its overly broad rules to ensure that they do not improperly restrict employees from discussing their wages, hours and working conditions with co-workers and others while not at work, and that they would not discipline or discharge employees for engaging in such discussions." Even though this was a settlement, it signals what the NLRB General Counsel believes the law is or ought to be. The General Counsel is, in effect, the prosecuting arm of the NLRB.

It is important to recognize that social media communications are already playing a significant and growing role in the work environment. Facebook, MySpace, Twitter, YouTube and other electronic media vehicles are being used in union organizing campaigns, in solicitations by employment agencies and employers for recruitment opportunities, by interest groups in corporate campaigns to affect business activities and in many other ways including by the NLRB for posting limited case and procedural information. Modulated appropriate use of these applications is a benefit to society and a reflection of our changing culture. Inappropriate use can lead to harmful effects, including legal liability. Social media communications now appear as issues not only in NLRB matters, but hostile work environment and discrimination cases, defamation claims and disclosure of confidential information areas where these communications come to center stage. In the NLRB cases, there is little question that social media communications will be a protected right. The issues of drafting appropriate employee rules of conduct and the boundary of what comments are deemed acceptable and protected will be matters that require significant legal care. ■

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