STARNES DAVIS FLORIE LLP

LABOR & EMPLOYMENT BULLETIN

November 2010

Is Facebook the New "Water Cooler"?
The NLRB Claims a Company Illegally Fired Employee over Facebook Comments

The National Labor Relations Board (NLRB), in unprecedented fashion, recently issued a complaint that an employer engaged in unfair labor practices for firing an employee who made derogatory posts about her supervisor on Facebook. The NLRB's Hartford, Connecticut regional office issued a complaint against American Medical Response of Connecticut, alleging that the ambulance service illegally terminated the employee, illegally denied union representation to the employee during an investigatory interview, and maintained and enforced an overly broad blogging and internet posting policy. This is the first case in which the NLRB has presented the argument that workers' criticisms of their supervisors or companies on social networking sites are generally a protected activity and that employers would be violating the law by punishing workers for such statements.

According to the NLRB news release, when the employee was asked by her supervisor to prepare an investigative report concerning a customer complaint about her work, she requested but was denied union representation. Later that day, the employee posted a negative remark about her supervisor on her personal Facebook page from her home computer. Her Facebook comments drew supportive responses from her co-workers and led to further negative comments about the supervisor from the employee. The NLRB claims that the employee was then suspended and later terminated for her Facebook postings and because such postings violated the company's internet policies. In contrast, American Medical Response denies the allegations and claims that complaints from patients and hospital staff about the employee were the reasons for her termination, not her Facebook posts.

The NLRB found that the employee's Facebook postings constituted protected concerted activity and that the company's blogging and internet posting policy contained unlawful provisions. The company's policy included a provision that prohibited employees from making disparaging remarks when discussing the company or supervisors and one that prohibited employees from depicting the company in any way over the internet without company permission. According to the NLRB, these types of provisions constitute interference with employees in the exercise of their right to engage in protected concerted activity. Furthermore, the board's acting general counsel said, "This is a fairly straightforward case under the National Labor Relations Act – whether it takes place on Facebook or at the water cooler, it was employees talking jointly about working conditions, in this case about their supervisor, and they have a right to do that." The National Labor Relations Act prohibits employers from punishing employees, whether union or nonunion, for discussing working conditions or unionization.

An administrative law judge is scheduled to begin hearing this case on January 25, 2011. The outcome of the case could have significant implications for employment and privacy laws. It is probable that a line will be drawn between an employee posting a single post that lashes out against a supervisor and Facebook conversations that involve several co-workers; the former is likely to be unprotected activity while the latter is likely to be viewed as "concerted protected activity." Whatever the outcome, it is important that employers are proactive in reviewing their Internet and social media policies to determine whether such policies could be seen as "reasonably tending to chill employees" in the exercise of their rights under the National Labor Relations Act.

- Breanna Harris

Employer-Friendly Changes to Non-Compete Agreements and Restrictive Covenant Law in Georgia

Georgia voters recently approved an amendment to the Georgia Constitution that will dramatically alter Georgia's legal landscape with respect to non-compete agreements and other restrictive covenants. With the enactment of this amendment, the previously passed House Bill 173 (now O.C.G.A. § 13-8-50, et seq.) became law and Georgia's stance on restrictive covenants now comes closer into line with those in most other states. These employer-friendly changes apply only to those restrictive covenants executed on or after November 3, 2010.

Historically, Georgia courts have applied an exceedingly stringent level of scrutiny to employee restrictive covenants, making Georgia one of the most difficult states in which to enforce such covenants. Before the passage of the amendment, the Georgia Constitution stated that contracts restraining trade were illegal and void. Employers were therefore significantly limited in the duration, geographic area, and scope of prohibited activities they could include in their employment agreements. Further, Georgia courts would not, under any circumstances, modify an otherwise unenforceable covenant so as to make it reasonable, and thereby enforceable, in the court's eyes (the "blue penciling" process). As a result, employers had little assurance that the restrictive covenants in their employment contracts would be enforceable.

The new law specifically states Georgia's new public policy *favoring* enforcement of these agreements and provides guidance to employers regarding the permissible parameters of restrictive covenants, as well as guidance to the courts on how to interpret and enforce them. Some of the key provisions of the new law include:

- Judicial modification of an otherwise overly broad covenant to make it enforceable is now permitted. The new statute allows for courts to uphold and enforce overly broad covenants by either blue penciling and/or removing unenforceable provisions in their entirety or enforcing provisions only to the extent that they are reasonable.

- The law now expressly deems restrictive covenants with a duration of two years or less presumptively reasonable, and those attempting a longer duration presumptively unreasonable.

- The law does not require non-solicitation agreements to contain an express geographic definition. This enables employers to enforce non-solicitation restrictions that lack an express reference to a specific territory or geographic area, and further allows that territory to include prospective customers.

- Previously, an employer could not prohibit the passive acceptance of business in a non-solicitation agreement. In other words, if the customer initiated the contact, the former employee could take on the business even if there was a non-solicitation agreement in effect. Under the new law, passive acceptance of business can be prohibited in certain circumstances, eliminating disputes over who contacted whom.

- The statute only applies to employment covenants with executive employees, employees in possession of important confidential information, or employees with specialized skills or knowledge, or customer contacts or information.

With the enactment of this new law, Georgia employers are now in a position to change their agreements with employees in ways that are more advantageous to the employer. Employers should consult with counsel to determine whether and how they can benefit from this new law. Remember, the new law only applies to agreements entered into on or after November 3, 2010, and prior agreements and contracts will be enforced under the former interpretive framework established by the courts. Thus, if an employer wishes to avail itself of the new statute's protections and guidance, it must execute new agreements with its current employees.

- Allison Garton

EEOC Issues Genetic Information Nondiscrimination Act Final Regulations: What Employers Should Know

On November 9, 2010, the U.S. Equal Employment Opportunity Commission (EEOC) issued final regulations implementing the employment provisions (Title II) of the Genetic Information Nondiscrimination Act (GINA), which was signed into law by President Bush in 2008. Title II of GINA represents the first legislative expansion of the EEOC's jurisdiction since the Americans with Disabilities Act of 1990. GINA prohibits discrimination in employment on the basis of genetic information and restricts the acquisition and disclosure of genetic information, which is defined as information regarding an individual's genetic tests, the genetic tests of a family member or the manifestation of a disease or disorder.

GINA covers all private employers, state and local governments, and educational institutions that employ fifteen or more individuals. The new regulations make it unlawful for an employer to engage in the following practices:

- Request, require, or purchase genetic information regarding an employee (This includes conducting an Internet search on an individual in a way that is likely to result in the employer obtaining genetic information and making requests for information about an individual's health status in a way that is likely to result in a covered entity obtaining genetic information.)

- Discriminate against an individual on the basis of the individual's genetic information in regard to hiring, discharge, compensation, terms, conditions, or privileges of employment.

- Limit, segregate, or classify an individual in any way that would deprive the individual of employment opportunities because of the individual's genetic information.

- Retaliate against an individual because that individual has opposed any act or practice made unlawful by GINA.

Because employers often obtain medical information concerning employees which may inadvertently include "genetic information," the regulations identify certain exceptions to protect employers in such situations. To fall within the exception, the employer must give notice to the employee that he should not provide genetic information. The regulations provide model language employers can use when requesting medical information from employees to avoid acquiring genetic information. Another exception exists when the genetic information disclosure takes place as part of a health or genetic service offered by the employer, including services offered as part of a voluntary wellness program. To fall under this exception, the employee's provision of genetic information must be completely voluntary and authorized and the information may not be accessible to anyone else in the workplace.

Furthermore, the regulations impose additional confidentiality requirements on employers by requiring that employers maintain genetic information separately from personnel files and treat such information as a confidential medical record. All employers are also required to post a notice either prepared by or approved by the EEOC regarding pertinent provisions of the Act in a conspicuous place in the workplace and should update forms used to obtain medical information to include the required notice regarding genetic information.

To obtain further information regarding the GINA regulations, visit the EEOC's website, which contains two question-and-answer documents on the final GINA regulations. One of the documents is aimed specifically at helping small businesses comply with the law. Links to the regulations and supplemental information can be found at http://www.eeoc.gov/laws/types/genetic.cfm.

- Breanna Harris

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