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DISPELLING THE MYTH THAT THE NATIONAL LABOR RELATIONS ACT PROTECTS ONLY UNION ACTIVITIES

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When you give employees their raises, do you tell them not to discuss their compensation with other employees? Does your employee handbook contain a policy that instructs employees not to discuss their compensation with others, either within the company or outside of the company? Do you have a social media policy that advises employees that they cannot post comments critical of their employer or other employees on Facebook or other social media? And do you think you are safe in firing employees who violate those rules? If so, think again. The National Labor Relations Board ("NLRB") is likely to order you to reinstate those employees with full back pay.

Many employers believe that the National Labor Relations Act ("NLRA") protects only employees' activities on behalf of a union. This is *not* true. Section 7 of the National Labor Relations Act protects many other activities on the part of employees regardless of whether a union is on the scene or has ever been on the scene. Section 7 of the National Labor Relations Act defines the rights of employees as follows:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

The NLRB has long held that employer policies that prohibit employees from discussing their compensation (or other terms and conditions of employment) are a *per se* violation of the NLRA. The reasoning is that if employees are prohibited from discussing compensation this necessarily infringes upon their Section 7 rights to act together for "mutual aid and protection." Over the years, the NLRB has extended the protection of Section 7 rights to other concerted activities on the part of employees that have nothing to do with organizing or joining a union. The Board has held that Section 7 protects any group action by employees for the legitimate furtherance of their common interests and on the authority of, or engaged in, with, or on behalf of other employees, and not solely by or on behalf of particular employees themselves provided the employer is aware of the concerted nature of the action. Thus, occasions where non-union employees filed a group "grievance," or confronted management as a group to air their grievances, or designated one person as a spokesperson to confront management on common grievances, have all been deemed

to be protected activities. Likewise, an employee's contacting the Department of Labor, the EEOC, or other government agency to protest a labor policy that affects numerous employees has been held to be protected concerted activity. Employees' appeals for public support is protected activity when confined to criticism of the employers' labor relations policies (please note, however, that employees who have spoken disparagingly of the companies' *product* have been considered to be guilty of disloyalty and therefore engaged in unprotected activity). Filing of a labor-related civil suit is also considered to be concerted protected activity so long as the suit is prosecuted in good faith.

Recent decisions have extended the protection of the NLRA to activities by employees on various social media such as Facebook. For example, on April 30, 2012, an Administrative Law Judge for the National Labor Relations Board ordered a San Francisco clothing store to reinstate three employees who were fired after writing Facebook posts that criticized their manager and discussed bringing an employees' rights handbook to the store. The Facebook postings were considered to be protected because they were part of the employees' efforts to get the store to close earlier in the evening based upon concerns about working late in an allegedly unsafe neighborhood. The judge also found that the store's handbook contained an unlawful policy that barred employees from discussing their compensation information with others.

This case, *Design Technology Group LLC dba Bettie Page Clothing*, is just the latest in a series of NLRB cases involving the legality of firing employees over Facebook postings. Since Facebook and other social media are relatively new, these NLRB cases are just the most recent in a series of NLRB cases extending the protection of Section 7 of the NLRA to concerted activities unrelated to unions. But this case also addresses one of the oldest NLRB precedents extending Section 7 rights outside of the union context - a policy preventing discussion of compensation.

Weston Hurd advises all of its clients to carefully review their employee handbooks and to remove any policy that would prohibit employees from discussing their compensation and other terms and conditions of employment with others. Likewise, employers should be careful in disciplining or discharging employees for engaging in group activities or who purport to speak on behalf of a group of employees. Employers have the right to run their businesses, but employers must be careful when applying work rules to make sure that they do not impinge upon protected employee rights.

If you have any questions, comments or concerns about this Client Alert, please contact your Weston Hurd lawyer.

Nancy A. Noall is a Partner with Weston Hurd LLP and Chair of the firm's Labor Practice Group. She concentrates her practice in the areas of labor and employment law and has successfully defended clients in such industries as computer software, contract research and development, communications and manufacturing. She has arbitrated grievances under union contracts in Arkansas, Kentucky, Indiana, New Jersey and Ohio. Nancy can be reached at 216.687.3368 or nnoall@westonhurd.com.

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