

LABOR & EMPLOYMENT LAW ALERT

OCTOBER 2011

SOCIAL MEDIA UPDATE: Further Developments in NLRB Rulings over “Facebook” Firings

On September 28, 2011, in *Karl Knauz Motors, Inc. d/b/a Knauz BMW*, NLRB No. 13-CA-46452, an administrative law judge (“ALJ”) found that a Chicago-area BMW car dealership (“Dealership”) did not violate the National Labor Relations Act (“NLRA”) when it fired a salesperson for making certain postings on Facebook.

Our July Alert brought this case to your attention when the Regional Director in Chicago issued a complaint against the Dealership.

As you may recall, the case involved the firing of a car salesman, Robert Becker, for posting comments on his Facebook wall that (1) criticized the Dealership for offering hotdogs to clients during a BMW promotional event for a new car model; and (2) described and depicted a car accident at an adjacent commonly-owned Land Rover dealership.

On the BMW promotional event, Mr. Becker expressed his concerns that the choice and quality of the refreshments served could negatively affect sales and commissions and Mr. Becker included photographic evidence of the unremarkable snacks in his posted criticism. Other co-workers made comments similar to Becker’s original posts. On the same day, Mr. Becker posted photos of an accident that occurred five days after the promotional event involving a Land Rover truck from the adjacent

Land Rover facility (also owned by the Dealership). The truck was accidentally driven into a pond by a customer’s 13-year old son, allowed by a salesperson to sit behind the wheel of the truck. Mr. Becker captioned the photos: “This is your car: This is your car on drugs.”

Management at the Dealership learned about the postings from two competitors, to the Dealership’s claimed embarrassment. Management confronted Mr. Becker with printouts of his Facebook posts regarding both the BMW promotional event and the Land Rover accident, to which Mr. Becker responded that his postings were “none of your business,” noting that it was his Facebook page and his friends. The management asked Mr. Becker to remove the posts, which he immediately did. Despite his later attempt to apologize, the Dealership terminated his employment.

After a hearing on July 21, 2011, the ALJ made two important findings. The ALJ found that the posting on the BMW promotional event was “protected concerted activity” because it could affect his compensation. The posting on the Land Rover accident exhibited a higher level of disparagement and was not protected activity. The ALJ held that the Dealership did not wrongfully terminate Mr. Becker because the posting concerning the Land Rover accident was not protected activity.

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The ALJ also addressed the language of certain rules in the Dealership’s Employee Handbook, alleged in this matter to be unlawful. Despite the Dealership’s revision of its challenged overly-broad employment policies, the ALJ found that the Dealership’s employment policies “tended to chill” Section 7 rights, specifically, clauses prohibiting employees from participating in interviews with even “union representatives, lawyers, or Board agents” or answering inquiries concerning other employees. Since these provisions could be understood by employees to restrict and limit their exercise of Section 7 rights, the ALJ found that they violated the NLRA. As a remedy, the ALJ ordered that the Dealership post a notice appended to the

Opinion on the violation at issue to inform its employees of their right to engage in protected, concerted activity.

The Bottom Line. Emerging case law in this area reinforces our continuing advice that Employers need to exercise care when deciding whether to discipline or terminate employees based upon posts on social media. As in every case, employers should consult counsel on their employment handbook policies and prior to making employee termination decisions which could have negative and/or costly consequences.

NLRA New Posting Notice Requirement Delayed for Private Employers Until January 31, 2012

Last month’s Alert announced the NLRB Rule, which was to take effect on November 14, 2011, requiring companies to post in the workplace notices to employees about their right to join a union. The Alert warned private sector employers that the Rule applies to all companies subject to NLRB jurisdiction. As expected, the announcement of this proposed Rule sparked very much attention and controversy.

On October 5, 2011, the National Labor Relations Board posted on its website an extension of the implementation deadline to January 31, 2012. The current requirements for certain federal contractors have not changed. The National

Labor Relations Board announced on its website that it “has postponed the implementation date for its new notice-posting rule by more than two months in order to allow for enhanced education and outreach to employers, particularly those who operate small and medium sized businesses.” The Board also explained that “[t]he decision to extend the rollout period followed queries from businesses and trade organizations indicating uncertainty about which businesses fall under the Board’s jurisdiction, and was made in the interest of ensuring broad voluntary compliance.” According to this press announcement, “no other changes regarding the content or form of the rule will be made” and “[a]uthorized posters can be downloaded from the Board’s website.”

Bressler Lawyers Score Victory Before the Third Circuit on the Use of Extrinsic Evidence in Interpreting Labor Agreements

Most lawyers and HR professionals believe that extrinsic evidence like past practice, custom and usage in the industry, and other evidence outside the four corners of a contract are not admissible unless the contract clause in question is ambiguous. And, they would be wrong. The U.S. Court of Appeals for the Third Circuit just reversed summary judgment for a union and various benefit funds on precisely this issue, holding, as urged by Bressler's labor lawyers, that the district court should have looked at the parties' past practice before deciding that a particular contract clause unambiguously favored the Plaintiffs' interpretation of the labor agreement. *See IBEW Local Union No. 102 v. Star-Lo Electric, Inc.*, No. 10-4559, 2011 U.S. App. LEXIS 19092 (3d Cir. Sept. 15, 2011).

The CBA in *Star-Lo* required employers to make contributions to the various benefit funds as a percentage of "gross labor payroll," ("GLP") a term which was not defined in the various trust agreements, nor adequately defined in the CBA. The dispute began when the trustees of the various funds conducted an audit and then claimed delinquencies on the ground that GLP meant all compensation, including gratuitous holiday and vacation pay and bonuses. The employers, however, argued that GLP meant, among other things, only wages paid on actual hours worked and that their interpretation was bolstered by over 50 years of past practice. When the dispute could not be resolved amicably, lawsuits followed.

After the close of discovery, both Parties moved for summary judgment. In arguing that GLP meant only actual hours worked, the employers relied upon the language of the CBA, bolstering their interpretation with undisputed evidence of past practice, industry usage, and admissions in depositions and affidavits. The union and funds did not dispute the evidence of past practice, arguing instead that GLP unambiguously meant all wages; therefore, the court should ignore the past practice.

The district court granted the Funds' motion for summary judgment, finding that the term GLP was unambiguous and ignoring the undisputed evidence of past practice and contract definitions. Perhaps sensing that a mistake had been made, the district court granted the employers leave to file an interlocutory appeal, which the Third Circuit then granted.

After extensive briefing, the Third Circuit reversed the district court's decision in its entirety, holding that the district court should have examined all the extrinsic evidence before deciding the question of ambiguity. Relying on its decision in *Teamsters v. Rolls-Royce*, 989 F.2d 132 (3d Cir. 1993), the Court reminded the district court that, before making a finding concerning the existence or absence of ambiguity, it must consider the contract language, the meanings suggested by counsel, and the extrinsic evidence offered in support of each interpretation. The Court observed that "extrinsic evidence may include the structure of the contract, the bargaining history, and the conduct of the parties that reflect their understanding of the contract's meaning." Thus, the district court erred when it refused to consider the extrinsic evidence. The matter has now been remanded.

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The U.S. Department of Labor and the Internal Revenue Service Jointly Combat Misclassification of Workers as Independent Contractors

Recently, the U.S. Department of Labor (“DOL”) and the Internal Revenue Service (“IRS”) announced that they have agreed to join forces to investigate and correct the misclassification of workers as independent contractors. This announcement is the result of the DOL’s “misclassification initiative” which was aimed at preventing, detecting, and remedying employees being misclassified as independent contractors. Several states have joined the DOL and IRS, and New York has announced plans to sign similar agreements.

The Memorandum of Understanding signed by the two agencies essentially allows the DOL and IRS to share information on misclassification. This sharing of information has the potential to lead to investigation and enforcement simultaneously by the DOL and IRS, and potentially New York and New Jersey agencies (if they join the initiative). At the signing of the agreement, Secretary of Labor Hilda L. Solis expressed the following joint message: “We’re standing united to end the practice of misclassifying employees. We are taking important steps toward making sure that the American dream is still available for all employees and responsible employers alike.”

Under the new “misclassification initiative,” a worker who is classified as an independent contractor does not have to bring a claim

against his or her employer alleging misclassification. Instead, the DOL, IRS, and/or state agency is empowered to initiate a directed investigation, which is essentially an unrestricted review of an employer’s classification of its workers and, potentially, all the employer’s payroll practices. Ostensibly, this would empower a complete audit of payroll practices. The DOL has announced plans to increase the percentage of DOL-directed investigations to thirty-five (35%) percent of all its investigations.

The IRS announced simultaneously a new Voluntary Classification Settlement Program (“VCSP”) which permits taxpayers to voluntarily reclassify workers as employees instead of as independent contractors, and to make a small payment covering the portion of past employment withholding tax obligations, instead of after an audit and investigation.

The Bottom Line. Companies that utilize independent contractors must be prepared to defend this classification with documentation, or face exposure to liability for a host of unpaid compensation and taxes including, but not limited to, unpaid overtime (if applicable), unpaid payroll taxes, liquidated damages, fines, penalties, and possibly attorneys’ fees and costs. Employers are urged to speak with experienced wage-and-hour attorneys and perform self-audits to ensure compliance with employee classification.

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Upcoming Speaking Engagements:

November 2-4, 2011: Jed Marcus will be speaking on current trends in labor and employment law at the Tennessee Employment Relations Research Association Annual Conference. Topics will include “Trends in Collective Bargaining” and “Social Media and Employment: Sour Grapes or Protected Activity?”, *Arnold Engineering Development Center, Tullahoma, TN.*

December 20, 2011: Jed Marcus will be participating in a panel discussion on Litigating and Trying Employment Cases, *The Sheraton Meadowlands Hotel in Secaucus, NJ, 9:30 am to 12:30 pm.* Sponsored by the New Jersey State Bar Association.

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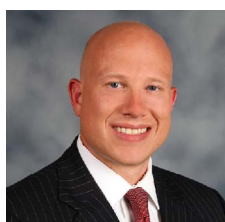
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