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Law Notes
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NATIONAL LABOR RELATIONS ACT POSES A DANGER FOR ALL EMPLOYERS SEEKING TO CONTROL EMPLOYEES' SOCIAL MEDIA CONTENT

By **Robert W. Morgan**

Section 7 of the National Labor Relations Act ("Act") provides all employees with "the right . . . to engage in . . . concerted activities for the purpose of collective bargaining or other mutual aid or protection . . ." This provision applies to both union and non-union employees who have the right to unionize under the Act. Therefore, in seeking to curtail or control employee speech via social media by disciplinary measures, all employers are in danger of committing an unfair labor practice under the Act if such employee speech is deemed to be a "concerted activity" done "for mutual aid or protection."

Since October 2010, when the National Labor Relations Board ("Board") first issued an unfair labor practice complaint against an employer for discharging a non-union employee for comments made on Facebook, charges and complaints against employers regarding their employees' social media activities have risen dramatically. The vast majority of those charges and complaints involved employers with non-union employees. In August of 2011, the Office of the General Counsel (OGC) for the Board issued a comprehensive report of its findings on social media cases.

In its report, the OGC stated that the existing standards of the Board for defining protected concerted activity will be applied in the social media context. First, the Board must determine whether employee speech is "concerted" – that is, whether it was intended to induce group action. Conversely, such activity is not concerted when the employee acts alone with no intent to induce group action – even if other employees may benefit. Then, the Board must determine whether the employee speech is protected by the Act, that is, whether it was done for mutual aid or protection with regard to wages, hours, and other terms and conditions of employment. Finally, the OGC has opined that the Board will decide whether the speech is so "opprobrious" that it loses its protection under the Act.

Determining whether employee speech on social media is "concerted" is no easy task. It appears to depend on whether any coworkers are also on the social media where the employee speech is posted, whether any coworkers respond to the posting, and the nature of the response. Also relevant to the inquiry is whether the social media posting referenced prior conversations with coworkers or whether there were conversations with coworkers after the posting that are related to the posting. Finally, determining the motivation behind the posting is not always readily evident and can lead to confusing and contradictory results.

Clearly, whether the speech is concerted is a question of fact. In its report, the OGC opined that the Board will find an activity concerted "[w]hen the record evidence demonstrates group activities, whether 'specifically authorized' in a formal agency sense, or otherwise."

On the other hand, determining whether the speech is protected by the Act is an easier task. If the content in the social media concerns wages, hours, and other terms and conditions of employment, it is protected.

Finally, if the Board finds the speech to be both concerted and protected, it will determine whether or not the speech lost its protection under the Act. Looking beyond obscene and profane, the OGB opined that

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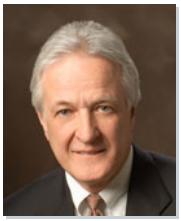

SELLING A BUSINESS – THE SALE PROCESS

By **Randolph M. Wright**

Once owners decide to sell their business they must engage in an emotional, time consuming, and challenging sale process. At the same time they must operate the business without having the process negatively impact its value.

Forms of Sale

A business sale transaction can take several forms: (1) sale of assets, (2) sale of stock, (3) merger, (4) consolidation, or (5) share exchange.

• The most common form of sale is the sale of assets. This is because it is the best way for purchasers to avoid acquiring some or all of the seller's liabilities. These liabilities may include unknown or undisclosed obligations.

• If a stock sale is more practical, the sale of 100% of the stock for cash is the most desirable form of sale from the seller's point of view. However, in most cases, the purchaser determines the structure of the transaction and purchasers are often unwilling to buy on this basis.

• The next most desirable form of sale is the sale of stock for a substantial cash down payment with the balance to be paid under the terms of a promissory note, with adequate security to insure payment.

• Another stock sale structure is the sale of a minority interest in the stock with the purchaser having the right to purchase additional shares from the seller on agreed upon option terms.

• The more complicated methods of sale, like reorganization, merger, consolidation, or share exchange should only be used if there is a problem in getting 100% of the shareholders to approve the sale.

The Pre Closing Process

1. First, the seller must determine **Enterprise Value** – a fair price for the business. This price is what the market will pay, not what the seller thinks the enterprise is worth.

The Enterprise Value of a company is the market value of the business as a whole. The first step is to determine the market capitalization of the company (the per share or membership interest multiplied by the share or interest value). The market capitalization amount is then adjusted for factors such as the company's total debt, minority interests, non operational assets that can be sold without hurting company performance, and cash on hand.

Once the Enterprise Value is determined, it is very useful in establishing a sale or purchase price for the business, especially when using valuation multiples like EBITDA (earnings before interest, taxes, depreciation, and amortization). The going multiple can be identified by researching the company's specific industry, the size of the company, and market share.

2. The seller must then **identify a number of potential strategic purchasers** – that is, purchasers from the same industry or business. Alternatively a seller can put together a comprehensive presentation booklet and "shop" the deal to a broader list of candidates.

3. If a purchaser indicates interest, the seller should negotiate a **confidentiality agreement** so that enough information can be disclosed to enable the potential purchaser to decide if it wants to enter into serious negotiations with the seller.

The terms of the confidentiality agreement should run both ways. In this way, the seller can obtain basic information from the purchaser to determine if the transaction makes sense and whether or not the purchaser has the financial capability to make the acquisition.

4. After disclosures are made by both parties and the disclosed materials have been evaluated, if the parties wish to proceed with the transaction, the potential purchaser will issue to the seller a **non binding letter of intent** ("LOI")**.**

In some cases, the seller will request that a LOI be signed before disclosing additional confidential information. However, professionals disagree regarding the use of a LOI. In some jurisdictions and in some circumstances, the presumed "non binding letter of intent" has been held binding by courts. Though this is very unlikely if the LOI is properly drafted, many conservative business people do not want to take the risk. They believe time and energy instead should be used to work on an actual purchase agreement.

5. **Due diligence** is an intensive investigation of the business which may take place before the purchase agreement is signed, between signing and closing, or some combination of the two. The purchaser and the seller can negotiate a due diligence checklist that they will follow.

The items to be investigated will depend on the structure of the transaction, the nature of the business to be acquired, and its assets and liabilities. For example, for an asset purchase in an industry where purchasers have not been held accountable for the seller's non acquired obligations, the checklist would be less extensive than the checklist for a stock purchase.

The purchaser's goal in due diligence is to find out about the business assets being purchased, assess the desirability of the purchase, and decide on the price, terms, and structure to offer.

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The seller must also evaluate the business or assets being sold to decide what warranties and representations it is willing to make to the purchaser. In a cash sale, the seller wants to know that the purchaser has, or will be capable of obtaining, the financing. However, if financing is part cash and part installment or other post closing payments, the seller will investigate the purchaser more thoroughly to assess the likelihood of receiving full payment.

The timing of the due diligence process is negotiated on a transaction by transaction basis. Sometimes due diligence takes place before the purchase agreement is signed. In other cases, the parties sign a purchase agreement and designate a 60 to 90 day due diligence period, with a provision that the purchaser has to be satisfied with the results of the due diligence as a condition of closing.

Due diligence will include examination of corporate books and records and evaluation of financial information, tax matters, title to assets, condition of assets, third party contracts (including labor), insurance contracts, intellectual property, and environmental matters.

6. A **preclosing checklist** is negotiated at the end of the due diligence investigation. At that point, the purchaser and the seller will identify a list of tasks that must be accomplished before the closing. The checklist will include any required government and bank approvals and set forth the process to obtain them.

7. Typically, the **purchase agreement** will require that the seller agree not to enter into any transactions or take any actions prior to the closing which would negatively impact the value of the business or result in any of the seller's representations and warranties not being true on the closing date.

The Closing Process

A closing date, time, and location will be scheduled. That will be the "target date" for the business managers and professionals to complete all of the items in the preclosing checklist.

Normally, the parties will assemble at a mutually agreeable location for an official "closing" to sign documents and transfer funds. Many closings now take place with authorized representatives of the seller and purchaser convening and other participants attending via telephone conference call or SKYPE.

In an asset sale, the seller will deliver a bill of sale and lien discharges at the closing. In a stock sale, the seller will deliver the stock certificates, lien discharges, and letters of resignation from the company's officers and directors.

Once the above documents are delivered, the purchaser will wire transfer funds to the seller's bank account in accordance with written instructions and authorization from the seller.

Post Closing Issues.

1. If the sale is cash for 100% of the stock or assets, the post closing issues will relate to **warranties and representations.** The purchaser will insist that the seller make warranties and representations regarding the title to the stock being sold, title to the assets of the company, financial statements issued by the company, the existence of litigation or government investigations, and lack of environmental contamination and so on.

2. Many purchasers pay with a **cash down payment** with the balance remitted in installments under the terms of a promissory note. In a stock sale, the security for this note can be the stock held in escrow by an escrow agent. If the purchaser defaults, there may be several remedies, which may include that 100% of the stock goes back to the seller and the purchaser forfeits the deposit.

3. The purchaser may purchase a **minority interest** in the company and receive an option or options to purchase additional stock. These options are exercised at the purchaser's sole discretion unless the seller requires "put" provisions that provide that, upon hitting certain benchmarks, the seller can force the purchaser to purchase the stock.

4. If the transaction is structured as **earn-out,** the purchaser agrees to purchase 100% of the stock for a cash price of $X based on the current business and projections of increases in business because of the transaction. The parties agree that, if the increased business is actually achieved, the purchaser will pay the seller an additional amount of money $X + $Y.

The purchaser will propose a certain percent of the purchase price be set aside in a "basket" to reimburse the seller's actual out of pocket losses if those warranties and representations prove to be untrue. At the end of the negotiated hold back period (usually 1 to 3 years) money is released to the seller.

If you have questions concerning the sale, merger,or acquisition of a business contact Randy Wright at the firm's Birmingham office 248-645-9680 for a confidential free consultation.

MAKING A PERSONAL LOAN

By **Patrice M. Ticknor**

Has a friend or family member asked you for a loan? In deciding whether to lend, consider the personal, legal, and tax implications. The most basic consideration is whether you have the resources to make the loan and whether the borrower is likely to have the ability to repay the debt as agreed. Other considerations then follow. What terms are appropriate? Should the loan be repaid in installments over time? Should it be repaid in full in a lump sum upon demand or on a specified date? What interest rate, if any, should be charged? What formalities are necessary to make sure the loan is legally enforceable? What are the tax consequences, if any?

All potential lenders should be aware of the basics in making the decision-

• Always get a promissory note which lays out the terms of the loan and is signed by the borrower. Not only is this important to ensure that the debt is legally enforceable, it also may be critical in ensuring that the loan is correctly characterized by the Internal Revenue Service ("IRS") for income and gift tax purposes.

• If you intend to charge interest on a money loan to an individual, under Michigan law, the interest rate charged cannot exceed 7% per annum. You will have to report the interest received on your income tax return.

• If you do not charge interest on a loan to an individual and your loans to that individual total $10,000 or less, there will be no gift tax or income tax consequences. The income tax and gift tax laws consider these loans to be minimal and thus ignore the foregone interest.

• On the other hand, if your total loans to an individual exceed $10,000 and either no interest is charged or the interest rate charged is below the Applicable Federal Rate ("AFR"), interest income will be "imputed" to you by the IRS. The AFR is the interest rate that the IRS sets monthly and uses to determine how much interest will be attributed to a lender for tax purposes. Currently, the AFRs are very low.

° When interest is "imputed" for income and gift tax purposes, the loan will be treated by the IRS as if the lender (1) made a loan to the borrower in exchange for a promissory note with an interest rate at the AFR, (2) made a gift to the borrower of the funds needed to pay the interest, and (3) actually received the interest from the borrower.

° The imputed interest must be reported on the lender's income tax return. Depending on the amount of imputed interest and other factors, the imputed interest also may have to be reported as a gift by the lender to the borrower on a gift tax return filed by the lender.

• A debt that is not paid is usually deductible by the lender either against ordinary income or as a short term capital loss. If the defaulting borrower is related to the lender, the IRS may require evidence that the original loan was not a gift. If the loan is characterized as a gift by the IRS, a bad debt deduction will not be allowed. In that case, the lender may also have to pay gift tax if no gift tax exclusion or exemption applies. Properly documenting the loan may help to avoid this result.

• You might also consider securing the loan with a mortgage on real estate or a security interest in personal property. Even if the borrower is a friend or family member, upon insolvency, the borrower will lose the ability to pay you more than other creditors. However, to the extent the loan is validly secured by an interest in the collateral, your right to have your loan partially or completely satisfied out of the proceeds of the collateral is generally superior to the claims of other creditors.

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the Board looks at two factors. First, has the employee made public outbursts against a supervisor? If so, then the Board examines the subject matter of the speech, the nature of the employee's outburst, and whether the outburst was in response to or provoked by an unfair labor practice by the employer. Second, the Board examines whether the speech is so disloyal, reckless, or maliciously untrue as to lose the Act's protection.

Aside from carefully examining the content of an employee's social media speech to determine whether disciplinary action can be lawfully taken, an employer must also examine its social media policy to determine whether that policy itself violates the Act by interfering with its employees' rights under the Act. The OGC stated that if it is determined that an employee could reasonably construe the language of the policy to prohibit rights under the Act, the policy is unlawful. It has yet to be determined if an employer can find a safe harbor for its social media policy by including language which states that the policy is not intended to interfere with employees' rights under the Act, even when it spells out what those rights are.

As to the penalties for committing unfair labor practices under the Act which involve such disciplinary actions, the employer is subject to a make-whole remedy. In the case of a discharge, the remedy would be reinstatement and a back pay award. In the case of a lesser disciplinary action, the remedy would include whatever steps are necessary to put the employee back in the pre-disciplinary position, including back-pay if necessary. If the unfair labor practice arises from an employer's social media policy, the policy must be revised. Finally, in all cases, the Board will require the posting of a notice that the unfair labor practice has been remedied.

FIRM NEWS

Berry Moorman's ever cheerful, kind, and helpful receptionist **Sarah Dean Dunsmore** retired on April 26, 2012 to spend more time with her husband, Butch, and her children and grandchildren. Over her 14 years at Berry Moorman, Dean's competence, friendliness, and positive attitude have been an asset to the firm and have touched every person who has come in contact with her. She will be missed.

Randolph M. Wright moderated a panel discussion on the current state of and opportunities in the Russian automotive sector presented by the US Russia Business Council at The Westin Book Cadillac Hotel on January 12, 2012. The event was held in conjunction with the North American International Auto Show. The panel included James Bovenzi, President of General Motors Russia & CIS, Moscow; Alan E. Draper, Vice President, Purchasing Ford Europe and former Director of Ford Russia, Cologne, Germany; Ivan Bonchev, Russian Automotive Leader for Ernst & Young, Moscow; Matthew Edwards, Director, Office of Russia, Ukraine & Eurasia, US Department of Commerce, Washington, DC; and Kenneth Duckworth, Principal Commercial Officer, US Consulate, St Petersburg, Russia.

Randy also was recently re-elected to the Board of Directors of Search for Common Ground (SFCG), a non profit organization headquartered in Washington D.C. and Brussels, Belgium, dedicated to transforming the way that the world deals with conflict. SFCG was recently named to the list of the "TOP 100 BEST NGO's in the World" by The Global Journal published in Geneva, Switzerland. SFCG was ranked the highest in the field of conflict resolution in part due to its innovative and effective media projects in Burundi and in the Democratic Republic of Congo.

Berry Moorman PC hosted meetings between US automotive suppliers interested in entering the Russian Federation market and Kenneth Duckworth, Principal Commercial Officer, US Consulate, St Petersburg, Russia and Eve Lerman, Senior International Trade Specialist, US Department of Commerce Global Automotive Team, on January 11, 12, and 13, 2012 at the firm's Detroit headquarters.

Noah S. Hurwitz has joined the firm as an associate. Noah's practice focuses on labor and employment litigation but he also assists clients in other general civil litigation matters, school law, and sports law. Noah is a member of the Employment and Civil Litigation sections of the State Bar of Michigan.

Harvey B. Wallace II chaired and made a presentation at the March 10, 2012 meeting of the Employee Benefits in Estate Planning Committee of the American College of Trusts and Estates Counsel in Miami Beach, Florida. Harvey's presentation addressed spousal rollovers from IRAs payable to trusts.

Sheryl A. Laughren will present "Hot Topics in Employment Law: Social Media, Medical Marijuana, NLRB and More" at the annual conference of the Michigan Assisted Living Association ("MALA") in Lansing on May 9, 2012. In this annual update, Sheryl will share recent decisions, laws, and perspectives on how recent court, administrative, and statutory changes impact workforce and human resource management. The presentation will include discussions of new National Labor Relations Board decisions regarding the ability of an employer to enforce rules that restrict an employee's content on social media (such as, Facebook, Twitter, and MySpace), the legal landscape concerning medical marijuana, and the Department of Labor's enforcement of overtime and minimum wage laws and regulation in the assisted living community.

Randolph T. Barker has been elected Director of the Detroit Association of Realtors ("DAR") for the three year term beginning January 1, 2012. DAR is one of the largest organizations of real estate professionals in Michigan. Its mission is to educate and to promote the highest professional and ethical standards among its members. Randy has significant experience with commercial, industrial, and residential real estate transactional and litigation matters, including leasing, land development, financing, zoning boundary disputes, property tax appeals, and construction lien issues. Randy also counsels real estate professionals regarding general business, errors and omissions insurance, and licensing matters.

ATTORNEY DIRECTORY

535 Griswold, Suite 1900
Detroit, Michigan 48226
(313) 496-1200

255 E. Brown Street, Suite 320
Birmingham, Michigan 48009
(248) 645-9680

900 Victors Way, Suite 300
Ann Arbor, Michigan 48108
(734) 668-4100

RANDOLPH T. BARKER (A)
Labor and Employment Law, Real Estate, Municipal Law, Business Law, and Litigation

DONALD F. CARNEY, Jr. (B)
Estate and Trust Litigation, Administration and Planning, Business Law, and Litigation

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Estate and Tax Planning, Business Planning, Corporate Law, Mergers and Acquisitions, Probate, Real Estate, and Litigation

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Estate Planning, Estate and Trust Administration and Litigation, and Business Law

HARVEY B. WALLACE II (D)
Estate Planning, Estate and Trust Administration, Employee Benefits, and ERISA Matters

RANDOLPH M. WRIGHT (B)
Domestic and International Business Law, Negotiation of Commercial Transactions, Banking and Finance, Real Estate Law, Business and Securities Litigation, Mergers and Acquisitions, and Alternative Dispute Resolution

RICHARD R. ZMIJEWSKI, Sr. (D & A) +
Intellectual Property, Technology Law, Business Law, Estate Planning, and Trust and Probate Administration

(D) Detroit office • **(B)** Birmingham office • **(A)** Ann Arbor office • + Of Counsel

berrymoorman.com

BERRY ◆ MOORMAN
Professional Corporation | Attorneys At Law

535 Griswold, Suite 1900
Detroit, MI 48226

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