News and Publications

Interfering with Employee Speech

Employers beware: The National Labor Relations Board is scrutinizing company social-media policies -- and their rulings apply to all companies, whether or not they are unionized. If Facebook postings or tweets involve working conditions or wages, employees are free to comment.

August 3, 2011 by Marvin L. Weinberg, Esq.

The dramatic increase in social media as a communications tool has been nothing short of phenomenal Facebook for example, has more than 600 million users.

According to a recent Deloitte survey, one-third (33 percent) of employees never consider what their boss or colleagues would think before posting online and more than half (53 percent) do not believe that their social-networking pages are their employer's business.

Given these numbers, it is not surprising that more and more employees are using social media to criticize their employers -- and some employers are responding with discipline for what they believe are unjustified and, at times, malicious attacks on the company's reputation.

Many employers are unaware that the National Labor Relations Act prohibits employers -- union or non-union -- from interfering with an employee's right to

engage in "protected and concerted activity," loosely defined to mean employee discussions or actions regarding wages, hours and other working conditions.

In a series of recent cases, an increasingly activist National Labor Relations Board, which enforces the NLRA, has taken a keen interest in employer rules that prohibit or discipline employees for engaging in such activity when using social-media sites such as Facebook or Twitter.

The first of these cases is *American Medical Response of Connecticut Inc*.AMR terminated an employee for violating its social-media policy when she complained about her supervisor on her personal Facebook page.Specifically, she referred to her supervisor as a mental patient in a "friends-only" Facebook post.

AMR's policy prohibited employees from making disparaging remarks about the company and/or supervisors, or depicting the company in any way on the Internet without company permission.

The case was significant enough that the NLRB's acting general counsel took the unusual step of announcing the complaint in a press release (see *HREOnline*™ story **here**).The case was soon settled and AMR agreed to revise its allegedly overly broad rules to ensure that it did not improperly restrict employees from discussing wages, hours and other working conditions with co-workers, even when not at work.

Another case in which the NLRB issued a complaint (there are cases pending in every NLRB Regional Office) is *Hispanic United of Buffalo Inc*. In this case, the company laid off five employees who participated in a Facebook discussion criticizing workload and staffing conditions.

The NLRB found that the discussion was protected concerted activity because it involved conversations among employees about working conditions.HUB's position is that the statements are not protected and that the employees were fired for harassing a co-worker.

This is not to say that employers cannot discipline employees for inappropriate use of social media.For example, writing inappropriate and offensive Twitter postings that did not involve protected concerted activity are not protected by the NLRA.

In a recent case involving the *Arizona Daily Star*, a reporter was terminated based on the content of messages he posted on Twitter, one of which read: "The Arizona Daily Star's copy editors are the most witty and creative people in the world or at least they think they are."

The newspaper, which did not have a social-media policy, warned him not to air his grievances or comment about the *Daily Star* in any public forum.He was eventually terminated for continuing to make derogatory comments that could damage the good will of the newspaper.

The NLRB dismissed the employee's unfair-labor-practice charge, finding he was lawfully terminated for posting inappropriate unprofessional tweets, after having been warned not to do so.

The board also found that the employee's conduct was not protected because it did not relate to terms and conditions of employment or seek to involve other employees in issues related to employment.

As a result of the intense publicity generated by the *AMR* and *HUB* cases, it is safe to assume that employers can expect more of these types of claims brought before the NLRB, and the board's acting general counsel has identified social media cases as a priority.

On April 12, he sent a memo to all regional directors to not take any action on cases involving employer rules that prohibit or discipline employees for using social media to engage in protected concerted activity. Directors were told to first inform the NLRB's Division of Advice.

Given the NLRB's leap into the world of social media, employers need to develop a clear policy addressing their employees' use of social media both within and outside the workplace.

At a minimum, any policy must state that employees do not have any expectation of privacy and their communications may be reviewed by the employer if they are using employer provided communication resources such as computers and emails.

The policy should not be overbroad so that it prohibits employees discussing their wages, hours and working conditions. However, a properly worded policy can prohibit employees from making comments that are libelous, abusive or anti-competitive and disloyal to their employer's interests.

*Marvin L. **Weinberg** is a Labor & Employment attorney at Fox Rothschild in Philadelphia, and he can be reached at 215-299-2836 or **mweinberg@foxrothschild.com**.*