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Top Employers Know When To Seek Counsel

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Social Media Policies and the NLRB
Does Your Company's Policy Comply With Labor Laws?

Employers should not forget that the National Labor Relations Act (NLRA) protects associational rights of "non-union" employees as well as "union" employees. Accordingly, it is possible to commit an ***unfair labor practice*** without a union presence in the workplace. Under the law, employees may engage in protected concerted activity in situations other than traditional union organizing and collective bargaining.

Section 7 of the NLRA provides:

> "Employees shall have the right to self-organization, to form, join, or assist labor organization, 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 of such activities…" (29 USC § 157).

In general, Section 7 applies to most non-supervisory and/or non-managerial employees in the workplace. It gives covered employees the right to engage in *concerted* activities even though no union activity is involved and even though no collective bargaining is contemplated by the employees involved. Section 8 of the NLRA, 29 USC § 158(a)(1), states that it is an ***unfair labor practice*** for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7. In essence, an employer's retaliatory conduct against an employee because of that employee's *protected concerted activity* violates the rights guaranteed by Section 7 of the NLRA. Remedies for unfair labor practices include reinstatement with full back pay plus interest. Employers also are required to post a notice to all employees detailing the violation and the remedy.

In recent months, the National Labor Relations Board ("NLRB") has been hearing an increasing number of cases alleging Section 7 violations as it pertains to Social Media policies and resulting discipline and discharge. Given the new and evolving nature of social media cases before the NLRB, employers should exercise caution when disciplining an employee for conduct on Facebook, Twitter, MySpace and other social media venues. Even though the NLRB's positions have not been tested in Court, when possible, employers should consult with legal counsel prior to taking action especially given this emerging area of the law before the NLRB.

This word of caution comes in light of the NLRB acting General Counsel's issuance of two separate reports in the last six months to provide guidance to human resource professionals and legal practitioners when it comes to social media policies and enforcement. What is clear is that the interpretation of what an employer can and cannot do is evolving and clarification is being provided with each new decision. For that reason, the current status of this area of the law is emerging and should be reviewed by HR professionals and legal practitioners.

The most recent report underscores two main points:

- Employer policies should not be so sweeping that they prohibit the kinds of activity protected by federal labor law, such as the discussion of wages or working conditions among employees.
- An employee's comments on social media are generally not protected if they are mere gripes not made in relation to group activity among employees.

Sample policies recently reviewed by the NLRB and their decisions include the following:

Unlawful Policy and Termination: An employer's policy that prohibited "making disparaging comments about the company through any media, including online blogs, other electronic media or through the media" was found to be a violation of the NLRA. The NLRB concluded that this policy was unlawful because it could reasonably be construed to restrict Section 7 activity, such as statements that the employer is, for example, not treating employees fairly or paying them sufficiently. Further, the rule contained no limiting language that would clarify to employees that the rule does not restrict Section 7 rights. The NLRB also concluded that the employer unlawfully terminated the employee following negative comments posted on Facebook by her and other coworkers regarding their working conditions. Comments included a possible class action lawsuit against the employer. The NLRB found the comments to be protected activity since the conduct was concerted activity for the purpose of inducing or preparing for group action.

Unlawful Policy but Lawful Termination: The NLRB found an employer's policy, which applied to all social networking communications, a violation of the NLRA by stating: "Employees should generally avoid identifying themselves as the Employer's employees, unless there was a legitimate business need to do so or when discussing terms and conditions of employment ***in an appropriate manner***." Emphasis Added). The policy also contained a no solicitation/no distribution rule that stated that employees may not solicit team members while ***on company property*** and that employees may not solicit others ***while on company time or in work areas***. The NLRB said the policy which did not define what is "appropriate" discussions and conditions of employment sought to prohibit Section 7 activity in violation of the NLRA. Also, the non-solicitation ban was overly broad and unlawful. On the other hand, the NLRB found the employee's termination to be proper because her Facebook posts did not amount to "concerted activity" under Section 7. After being disciplined for not complying with an office policy, the employee updated her Facebook status with a comment that consisted of an expletive and the name of the employer. Four individuals, including one of her coworkers, "liked" that status, and two other individuals commented on that status. About 30 minutes later, the employee posted again, this time commenting that the employer did not appreciate its employees. Although several of the employee's friends and relatives commented on this second post, the four coworkers who were her Facebook "friends" did not respond. In the following days, the employee discussed the incident that prompted her Facebook post to several coworkers. The coworkers offered their sympathy, but none of them indicated that they viewed the incident as a group concern or desired to take further group action. A few days later, the employee was terminated due to her Facebook posts. Her termination was deemed proper because the employee had no particular audience in mind when she made that post, the post contained no language suggesting that she sought to initiate or induce coworkers to engage in group action, and the post did not grow out of a prior discussion about terms and conditions of employment with her coworkers. Accordingly, it did not violate the NLRA.

Unlawful Policy but Lawful Termination: The employer had a policy that stated: "Insubordination or other disrespectful conduct" and "inappropriate conversation" are subject to disciplinary action. The employee posted a status update on her Facebook page indicating that she had learned that a coworker/bartender was a cheater who was "screwing over" customers. The employee was Facebook "friends" with coworkers, former coworkers, and customers. Coworkers responded saying she better be careful about her posts. The employee responded saying that she was concerned about customers leaving and thereby reducing her tips as a fellow bartender. Other coworkers complained to management about the Facebook posts and the employee was discharged for improper communications to fellow employees. The NLRB found that employer's policy was overly broad and a violation of the NLRA. Specifically, they found that "disrespectful" and "inappropriate" were not defined and could impede Section 7 rights. However, the NLRB found the employee's termination to be proper since the link between the subject of the posts and any terms or conditions of employment was too attenuated to implicate the concerns underlying Section 7. Accordingly, her discharge did not violate Section 8(a)(1) even if her conduct was concerted and even though she was discharged under the employer's overly broad rule.

Unlawful Policy but Lawful Termination: The employer's social media policy prohibited employees from using social media to engage in "unprofessional communication that could negatively impact the employer's reputation or interfere with the employer's mission or unprofessional/inappropriate communication regarding members of the employer's community." The NLRB found that such a policy violated Section 8(a)(1) because it could reasonably be construed to chill employees in the exercise of their Section 7 rights. The employee was discharged after posting angry profane comments on her Facebook wall, ranting against coworkers and the employer, and indicating that she hated people at work, that they blamed everything on her, that she had anger problems, and that she wanted to be left alone. One coworker commented that she had been through the same thing. Other coworkers reported the conduct to a manager and the employee was discharged. The NLRB found the termination to be proper since the employee was not engaged in "protected concerted conduct." The postings were simply expressions of personal anger and did not encourage coworkers to engage in group action.

Unlawful Policy: The NLRB looked at several handbook policies in this instance. The first prohibited employees from disclosing or communicating information of a confidential, sensitive, or non-public information concerning the company on or through company property to anyone outside the company without prior approval of senior management or the law department. The NLRB noted that the employer failed to provide any context or examples of the types of information it deemed confidential, sensitive, or non-public in order to clarify that the policy does not prohibit Section 7 activity. As a result, the NLRB found that employees have a Section 7 right to discuss their wages and other terms and conditions of employment, both among themselves and with non-employees. Accordingly, the policy violated Section 8(a)(1). Employees could reasonably understand this provision to prohibit them from communicating with third parties about Section 7 issues such as wages and working conditions.

Another provision of the policy prohibited use of the company's name or service marks outside the course of business without prior approval of the law department. The NLRB found this part of the policy violated employees' Section 7 right to use their employer's name or logo in conjunction with protected concerted activity, such as to communicate with fellow employees or the public about a labor dispute. Although an employer has a proprietary interest in its service marks and in a trademarked or copyrighted name, employee use in connection with Section 7 activity was found not to infringe on that interest.

The policy prohibited employees from publishing any representation about the company without prior approval by senior management and the law department. The prohibition included statements to the media, media advertisements, electronic bulletin boards, weblogs, and voice mail. The NLRB found the policy to be unlawfully overbroad. The Board recognized that "Section 7 protects employee communications to the public that are part of and related to an ongoing labor dispute." The employer's policy restricted *all* public statements regarding the company, which would include protected Section 7 communications among employees and between employees and a union. Accordingly, it was an unlawful restriction.

In another provision of the policy, the employer required that social networking site communications be made in an honest, professional, and appropriate manner, without defamatory or inflammatory comments regarding the employer and its subsidiaries, and their shareholders, officers, employees, customers, suppliers, contractors, and patients. The NLRB found this policy to be unlawful since employees could reasonably construe broad terms such as "professional" and "appropriate," to prohibit them from communicating on social networking sites with other employees or with third parties about protected concerns under the NLRA.

Another provision in the policy provided that employees needed approval to identify themselves as the employer's employees and that those employees who had identified themselves as such on social media sites must expressly state that their comments are their personal opinions and do not necessarily reflect the employer's opinions. The NLRB found that this policy was particularly harmful to the Section 7 right to engage in concerted action for mutual aid or protection and was unlawfully overbroad. Moreover, the NLRB also concluded that requiring employees to expressly state that their comments are their personal opinions and not those of the employer every time that they post on social media would significantly burden the exercise of employees' Section 7 rights to discuss working conditions and criticize the employer's labor policies, in violation of Section 8(a) (1).

Lawful Policy: An employer's amended policy that prohibited the use of social media to post or display comments about coworkers or supervisors or the employer that are vulgar, obscene, threatening, intimidating, harassing, or a violation of the employer's workplace policies against discrimination, harassment, or hostility on account of age, race, religion, sex, ethnicity, nationality, disability, or other protected class, status, or characteristic was deemed lawful by the NLRB. The employer's prior policy which was more general and prohibited discriminatory, defamatory, or harassing web entries about specific employees, work environment, or work-related issues on social media sites was found to be a violation of the NLRA.

Lawful Policy: The NLRB upheld an employer's social media policy that stated that the employer could request employees to confine their social networking to matters unrelated to the company if necessary to ensure compliance with securities regulations and other laws. It also prohibited employees from using or disclosing confidential and/or proprietary information, including personal health information about customers or patients, and it prohibited employees from discussing in any form of social media "embargoed information," such as launch and release dates and pending reorganizations. The NLRB found this policy to be in compliance with the NLRA.

Based on these recent decisions, employers should review their policies and make sure they are NLRA compliant. If you need assistance in revising your Social Media policy, I would be happy to assist you with this process.

For additional information on Employment or Labor Law issues, please contact TAMMY MEADE ENSSLIN at 859-963-9049.