Your Social Media Policy Needs a Status Update

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In light of rapid developments in labor law surrounding social media, employers and their counsel must know how to distinguish between "protected concerted activities" and other employee communications. Indeed, it wouldn't hurt for companies to update their social media policy as often as their employees update their own social media status.

The National Labor Relations Act (NLRA) Section 8(a)(1) (29 U.S.C. Section 158(a)(1)) protects employees' rights to engage in "protected concerted activities." Specifically, it makes it an unfair labor practice to violate Section 7 rights. Most people associate protected concerted activities with union activity. And in most cases, such an association is accurate. But Section 7 broadly defines "concerted" activity. Section 7 says, "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*...." Thus, Section 8(a)(1) may also protect concerted activity that is not specifically union oriented.

Although the NLRA is primarily concerned with union organization, the "concerted" requirement of Section 7 for "other mutual aid and protection" is not literally construed to provide protection solely to employee activity involving union organization. Some examples of such activities include: Two or more employees addressing their employer about improving their working conditions and pay; one employee speaking to his or her employer on behalf of him or herself and one or more co-workers about improving workplace conditions; and two or more employees discussing pay or other work-related issues with each other. In determining whether an employee's activity is *concerted*, the board will look to the purpose and effect of the employee's actions.

Essentially, the NLRA protects one employee speaking to another - a co-worker or workers employed elsewhere - seeking to enlist support on a matter of shared employee concern. And it should make no difference that the communication is made face-to-face or electronically.

The National Labor Relations Board's Hartford, Conn. office recently filed a complaint against American Medical Response of Connecticut Inc. (AMR), alleging that the ambulance service illegally terminated an employee for her postings on Facebook. The employee posted a negative remark about the supervisor on her personal Facebook page, from her home computer. Her remarks drew supportive responses from her co-workers. And these comments set off a further spate of negative comments about the supervisor from the employee. Significantly, the company's Internet policy barred employees from making disparaging remarks when discussing the company or supervisors. Consequently, the employee was fired three weeks later. The NLRB's complaint alleged, among other things, that the company "maintained and enforced an overly broad blogging and Internet posting policy."

AMR's Facebook rule improperly limited employees' rights to discuss working conditions among themselves. The main problem was that the policy prohibited employees from making "disparaging" or "discriminatory" "comments when discussing the company or the employee's superiors" and "co-workers." Whether it takes place on Facebook or at the water cooler, employees have a right to discuss working conditions - in this case, their supervisor's conduct. As *Newsweek* recently proclaimed: "The National Labor Relations Board declares that Facebook posts are legally protected speech...Take this job and shove it!"

Still, whether Section 7 protects such remarks may depend on with whom the employee communicated. If a worker lashes out in a post against a supervisor but is not communicating with co-workers, that type of comment might not be protected. If the Facebook conversation involves several co-workers, however, it is far more likely to be viewed as "concerted protected activity." But employees might cross into unprotected territory if they disparage supervisors over something unrelated to work - for instance, a supervisor's libido - or if their statements are patently fallacious.

Rather than creating ineffective, overly broad policies forbidding any online mentions of the workplace, employers will have to manage online employee speech like they already handle offline speech - carefully. For instance, it is likely safe to proscribe speech that shows poor judgment, undermines the employer in public or creates a hostile work environment. But it is a thin line between "protected concerted activities" and other employee communications.

An NLRB advice memorandum, issued last December, can provide guidance for employers crafting social media policies. There, the NLRB challenged Sears' social media policy, which forbade "disparagement of company's or competitors' products, services, executive leadership, employees, strategy and business prospects" on social networks. The NLRB determined that the policy was an acceptable one, since employees were still able to talk among themselves in a private Yahoo group.

The *Sears* company rule appeared in a list of plainly egregious conduct, such as employee conversations involving the employer's proprietary information, explicit

sexual references, disparagement of race or religion, obscenity or profanity, and references to illegal drugs. The policy preamble further explained that it was designed to protect the employer and its employees rather than to "restrict the flow of useful and appropriate information." Because no complaint was issued, the question did not reach the board for adjudication. But the board did advise that, taken as a whole, the policy contained sufficient examples and explanation of purpose for a reasonable employee to understand that it did not prohibit Section 7 protected complaints about the employer or working conditions. Rather, it prohibited the online sharing of confidential intellectual property or egregiously inappropriate language.

The NLRB opined that the appropriate inquiry is whether the rule in question would "reasonably tend to chill employees in the exercise of their Section 7 rights." The NLRB analyzed the issue under the framework set forth in *Lutheran Heritage Village - Livonia*, 343 NLRB 646 (2004), a case that dealt with a rule prohibiting certain types of interactions in the workplace. The union in that case argued that workplace rules prohibiting "abusive and profane language," "harassment," and "verbal, mental and physical abuse" unlawfully chilled union activity. The board, announced a three-part test to determine the validity of rules that do not explicitly forbid activity protected by Section 7 of the NLRA. Under that test, a rule is only unlawful if: "(1) *employees would reasonably construe the language to prohibit Section 7 activity*; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights." The Board in *Lutheran Heritage Village* found that the test was not met, so the rules prohibiting "abusive and profane language," "harassment," and "verbal, mental and physical abuse" were lawful.

Some may argue that words like "abusive" and "harassment," are highly subjective. And without a defining context, or limiting language, the rules could subject to discipline, and thus inhibit, protected conduct. For example, might not an angry conversation with a supervisor expressing dissatisfaction over an evaluation, or a heated discussion between employees over the benefits of unionization constitute "abusive" behavior? But expressions of displeasure, and even anger in a "moment of animal exuberance," are protected means of Section 7 communication. Indeed, workplace realities suggest that in the course of protected activity, tempers often flare and emotions run high. And employees sometimes do use language that is abusive, but not so egregious as to cost them the protection of the Act.

In view of this, all employers should be explicit and as detailed as possible when crafting their social media policy. The policy must convey that the purpose is not to inhibit protected employee communications, such as those concerning workers' rights, working conditions, or harassment. Rather, it should explain that while employees are encouraged to voice their grievances, the company also has a duty to maintain a safe, harassment- and discrimination-free workplace. The company also needs to protect its key assets and reputation. Employers should even provide examples of specific instances of prohibited and protected speech. Moreover, employees should sign off on the fact that they have read, understood and had an opportunity to inquire about any confusion regarding the policy.

When drafting a social media policy, remember that Section 7 protects all employees - whether or not they are a member of a union or work for a unionized enterprise.

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