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Don't Fire that Employee for a Facebook Posting Just Yet

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If it hasn't happened to your company yet, it will. One of your employees may post a disparaging remark on-line about the company, company practices or a member of management. The employee may even use profanity in the posting. However, before you react and fire the employee you should know that, depending on the nature of the posting, the employee may be engaging in what the National Labor Relations Board ("NLRB") considers "protected activity."

Section 7 of the National Labor Relations Act (the "Act"), applies to both union and non-unionized work forces. It states: "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." An employer's retaliatory conduct, such as interfering with or disciplining an employee because of that employee's protected concerted activity violates these employee rights guaranteed by the NLRA and is illegal under 29 USC §158(a)1.

At the time the Act was ratified, the digital world did not exist. Recently, however, the NLRB has made it clear that it is in tune with our digital age and that social networking sites such as Facebook and Twitter, as well as personal blogs, are platforms where employees may engage in "concerted activity."

On August 18, 2011, the NLRB released a General Counsel Report which analyzed its investigation of approximately 14 cases involving social media and alleged violations of the Act. (See https://www.nlrb.gov/news/acting-general-counsel-releases-report-social-media-cases). Though the Report does not draw definitive lines as to what constitutes protected activity, it does cite guidelines for deciding when an employee's use of social media may be considered protected activity. For example, postings that may be protected activity will:

- Discuss terms and conditions of employment
- Have co-workers involved in the posted discussions
- Directly relate to or come about from earlier discussions
- Invite coworkers into action

Though the General Counsel Report is helpful, it does not give employers enough guidance. For example, in one particular case, management was referred to as a "scum bag." Many employers would instinctively think that this person should be terminated immediately. Yet the NLRB ruled that this employee's posting was protected activity under the Act because it was: (a) made outside the workplace, (b) was not accompanied by threats, and (c) was "provoked" by the employer's allegedly unlawful behavior.

The General Counsel Report also briefly discussed how broad employer social media policies can violate the Act. Social media policies that prohibit posting pictures depicting the company, using the company logo or barring discussions about the company and/or management are considered unlawful.

Designing narrowly focused social media policies appears to be the best approach for employers. The NLRB recommends that social media policies contain a disclaimer informing employees that the policy does not apply to activities protected by Section 7 of the Act.

Many of the 14 cases analyzed in the NLRB General Counsel Report did not involve unionized employers, and by January 31, 2012, the majority of private employers will be required to post a notice entitled "Employee Rights under the NLRA." For your convenience, we are providing a link to the required posting: https://www.nlrb.gov/sites/default/files/documents/1562/employeerightsposter-8-5x11.pdf.

It is clear that the NLRB will continue to flex its legal muscles. Employers are encouraged to seek legal counsel before taking disciplinary action against an employee for a social media posting or before implementing a social media policy.

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