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Social Media in the Workplace: NLRB Offers Guidance for ALL Employers on Offensive Posts and Social Media Policies

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While it is well known that the National Labor Relations Board (NLRB) governs issues involving unions and unionized employers, it also protects employees' rights to engage in "protected concerted activities," defined as two or more employees conferring or taking action for their mutual aid or protection regarding terms and conditions of employment. **It does not matter if the employees are unionized.** If an employer disciplines or discharges an employee for engaging in such activities, it may be committing an unfair labor practice under the National Labor Relations Act (NLRA), and may be required to reinstate the employee and pay for lost wages.

Throughout 2011, the NLRB's General Counsel increasingly has been using his power to issue and prosecute unfair labor practice complaints against employers that have disciplined employees for Facebook, Twitter or other social media posts that the employers considered detrimental to their business. The General Counsel also has issued complaints against employers for promulgating social media policies that he believed were overbroad because they tended to prohibit employees from engaging in protected activity.

On August 18, 2011, the NLRB released a report summarizing the most recent social media cases reviewed by the Office of the General Counsel. The report provides some insight into the types of conduct the General Counsel will and will not consider protected from employer discipline. The report also sheds light on when an employer’s social media policy will be considered overbroad.

What Constitutes Improper Discipline for Social Media Posts?

The General Counsel's report summarizes four cases in which he concluded that the employer's discharge of employees for social media conduct violated the NLRA:

1. In preparing for a meeting with management, an employee asked coworkers in a Facebook post for their reactions to another employee's complaint about work quality and staffing levels, and four responded with posts. The employee who was the subject of the Facebook discussion complained to management about what she perceived as harassment and cyber-bullying by the others. The employer, a not-for-profit organization, then fired all five

employees who posted the Facebook messages. The General Counsel viewed the employee's request for assistance from coworkers as concerted activity and concluded that the terminations were illegal. (Recently, this case became the NLRB's first adjudicated social media case, and an NLRB administrative law judge agreed with the General Counsel that the Facebook discussion related to matters affecting the employees' employment and, therefore, was protected activity, notwithstanding the employer's argument that it was simply enforcing its anti-harassment policy).

2. An employee complained on Facebook about her supervisor's refusal to allow a union representative to help her answer a customer complaint about the employee, using language describing her supervisor as a "scumbag," among other terms, and drawing comments from her coworkers. Notwithstanding the insults, the General Counsel viewed as protected the employee's discussion of supervisory actions with coworkers who were her Facebook friends.

3. In a case involving a Chicago-area luxury car dealership, a salesperson criticized his employer's handling of a sales event to promote a new car model by serving hot dogs and snacks, which he considered cheap food unbefitting the image of the dealership and sending the wrong message to potential customers. He also posted mocking photos of the event that included his coworkers. The General Counsel felt that the employee was simply vocalizing the concerns of his fellow employees about an event that could have an impact on the employees' compensation, which consisted entirely of commissions. Therefore, the employee's expression of those sentiments was protected and his termination was illegal.

4. Two employees responded to a former employee's Facebook post criticizing the employer for failing to withhold enough money for state income taxes. One employee clicked "like." The other commented that the employer also owed her money and that one of the owners of the company was "such an asshole." The General Counsel noted that the tax issue previously had been raised with management and that the online discussion included future group activity by the employees. Therefore, it was protected.

The report also discusses cases where the General Counsel did *not* think employees had engaged in protected activity. In one, an employee complained on Facebook about the "tyranny" at work, asserting that the assistant general manager was a "super mega puta." The General Counsel did not find this protected because it was merely an individual gripe, rather than the logical outgrowth of any prior group activity. In another case, the General Counsel declined to issue a complaint on behalf of a newspaper reporter because his unprofessional tweets on a work-related Twitter account did not involve other employees and did not relate to terms and conditions of employment.

Several common threads can be gleaned from these examples:

- **To qualify as protected concerted activity, the use of social media must involve commentary regarding terms and conditions of employment.** If employees are discussing workplace responsibilities and performance together online, the employer should always think twice before disciplining them. On the other hand, simply griping about matters that have nothing to do with working conditions (such as the reporter in the above example who posted concerns about the newspaper in general and other topics in an unprofessional manner) is not a protected activity.

- **Profanity and insulting language in Facebook posts generally will not justify discipline**

if used in the course of protected concerted activity. In some of the above examples, employees used insulting or abusive language to discuss their employer, a supervisor or a coworker, yet the General Counsel felt the activity was protected. In effect, he is telling employers they will need to develop a thicker skin when it comes to dealing with protected concerted activity. Although there comes a point where the language may be so offensive or defamatory that it may no longer be protected, the threshold will be high.

- **The social media activity must be concerted or in some way involve other employees.** If an employee simply speaks for himself or directs his comment at non-employees, that will not be considered concerted activity and, therefore, will be unprotected. But if the employee directs his comments to coworkers, seeks to enlist their assistance or guidance, or posts something that is a logical "outgrowth" of an earlier discussion among coworkers about terms or conditions of employment, then his activity will be considered protected.

Where Does the NLRB's General Counsel Stand on Social Media Policies?

The General Counsel's report also includes examples of social media policies that he considers overbroad and in violation of the NLRA. For instance, he found a policy improper that outlawed "inappropriate discussion about the company, management and/or coworkers." In the General Counsel's view, such a prohibition was overbroad, as it reasonably could be read to prohibit or restrict employees from exercising their rights to discuss terms and conditions of employment. Similarly, and perhaps more controversially, he found a policy overbroad that prohibited employees from posting pictures in any media—online or offline—that depicts the company in any way, including the employer's logo and photographs of the employer's store, brand or product. In the General Counsel's view, such a prohibition would restrict employees from engaging in certain types of protected activity, such as posting pictures of lawful picketing that showed the company name or logo.

The General Counsel's report also offers suggestions on how employers can more narrowly tailor policies to stand a better chance of passing muster. For example, he suggests that a policy prohibiting employees from making disparaging comments about their company or its supervisors, coworkers, clients or products would not be objectionable if it contains disclaiming language that such provisions will not be construed or applied in a manner that interferes with employees' exercise of rights under the NLRA.

Additionally, the report approves a provision stating that no employee can pressure a coworker to "friend" or otherwise connect with that employee via social media. Such a policy, in the General Counsel's view, clearly applies only to harassing conduct, rather than prohibiting employees from "friending" for purposes of engaging in activity protected under the NLRA. Similarly, the General Counsel approved policies that require employees to maintain confidentiality about sensitive information or that direct all media inquiries to the company's public affairs office.

All Employers Take Note

It is important to remember that the NLRB's guidance on social media applies to all employers, whether or not their employees are unionized.

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