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More on Social Media and Employment Law

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With the emergence of an active National Labor Relations Board ("NLRB"), non-union employers are learning about the National Labor Relations Act ("NLRA") the hard way. The NLRB's keen interest in how employers attempt to regulate employees' use of "social media," such as Facebook, Twitter, and related sites creates new challenges for management unfamiliar with the NLRA and its requirements.

The Broad Scope of the NLRA

Under the NLRA, all employees, whether union members or not, have the right to engage in "protected concerted activity." These activities include discussing wages, hours and other terms and conditions of their employment with their co-workers.

Employer actions against employees who engage in activity the NLRA protects may constitute an "unfair labor practice." The NLRB adjudicates unfair labor practice complaints against non-union and unionized employers. Remedies may include reinstatement with backpay for discharged workers, invalidation of policies, and orders to post notices, among other things.

No longer limited to clandestine meetings or private email exchanges, workers' discussions on Facebook, Twitter or other fora are often posted on public websites for nearly anyone to see. Discussions among employees on matters the NLRA protects often are critical of employers and management. Even derogatory, misleading and seemingly disloyal expressions are protected.

Recent Guidance

And there is the rub. Management does not want "dirty laundry" aired in public, particularly when criticism gets personal. So, when do employees who complain about their employers cross the line and under what circumstances may management take action? The NLRB's General Counsel recently analyzed several scenarios to help explain its position regarding when employee social media activities may be protected by the NLRA.

Protected Conduct

The four scenarios in which the NLRB found conduct protected share common themes. First, all of the conduct occurred outside of the workplace, with employees posting comments on Facebook during their own (non-work) time. One scenario involved employees complaining to one other about their employer's tax withholding practices. Another involved a commission-paid employee who posted pictures and sarcastic commentary, criticizing the manner in which his employer conducted a sales event. Yet another involved an employee posting negative comments about a "scumbag" supervisor who was investigating a customer complaint against the employee. In the final scenario, a group of employees posted explicit comments criticizing the work performance of their coworkers and staffing level problems.

In each scenario, the NLRB determined the employees were engaging in protected concerted activity because: (1) the communications concerned the terms and conditions of employment; (2) the subject of the communication was brought to management's attention, or the employee had reason to believe the communication would result in a discussion with management; (3) the communications addressed employees' shared work concerns; and (4) the communications were either directed to coworkers or discussed among coworkers.

Unprotected Conduct

The NLRB found two scenarios did not involved protected concerted activity. In one situation, an employee posted to a senator's Facebook page, complaining that her employer paid low wages and lacked sufficient equipment. The NLRB found that such a posting was not protected because: (1) the employee did not discuss the post with any of her co-workers; (2) she did not try to raise the issue with management, and she did not reasonably expect the senator to resolve the problems with her employer; (3) none of her coworkers had met or organized any group action regarding the subject of her comments. So, in the Board's view, complaining by yourself about your employer to an outside entity that is not a union is likely

unprotected under the NLRA. Of course, complaints to third-party government agencies or officials may be protected activity under other laws. Each situation must be analyzed carefully.

In a second scenario, a reporter created a Twitter account. He then used Twitter to criticize his employer's copy editors, comment about area homicides (which were a part of his beat), and criticize an area television station. Again, the NLRB found there was no protected concerted activity. This time, it reasoned that the posts did not relate to the terms and conditions of his employment. Additionally, the reporter made no effort to involve co-workers.

The "Test" for Protected Activity

The NLRB's analysis suggests a rough "test" to help employers assess whether social media activity is protected: (1) does the communication concern the terms and conditions of employment?; (2) was the subject of the communication brought to management's attention, or did the employee have reason to believe the communication would result in a discussion with management?; (3) does the communication address employees' shared concerns (as opposed to an individualized issue)?; and (4) was the communication directed to coworkers and/or discussed with coworkers?

The more the facts suggest "yes" answers to these questions, the more likely the conduct is protected concerted activity under the NLRA, and therefore beyond the reach of employer discipline.

Tips for Employers

Employers still may and should issue policies governing social media use. They may protect their trade secrets and confidential information, and may extend anti-discrimination and harassment policies to social media. Such policies provide employees with guidance regarding employers' expectations and may help employees avoid crossing the line. Because of the NLRA and other laws that may protect employees' complaints and criticisms regarding working conditions, however, employers must carefully analyze each situation to determine potential risks. Prudent employers also may wish to consider whether social media commentary signals a larger employee relations problem within an organization, or whether complaints are isolated or lacking merit.

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