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Review social media policies to make sure they comply with law

NLRB will not uphold policies considered to be 'overly broad'

By Evan M. Rosen

On average, your employees use various forms of social media more than 15 hours a month, and they frequently use social media sites like Facebook, Twitter, and YouTube to complain about their job or supervisor. These posts often generate comments from coworkers, customers, and the general public, and therefore are of increasing concern.

Employers have legitimate concerns about their employees' use of social media. The prudent employer should include a well-drafted social media policy in its employee handbook to address each of these issues. But it is crucial that the policy is drafted narrowly enough to withstand scrutiny from the National Labor Relations Board. Section 7 of the National Labor Relations Act protects employees who engage in concerted activity for their mutual aid or protection regarding their wages, hours, or working conditions. This includes action by a group of employees, or an individual employee acting with or on the authority of employees in pursuit of a common goal. Notably, employees have this right even if they are not members of a labor union.

The Board has taken an aggressive anti-employer stance on these issues, and is regularly filing complaints against employers who discharge workers for posting disparaging messages on social media sites about the company, their supervisor, or company policies. In these cases, the Board seeks reinstatement of employment and backpay for the aggrieved employees, and requires employers to post a notice stating that they will not violate their employees' rights.

In one case, for example, a restaurant discharged two employees after a former employee posted a message complaining that she owed money as a result of the company's tax error, and two current workers responded to the post. The restaurant discharged both workers under its policy that prohibited "inappropriate discussions." The Board, however, determined that the restaurant's social media policy was "overly broad" and ordered that the employees be reinstated with backpay because they had engaged in protected concerted activity. Conversely, in a different case, the Board upheld a restaurant's discharge of a bartender who posted a message on Facebook complaining that he had not received a raise in five years, finding that although the posts dealt with conditions of employment, the posts were personal to his situation and did not involve "concerted" activity.

To determine if an employee is engaging in protected concerted activity, the Board reviews whether coworkers responded to the posting; the posting generated online discussion among employees about working conditions; the posting sought to initiate or induce coworkers into group action; and the posting was a continuation of earlier group action, such as a follow up to a group complaint raised with management.

Policies that are sufficiently specific, and do not impair an employee's Section 7 rights, will be upheld. Accordingly, the Board has upheld policies that prohibit posts that are vulgar, obscene, threatening, harassing, or a violation of the employer's policies against discrimination. Likewise, a policy prohibiting disclosure of confidential information may be lawful if it clearly identifies the types of information the employer seeks to protect.

Some employers have attempted to circumvent the Board's rulings by including a savings clause, which states that nothing in the policy is intended to interfere with an employee's Section 7 rights. Unfortunately, the Acting General Counsel recently stated that such provisions will not cure an otherwise overly broad policy.

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