EPSTEIN BECKER GREEN

On Managing Employees' Social Media Activity, *in* PLC Labor and Employment

September 1, 2012 | Publications

Steven Swirsky, a Member of the Firm in the Labor and Employment and Health Care and Life Sciences practices, in the New York office, wrote a column about disciplining employees about social media posts.

Following is an excerpt:

Q. What sort of actions can an employer take against an employee whose online postings may be offensive or insubordinate, but may also be construed as protected concerted activity?

A. The key is to have a social media policy that identifies with particularity what is and is not prohibited. In his recent Third Report on Social Media, National Labor Relations Board (NLRB) Acting General Counsel (AGC) Lafe Solomon made clear that when a social media policy does not offer clear examples of the types of postings, statements and conduct that it intends to prohibit, the NLRB will find employees would "reasonably construe" the policy as prohibiting them from engaging in conduct protected by the National Labor Relations Act (NLRA). Many of the cases the AGC has dealt with address whether policies are lawful on their face.

An employer's ability to take effective discipline in a lawful manner will turn on the specific facts of what makes a posting or action insubordinate or offensive. The fact that an employee's postings are offensive to the employer or potentially harmful to its business or reputation does not mean they are not protected. Supervisors and managers must be trained so they understand how to apply a well-drafted social media policy and know that offensive remarks, even those that are harmful to a business's reputation, can be protected by law.

People

Steven M. Swirsky
Board of Directors / Member of the Firm
Labor Management Relations
New York
212-351-4640
sswirsky@ebglaw.com

Q. What is the single biggest mistake you see employers making in this area, and how can they avoid it?

A. Too many employers are relying on the social media policies they put in place at the start of the social media era, and not realizing that they need to keep refining not only their policies' language but the manner in which they are applied. Policies need to include the concrete examples that the AGC calls for. For example, older policies often fail to include examples of prohibited conduct or speech. lnstead, these policies refer to speech that might be offensive or harm the reputation of a company, which is too vague and may be overbroad. Similarly, it is clear that the NLRB will find requirements that employees get permission before posting online to violate the NLRA and chill employees' exercise of their rights.

It is also no longer enough to simply prohibit the disclosure or use of confidential information, trade secrets, or customer or financial data. Human Resources, supervisors and management need to understand current law and that the NLRB requires narrowly drawn provisions. With the Third Report, we now have a much better idea what the AGC considers lawful and what the NLBB will find violates the NLRA. The sample policy in the Third Report also gives employers an opportunity to develop or revise their own policies that should stand up to NLRB scrutiny.