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In Brief

August 2011

EMPLOYEES AND THEIR SOCIAL MEDIA POSTINGS: ARE THEY PROTECTED ACTIVITY?

Employers are presently confronted with difficult legal and practical issues when considering the possibility of punishing employees for their statements on social media sites like Facebook and Twitter. When is such discipline permissible, and when might it violate basic labor law principles? Based on recently issued guidance, the National Labor Relations Board[1] (NLRB) appears to be moving away from an expansive position on this issue toward a more realistic approach.

NLRB'S Previous Responses Aggressively Targeted Employer Action Based Upon Social Media Posts

In October of 2010, the NLRB created quite a stir when it filed its first enforcement action based on employees' social media communications. In *American Medical Response of Connecticut, Inc.*, the NLRB alleged that the employer violated federal labor law by terminating an employee over her Facebook posts. The posts in question included profanity-laced criticism of her supervisor, which co-workers subsequently responded to. In the NLRB's view, this online dialogue was "protected concerted activity" under federal labor law because the employees were discussing terms and conditions of employment. For many, the NLRB's position appeared to indicate an unrealistic expansion of the concept of "protected concerted activity" under federal labor law.

Following the *American Medical* complaint, the NLRB took similar action in several additional cases. Of particular interest to Illinois employers was the NLRB's May 2011 complaint against Knauz BMW, a Chicago area BMW dealership, alleging unlawful termination of an employee for posting photos and comments on Facebook that were critical of the dealership. In that case, a car salesman and his co-workers were unhappy with the quality of food and beverages at a dealership event promoting a new BMW model, fearing that their sales commissions could suffer as a result. Following the event, the salesman posted photos and commentary on his Facebook page criticizing the dealer for serving only hot dogs and bottled water to customers. Other employees had access to the Facebook page. The dealership subsequently terminated the salesman for posting the photos and comments. Like in *American Medical*, the NLRB viewed the online activity as protected concerted activity, and terminating the salesman for engaging in such violated federal labor law.

Needless to say, the NLRB's firestorm of activity during the latter part of 2010 and the first half of 2011 generated much discussion concerning the NLRB's increasingly expansive view on this issue. At the same time, employers were left without clear guidance as to how to handle employee activity on Facebook and other social media sites.

NLRB's July 2011 Memoranda[2]

Last month, the NLRB's General Counsel issued three memoranda that indicate the NLRB is now returning

[1] The NLRB's jurisdiction extends only to private-sector employers. However, both the IELRB (educational employers) and ILRB (governmental employers) generally follow NLRB precedent.

[2] On August 18, 2011, the NLRB's General Counsel issued a comprehensive report concerning social media cases. The report contains summaries of numerous recent cases in this area. A copy of the report is available on the NLRB's website: http://mynlrb.nlrb.gov/link/document.aspx/09031d458056e743

to a more sensible viewpoint concerning whether employees' social media activity is in fact protected activity. In the memoranda, the General Counsel concluded that three employee social media situations did not involve protected concerted activity.

In the first case, a bartender at JT's Porch Saloon & Eatery in Illinois was fired for having a Facebook conversation with his step-sister about work. The bartender complained that he had not received a raise in five years and that he was doing waitress work without tips. He also called the establishment's customers "rednecks" and stated that he hoped they would choke on glass as they drove home drunk. He did not discuss his postings with any other employee, and no employee responded to it.

In the second case, a Walmart employee posted negative comments about the company on his Facebook page, predicting that many employees would quit if the store's "tyranny" did not end. Two co-workers responded to his post. One indicated that he found the Facebook post humorous and the other asked why the employee was so "wound up." Walmart disciplined the employee for posting profane comments that were critical of store management.

In the third case, an employee of Martin House, a non-profit residential facility for homeless people, was terminated for having had a conversation on her Facebook page while working her overnight shift. According to Martin House, the employee used the illnesses of the organization's clients for personal amusement and created confidentiality concerns regarding client information.

In all three cases, the NLRB's General Counsel concluded that the employee activity was not protected concerted activity. The General Counsel reiterated that the test for "concerted" activity is whether the activity is engaged in with or on the authority of other employees and not solely by or on behalf of the individual employee. In other words, the focus is on whether the employee postings are seeking to initiate or induce group action on behalf of others. Individual employee gripes and complaints are not protected.

Summary

The NLRB's recent decisions and memoranda demonstrate that employers need to undertake careful review of an employee's social media communications before disciplining an employee for such activity. Employees do have the right to engage co-workers in discussion of common issues and potential group action, both in person and online. However, employees are not allowed to use social media sites as a means of publicly posting personal complaints and attacks on an employer without risk of discipline.

Although the General Counsel's July memoranda represent a more well-reasoned approach to this issue, the NLRB is unquestionably keeping employee social media activity high on its enforcement priority list. Accordingly, before taking action based upon an employee's statements on Facebook or other social media sites, we recommend that employers first consult with their legal counsel and carefully review the potential implications of the communications.

If you have any questions about an employee's social media postings, employer social media policies, or this *In Brief*, please feel free to contact any RSNLT attorney.

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