NLRA May Protect Your Employees' Facebook Rants (Regardless of Union Status!)

Posted on Erickson's Social Networking Law Blog by Megan J. Erickson on December 9, 2010.

The National Labor Relations Board's Hartford regional office recently accused an employer of engaging in unfair labor practices when the company fired an employee who complained about her supervisor on her personal Facebook page. The NLRB regional director (part of the NLRB's Office of General Counsel) filed the complaint against American Medical Response of Connecticut on October 27, 2010, and issued a press release last month announcing that an NLRB investigation concluded that the employee's Facebook posts were protected concerted activity, and that the company's blogging and internet posting policy contained unlawful provisions. Specifically, it took issue with the provision "that prohibited employees from making disparaging remarks when discussing the company or supervisors and another that prohibited employees from depicting the company in any way over the internet without company permission." The press release explained these kinds of provisions interfere with employees' rights to engage in protected concerted activity. I found a copy of the complaint posted to JDSupra by Adrian Lurssen, which included the actual text of the two alleged "unlawful provisions," which state:

- Employees are prohibited from posting pictures of themselves in any media, including but not limited to the Internet, which depicts the Company in any way, including but not limited to a Company uniform, corporate logo or an ambulance, unless the employee receives written approval from the EMSC Vice President of Corporate Communications in advance of the posting;
- • Employees are prohibited from making disparaging, discriminatory or defamatory comments when discussing the Company or the employee's superiors, co-workers and/or competitors.

This has caused quite a ruckus among human resources and legal professionals, because – remember – the National Labor Relations Act protects union and non-union employees against discrimination based on union-related activity or group action ("protected concerted activity" such as discussing the terms and conditions of their employment). Although this complaint has received extensive coverage already, I thought it may be worthwhile to join in the discussion to point out that this NLRB complaint doesn't sound the death knell on employer social media policies or internet policies. The NLRB isn't saying blogging or internet policies violate the law, it just seems to be saying this employer's internet policy was too broad. That being said, I think the complaint still might possibly inject a little confusion into the employer's (and lawyer's) evaluation of appropriate social media policy language.

Last December, the NLRB's Office of the General Counsel issued an Advice Memorandum in Sears Holdings (Roebucks), No. 18-CA-19081, which examined another employer's social media policy and found the policy did not violate the NLRA. The challenged provision within the policy in that case prohibited "[d]isparagement of company's or competitors' products, services, executive leadership, employees, strategy, and business prospects."

On one hand, the specifically challenged disparagement provisions in the two cases are relatively similar. Consequently, the approval of the policy at issue in December 2009 seems inconsistent with the October 27, 2010 complaint – at least at first blush. Both seem to be broadly worded to restrict what could be considered protected under the NLRA. But it seemed important to the December 2009 conclusion that the challenged provision within the Sears policy was only one of multiple other, relatively specific, prohibited social media activities such as prohibiting disclosure of confidential or proprietary company information, reference to illegal drugs, obscenity or profanity, and so on. The Sears policy also included prefatory language saying "…[t]he intent of this Policy is not to restrict the flow of useful and appropriate information, but to minimize the risk to the Company and its associates."

The *Sears* Advice Memo pointed out that, standing alone, "the ban on "[d]isparagement of company's . . . executive leadership, employees, [or] strategy . . ." could chill the exercise of protected concerted activity. But read in light of its longer list of prohibited activity that clearly fell outside NLRA protection, employee wouldn't reasonably construe the Sears social media policy to prohibit protected concerted activities. In contrast, the American Medical Response provisions at issue appear to constitute that employer's entire "Blogging and Internet Posting Policy" (based on the way it reads in the complaint, anyway). The lack of the more limiting contextual language like that included in the Sears social media policy seems to distinguish it and suggests that may make the American Medical Response internet policy too broad. The American Medical Response complaint also indicates the employer fired the employee after denying her requested union representation. Sounds like that may be a game-changer, too.

American Medical Response's answer to the complaint was due last month, and on January 25, 2011, there will be a hearing before an NLRB administrative law judge on the American Medical Response complaint. Keep your eye out for that.

Two important reminders: (1) the NLRB agency's complaint isn't a final determination or decision -- it's just a charging document; there hasn't even been a hearing yet, and (2) the Advice Memorandum isn't binding, either. Although it's fun (well, fun for nerdy lawyers like me) to think about the various implications these kinds of filings could suggest, keep those two caveats in mind! Look for tomorrow's post that will expand on this one a bit.

Thanks to Anders for pointing me to the NLRB press release last month!

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If you have questions regarding legal issues relating to social media and the workplace, please contact attorney Megan Erickson at 515-246-4538 / merickson@dickinsonlaw.com or another member of the firm's Iowa Employment Law and Labor Law Group at employmentlaw@dickinsonlaw.com.