

[An Update on Social Media and Employee Discipline](#)

June 19, 2011

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A [few months back, we reported](#) that the [National Labor Relations Board \(Board\)](#) had issued a complaint against a company for disciplining an employee because she posted insulting remarks about her supervisor on her Facebook page. We [subsequently reported that the complaint was settled](#). Since that time, the Board has remained very active in the the social media area, and has demonstrated an apparent desire to actively police that space. The Board has issued several complaints, which send a strong message that the Board is interested in protecting the social media space for employees.

Before we move forward to discuss the Board's activity, lets first take a step back and remember that the rules of the game have not changed too much. The only difference is, the game is being played in a new arena. Since the enactment of the National Labor Relations Act (Act), employees have had the right to engage in concerted activity and to discuss the terms and conditions of employment without retribution from their employers. The right to discuss the terms and conditions of employment, includes the right to discuss wages, benefits, working hours and working conditions, and under the Board's precedent, also includes the right to complain about supervisors and managers in some cases. The Act prohibits covered employers from disciplining employees who exercise these rights.

While these employee rights have not changed, they are now being exercised in a new forum. Employees, and unions, have flocked to social media. Unions are using social media to help organizing campaigns, and employees are using social media for just about everything. As a result, conversations that used to occur in the break room and bar room now take place on Facebook or via Twitter. In the past, employers were probably not even aware that employees were discussing the terms and conditions of employment, but now these conversations on posted on the Internet, and in some cases, have a very wide audience.

When these discussions are offensive or disparaging, employers often want to take action. Understandably, employers may wish to discipline employees whose comments demonstrate a lack of professionalism or violate employer policies. However, the Board has been quick to step in and issue a complaint if, in the opinion of the Board, the employer's action has violated the Act.

The Board has issued complaints involving Facebook and Twitter, complaints involving negative comments about individual supervisors and the employer as a whole, and complaints against both union and non-union employers. As the Board's first widely

publicized social media complaint demonstrates, it does not matter what the forum is, employers cannot discipline an employee for discussing the terms and conditions of employment, and social media policies cannot prohibit employees from exercising their rights under the Act. The Board seems intent on protecting employee use of social media. Importantly, however, the Board's authority ends at the outer limits of the Act. Recently, the Board dismissed a complaint involving an employee termination because the employee's inappropriate tweets did not involve the terms and conditions of employment and therefore, were not "protected activity" under the Act.

The Board's activity highlights some key points.

First, the Board is not afraid to step into the social media fray, even though many employers themselves have not yet entered that space. Also, employers need to remember that if they are covered by the Act, whether or not they are a union or non-union workplace, they must comply with the Act's requirements. In addition, employers should have social media policies in place, but those policies cannot prohibit employees from engaging in protected activity. Finally, only certain activity is protected by the Act, not all employee social media activity is protected.

Generally speaking, these rules are not new. What is new is that employers must develop and implement a social media policy if they have not done so already. All employers need to have social media policies in place to ensure that they are not caught flat footed when the first social media issue pops up. And, if that has not happened already, it soon will. A good social media policy is written using plain language, reflects the employer's risk tolerance and culture, and provides employees guidance on appropriately using social media.

Finally, employers covered by the Act must be sure to take appropriate precautions before disciplining an employee based on content posted on a social media site. As we have seen, the Board will not hesitate to step in and issue a complaint.

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