NLRB Offers Useful Guidance for Employers In Summary Report on Social Media Cases

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Social media issues continue to dominate the labor law landscape. Last month, we highlighted three recent memoranda issued by the National Labor Relations Board's Division of Advice to NLRB regional offices discussing social media under the National Labor Relations Act (NLRA). And, on August 18, 2011, the NLRB's Office of the General Counsel released its own Memorandum that summarized the most recent social media cases issued by the Board.

Among others, the Memorandum examined five cases where an employee's social media use did not warrant NLRA protection and another four that did constitute "protected concerted activity," as well as summarizing employer social media policies in these and other cases. The report does not draw any bright lines for employers to follow, but does provide some useful guidance.

In general, the Board has outlined four preconditions for an employee's use of social media to qualify as protected concerted activity. The social media use must: (1) involve the terms and conditions of employment; (2) act as a logical "outgrowth" of some earlier discussion among coworkers about those terms and conditions; (3) be directed to or involve coworkers; and (4) intend to invite or induce coworkers' further action.

Preconditions for Social Media to Qualify as Protected Concerted Activity

In evaluating the conduct at issue, the Board will focus on the objective content, and not any colorful language or subjective insults. For example, one of the cases involved an employer's decision to discharge employees who had made profane and insulting comments on a coworker's Facebook post. The employee had solicited his coworkers for information in preparation for a meeting with management. Despite the profanity, the Board found this was a "textbook example of concerted activity." Even though the employees laced their messages with insults and profanity, the Board afforded them protection because "the conversation was objectively quite innocuous." Similarly, the General Counsel summarized a case where the Board found an employee's language protected when she described her supervisor as a "scumbag," among other terms, drawing comments from her coworkers. The Board observed that it "has found more egregious name-calling protected" and focused on the employee's objective motivation: her supervisor's disciplinary threats and refusal to allow the employee to have a union representative present at an investigatory interview.

Not all conduct rooted in social media is protected, however, and the General Counsel also discussed cases where the Board determined that profane or inappropriate comments directed toward an employer's clients or customers did not merit protection. For instance, the Board declined to protect a reporter's unprofessional tweets on a work-related Twitter account or disparaging comments that other employees, including an employee at a mental health facility, made about an employer's clients.

As to the second element, the General Counsel noted that the Board has been more likely to find Facebook or Twitter postings protected if they are a “direct” or “logical outgrowth” of earlier employee discussions or complaints. Thus, to the extent the online discussions are preceded by either face-to-face employee discussions or common employee concerns about working conditions, the more likely it is the Board will find protected conduct.

The third element of the Board’s analysis of social media issues involves whether other coworkers are involved. As noted in the General Counsel’s Memorandum, the Board is unlikely to protect activity directed toward non-coworkers or made on behalf of the employee only. For example, the Board declined to find protected concerted activity where a bartender made negative comments about his employer’s tipping policy on Facebook because he had directed his comments to a non-coworker, and made them only on his own behalf.

Finally, the Board’s recent social media cases generally differentiate between activity that merely involves coworkers from activity intended to invite or induce further action. As noted by the General Counsel, an employee’s individual complaints about the workplace posted on Facebook or Twitter–even if fellow coworkers interject their own comments–do not rise to the level of concerted activity protected by the NLRA. For example, the Board declined to protect a retail store employee’s Facebook complaints about his store’s management. The Board found that the employee had not specifically directed these comments at fellow employees, even though some of them posted messages of support. Because the employee was complaining about his individual situation and did not intend to induce any group action, his comments were not protected.

Employer Social Media Policies

As noted by the General Counsel, the Board’s recent social media cases also touch on employer social media policies. In one case, the Board found that an employer’s social media policy was overbroad (and therefore unlawful) because it prohibited employees from posting pictures of themselves in *any* media, online or offline, that depicted the company in *any* way, even by simply including a company uniform or corporate logo. The Board found the policy overbroad because it would effectively prohibit employees from engaging in protected activity, such as posting pictures of lawful picketing that used a company name or logo.

Other employer policies have suffered the same fate. The Board has found violations where the employer’s social media policy outlawed posting any material that “could be construed as inappropriate;” that employees “would not want their manager or supervisor to see;” or that discussed company business on personal accounts on personal time. The Board found such policies overly broad because they could reasonably be construed to prohibit an employee from exercising Section 7 rights.

After reviewing the Board’s social media cases, the General Counsel offered some helpful guidance for employers. Although overly broad policies will not survive Board scrutiny, employers stand a better chance with “narrowly tailored” policies that limit employees from making disparaging comments about the company, an employee’s superiors or coworkers, or the company’s clients and/or competitors; or using language or taking other generally offensive actions, provided that the policies also contain language informing employees

that such provisions do not apply to Section 7 activity. For example, the Board found that an employer's policy prohibiting employees from pressuring their coworkers to connect or communicate with them through social media was valid because the employer's policy was "narrowly drawn "to restrict harassing conduct and could not reasonably be construed to interfere with protected activity." Similarly, the Board found that an employer's restriction on employee media contact ensured that only one employee spoke on the company's behalf, and did not restrict employees' ability to speak on their own behalf with the media.

While the Board continues to take an aggressive approach toward overly broad or restrictive social media policies, the outcome of each decision will be extremely fact-dependent. The General Counsel's Memorandum provides some helpful guidance on social media policies in a rapidly developing area of federal labor law.

More Information

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