Social Media Policies for Employers: A Few Notes on the NLRA

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Yesterday's post discussed recent action by the National Labor Relations Board, pointing out that your employee's Facebook posts or other online communications may be protected under the National Labor Relations Act. Many private employers don't realize Section 7 of the NLRA protects the rights of all employees, regardless of union status, to engage in protected "concerted activities," such as discussing wages, work conditions, and other terms of employment. In light of yesterday's discussion, when reviewing or updating social media policies, employers may want to think about:

- An employer may violate the NLRA simply by maintaining certain work rules or policies, even if they're not enforced, if the rule would reasonably tend to chill employees in exercising their Section 7 rights.

- Obviously, an employer violates the law if a workplace rule explicitly restricts Section 7 protected activities (i.e., "You can't talk about your wages."). But a rule that doesn't expressly restrict protected activity may also be illegal if (1) employees would reasonably construe the language to prohibit Section 7 activity, (2) the rule was promulgated in response to union activity, or (3) the rule has been applied to restrict the exercise of Section 7 rights.

- Thus, an employer may violate the NLRA by implementing overly broad policies. For example, it may be unlawful to implement a policy broadly prohibiting online communications that disparage the employer or supervisors or prohibiting any depiction of the company without employer permission.

- Of course, prohibiting conduct that's clearly not protected under the NLRA isn't a violation – an employer may properly restrict communications such as (non-exhaustive list of examples cited by the NLRB): (1) conversations about the employer's proprietary information, (2) explicit sexual references, (3) criticism of race or religion, (4) obscenity, profanity, or egregiously inappropriate language, (5) references to illegal drugs, and (6) online sharing of confidential intellectual property.

- Sometimes, an employer's policy provision might be overly broad standing alone, but the surrounding context may give it a more limited – and legal – meaning. For example, prohibiting employees from having "negative conversations" about managers may be overly broad if it contained no further clarification or examples. However, an employer probably can prohibit employees from making "statements that are detrimental to the company" when the prohibition is listed alongside examples of egregious misconduct (such as "sexual or racial harassment" and "sabotage") that clearly aren't protected under Section 7. The inquiry remains: when read in context, would employees reasonably construe the rule as restricting Section 7 activity?

- Although the inclusion of limiting or clarifying language may protect an employer's otherwise overbroad policy, it's probably wiser to just more carefully articulate the prohibited activity itself. (If you can't say "don't do stuff that annoys us," but you may say, "don't do stuff that annoys us, like sexually harassing other employees or stealing our trade secrets," why not just eliminate the risk by saying "don't sexually harass other employees or steal our trade secrets"?!)*

- An employer may want to simply include language in a social media policy expressly clarifying the policy doesn't restrict protected communications.

- Consider how you might re-phrase policy language to capture what your company really wants to restrict. For example, "defamation" is generally unlawful, but "disparagement" is broader and might include some online complaining that's actually protected activity. Perhaps it would be safer for an employer to prohibit "defamatory comments about company supervisors" rather than "disparaging comments about company supervisors."

- Remember, an employee's online communications may be protected under other laws, too!

** Um, I hope this doesn't really need a disclaimer, but I'm not literally suggesting you phrase your policies like this.*

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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.