Regulate employee technology use without becoming a target

Throughout the digital workplace, email, social media and text message communications frequently yield the "smoking gun" evidence that results in employment claims against employers. Many employers seek to limit their exposure by adopting broadly written technology policies designed to keep employees from improperly using email and social media to make disparaging or discriminatory remarks. So, when an employee posts derogatory comments about the company and his boss on social media sites, prompting other employees to voice similar complaints, the company has the right to discipline the employees, right? Guess again!

Contrary to popular belief, private sector employees do not have a constitutional right to "free speech" in the workplace. Many employees do, however, have the right under Section 7 of the National Labor Relations Act (NLRA) to engage in "concerted activities for the purpose of ... mutual aid or protection." While the NLRA does not protect actions taken solely on an employee's own behalf, it does protect actions taken with or on behalf of at least one other employee, or on the authority of other employees, when those activities relate to the terms and conditions of their employment. Although some individuals are excluded from protection, including supervisors, managerial employees and independent contractors, most private sector employees are covered by the NLRA, even if they are not represented by a union.

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On August 18, 2011, the acting general counsel of the National Labor Relations Board (NLRB) issued a report summarizing cases in which employees were disciplined for social media postings. The NLRB Division of Advice found protected concerted activity under the NLRA in several cases where employees posted negative comments on Facebook about supervisors and company sales events, when those postings were prompted or joined by co-workers, involved workplace terms and conditions, and did not disrupt company operations. While the findings were neither binding nor precedential, the report caught the attention of many employers who struggled to understand when they could discipline employees for social media activities.

A second report issued on January 24, 2012, focuses more closely on employer policies that violate the NLRA. It will likely require most employers to rewrite their technology policies. The division found the following policies to be overbroad and therefore unlawful under the NLRA:

- A policy that prohibited employees from making "disparaging comments" about the company through any medium.
- A policy that prohibited employees from disclosing or communicating confidential, sensitive or non-public information concerning the company on or through company property to anyone outside the company without prior approval.
- A policy prohibiting the use of the company's name, logo or service marks outside the course of business without prior approval.
- A policy prohibiting employees from publishing any representation about the company without prior approval.
- A policy requiring that social networking site communications be made in an honest, professional and appropriate manner, without defamatory or inflammatory comments regarding the employer, its shareholders, officers, employees, customers, suppliers, contractors and patients.
- A policy requiring approval before employees could identify themselves as the employer's employees and then requiring them to further state that their comments were their own personal opinions and did not necessarily reflect the employer's opinions.

Given the obvious tension between the NLRA's restrictions and the need to protect against discrimination claims, improper disclosure of confidential information and trademark misuse, employers should revisit their technology policies. Similarly, it is important to consult with counsel before discharging employees based on the use or misuse of technology, to determine whether such activities are legally protected.

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