The Fallout from the Latest NLRB Salvo on Social Media

By Daniel Schwartz on February 8th, 2012

Last year, I mentioned that I was growing a bit tired about writing about social media in the workplace.

It's not that the topic isn't interesting; it's just that there isn't that much new to discuss. For those of us who have been writing about it for years, we've seen much of this for a while.

(Though to be fair, my earliest post on Facebook talked more about its use for employment screening; its adoption in the workplace shows just how far Facebook has come in four years.)

And yet, every pronouncement from the NLRB is treated as if it is written in stone with lots of suggestions on how to rewrite all of your policies.

The latest was an updated report last month from the NLRB on the topic again. Rather than jump on board with a quick summary, I've decided to take a step back and really look at how significant this report really is.

According to Jon Hyman at the Ohio Employer's Law Blog, it's a "mess. In a mere 35 pages, the NLRB appears to have ripped the guts out of the ability of employers to regulate any kind of online communications between employees."

Brian Hall at the Employer Law Report isn't as critical noting that the Board's interpretation of a lawful policy is "very nuanced". His suggestion?

Where possible, examples or context should be provided for any specific policies that arguably can be interpreted as infringing on employees Section 7 rights. In addition, employers should consider a disclaimer in the policy disavowing any intent to infringe on those rights. Finally, the Board's consideration of the lawfulness of social media policies appears to be heavily influenced by how those policies are enforced. Employers should seek legal counsel in drafting or reviewing their social media policies and before taking disciplinary action against employees for their social media activity.

Jason Shinn at the Michigan Employment Law Advisor quotes Shakespeare in observing that "the devil can cite Scripture for his purpose." In doing so, Shinn observes that employers may want to rethink, rather than double down on drafting broad social media policies and expect such policies to pass muster because of a "savings clause."

From my perspective, I think the NLRB's analysis of the issues remain fluid and not well defined. Courts have yet to chime in on this and its unclear whether the NLRB's approach will pass muster.

That does not mean that employers shouldn't review their policies and consider using narrower language regarding what employees can and cannot do. But employers who jump at every word that the NLRB says may be missing the larger messages behind those words. Consider your overall approach and, where appropriate, get legal counsel involved to answer questions you may have.

But above all else, take a measured approach. Social media moves fast; the law does not, despite the NLRB's suggestions to the contrary.

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