Davis Wright Tremaine LLP

# Can You Restrict an Employee From Calling Her Supervisor a "Scumbag" on Facebook?

**By Merisa Heu-Weller and Amy H. Pannoni**

February 18, 2011

The answer is that it may be more difficult than you think.

On Feb. 7, 2011, a battle between the National Labor Relations Board (NLRB) and American Medical Response of Connecticut, Inc. (AMR), over an employee's Facebook activity ended in a settlement that should be a signal to employers to review their social media policies to ensure they clearly communicate the company's policy and comply with NLRB regulations.

This advisory provides a brief discussion of the settlement and offers some questions employers should answer to help them begin reshaping their policies.

From home, the AMR employee posted derogatory comments about her employer on Facebook. Specifically, she referred to her supervisor as a "scumbag" and compared AMR management to psychiatric patients. AMR responded to the post by firing the employee according to its policy that prohibited employees from disparaging the company or commenting on the company online without permission.

The NLRB characterized AMR's nondisparagement policy as "overbroad" because it potentially infringed on an employee's right to discuss working conditions with other employees. Such a restraint on employee activity is prohibited under federal labor law. The NLRB also claimed that AMR's termination of the employee was illegal because she was complaining about the general terms and conditions of her employment, and that prompted her co-workers to respond to her Facebook post.

The NLRB considers such "water cooler conversations" about shared working conditions "protected concerted activity." In other words, Facebook complaints like this may be deemed protected speech especially where more than one employee is in the "conversation." The NLRB's position is that taking an adverse action against an employee under such circumstances is unlawful.

As part of the settlement, AMR agreed to modify its Internet posting policy to include the following elements:

- Employees will be allowed to discuss wages, hours, and working conditions with other employees outside of the workplace.

- The company will not discipline or fire an employee for engaging in such discussions.

The developing landscape of social media law can create legal exposure for employers who, like AMR, unwittingly craft "overbroad" social media policies. On Feb. 24, 2011, advisory co-author Merisa Heu-Weller will lead a seminar on best practices for employer social media policies. Register online here or contact Molly Klein (206.757.8696) for further information.

By way of a preview, the following six questions are an excellent first step toward retooling a social media policy:

1. Does the policy address off-duty conduct? The ever-evolving case law relating to social media policies suggests that employers need to be wary when attempting to restrict what an employee can or cannot say about the company off-the-job. For example, avoid policies that invade areas where employees have a high expectation of privacy (e.g., personal e-mail, password-protected Web pages), or penalize employees for engaging in protected concerted activity (e.g., discussing working conditions with co-workers). On the other hand, a policy prohibiting employees from denigrating the employer's product or services on a social media website would likely be enforceable.

2. Does the company's track record reflect disparate treatment? Determine whether the company has disciplined an employee or made an employment decision because of the employee's social media activity in the past. If so, this will enable the company to determine a consistent approach in handling renegade bloggers or Facebook mischief.

3. What do the company's internal experts think? Invite input from the people in the company who are active

social media users and those who would be tasked with enforcing the policy. Consider convening a working group of "stakeholders" (e.g., human resources staff, employees, information technology, supervisors, etc.), to canvas their particular points of view.

4. Does the policy fit the company's culture? Creating a policy addressing employee use of social media is certainly not a "one-size-fits-all" endeavor. Any policy should reflect the unique needs and values of the employer. It would be instructive to peruse the company's mission statement or the introduction to its employee handbook. These statements tend to set the tone for the employer-employee relationship and the social media policy should reflect these ideals.

5. How will the company communicate the policy to employees? Once the company has finished drafting or revising its social media policy, don't just put it on the shelf. Ensure that employees and supervisors are educated about the new policy and provide training, if needed. Review the policy on a regular basis to make sure it effectively addresses the ever-evolving world of social media.

6. Should you have an experienced lawyer review the policy? Yes. The parameters of your social media policy may be subject to several legal constraints. For example, a public employer will need to be wary of infringing its employees' First Amendment rights. An employer with a unionized workforce will need to consider whether such a policy would violate its collective bargaining agreement. With the help of your trusted advisors, you can avoid these litigation landmines.