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Social Media and the National Labor Relations Act: A Trap for Unwary Employers

The use of social media has become one of the most rapidly-changing areas in employment law today. What most employers do not realize is that the National Labor Relations Board (the "NLRB") has become very active in policing both the substance of social media policies and the actions of employers in addressing social media concerns. If an employee's online activity is protected concerted activity under the National Labor Relations Act ("NLRA"), then an employer may not prohibit that activity in its social media policy, nor can an employer discipline that employee without violating the NLRA. On August 18, 2011, the Acting General Counsel of the NLRB issued a report detailing the NLRB's recent opinions regarding social media and employment-related matters. The report provides an overview of NLRB activity in the area of employee use of social media that certainly will be a surprise to many employers.

Cases Where an Employee's Online Actions Were Protected Under the NLRA

In at least four cases, the NLRB overturned the termination of employees based on their social media activities because the activities involved active, online conversations among multiple employees regarding work conditions. Therefore, they were "concerted activities" for which the employees could not be terminated under Section 7 of the NLRA. The NLRB also found that several anti-blogging and disruptive behavior employment policies were illegal under Section 8(a)(1) of the NLRA on their face because the policies were blanket prohibitions of protected activity.

There are several commonalities worth noting among these cases. First, they all involved employees who criticized specific employment practices or work conditions, which is traditionally viewed as protected activity under the NLRA. Additionally, all of these employees engaged in online discussions after work hours, on their own personal computers and media pages, and off work property, which are all factors the NLRB considered in gauging whether the online activity was protected. Most importantly, every case involved online discussions among multiple *employees*, which made the discussions "concerted activities" under the NLRA. The involvement of multiple employees appears to be the most important factor in determining whether the activity is protected. Additionally, the NLRB

did not consider the minimal use of derogatory language in an online post to be an adequate reason for termination.

Cases Where an Employee's Online Actions Were Not Protected Under the NLRA

In several other cases, the NLRB determined the social media activity at issue was not protected under the NLRA under facts in which employees were merely voicing their individual dissatisfactions with their employment or employer on a personal level, as opposed to inviting discussions with co-workers regarding the employer's business practices. In one case, the fact that other employees posted supportive comments about an individual's complaints regarding a negative interaction with a new manager was insufficient to constitute protected activity. The General Counsel also noted that in these cases, no other employees responded to the post at issue or participated in online discussions regarding the post's subject matter, which took the post outside the realm of "concerted activity" under the NLRA.

Cases Where the Employer's Policies Were Overbroad

The General Counsel also addressed several cases in which the NLRB found that the employer's social media or disciplinary policies were too broad under the NLRA. The NLRB tended to strike an employer's invocation of general, sweeping policies to justify disciplining employees for online conduct. Policies deemed unlawful by the NLRB when used to discipline employees for protected conduct included those that strictly prohibited the following behaviors: engaging in "inappropriate discussions" about the employer; posting materials that "embarrassed," "defamed," or "disparaged" the employer or employees; posting any personal information about employees or clients without consent; disclosing "inappropriate or sensitive" employer information; using the employer's logo without its consent; or posting personal photographs depicting the corporate uniform or logo. The NLRB criticized these policies because they either could reasonably be interpreted as prohibiting protected communications about terms and conditions of employment, or because they did not exclude protected, concerted activity.

Suggested Actions For Employers

The NLRB has yet to articulate specific standards to guide employers in their creation and enforcement of social media policies, or discipline of employees for insubordinate behavior online. Regardless, there are several precautions employers should take moving forward:

- **Create a social media policy**. Every employer should have a specific policy in place that addresses the use and abuse of social media by employees.
- **Tailor the policy to your specific business and practices**. Policies should address the unique practices and concerns of the business, including the employees' access to sensitive information, the accessibility of social media accounts during work hours, and the employer's ability to monitor online activities.
- **Avoid drafting overbroad policies**. Employers should avoid drafting catch-all policies that stifle every kind of employment-related online activity by employees. Such policies lead to difficult or inconsistent enforcement, and run the risk of being deemed overbroad.

- **Be aware of your employees' activities**. To ensure consistent enforcement of a policy, the employer should be aware of its employees' social media presence and monitor the use of social media. If a questionable post or online activity is brought to the employer's attention, the situation should be addressed promptly and with consistency.
- **Consider the specific situation at issue**. If an employer suspects that an employee is engaged in prohibited or insubordinate activity online, the employer should fully investigate the situation prior to taking disciplinary action.
- **Periodically review your policy**. Social media is an evolving phenomenon, and the popularity, use and capabilities of social media sites change over time. Employers should periodically review their policies to ensure they are up to date as technology progresses.

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For additional information on this topic, please contact a member of Bryan Cave LLP's Labor and Employment or Internet and New Media Client Service Groups.