Puget Sound
BUSINESS JOURNAL

November 11-17, 2011

SOCIAL MEDIA

NLRB protects many employee Facebook postings

The employee Facebook chatter started after work.

One employee asked co-workers — who happened to be Facebook friends — what they thought about a manager's criticism of their work. Lively banter filled with obscenities followed. They even openly posted comments on Facebook about "difficult" customers.

When management learned about the Facebook discussion, all five commenting employees were fired. The decision to fire these nonunion employees was pretty easy, the employer thought.

But then the National Labor Relations Board (NLRB) got involved.

The NLRB filed a complaint against the company, contending the employees were wrongfully discharged in retaliation for engaging in "protected concerted activity."

The complaint was based upon the National Labor Relations Act, which makes it illegal to interfere with, restrain, or coerce employees in the exercise of "the right to engage in other concerted activity for the purpose of ... mutual aid or protection."

Older NLRB cases indicate that negative group comments about employers, including supervisors, may generally be viewed as "protected activity" if they are seeking to initiate group action. But employee activity may not be "concerted activity" when the employee acts alone, when the comments do not involve work conditions, the comments are recklessly or maliciously untrue, or when the comments are obscene, racial or prejudicial.

LEGAL DIMENSION
D. Michael Reilly

But how do these old rules apply to the new era of social media?

Just last month an administrative law judge with the NLRB found that the five employees' Facebook postings about their employment were "protected, concerted activity" and that the employer unlawfully terminated the employees in retaliation for engaging in protected activity.

Under the Obama administration, the NLRB has filed dozens of complaints like this. The NLRB has identified social media cases as a big priority. The agency is also lodging many challenges to company social media policies if the policy explicitly forbids or "reasonably tends to chill" an employee's right to engage in "concerted activity."

How does an employer cope with this new NLRB initiative? Here is a checklist.

1. Have a narrowly tailored social media policy. Avoid policies that are so broadly worded as to explicitly or implicitly restrict an employee's right to engage in protected activity, or "chill" an employee's exercise of those rights. Include language in your policy disclaiming any intention to restrict employee rights under the National Labor Relations Act.

2. Carefully scrutinize employee social media conduct before issuing discipline. From the positions taken by the NLRB in this new social media initiative, even the agency admits there are limits to the scope of employees' protected concerted activity in social media. The NLRB will look to see if the Facebook posts are "taking the first step towards taking group action." So employers have the difficult task of determining when to infer an employee's intention is to take group action, or whether it is just an individual complaint.

Facebook posts expressly engaging employees to work together to improve work conditions will be protected. Terminating a group of employees engaging collectively on Facebook about work certainly might look like to the NLRB like the employer is retaliating for group activity.

An individual employee's Facebook post that does not expressly seek co-worker input, but results in co-worker comments that grow into substantive concerns about the terms and conditions of work, might well be protected.

Disparaging comments about an employer or supervisor will be protected even if they involve vulgar or rude language, unless they are so outrageous or offensive as to lose the protection of the National Labor Relations Act.

Discriminatory comments or posts that advocate unlawful conduct will not be protected.

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