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Gavel to Gavel: Employers and 'in-your-face' Facebook

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By Charlie Plumb

What happens when you cross a work force that increasingly uses social media with a federal employment agency determined to increase investigations and legal actions against employers? A potentially rocky road for employers in the future.

Like a lot of employers, American Medical Response of Connecticut includes in its employee handbook a blogging and Internet posting policy. Among other things, the policy prohibits its employees from making "disparaging, discriminatory, or defamatory comments when discussing the company or the employees' superiors, co-workers, and/or competitors."

Medical tech Dawnmarie Souza became angry with her supervisor. While at home one evening and using her home computer, Souza posted on her personal Facebook page entries about her supervisor, comparing him to a psychiatric patient and using two expletives. Co-workers who read Souza's Facebook page added posts supportive of Souza's comments.

The following day, when she was called in to be interviewed about her Facebook posting, Souza's request for a union representative during the investigative interview was denied. Shortly thereafter, American Medical Response fired Souza for violating its blogging Internet posting policy.

The National Labor Relations Act protects the right of employees to discuss the terms and conditions of their employment, including wages, benefits, and management. This legal protection applies to unionized and non-unionized employers.

Taking the position that Souza's comments on her personal Facebook page about her supervisor were protected speech, the National Labor Relations Board filed a complaint against American Medical Response, attacking its Internet policy and accusing the employer of retaliating against Souza for taking part in a protected activity.

Many employers nationwide were hoping American Medical Response would fight the complaint. However, the day before the hearing, the employer and the NLRB settled the dispute.

So, does this settlement mean all employers should do away with their own blogging and Internet policies? No.

It is important to understand what is going on. Like other federal employment agencies, the National Labor Relations Board is expanding the scope of activities it considers as protected and used the American Medical Response case as a way to publicize its stance. Like a lot of instances, the American Medical Response situation turned more on how their policy was applied, rather than how it was written. Here are some suggestions for employers:

- Review your own Internet or blogging policy to make sure it is not overly broad.
- Don't put policies in place that broadly prohibit all employee discussions about the company. Policies should focus on prohibiting communication that violates the employer's other policies or harms the business, such as discussions about any confidential business information and the like.

- Don’t use the policy to discipline an employee for taking part in an activity that is protected, like complaining about discriminatory or unfair treatment.

And finally, with aggressive enforcement by the NLRB on the rise, it’s important for all employers – whether unionized or not – to re-familiarize themselves with the protections afforded to employees under the National Labor Relations Act.

Charlie Plumb is an attorney and the leader of the Labor & Employment Group at McAfee & Taft.

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