



Employees' Social Media Activity: NLRB Clicks the "Like" Button

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The proliferation of social media issues in the workplace has created a multitude of challenging new problems for employers. The National Labor Relations Board (NLRB) is doing its best to expand that list. As recent NLRB decisions make clear, even non-union employers can run afoul of federal labor law with a social media policy that dissuades employees from exercising their rights to engage in protected concerted activity via Facebook, Twitter, or similar sites.

The NLRB has been extremely active on the topic of an employer's ability to restrict the off-site use of social media by employees. Earlier this year, an administrative law judge found that even using Facebook's "Like" button might confer protection under the National Labor Relations Act (the Act). The judge found that an employer had unlawfully terminated employees for participation in a Facebook conversation regarding their employer's withholding of taxes. The judge found that one of the discharged employees had participated in a protected discussion by simply clicking the "Like" button on another employee's Facebook wall post about the employer's tax withholding error.

More recently, the NLRB's General Counsel issued the agency's second report on social media cases within the past year. The report summarizes 14 recent NLRB cases which "present emerging issues in the context of social media."

The report, available at www.nlrb.com, confirms that the NLRB is continuing to find many facially neutral, but broadly worded, employer policies to be unlawful restraints of employees' rights to engage in protected concerted activity under the Act.

Eleven of the cases discussed in the report address some form of discipline based on employee social media use. Of those 11, the NLRB found in six cases that there was no violation of the employee's right to engage in protected concerted activity. Seven of the cases discussed in the report address specific language contained in an employer's social media policy. Of those seven, six policies were found to be overbroad and unlawful.

Employers can expect that the NLRB will continue to focus on this developing area of the law, especially in light of the fact that the Act applies to most employers in this context, not just those that are unionized. As the use of social media continues to grow, employers must remain aware of the Board's aggressive policing of this area of the law and should carefully consider the Board's position before disciplining any employees for using social media to complain about any aspect of their employment.