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Employment Law ALERTS

CHARLESTON COLUMBIA GREENVILLE MYRTLE BEACH www.collinsandlacy.com

Attorney Charles Appleby
Practices: Employment Law, Retail/Hospitality, Construction Defect Litigation

cappleby@collinsandlacy.com
TEL: 803.255.0409
FAX: 803.771.4484

Social Media – Revise Your Policy If It Says This

If you have a provision similar to the one below in any of your employee agreements, handbooks, etc. or are considering including one, make sure you read the rest of this article.

> Any communication transmitted, stored or displayed electronically must comply with the policies outlined in {Insert your Company Name} Employee Agreement. Employees should be aware that statements posted electronically (such as [to] online message boards or discussion groups) that damage the Company, defame any individual or damage any person's reputation, or violate the policies outlined in the {Insert your Company Name} Employee Agreement, may be subject to discipline, up to and including termination of employment.

On September 7, 2012 the National Labor Relations Board (NLRB) issued their first published decision in a case which directly involved a company's policies relating to electronic communication and social media. As explained in past articles, over the last two years, there have been numerous complaints involving social media and provisions which limit the information an employee can discuss in electronic forums. However, previous complaints were settled prior to the NLRB issuing a published decision. In light of the lack of reported decisions, the NLRB General Counsel issued three different advisory memoranda explaining how the Board would most likely decide in different situations.

In Costco Wholesale Corporation and UFCW Local 371, Case 34-CA-012421, the NLRB proved their decisions would follow the stance outlined by their General Counsel in the prior advisory memoranda. The NLRB found Costco violated the National Labor Relations Act (Act) by including the provision above, which prohibits employees from electronically posting statements that "damage the Company … or damage any person's reputation." The provision was deemed a violation of the Act because it did not include "accompanying language that would tend to restrict its application."

As explained in further detail in prior articles, an employer cannot maintain a work rule that prohibits employees from exercising their Section 7 rights (i.e. right to concerted activity) or that employees would reasonably construe to prohibit Section 7 activity. The NLRB found that since the provision did not have accompanying language to restrict its applications, it allows employees to "reasonably assume that it pertains

to – among other things – certain protected concerted activities, such as communications that are critical of the [Company's] treatment of its employees."

The main take away from this new decision is the NLRB is going to construe broad provisions as violations of the Act. Companies need to be specific in their rules and provide examples to ensure it is clear to employees that the company is not prohibiting the rights an employee is guaranteed under the Act, i.e. the right to engage in protected concerted activity. If you have questions about your social media policies, contact our employment team.

About Charles Appleby

Charles Appleby is an associate practicing in employment law, retail/hospitality/entertainment liability and construction defect litigation. In his employment practice, Charles represents employers from all types of industries in litigation and alternative dispute resolution. Charles has represented clients in Circuit Court, United States Federal Court, and has appeared regularly before the South Carolina Employment Securities Commission and Appeals. In addition, Charles provides informative content on retail/hospitality law and employment law through quarterly newsletters and on the South Carolina Retail/Hospitality Law Blog and South Carolina Employment Law Alerts.

Charles, originally from Columbia, SC, graduated from the University of Florida and received his Juris Doctor from the University of South Carolina School of Law. While in law school, he served as the Student Bar Association President and initiated the inaugural University of South Carolina School of Law Career Week. He was also a member of the John Belton O'Neall Inn of Court. Charles worked as a law clerk for Collins & Lacy prior to joining the firm in 2007.

About Collins & Lacy, P.C.

Collins & Lacy is a defense litigation firm in South Carolina that delivers valuable legal representation for our clients through solid preparation, thorough execution, and client-oriented service aimed at success. With offices in Charleston, Columbia, Greenville and Myrtle Beach, the firm represents local, regional and national clients in the areas of:

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