How To Deal With NLRB Social Media Enforcement

The National Labor Relations Board has quickly expanded its role in the world of social media. Citing their authority to protect and promote Section 7 rights under the National Labor Relations Act, the board has filed unfair labor practice charges against many employers who it believes have infringed on employee rights to participate in protected and concerted activity via social media.

Additionally, the board has, through its general counsel, issued a variety of “reports on social media policies” and “advice memoranda” offering guidance to employers based on the holdings from the board’s social media-related cases. The important question for employers is: What does the board’s enforcement activity mean for employers, and what are the boundaries of the board’s authority?

The NLRB’s Authority to Supervise Social Media

Section 7 of the act gives employees the right to form, join or assist labor organizations. It also guarantees employees the right to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. Even in the absence of a labor union, an employee complaining about wages, hours or working conditions on behalf of himself or other employees cannot be disciplined or discharged for such conduct under the NLRA.

Transitioning from the days of employer communications on such matters through voice and pamphlets to the age of the Internet, the NLRB vigorously asserts that employees have the right to voice these concerns through the public forum of social media.

In many instances, employers have a different perspective, since complaints through social media often conflict with employer “open door” policies that allow employees to voice their concerns to management about these same issues in a professional and confidential atmosphere where management can address the concern.

Whether an employer can lawfully discipline an employee for social networking misconduct has been a controversial issue. For example, a Facebook posting that says, “I wish we were paid a dollar an hour more to reflect the industry standard,” is a more respectful way of discussing wages than, “We are paid like slaves here, we might as well go back to the plantation.”

Likewise, a complaint to management about perceived discriminatory activity in the workplace is more professionally communicated through the company’s open-door policy than a community tweet that “the glass ceiling at this company is three feet high.”

The NLRB focuses on reigning in management’s attempts to place boundaries on employee and management communications via the Internet. The NLRB views employees as having an expansive ability to question terms and conditions in the workplace, even if the communication contains a less than respectful tone.

Recent Board Guidance

In an Aug. 18, 2011, memorandum summarizing four NLRA cases, the board concluded that in each of the following instances, the employer’s discipline violated the act.

In one instance, an employee, while preparing for a meeting with management, asked coworkers on her Facebook page for their reaction to another employee's complaints about work quality and staffing levels. In another instance, an employee complained on her Facebook page about the supervisor's refusal to permit a union representative to assist her in responding to a customer complaint. In the last instance, employees posted on Facebook about the employer's failure to withhold state income taxes, resulting in an employee receiving payment demands from state tax authorities.

In all of these cases, the board found that employer discipline of the employee violated the act because there were elements of concerns about terms and conditions of employment in each of the cases.

In 2012, the board issued a memorandum offering advice to companies on their social media policies. In general, the memo warned companies to be specific in their policies and to avoid overbroad statements that can be construed as having a chilling effect on workplace speech. The memo even noted that one major retailer's policy that warned employees not to "release confidential guests, team member, or company information" was unlawful because it could reasonably be interpreted as preventing discussions of employment among workers.

The memo noted that another company's policy was overbroad for advising employees to "think carefully about friending co-workers." Such advice, in the board's view, was unlawful because it discouraged communication among employees.

In a Jan. 25, 2012, report, the board conducted an examination of employer social media policies. The board's report underscored two main points regarding the NLRB and social media: First, an employer's policy should not be so sweeping that it prohibits the kind of activity protected by federal law, such as the discussion of wages or working conditions. Second, an employee's comments on social media, the board conceded, are generally not protected if they constitute mere gripes not made in relation to group activity among employees.

Finally, in a recent amusing case, an employee was lawfully terminated for a Facebook posting when the employer merely acceded to the employee's wish to be terminated. In Tasker Healthcare Group, CA-094222 (May 8, 2013), the employee posted on Facebook that she told her supervisor to "back the freak off" when the supervisor tried to tell her something. Additionally, the employee posted that "they are full of shit ... they seem to be staying away from me … fire me … make my day."

Another employee who was part of the message string shared the messages with the employer, causing the employer to terminate the employee. The employer noted that it was "obvious the employee was not interested in continuing employment." Appropriately, the board noted that the employee's conduct was not protected concerted activity.

What Should Employers Do?

In crafting social media policies, employers need to be specific about the conduct they are prohibiting. Defamatory or disparaging comments about co-workers and management are generally not protected unless the message is targeted at employee concerns about protected conduct. Likewise, employer policies protecting the company's confidential and private information are generally upheld by the board.

Also, employer policies prohibiting the employee's use of the company's logo and contact information for personal purposes are generally upheld. Conversely, an employer attempting to outlaw any disparaging comments about the company, management or fellow employees are often not upheld by the board.

As one may suspect, the legality of disciplining an employee for social networking conduct will hinge on the facts of each individual case. Nevertheless, when these cases are viewed collectively, the following are some helpful pointers for employers with respect to employee social media communications.

Point 1: As remarkable as it sounds, employers should not be overanxious in disciplining an employee for use of profanity with respect to company matters. Profanity-laced posts may be protected under the NLRA. The board's memorandum summarized a case in which an employee's Facebook posts were protected despite the fact that she referred to her supervisor as a "scumbag." In the board's rationale, the offensive conduct occurred outside the workplace and during nonworking time. Nevertheless, from a management standpoint, it makes sense in such instances to err on the side of employee discipline to maintain management's workplace authority, knowing the NLRB may come calling later.

Point 2: Was the post intended as a gripe to management, or does it contain legitimate concerns, albeit clumsily communicated, concerning the workplace? The board is more likely to protect communications that have some reference to workplace conditions or pay, even if the post reflects a level of disrespect for management.

Point 3: Does the post reflect information that is more properly communicated in an open-door policy to human resources or upper management? If the employer can show that the employee has disregarded the open-door policy by communicating something that fits squarely within that complaint procedure, the employer has a stronger argument that the speech is not protected under Section 7. A classic example is an employee's complaint about workplace discrimination or harassment.

Point 4: Did the communication occur on company equipment and/or during company time? The board seems to focus an inordinate amount of its analysis on whether the post was made during working hours or on the employee's own time. If an employee posts an unprofessional or offensive communication concerning management or co-workers, why should it matter when the post was made? Nonetheless, the board conveys to employers more authority to discipline an employee for a social media communication if it occurs on company equipment, and/or on company time.

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