Risk Control Bulletin

The NLRB and Social Media: What All Employers Need to Know

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Absent a union organizing drive, many non-unionized employers pay little attention to decisions by the National Labor Relations Board (NLRB), the federal agency that enforces the National Labor Relations Act (NLRA). However, Section 7 of the NLRA and related recent decisions by the NLRB potentially affect all employers that fall within the NLRB's jurisdiction by limiting the ability of an organization, unionized or not, to discipline or terminate employees for their social media postings.[1]

Legal Background

Section 7 of the NLRA (which covers most businesses whose interstate commerce activities exceed a minimal level[2]) protects union and nonunion employees alike who engage in concerted activities "for the purpose of collective bargaining or other mutual aid or protection." Traditionally, Section 7 claims involved so-called "water cooler" conversations among employees regarding wages or working conditions.

The advent of social media means that many of these conversations are now online, with a broader audience and greater potential to damage the employer's reputation. However, the NLRB has decided to treat social media exchanges no differently than face-to-face discussions, without considering the employer's interest in limiting harm to the business. Taking action against an employee who has engaged in protected concerted activities – whether in person or electronically – is thus a violation of the NLRA.

Over the past few years, the NLRB has prioritized NLRA claims involving social media, issuing complaints against non-unionized employers for interfering with their employees' Section 7 rights when employees are disciplined or terminated for social media activity. In these situations, the NLRB is authorized to order the employer to reinstate the employee and/or pay damages, such as back pay.

The bottom line: Before punishing an employee for posting a critical comment on Facebook® or elsewhere, be certain that doing so does not violate the NLRA.

Protected and Unprotected Activities

The NLRB defines "concerted activity" as actions "engaged with or on the authority of other employees, and not solely by and on behalf of the employee himself."[3] It includes situations in which employees seek to initiate, induce or prepare for group action, as well as when an individual employee brings "truly group complaints" to management's attention. To be protected under the NLRA, the concerted activity must involve mutual aid for employees concerning wages and/or working conditions.

In the NLRB decisions addressing this area, the threshold issue is whether the employee's online communication constitutes a protected concerted activity. If so, any disciplinary action, including termination, violates the NLRA. In one case where social media activity was held to be protected concerted activity, a Facebook® post containing an employee's complaints about her supervisor's treatment of subordinates drew supportive postings by co-workers who had similar complaints. One co-worker responded that she was going to bring to work a book about employee rights. The supervisor became aware of the critical statements made about her and fired the employees who had posted them. The NLRB held that the terminations violated the NLRA because the Facebook® posts were protected concerted activity.[4]

However, employees' social media postings that do not constitute concerted activity – including comments made solely by and on behalf of an employee, or "mere griping" without an appeal to take action – are not protected by the NLRA. For example, an employee who complained to a family member on a social media site about his company's tipping policy was deemed not to have engaged in concerted activity.[5] Rather, his complaints were considered to be unprotected griping, as he failed to seek action and his comments were not directed at co-workers.

Even if an employee's postings are rude or disrespectful, they still may be protected under the NLRA, if they are considered "concerted" in nature. Concerted activity may lose legal protection only if it is so flagrant, violent or extreme as to render the individual unfit for further service.[6] In addition, illegal activity or deliberate lies are typically considered unprotected under the NLRA. [7]

[1] See 29 U.S.C. § 157, et seq.

[2] The Board's jurisdiction is very broad, covering the majority of non-government employers in the United States, including not-for-profit organizations, employee-owned businesses, non-union businesses and even businesses in "Right to Work" states. See http://www.nlrb.gov/resources/faq/poster#t39n3210.

[3] See Meyers Industries, 281 NLRB 882 (1986).

[4] See Design Technology Group, LLC., 359 NLRB No. 96 (2013).

[5] See Advice Memorandum from the NLRB Office of the General Counsel to Gail R. Moran, Acting Regional Director of Region 13, regarding JT's Porch Saloon & Eatery, Ltd., No. 13-CA-46689, 2011 WL 2960964, at *1 (July 7, 2011). Available at http://mynlrb.nlrb.gov/link/document.aspx/09031d458055b9c6.

[6] See Advice Memorandum from the NLRB Office of the General Counsel to Ray Kassab, Acting Regional Director of Region 7, regarding Detroit Medical Center, No. 07-CA-06682, 2012 WL1795803, at *1 (Jan. 10, 2012). Available at http://mynlrb.nlrb.gov/link/document.aspx/09031d458084ffc5.

[7] See Valley Hosp. Med. Ctr., 351 N.L.R.B.1250, 1252 (2007).

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Risk Control Recommendations

The following strategies can help minimize the likelihood of a lawsuit or regulatory action due to a violation of Section 7 of the NLRA:

- Exercise caution when disciplining and/or terminating an employee for reasons involving social media. Examine the employee's online communication to determine if it concerns wages and/or working conditions, and whether it may be considered protected concerted activity under the NLRA. As social media usage constitutes an evolving area of law with many nuances, consult with an employment attorney before taking action in such a situation.
- Review employment policies relating to social media. Ensure that policies and procedures do not prohibit what may be deemed protected concerted activities.
- Train supervisors and managers regarding protected communication. Supervisors and managers must understand the import of Section 7, so that they do not interfere with employees' right to engage in concerted activity for their mutual aid and protection.

Additional Resources

Eastman, M. "A Survey of Social Media Issues Before the NLRB," prepared by the U.S. Chamber of Commerce, Labor, Immigration & Employee Benefits Division, August 2011. Available at http://www.uschamber.com/reports/survey-social-media-issues-nlrb.

"The NLRB and Social Media," a National Labor Relations Board fact sheet (undated). Available at www.nlrb.gov/news-outreach/fact-sheets/nlrb-and-social-media.

NLRB's "First Report of the Acting General Counsel Concerning Social Media Cases," August 2011. Available at http://www.nlrb.gov/news-outreach/news-story/acting-general-counsel-releases-report-social-media-cases.

NLRB's "Second Report of the Acting General Counsel Concerning Social Media Cases," January 2012. Available at http://www.nlrb.gov/news-outreach/news-story/acting-general-counsel-issues-second-social-media-report.

Sprague, R. "Facebook Meets the NLRB: Employee Online Communications and Unfair Labor Practices." *University of Pennsylvania Journal of Business Law*, October 2012, Volume 14:4, pages 957-1011. Available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1982717.

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