Employer Social-Media Policies Are Under Scrutiny

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VIEWPOINT

The explosion of social-media outlets such as Facebook, Twitter, LinkedIn and other electronic-communication forums has resulted in a corresponding dramatic increase in the external discussion of matters once confined to the workplace. These communications often touch on topics thought by employers to be confidential. Many employers have been quick to respond with new policies addressing the use of social-media forums, and with disciplinary actions in response to employee discussions of work-related matters. The application of legal principles established under federal labor law to social-media communications has resulted in determinations that many of these policy formulations and disciplinary actions are unlawful.

The National Labor Relations Act (NLRA) is generally known as the federal law that governs private-sector employers with union relationships or union activity in their workplaces. Less known is the fact that the NLRA protects the rights of nonunion employees to engage in what are known as "protected concerted activities." It has long been held that an employer cannot interfere with the rights of employees to discuss employment terms and working conditions, this being considered a form of protected concerted activity. The National Labor Relations Board (NLRB) has held that employment policies that prohibit employees from discussing salary levels and wage rates, for example, are unlawful. While individual gripes are generally not considered protected concerted activity, communications between employees about working conditions or matters which may be of interest to more than one employee are protected.

The concerns generated by application of the protected concerted-activity analysis to social-media communications has prompted the General Counsel of the NLRB to issue three reports in the last year addressing the legality of social-media policies in dozens of cases. Employer policies were found to be unlawful in nearly every case. The General Counsel has advised that a wide variety of general social-media policy prohibitions directed to confidential information, offensive or disparaging comments, and even statements harming the employer's image, will be considered unlawful unless expressly limited to matters that do not relate to employment terms and working conditions. Decisions issued by the NLRB this past September confirm the scope of these rulings. Employers need to recognize that the NLRB's analysis of employment policies in many instances will be overly technical and largely counterintuitive.

Thus, while a specific prohibition against discussion of trade secrets, products, or processes in social-media sites would be lawful, a general prohibition against the discussion of "confidential and proprietary information" would be considered unlawful as it potentially extends to matters relating to working conditions. A social-media policy prohibiting electronic postings, which "damage the Company, defame any individual or damage any person's reputation" would be considered unlawful as it potentially prohibits criticism of the employer's employment policies or treatment of its employees. A social-media policy instructing employees to think carefully about "friending" their coworkers on Facebook likewise would be considered unlawful as it would tend to discourage communications about working conditions. A general social-media policy that requires the prior permission of the employer to discuss any aspect of employment would also be considered unlawful by the NLRB.

In one notable case from Buffalo, a nonprofit organization that provided advocacy services to victims of domestic abuse discharged several employees for harassment following their negative Facebook discussion of a coworker. The coworker had criticized employees for not doing enough for the organization's clients. The NLRB issued a complaint upon a finding that the Facebook discussion was a protected concerted activity. An Administrative Law Judge agreed, and determined that the employees were entitled to reinstatement to employment with back pay.

Private-sector employers need to be cognizant of the restrictions presented by federal law on the formulation of policies and the administration of disciplinary actions that may have an impact on "protected concerted activities" in social-media communications. Employers have a legitimate interest in safeguarding their business images, customer relationships and proprietary information, and likewise have legitimate expectations that their employees will take care to preserve, if not advance, these interests.

Employers should expect their social-media policies to come under scrutiny, and should review and update them as appropriate. With proper attention to this evolving area of social-media law, employers can achieve a workable balance. ❑

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Update: The NLRB recently affirmed the rulings of the Administrative Law Judge in the case arising out of Buffalo, and adopted the recommended Order of reinstatement with back pay, in a Decision issued on 12/21/12. The latest Decision does not impact the viewpoints expressed in this article.