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Does Your Social Media Policy Illegally Restrict Protected Speech?

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This post looks at two recent National Labor Relations Board reports and their impact on employers' social media policies. Several planned upcoming posts will also be looking at social media and its effects on hoteliers's and restaurateurs' operations - stay tuned.

Thanks to the internet, a single disgruntled employee can now do dramatic damage to a company's image through posts on social media sites. (Just ask Domino's Pizza or Hotel Renaissance). The social media policies employers have instituted in the last few years may work to inhibit online employer-bashing; however, they can also come perilously close to violating the law. To assist employers in navigating this rapidly changing area of law, the National Labor Relations Board ("NLRB") has issued two social media reports in the last seven months, explaining their rulings in several recent social media cases. As this posting demonstrates, even if you think you have a good social media policy, you may want to revisit it, given the latest NLRB guidance.

Employees in both unionized and non-unionized workplaces have protected rights to certain types of speech under the National Labor Relations Act. These include, briefly, the right to discuss terms and conditions of employment and unfair labor practices with coworkers and the right to engage in concerted activity. Employers who want to restrict employees from making disparaging comments about the company online must carefully phrase their policies to avoid trampling on these rights.

The NLRB guidance suggests that policies that use vague, general terms to describe restrictions will be struck down for being overly broad. In one case, the NLRB rejected a policy preventing employees from "making disparaging comments about the company" on social media sites. Another policy that was struck down prohibited online discussion about the employer unless conducted in "an appropriate manner." Yet another policy was deemed illegal when it prohibited "inappropriate discussions" and "insubordination or other disrespectful conduct." In each case, the Board reasoned that such broad language might lead an employee to think she was not permitted to complain about unfair working conditions or otherwise voice valid concerns about employment practices. In short, if a policy could reasonably be read to restrict protected speech, it will probably be void.

To avoid this pitfall, employers should narrow their social media posting policy to make sure that a rational person would not understand it to include protected activity. One simple way to do this is to explicitly state in the policy that it is not intended to stop employees from exercising their rights under the NLRA. Another suggestion is to use specific language, instead of vague terms, to describe what kind of online postings aren't allowed. A third option is to keep the broad term (such as "inappropriate"), but then provide examples of the types of speech that are not allowed.

How to avoid punishing employees for concerted activity taking place on Facebook.

The NLRB cases also show that an employer needs to be very careful when making the decision to terminate someone who has slandered the company online. In this age of social media, a Facebook posting can easily be the beginning of protected concerted activity, and an employer who fires an employee for such a statement can get into trouble.

For example, if an employee posts a complaint about his working conditions on his Facebook page, and other employees who are his Facebook friends either contribute or "like" his posting, this is likely protected speech. There are many examples of terminations deemed unlawful when an employee was using social media this way, as the site functioned as a platform for the employee to air grievances and gain support from colleagues.

The critical distinction between protected and unprotected speech here is whether an employee is posting an individualized gripe—which is not protected—or discussing a collective concern that many employees have or that affects terms and conditions of employment. If the latter, it may constitute concerted activity and cannot be the basis for a lawful termination.

To sum up, employers should avoid placing greater restrictions on online speech than they would in any other medium. Though the damage from a viral posting can be severe, this doesn't entitle an employer to prohibit employees from engaging in protected speech about the terms and conditions of their employment or from organizing with other employees.

If you have questions or want additional information about these recent reports and their effects, please feel free to contact Greg.

Tags: Facebook, National Labor Relations Act, NLRB, personnel policies, Social Media