Chipotle Decision Reminds Employers Once Again That Strict Social Media Policies Are Unlikely To Survive NLRB Scrutiny

Labor & Employment Law Update

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A recent decision from a NLRB Administrative Law Judge ("ALJ") serves as yet another reminder that most private sector employers must allow employees some leeway to make work-related complaints, especially on social media. The employer in the case, Chipotle Services LLC, operates Chipotle restaurants nationwide. As readers likely are aware, Chipotle has received a great deal of negative press in recent months, but this recent decision was unrelated to food safety or illness issues.

Instead, this case arose after Chipotle management confronted an employee who used the social networking application, Twitter, to complain of low wages and being required to work on days when heavy snow fell and public transportation was not operating. The employee also tweeted that Chipotle, unlike its competitor, Qdoba, charged customers for guacamole.

Management met with the tweeting employee, handed him a copy of the company's social media policy, and asked him to delete his tweets about Chipotle because they violated the policy. Further showing that Chipotle cannot catch a break, the policy document that management gave the employee was not even Chipotle's current social media policy—but that did not matter to the NLRB because Chipotle relied on the outdated policy when it asked the employee to delete his tweets.

Two particular provisions in the social media policy drew the NLRB's ire. Those provisions prohibited: (1) spreading "incomplete, confidential, or inaccurate information;" and (2) "making disparaging, false, misleading or discriminatory statements about or relating to Chipotle . . . ."

The ALJ concluded that prohibiting false, misleading, incomplete, or inaccurate statements was improper as prior NLRB decisions required more than a false statement for an employee to lose the protection of the National Labor Relations Act ("NLRA"). Under existing precedent, in order to lose the protection of the

NLRA, inaccurate statements must be combined with a malicious motive.

The ALJ also was troubled by the prohibition on disclosing confidential information, because the term "confidential" was not defined in the policy and, therefore (according to the ALJ) could have been broadly construed by employees to include NLRA-protected activity. Prior NLRB decisions have struck down overly broad confidentiality provisions that could be construed to bar employees from discussing, for instance, their wage rates. Similarly, the ALJ determined that the prohibition on "disparaging" statements was also too vague, and thus could be interpreted to bar protected activity. Again, as NLRB precedent has shown, insulting one's employer and supervisor often can be protected by the NLRA.

Bearing all of this in mind, it is critical that employers realize that employees do have certain rights to bite the hand that feeds them—and that efforts to enforce overly strict limitations on employee comments have the possibility to create more harm than the original comments ever could have. In this regard, employers must also recognize that the NLRA covers most private sector employers with multiple employees, regardless of whether the employer's employees are union members. As such, employers must be mindful of the rights that exists under the NLRA, and should consult with experienced legal counsel when implementing and enforcing employee social media policies.