



LEGAL RISKS ASSOCIATED WITH SOCIAL MEDIA AND CONCERTED ACTIVITIES HIGHLIGHTED IN FACEBOOK CONTROVERSY

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On October 27, 2010, the National Labor Relations Board issued a Complaint against an employer who allegedly terminated an employee because the employee posted derogatory remarks about her supervisor on her personal Facebook page. The Complaint asserted that the employee's remarks were "protected concerted activity" under the National Labor Relations Act, and that the company's social media policy prohibiting such remarks was unlawful. The Complaint was the first time the NLRB has addressed private Facebook postings. Although a hearing on the Complaint is not scheduled until January, 2011, and although the company has denied that the termination was based on the derogatory Facebook statements, the case has drawn national focus. The issues raised in the case provide important lessons to HR professionals on the legal risks surrounding social media and the expanding scope of state and federal prohibitions on interference with concerted employee activities.

Facts of the Case. The NLRB Complaint alleges that the employer, American Medical Response of Connecticut, maintained a Social Media Policy in its employee handbook. The policy, among other things, prohibited employees from "making disparaging, discriminatory or defamatory comments when discussing the company or the employee's superior, co-workers and/or competitors."

In November of 2009, one of the company's medical technicians, Dawnmarie Souza, became angry with an assignment she had been given by her supervisor. One evening, while at her home, she posted several statements on her personal Facebook page which were critical of her supervisor, and stated that he was "being a d*** and a scum***". She also stated: "looks like I'm getting some time off. Love how the company allows a 17 [the company's terminology for a psychiatric patient] to become a supervisor". The statements were discovered by the company and Ms. Souza was terminated.

The NLRB regional office then filed a complaint, asserting, among other things, that the company's Social Media policy was unlawful (even if it had never been used to actually discipline anyone) and that the company's termination of Ms. Souza was unlawful because it interfered with protected "concerted activity" under federal law.

Definition of "Concerted Activity". Many employers may be unaware of the protections employees enjoy for "concerted activities", or how those protections have been defined by enforcement agencies. Prohibitions on employers' interference with employee's concerted activities are contained in both the National Labor Relations Act and the Wisconsin Statutes. Those laws provide employees with the right to, among other things, "engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection".

The phrase "other mutual aid or protection" signifies that the protection applies to both unionized and nonunionized workforces. This can often be overlooked by supervisors in nonunion settings.

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Enforcement agencies have expanded the scope of protected “concerted activities” over many decades, and employers are often surprised by the type of actions that can constitute a “concerted activity”. In general, communications between employees which share information on wages, benefits, or other terms or conditions of their workplace, including concerns or unhappiness with such workplaces, are protected communications. Likewise, joint actions taken by employees in furtherance of efforts to address workplace conditions constitute “concerted activities”.

Of course, there are limitations on the nature of protected “concerted activities”, and some “concerted activities” lose their protection when they cross the line. For example, “concerted activities” that disrupt the workplace, and threats or acts of violence are not protected. In between, there are a host of actions that may or not be classified as a protectable “concerted activity”.

Is Disparagement Protected as a “Concerted Activity”? One type of action that has long been the subject of legal debate is whether an employee’s disparagement of his or her employer, or its products, business, workforce or supervisor staff constitutes a “concerted activity”. The “disparagement” issue is front and center in the Facebook dispute and is one of the reasons the case is likely to continue to receive increased scrutiny.

In December of 2009, the General Counsel of the NLRB issued an Advice Memorandum which indicated that statements which were generally “negative” about an employee’s managers, are considered protected activities, while statements which were “slanderous” or “detrimental” to the company would generally be outside legal protections. In the Facebook case, Ms. Souza’s statements were certainly “negative” and might or might not be seen as “slanderous” or “detrimental” to the Company, depending on your point of view. However, it is important to note that the composition of the NLRB has changed in the past year, with the appointment by President Obama of new Directors who are viewed as pro-employee. Thus, the Facebook case could represent an expansion of those types of disparaging statements which will now be considered protected.

Personnel Policies Which “Interfere” with Protected Activity. Another important point in the Facebook case is the NLRB’s challenge to the employer’s personnel policies which prohibited “disparaging, defamatory or discriminatory” statements, posting or other communications by employees. Such work rules are very common and the NLRB’s claim that such policies are unlawful represents a new legal exposure which HR professionals should carefully monitor.

In the December, 2009 Advice Memorandum, the NLRB General Counsel held that a similar policy adopted by Sears was not unlawful because the prohibition on disparagement was listed among other work rules addressing “egregious misconduct” that was clearly non-protected. As such, the General Counsel felt that employees would not reasonably believe that the disparagement prohibition restricted them from protected concerted activity communications.

Once again, the Facebook case suggests that the NLRB is changing course and taking a more narrow view on non-disparagement and other policies. Such policies could now be seen as interference with an employee’s right to engage in concerted activities. This is a concerning trend for employers, particularly since the NLRB has long taken the position that an employer can be in violation of the law for having a non-compliant policy even if it has never

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disciplined any employee for violating it. The key is whether such policies could have a “chilling effect” on an employee’s exercise of protected actions.

The Facebook case also indicates that in particular the NLRB is particularly concerned with Social Media policies and employer’s actions taken in relation to information posted in blogs, emails, Twitters, websites, Facebook pages and other 21st century forms of communication.

In addition to non-disparagement policies, confidentiality policies, which many employers maintain to protect the disclosure of proprietary business information, are coming under more frequent attacks. The NLRB has taken the stand that if “financial”, “payroll” or similar items are prohibited from being “disclosed”, it could be an unlawful policy because it could prohibit employees from sharing wage and salary information with other employees or unions. Policies prohibiting “false or inaccurate statements” are also coming under attack. The NLRB’s position is that only deliberately false or dishonest statements are per se outside the scope of protected activity and some “false or inaccurate” statements are protected as “concerted activities” in certain contexts.

Recommended Action for HR Professionals. Regardless of the ultimate outcome of the Facebook case, HR professionals in both unionized and nonunion workplaces are well advised to promptly take the following steps to reduce the legal risks highlighted in that case. These steps include:

- Review all personnel policies. Of particular focus should be social media, nondisparagement and confidentiality policies. For those that could be susceptible to legal challenge, either modify or include disclaimer language. One example of such a disclaimer is the following: “This Policy will not be construed or enforced in a manner which restricts or interferes with employees’ legal rights”.
- Review all disciplinary actions to ensure that the conduct engaged in by the employee could not be construed as a “concerted activity”.
- Train all supervisors on the definition of “concerted activity” and how to deal with employees who engage in such activities and when such activities cross the line.
- Continue to monitor cases and rulings involving the definition of “concerted activities” and those involving personnel policies to ensure your policies and practices continue to comport with the law.

Further information on the Facebook case can be found in an NLRB Press Release dated November 2, 2010, or by contacting the Liebmann, Conway, Olejniczak & Jerry Employment Team at (920) 437-0476.