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EXPERT ANALYSIS

My Employee Said What on Facebook!?! Disciplining Employees for Social Media Posts

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There may be little more frustrating for employers than finding out employees have been spouting off on social media and disparaging the workplace. Unfortunately for employers, the National Labor Relations Board maintains that employees have wide latitude to criticize their employers on social media.

In fact, the NLRB has issued some surprising rulings in favor of employees including for employees who made vulgar and profane posts about their employers or supervisors.[1] In light of these decisions, employers should think carefully before disciplining an employee for a post relating to wages, hours or working conditions — or to an ongoing labor dispute.

How can an employer determine when employees' social media actions cross the line from merely obnoxious to worthy of discipline?

Here's a rundown that will aid in assessing when an employer can discipline an employee for his posts on Facebook, Instagram, Twitter or elsewhere — and when disciplinary action may be considered a violation of the employee's rights under the National Labor Relations Act.

WHY DOES THE NLRB CARE?

The NLRB enforces the NLRA,[2] which gives employees the right to support or oppose unionization. In addition, the NLRA states that employees may engage in other "concerted activity" for "mutual aid and protection."[3] This can include discussing or encouraging group action among co-workers, even if the ultimate objective is not to start a union.

The NLRB recognizes that electronic media serve as the modern-day water cooler,[4] and as recently as October it endorsed the concept of using electronic signatures collected over social media to support the requisite "showing of interest" for a union election petition.[5] Given this focus on social media, the NLRB as currently comprised is likely to closely scrutinize whether an employee who got in trouble over a social media post was engaging in concerted, protected activity.

Is the post about union activity or organizing?

As one might imagine, the NLRB will usually find employee posts that expressly discuss or directly concern unionization or labor unions to be protected speech. These may include posts that support a union drive, ask employees to sign union cards or ask employees to attend a union meeting. In most cases, the board will find the post protected even if it contains some off-color words or disparaging language.

In one notable example, the NLRB held as protected a profanity-laden post in which an employee called his supervisor a "NASTY MOTHER F------", and continued "F--- his mother and his entire f------ family!!!! What a LOSER!!!! Vote YES for the UNION!!!!!!"[6]

A key factor in finding the post protected, the NLRB noted, was that it "exhorted employees to 'Vote YES for the UNION.'"[7]

Is the post directed at wages, hours or working conditions?

The NLRA covers more than just union organizing. It also protects concerted activity undertaken to discuss or protest "wages, hours, and working conditions." As a result, the NLRB has found that social media posts about wages, benefits and employment policies are protected activities even if they do not mention joining or supporting a union.

A Connecticut waiter recently prevailed on an NLRB charge she brought against her employer, a sports bar that fired her after she posted a comment to her Facebook page questioning her employer's payroll tax withholding rate. Several co-workers, including one who was also fired, "liked" the post and added their own comments on the topic. The employees talked about feeling cheated by the employer's withholding policy and discussed options for pursuing wage claims with government agencies. Two filed NLRB charges, saying they were terminated in retaliation for engaging in protected concerted activities.

The NLRB held that the employees had engaged in a protected discussion about their employer's wages, hours and working conditions. In October the 2nd U.S. Circuit Court of Appeals agreed, affirming the board's decision.[8]

The NLRB recognizes that electronic media serve as the modern-day water cooler.

BUT ISN'T THAT INFORMATION CONFIDENTIAL?

A knee-jerk reaction that an employee has violated the company's confidentiality policy by posting sensitive wage, disciplinary or other employment information can get employers in hot water. In most cases, if the post pertains to wages, hours or working conditions, the NLRB will find that the employee's right to discuss the topic outweighs the employer's interest in maintaining confidentiality.

In another recent case, the NLRB held that an employee had a right under federal labor law to laminate and post in his cubicle a disciplinary notice he received for using his personal computer tablet at work.[9]

While one might think that individual discipline is a personal — and therefore confidential — matter, the NLRB said the employee was entitled to publicize his disciplinary notice to co-workers so they could learn the circumstances of his discipline and how to avoid similar write-ups.[10]

Given that the board held that the employee had the right to post the notice in his cubicle, it's not a stretch to imagine that the NLRB could find employees are entitled to post their disciplinary records to social media, where the employer's real property interests are not implicated at all.

The following hypothethicals provide examples of posts the NLRB might find protected because they relate to wages, hours or working conditions:

- "I can't believe the overnight pickers are getting such a chintzy hourly premium for working the graveyard. 2 bucks an hour is chump change!!! We deserve a raise!"
- "The company's new policy of single-manning the sorters puts profits over people. Like if you agree."

That said, employees are not free to post confidential business information that pertains to trade secret and proprietary information not related to wages, hours or working conditions. For example, an employee's post saying "People always ask me — what's in the delicious secret sauce? Answer: habanero and vinegar," is unlikely to be considered protected.

DO I HAVE TO PUT UP WITH THIS DISLOYALTY?

The NLRB draws a distinction between posts that are merely prejudicial to the employer's reputation and posts that are so "disloyal" as to lose the protection of the NLRA. As a practical

matter, the board will afford a high degree of protection to any social media post that protests wages, hours or working conditions as part of a "labor dispute" — even if the post casts the employer in an negative light.

In a case from the District of Columbia, the NLRB concluded that a nurse did not lose the protection of the NLRA when she told the city council and local media that her hospital-employer was not prepared to deal with the Ebola virus and had given nurses no Ebola training "whatsoever."[11]

The NLRB found that the nurse's statement was protected. It said that although the statement disparaged the employer's Ebola preparedness, it was part of an ongoing labor dispute and was not so "disloyal, reckless, or maliciously untrue as to the lose the [NLRA's] protection."[12]

In fact, the NLRB affords employees a high degree of latitude to criticize their employers, as long as the criticism is tangentially related to wages, hours or working conditions and is part of a labor dispute.

The agency has held that employees can, as part of a protest for more sick days from their employer, "warn" the public that the employer's food products may have been contaminated by germs spread by sick workers. In finding the speech protected, the board explained that an employer's sick leave policy is a relevant working condition.[13]

However, a post that is simply critical of the employer's business or products, without any connection to a labor dispute, is unlikely to be protected under federal labor law. For example, a post asking readers, "Why would you eat at our restaurant when the restaurant next door is better and more affordable?,"[14] without more, would not likely be considered protected.

The NLRB has found that social media posts about wages, benefits and employment policies are protected activities even if they do not mention joining or supporting a union.

BUT THAT'S JUST NOT TRUE!

The NLRB has also found that employees cannot claim legal protection for posting intentional or maliciously false statements about their employer. Employees, however, do not need to be 100 percent factually accurate when making social media posts, the board has held. Instead, federal labor law protects employees who make innocent or negligent mistakes of fact.

In one case, the NLRB allowed employee statements made during a heated labor dispute, and that were "rhetorical hyperbole" incapable of being proved true or false in an objective sense. The burden is on the employer to prove that an employee's post contained a malicious falsehood as opposed to an innocent mistake of fact.[15]

WHAT ABOUT VULGARITY?

Much to the chagrin of some employers, the board tolerates a hefty amount of vulgarity and profanity by employees on social media. It asks several questions when determining whether a profane post exceeds the protection of the NLRA,[16] including:

- Did the employee act impulsively? The NLRB grants employees some leeway for profane outbursts made in the heat of the moment.
- Did the employee act in response to some type of employer provocation? The NLRB doesn't "like" when employers commit a labor law violation that prompts an employee's profane outburst.
- Does the employer tolerate similar profanity in its workplace? If so, it is harder to argue in favor of disciplining a worker for his online conduct.

Taking these factors into account, it's possible that the NLRB would hold as protected a post by an employee saying, "Can you believe no raise again? F--- this f------ company. Let's organize and get some real power!"

Because the post relates to wages, the NLRB would scrutinize whether the employee acted impulsively and whether the employer strictly forbids cursing in the workplace — both in policy and in practice.

Similarly, if an employee posted comments complaining that "Supervisor Ron told me to throw out my union card. That fatso is a lazy anti-union piece of s---," the agency will evaluate whether the employer's unfair labor practice provoked the outburst. You can bet that the current NLRB will usually stretch to find some rationale to protect this type of post.

IN CONCLUSION

The NLRB requires employers to tolerate a wide array of comments and language from employees on social media. Understanding where to draw the line between protected activity and inappropriate conduct can make all the difference between a clean separation and an unfair-labor-practice charge (or worse).

In most cases, if the post pertains to wages, hours or working conditions, the NLRB will find that the employee's right to discuss the topic outweighs the employer's interest in maintaining confidentiality.

NOTES

[1] *See, e.g.*, Pier Sixty LLC, 362 N.L.R.B. 59 (2015), and Triple Play Sports Bar & Grille, 361 N.L.R.B. 31 at *3 (2014).

[2] 29 U.S.C.A. §§ 151–169.

[3] 29 U.S.C.A. § 157 ("Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities.").

[4] *See, e.g.*, Register Guard, 351 N.L.R.B. 1110, 1125 (2007) (Liebman, dissenting) ("The discussion by the water cooler is in the process of being replaced by the discussion via email."); Purple Communications Inc., 361 N.L.R.B. 126 at *8 (2014) (adopting Liebman's dissent in Register Guard and describing email in the workplace as the "natural gathering place" for employees to communicate with each other).

[5] Memorandum from Richard F. Griffin Jr., Gen. Counsel, Nat'l Labor Relations Bd., to All Reg'l Directors, Officers-in-Charge, and Reg'l Directors (Oct. 26, 2015).

[6] Pier Sixty, 362 N.L.R.B. 59 at * 2.

[7] *Id.* at *3.

[8] Triple Play, 361 N.L.R.B. 31 at *3 (2014), *enforced*, *Three D LLC v. NLRB*, Nos. 14-3284 and 14-3814, 2015 WL 6161477 (2d Cir. Oct. 21, 2015).

[9] Central States Se. & Sw. Areas, Health & Welfare and Pension Funds, 362 N.L.R.B. 155 at *2 (2015).

[10] *Id.*

[11] Advice Memorandum from Barry J. Kearney, Assoc. Gen. Counsel, Div. of Advice, Nat'l Labor Relations Bd., to Charles L. Posner, Reg'l Dir., Region 5 (June 4, 2015).

[12] *Id.* at *6 (citing MasTec Advanced Technologies, 357 N.L.R.B. 17 at *5 (2011)).

[13] Jimmy John's, 361 N.L.R.B. 27 (2014).

[14] In Mountain Shadows Golf Resort, 330 N.L.R.B. 1238 (2000), the NLRB held that an employee did not engage in protected activity when he implored the city to terminate its contract with his employer and hire a new vendor, where the employee's flyer did not reference the existence of a labor dispute or relate to working conditions in any manner.

[15] Kearney Advice Memorandum, at *7-8.

[16] *See* Triple Play, 361 N.L.R.B. 31.

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