Social Media Cases Under The National Labor Relations Act

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Employee Rights Under the NLRA

- Section 7 of the NLRA provides that:
- “Employees shall have the right . . . to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . .”
Concerted Activity

“Concerted activities” are those “engaged in with or in the authority of other employees, and not solely by and on behalf of the employee himself.”

Individual action is concerted if it is engaged in with the object of initiating or inducing group action.
Unfair Labor Practices

• Under the NLRA, it is an unfair labor practice for an employer:
  o “to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.” 29 U.S.C. § 158(a)(1).
Cases Before The NLRB

- The NLRB has heard claims that social media use led to an adverse employment decision.
  - Facebook, Twitter, YouTube and Blogs
  - Employer handbooks and social media policies
- In August NLRB General Counsel’s office issued a Memorandum discussing the outcomes of 14 cases
What Does the Board Look At?

- Is the blog or tweet or other posting concerted activity?
  - Not a gripe
  - But getting others to join for “mutual aid and protection” protected
- If concerted is it protected?
- If protected, has employee’s conduct forfeited the protection of the NLRA?
Forfeiting NLRA Protection

• The place of the discussion;
• The subject matter of the discussion;
• The nature of the employee's outburst; and
• Was the outburst provoked by the employer’s unfair labor practice?
Example 1
Protected Activity

- Employee 1 posted on Facebook about another employee’s negative opinion of some employees’ job performance
- Employee 1 asked coworkers for their opinion, and four coworkers responded on Facebook
- Employee 1 and the four coworkers were terminated
- Employer admits that Facebook postings sole reason for terminations
Example 1
Protected Activity *continued*

- Comments *were* concerted activity – an appeal by an employee to coworkers for assistance
- Comments *were* protected activity – employee statements concerning staffing levels is protected where it implicates working conditions
- Swearing and sarcasm did not forfeit protection
- Reinstatement and backpay ordered
Example II
Protected Activity

- Employee fired after posting photos and comments on Facebook criticizing a sales event specifically targeting the quality of refreshments.
- Posting was concerted activity. While employee wrote the comments himself, he was vocalizing the sentiments of coworkers and continuing the course of concerted activity that began at a sales meeting.
Example II
Protected Activity  continued

• Comments were protected because they involved employees’ concerns over commissions and had been raised at an earlier staff meeting.

• Not so “opprobrious” or otherwise so disloyal, reckless, or maliciously untrue so as to lose the Act’s protection.
Example III
Non-Protected Activity

• Employee-bartender had a Facebook “conversation” with a relative complaining about the bar’s tipping policy
  o Called the customers “rednecks”
  o Hoped they choked on glass while driving home drunk
  o No discussion with coworkers, and no coworker responded
  o Terminated
Example III
Non-Protected Activity  continued

• NLRB found no concerted activity
  o Although posting discussed employment conditions
  o No coworker involvement
  o Facebook conversation did not grow out of a conversation with a fellow employee
Example IV
Non-Protected Activity

- Customer service employee posted Facebook comments that criticized store management:
  - “Tyranny” at the store
- Coworkers respond:
  - Express emotional support
  - Ask why he was so “wound up?”
Example IV
Non-Protected Activity continued

- Employee responds:
  - Describes assistant manager with slang-expletives, and complaining about getting “chewed out” for mispricing and misplacing merchandise
- Employer disciplined employee
- NLRB – Comments are individual gripes, not concerted activity
  - Contained no language which suggested invitation to concerted activity
  - Only an expression of frustration
Employer Policies Regarding Social Media

• An Employer Rule is unlawful if it explicitly restricts Section 7 protected activities.

• If a rule does not explicitly restrict protected activities unlawful if:
  o Employees reasonably think the policy prohibits Section 7 activity;
  o The rule was created in response to union activity; or
  o The rule has been applied to restrict the exercise of Section 7 rights.
Examples – Employer Social Media Policies

• Employer policy stated that
  o Employees are subject to discipline for engaging in “inappropriate discussions” about the company, management, and/or coworkers.

• Policy over-broad because it could reasonably be interpreted to restrain Section 7 activity.
Examples Continued – Employer Social Media Policies

• Employer Policies

1. Employees can’t use any social media that may violate, reasonable expectations as to privacy or confidentiality

2. Employees can’t communicate or post statements that might embarrass, harass or defame the Employer or its employees

3. Employees can’t make statements that lack truthfulness or that might damage the reputation or goodwill of the Employer

• All policies over-broad because an employee could think they prohibited protected conduct.
Examples Continued –
Employer Social Media Policies

• Employer’s online social networking policy prohibited employees on their own time from:
  o using blogs to talk about company business on personal accounts;
  o from posting anything they would not want their supervisor to see;
  o from posting pictures or comments involving the company or employees;
  o from disclosing sensitive or inappropriate information about the employer.

• NLRB - All policies over-broad because they prohibit protected discussions about employer’s labor policies or treatment of employees, and an employee could think they are prohibited from discussing wages and other terms and conditions of employment.
Examples Continued – Approved Employer Social Media Policies

• Employer policy prohibiting employees from pressuring coworkers to connect with them on social media:
  o NLRB - Approved. Sufficiently specific and narrow. Clearly applied only to pressuring/harassing conduct.

• Employer policy restricting employee contact with media to ensure a consistent/controlled company message:
  o NLRB - Approved. Policy only sought to limit media contact to extent necessary to ensure that one person spoke for company.
  o Note: Employees do have right to speak to reporters about wages and conditions of employment.
• Employees have always had the right to engage in concerted activity for purposes of mutual aid and protection.
• This protection applies whether employees are represented by a union or not.
• Social media helps communication between employees.
• Social media allows a larger audience including persons who are not employees to receive communications about work-related matters.
Summary - II

- Social media communications may be protected by the NLRA
- Communications are concerted if engaged in with or on the authority of other employees may include situations where individual employees seek to initiate group action
- Activity will be protected if involves terms and conditions of employment, discussion of supervisory actions
Summary - III

- Think before discipline — consult counsel
- Review your own social media policies
- Take a look at what the NLRB has said