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# Can disparaging posts prompt employee discipline?

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Social media is becoming an increasing challenge for employers who find themselves outraged at public dissemination of disparaging comments about their businesses by their own employees, yet uncertain about their ability to impose disciplinary action against these individuals in light of the alarming uptick in claims filed under the National Labor Relations Act.

Some employers mistakenly believe that the NLRA does not apply to them because they do not have a unionized work force. The NLRA, however, applies to the workplace even if the employer does not have a union presence such that all employers should pay close attention to the recent guidance and developing case law emanating from the National Labor Relations Board.

One of the first steps many employers have taken in response to damaging tweets, blogs or posts made by their employees is to ensure that they have social media policies in place. These often strongly worded policies, however, have come under increased scrutiny by the NLRB and in many cases portions or even the entirety of such policies have been deemed unlawful.

Section 7 of the NLRA allows employees to engage in protected "concerted activity" for "mutual aid or protection." The board has concluded that an employer violates Section 8(a)(1) of the act through the maintenance of a work rule if that rule would "reasonably tend to chill employees in their exercise of their Section 7 rights."

Not surprisingly, a rule is unlawful if it expressly restricts Section 7 activity. Even if a work rule does not contain such an express prohibition, however, it is still unlawful if employees would reasonably construe the language in the rule to prohibit Section 7 activity or if the rule has been applied by the employer to restrict the exercise of Section 7 rights.

The question then arises as to what an employer can and cannot prohibit its employees from posting in light of these restrictions. The answer is not always obvious, and many employers find themselves surprised to learn that their policies may be unlawful for reasons they never contemplated.

Recent decisions and guidance from the board provide some useful instruction as to how some of the more commonly included topics in social media policies can most safely be addressed and form the basis for appropriate disciplinary action.

## Non-disparagement/defamation

The board has found that a policy that contains a prohibition on making "disparaging or defamatory" comments is unlawful because employees would reasonably construe this provision to apply to protected criticism of the employer's labor policies or treatment of employees.

However, the board has concluded that requiring employees to expressly state that their postings are their own and do not represent the employer's "positions, strategies or opinions" is not unlawful and a policy should be able to prohibit employees from saying things that would harm the reputation of the employer or hinder its ability to do business.

## Inappropriate comments

The board has found unlawful a policy that contained an instruction that "[o]ffensive, demeaning, abusive or inappropriate remarks are as out of place online as they are offline" because such a provision proscribed a broad spectrum of communications that would include protected criticism of the employer's labor policies or treatment of employees.

A policy, however, that contains specific examples of prohibited conduct that would not be reasonably understood to restrict Section 7 activity would be appropriate. For example, the board has found lawful a provision under which "harassment, bullying, discrimination or retaliation that would not be permissible in the workplace is not permissible between co-workers online, even if it is done after hours, from home and on home computers."

### Confidentiality

Policies that broadly prohibit the release or dissemination of confidential information could reasonably be interpreted as prohibiting employees from discussing and disclosing information regarding wages and conditions of employment. Thus, a policy should define the nature of the confidential information that the employer is seeking to protect as specifically as possible and include examples (e.g., personal health information of patients or customers or launch or pricing information related to products).

### Intellectual property

Employers are allowed to protect their trade secrets, but need to ensure that they do not hinder employees' ability to discuss wages and working conditions when so doing. Thus, the board has approved of a policy that defines trade secrets to include information regarding the development of systems, processes, products, know-how and technology.

On balance, employers when possible should frame language in their policies in the most positive light possible in terms of what they want employees to achieve and, when imposing prohibitions, provide specificity and concrete examples of the types of behaviors that are unacceptable.

Additionally, it is often recommended that a policy include a statement or disclaimer that the policy does not intend to interfere with or discourage employees communicating or acting in concert, although such language will not necessarily save an otherwise unlawful policy or prohibition.

While the board has increased its scrutiny of social media policies and related disciplinary action, it does not in every case find discipline to be inappropriate in this context.

In a ruling last month, the board overturned an administrative law judge's finding that the employer violated the NLRA through statements to an employee about the employee's Facebook posts.

The board concluded that there was insufficient evidence to show that the posts concerned terms and conditions of employment or were intended for or in response to co-workers.

The board described the posts as containing unspecified criticism of the employer and comments regarding the union and found that although they responded to another person's initial post, there was no evidence that the statements were directed at or in response to protected activity.

Before disciplining an employee for violation of a social media policy, the communication should be analyzed in relation to the NLRA, and the legality of both the discipline itself as well as the employer's policy should be closely examined.

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