Employers Face New Challenges From Employee Use of Social Media

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Emerging social media technologies like Twitter and Facebook are putting a new spin on familiar employment problems. As employees increasingly access social media, employers have become more interested in regulating and monitoring what their employees are saying online, and for good reason. Employers learned in the era of blogging that the online activities of their employees can lead to public relations nightmares, or even employer liability. Unfortunately, monitoring an employee's online activities can also easily land an employer in hot water.

Employer Monitoring of Social Media under the National Labor Relations Act

Section 7 of the National Labor Relations Act ("NLRA"), which applies to union and non-union employers alike, prohibits employers from taking adverse action against employees for engaging in "protected concerted activity," including activities for the "mutual aid or protection" of fellow employees. Generally, the National Labor Relations Board ("NLRB"), who is charged with enforcing the NLRA, has taken the position that discussions among employees about supervisors and managers, salary, employer policies, or benefits may constitute protected concerted activity.

Recently, the NLRB filed an unfair labor practice complaint against an ambulance service in Connecticut, alleging that the service had unlawfully terminated an employee for posting unfavorable remarks about her supervisor on Facebook – in one such post, the employee called her supervisor a "scumbag." The NLRB alleged that such posts were made in response to threats from the employee's supervisor that the employee would be disciplined for requesting union representation at a meeting she reasonably believed would result in discipline (a right guaranteed under the NLRA). In addition, the NLRB alleged that the employer's Blogging and Internet Posting Policy, which prohibited employees from "making disparaging, discriminatory or defamatory comments when discussing the Company or the employee's supervisors, co-workers and/or competitors," unreasonably interfered with the employee's Section 7 rights. The NLRB's complaint, slated for hearing in January 2011, has garnered a lot of media attention. Given the particular facts of the case, the outcome is uncertain.

Interestingly, this is not the first NLRB complaint to address an employer's social media policy under Section 7. In 2009, a union filed an unfair labor practice charge against Sears Holdings over a social media policy that prohibited, in part, "[d]isparagment of company's or competitor's products, services, executive leadership, employees, strategy, and business prospects." In an Advice Memorandum issued by the NLRB's General Counsel, the NLRB concluded that the policy did not unreasonably interfere with an employee's Section 7 rights where: (1) the particular portion of the policy at issue was being taken out of context, as it was included in a list of egregious activities that would not normally receive Section 7 protection – suggesting that an employee would reasonably understand the policy did not prohibit exercise of Section 7 rights; (2) the policy was not enacted in response to union activity; and (3) no employee had been disciplined under the policy for engaging in activity

protected by Section 7. The last point may distinguish the NLRB's prior guidance from the complaint it recently filed.

The NLRB's complaint has sparked other similar charges, including a recently filed charge by a teacher's union in Manatee County, Florida, alleging that a school district's proposed social media policy violated teachers' privacy and First Amendment rights. Unlike private sector employees, speech by public employees on matters of public concern and made in their capacity as citizens (rather than employees) may be protected, depending on the government's interest in maintaining a non-disruptive workplace. Similarly, public employees enjoy certain heightened privacy rights as compared to their private-sector counterparts, although such privacy rights will also generally be balanced against their employer's legitimate business needs.

Advice to Employers

While these cases highlight some potential pitfalls for employers who have adopted or are considering social media policies, they should not be read to suggest that the best social media policy is simply no policy at all. Rather, drafting a good social media policy includes:

- Understanding your own organizational culture, including how your current employees use social media, how the organization uses social media, and how you want your employees and the organization to use these tools in the future;
- Considering the potential risks associated with employee or organizational use of social media, including the myriad of business, public relations and legal concerns that follow from using these technologies;
- Partnering with stakeholders to develop a policy that will be consistently enforced;
- Training employees and managers on your social media policy, including reminders about the need for common sense when using these technologies, the use of privacy settings as appropriate, and other workplace policies that may bear on employee use of social media.

Partnering with competent legal counsel who are staying abreast of recent developments in this area will also ensure that your social media policy is appropriate in light of the host of employment laws that can impact employee online activities and employer monitoring of those activities. For instance, should you prohibit supervisors from "friending" subordinates? Such a policy may seem a bit over-the-top, until you consider the potential for harassment, or the risk that a manager's monitoring of an employee's online activities could be illegal surveillance of an employee under the NLRA. Don't hesitate to give us a call - these are the sort of considerations we can help you identify and address *before* you adopt a social media policy.