



Social Media in the Workplace A New Web of Regulations Falls on Employers

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Employers with a non-union workforce may be surprised to learn that their non-supervisory employees have legal protections enforced by the National Labor Relations Board (NLRB). The NLRB has recently taken an aggressive stance in regulating employer's social media policies.

The National Labor Relations Act (NLRA) guarantees employees the right to engage in "*concerted activities* for the purpose of collective bargaining or *other mutual aid or protection*." Employer policies that contain ambiguous rules with no limiting language or context making it clear that there is no restriction of these rights are unlawful. The termination or other adverse action against an employee for violation of an invalid rule may give rise to a claim before the NLRB for reinstatement and back pay.

The General Counsel of the NLRB has issued reports that may help employers create social media policies that comply with the NLRA. Rules that the General Counsel has deemed problematic include:

- Directing employees not to release confidential guest, team member, or company information;
- Preventing employees from sharing confidential information with co-workers unless necessary to do their job;
- Prohibiting employees from discussing confidential information in the break room, at home, or in public places;
- Requiring employees to ensure that their posts are completely accurate and not misleading;
- Instructing employees to consider whether the post they are about to share is prohibited and if so, to check with the employer;
- Prohibiting employees from postings that use the employer's logos or trademarks;
- Prohibiting offensive, demeaning, abusive, or inappropriate remarks both online and offline; and
- Instructing employees to think carefully about "friending" coworkers.

Rules that the NLRB General Counsel found acceptable include:

- Encouraging employees to be suspicious about being tricked into disclosing confidential information and urging employees to be suspicious when asked to ignore identification procedures;
- Prohibiting inappropriate postings that include discriminatory remarks, harassment, threats of violence or other similar inappropriate conduct;
- Requiring employees to maintain the confidentiality of an employer's trade secrets and private and confidential information when coupled with examples demonstrating prohibited activity; and
- Prohibiting employees from representing that an opinion or statement is the policy or view of the employer or on behalf of the employer.

Recent Decisions Relating to Terminations Arising From Employee Postings on Facebook.

In *Hispanics United of Buffalo, Inc.*, the NLRB concluded that an employer violated the NLRA when it fired five employees for comments and posts they made on Facebook. The posts by one of the fired employees criticized another employee about his plans to complain about their work performance to the employer. Another employee disputed the criticism and asked for the views of his fellow workers. Four other employees posted comments stating that his criticism was unfounded and unfair. The NLRB concluded that the posts were protected because employees were seeking mutual aid from their co-workers.

Similarly, in *Design Technologies, LLC*, the NLRB held that two employees were unlawfully terminated due to their Facebook posts. The posts were complaints *among* employees about the conduct of their supervisor as it related to their terms and conditions of employment and about the employer's refusal to address other work-related concerns.

In contrast, in *Tasker Healthcare Group* the NLRB's General Counsel directed dismissal of a charge filed by an employee who was fired after his Facebook posts, in which he complained about his supervisor and stated his dislike for his job, were reviewed and commented on by other employees. The comments were "mere griping," and did not look forward to any action by his co-workers.

Federal Trade Commission. The FTC requires employers who purchase social media reports to comply with the Fair Credit Reporting Act.

Oregon Law Developments. Effective January 2014, Oregon law prohibits employers from requiring or requesting an employee or applicant for employment to: (1) disclose a user name or password for the purpose of accessing personal social media, (2) access personal social media in the presence of the employer, (3) divulge any personal media, (4) add the employer to the employee's social media account contacts.

Employers are prohibited from discharging or penalizing an employee, or refusing to hire an applicant, because they refused to provide a password or access to their social media account.

"Exception" for investigations. To qualify, the investigation must be for the purpose of ensuring compliance with laws, regulatory requirements or prohibitions against work-related misconduct based on receipt by the employer of *specific information about activity of the employee* on a personal online account or service. For investigations meeting these requirements, the employee may only be required "to share content that has been reported to the employer that is necessary for the employer to make a factual determination."

The new law does not prohibit employers from accessing information available to the public about an employee or applicant that is accessible through an online account.

Violations may subject an employer to damages, reinstatement, and attorneys' fees. ■

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