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Green Light, Yellow Light, Red Light

How to Abide by NLRB's Social Media "Traffic Signals"

Social Media use is altering the employment law landscape in many ways, but the most recent trend is emerging from the National Labor Relations Boards (NLRB's) aggressive protection over an employee's right (whether the employee is a member of a union or not) to use social media sites as a venue for "protected concerted activity" as it is defined by Section 7 of the National Labor Relations Act (NLRA).

On this topic, two beneficial documents have been published recently to assist employers in drafting their social media policies and in navigating social media disciplinary decisions so that the employer does not violate the employee's rights in this arena.

- On August 5, 2011, the United States Chamber of Commerce issued a helpful "Survey of Social Media Issues Before The NLRB" ("the Survey.") The Chamber had sent a Freedom of Information Act request to the NLRB and received 129 cases back. According to Michael Eastman, the Executive Director of Labor Law Policy at the US Chamber of Commerce, "the issues most commonly raised in the cases before the Board allege that an employer has overbroad policies restricting employee use of social media or that an employer unlawfully discharged or disciplined one or more employees over contents of social media posts.

- On August 18, 2011, the NLRB's Office of the General Counsel released its own Memorandum that summarized the most recent social media cases issued by the NLRB ("the Memorandum".) In the Memorandum, Associate General Counsel, Anne Purcell, states, "Recent developments in the Office of the General Counsel have presented emerging issues concerning the protected and/or concerted nature of employees' Facebook and Twitter postings, the coercive impact of a union's Facebook and YouTube postings, and the lawfulness of employers' social media policies and rules. This report discusses these cases, as well as a recent case involving an employer's policy restricting employee contacts with the media."

From the Survey and the Memorandum employers can gain insight, not only into how to narrowly draft their own social media policies so that it does not prohibit conduct that might be "protected concerted activity," but also how and when to discipline employees who violate their internal policy. Since I have previously blogged about essential provisions of a social media policy and provided my own Sample Social Media Policy

(which carves out for Section 7 protected concerted activity) this entry will focus on employer's disciplinary decisions when an employee acts in contradiction to the company's social media policy.

Proactive Lawsuit Prevention Strategies for
Social Media Abuse Related Disciplinary Actions

Although the Survey and Memorandum do not explicitly set forth clear rules for employers to abide by, employers can infer "Traffic Signals" from these documents to obey when determining how and when to discipline employees for social media use that undermines the employer's interests. The traffic signals for employers are:

Red Light.
STOP employer. This is the instance when an employee is using social media in a way that may undermine or threaten the employer, but the employer should *not* discipline or terminate the employee for this social media use. Red Light employee actions exist when

1) the employee is using social media to create a site or page or use a site or page where the stated purpose is to organize his or her coworkers to join together to protest working conditions or vote in a union.
2) the employee is using its own social media site or page to complain about wages, working conditions, or management and he or she is explicitly asking other employees for their opinions and support and/or other employees are giving their opinion and support about the working conditions at that company.
3) the employee is using social media to whistle-blow the employer's illegal activity.

Yellow Light
SLOW DOWN employer. This is the instance when an employee is using social media in a way that may undermine or threaten the employer, but the employer should proceed with caution, and hopefully seek legal advice, before it makes a decision to discipline or terminate this employee for this social media use. Yellow Light employee actions exist when

1) the employee is "venting" about his/her own work, working conditions, wages or manager, but he/she is not seeking support from coworkers, yet other coworkers are commenting on it and/or "liking" the comment.
2) The employee is "griping" about work, working conditions and wages, in general, or management, but no one is commenting about it, although the employee's friends or followers include his/her coworkers.
3) the employee is using social media to "out" the employer or managers for what the employee *erroneously* perceives as illegal or unethical activity.
4) the employee is name calling or bad-mouthing the company or its employees, but the comments are all true and not harassing or discriminatory.

Green Light
INVESTIGATE, BUT DISCIPLINE ACCORDINGLY employer. Assuming the following activities are appropriately investigated and also prohibited by the company's policies, if the employer determines that the employee is engaging in the following

activities while using social media, the employer should discipline the employee for violating the company's social media policy. Green Light employee actions exist when

1) the employee is posting violent threats, harassing and/or discriminatory comments about his coworkers, managers or customers and the comments unreasonably interfere with the targets ability to perform his/her job, especially when it is clear that these comments have nothing to do with working conditions.
2) the employee is posting comments that are so disloyal, reckless, or maliciously untrue about the company, and the company can prove the employee knew this when he/she posted it.
3) the employee is disclosing the company's trade secrets and/or confidential information.
4) the employee is spending so much time on social media during work hours that it is interfering with the performance of his or her job (but remember to enforce this policy consistently.)
5) the employee is expressing a personal vendetta or gripe about his/her manager or coworkers, but it is not directed at coworkers and only his family and friends see it.

Remember, bad words or profanity are not determinative. It is about the motive behind the name-calling that the NLRB cares about. Also, *how* the company learned about the social media abuse will be taken into account. In other words, employers should not force employees into giving up their passwords to privacy protected groups or chatrooms. (*See* Pietrylo v. Hillstone Restaurant Group.) Also, do not pretend to be someone you are not to trick the employee into "friending" you or "accepting" you, especially if you are an attorney-investigator as this may be in violation of your code of professional conduct. Finally, using unlawful surveillance, interrogation or threats to get information about an employee's social media postings violates California's and other state statutes, which protect employees from this conduct.

Last, recognize that these "Traffic Signals" are merely my interpretation of the Survey and the Memorandum at this moment in time and the interpretation may change as the laws and rules surrounding social media use are in constant motion and continually change based on new cases and emerging law.

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