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Can you fire someone for disparaging your company on Facebook?

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(Editor's note: Curtis Smolar is a partner at Ropers Majeski Kohn & Bentley. He submitted this column to VentureBeat.)

A reader asks: I have an employee who has gone onto Facebook and griped about my company. Can I institute company policies that prevent employees from doing this and terminate their employment them if they continue?

Answer: It's a frustrating and embarrassing situation for a business to see its employees assailing it via social media platforms – but penalizing them for it is a tough, if not impossible, task.

The debate over the First Amendment rights of the employee to post their negative feelings about a company and the rights of the company to protect its private informa tion used to skew in the employer's favor. That has changed, however, and today the federal government counsels against restricting employees' Internet chatter, regardless of its nature, because it may violate their First Amendment rights.

That message was delivered in a recent National Labor Relations Board (NLRB) case. In November 2009, NLRB filed a complaint against American Medical Response of Connecticut (AMR) (*NLRB v. American Medical Response of Connecticut)*. In this case, AMR had a social media policy which did not permit employees to depict the company in any way whatsoever over the Internet without company per mission, and which also included a Blogging and Internet Policy that prohibited employees "from making disparaging, discriminatory or defamatory comments when discussing the Company or the employee's superiors, co-workers and/or competitors."

An AMR employee requested union representation at an internal investigation that the employee believed would result in disciplinary action. She was then threatened by her supervisors with disciplinary action for requesting representation. The NLRB, in a press release, said that after work on her home computer the employee posted negative comments about the supervisor on her Facebook page. Co-workers joined in and showed their support of her.

The employee was suspended and later terminated because the company viewed her Facebook postings as violating the company's social media policies.

The NLRB investigated and asserted that the employee's Facebook postings constituted protected concerted activity. Generally, a "concerted activity" is an activity in which two or more employees discuss their working conditions. That sort of protection has its roots in the right of free association. The NLRB also determined that, by prohibiting the employee's concerted activity, the company's social media policies were illegal.

The case settled this month. According to NLRB, AMR has agreed to revise its social media policies so that they do not improperly restrict employees from discussing wages, hours and working conditions.

That said, employers may still institute social media policies that do not interfere with the employees' protected activities. The NLRB case does not appear to bring into question agreements employees may have to maintain the non-disclosure of confidential information and/or trade secrets. Nor does the decision address and does not appear to prohibit non-disparagement clauses in separation agreements.

This recent NLRB settlement is groundbreaking for social media law. If you've got a social media policies, it's probably a wise idea to review it carefully with your company's attorney to see if they run afoul of the NLRB's expansive view of concerted employee activity.

Startup owners: Got a legal question about your business? Submit it in the comments below or email Curtis directly. It could end up in an upcoming "Ask the Attorney" column.