Is it Time to Revamp Your Social Media Policy?

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Employers who fire their employees for their Facebook postings or Twitter tweets, take heed: Your actions and social media policies could land you in a costly dispute with your employees. Before disciplining employees for improper social media use, employers should consider whether the actions by their employees are legally protected by federal or state law. Specifically, Section 7 of the National Labor Relations Act (NLRA) protects employees who engage in "concerted activity," which generally includes the right to discuss the terms and conditions of their employment with coworkers and outsiders. In the context of Facebook postings and tweets, this means that two or three employees are free to express their opinions of their employers, supervisors, working conditions or wages online without fear of reprisal.

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Recent Actions

In an unprecedented case at the end of 2010, the National Labor Relations Board (NLRB), an independent federal agency that acts to prevent and remedy unfair labor practices committed by private-sector employers and unions (e.g., violations of the NLRA), filed an unfair labor practice charge against an employer, American Medical Response of Connecticut, Inc. (AMR). The NLRB asserted that AMR's termination of an employee, who posted disparaging comments about her supervisor, was illegal, and so was the company's social media policy.

In this case, an emergency technician had a fight with her supervisor. That night, she posted to her Facebook page that her supervisor was a "17" – the company's term for a psychiatric patient. She posted other disparaging comments about her supervisor, and other employees of the company responded with comments on her page. As a result of these statements, the company fired the emergency technician, claiming that her actions were a violation of the company's social media policy. The company's policy held that "employees are prohibited from making disparaging, discriminatory, or defamatory comments when discussing the company or the employee's superiors, coworkers and/or competitors." The NLRB claimed that AMR's termination action violated Section 7 of the NLRA, which protects employees' right to discuss their working conditions, in the workplace or on Facebook. In February 2011, the AMR and the NLRB reached a settlement on this matter.

In April 2011, the NLRB issued a memorandum seeking comment pertaining to "cases involving employer rules prohibiting, or discipline of employees for engaging in, protected concerted activity using social media, such as Facebook or Twitter." The memorandum confirms the NLRB's willingness and intent to expand its view of employees' rights with regard to social media.

On May 18, 2011, the NLRB issued a complaint against the Hispanics United of Buffalo regarding the discharge of five employees for their criticism of working conditions on Facebook. On September 2, 2011, Judge Arthur Amchan, an NLRB administrative law judge, held that the activity by the five employees was protected "concerted activity." As a result, HUB has been ordered by Judge Amchan to reinstate the five workers with back pay.

In the first case to involve Twitter, in April of this year, the NLRB allegedly threatened Thomson Reuters that it if it didn't reach a settlement with the Newspaper Guild of New York, the NLRB would file a complaint against the company. The NLRB contended that Thomson Reuters illegally reprimanded

a reporter as a result of the reporter's tweet stating, "One way to make this the best place to work is to deal honestly with Guild Members." The reporter sent the comment to a company Twitter address, responding to a management solicitation for opinions about the company. The reporter's supervisor allegedly told her that she was not supposed to damage the reputation of the company. Reuters denied that it disciplined the employee, but the employee claimed that she felt threatened and intimidated. Reuters and the Guild settled the dispute.

Employers are becoming increasingly limited in their ability to discipline their employees for Facebook postings and tweets.

Elements of a Good Policy

What should employers do in light of these recent actions by the NLRB? Throw out the company social media policy? The rationale behind the creation of most of these policies was to combat decreased employee productivity, protect the disclosure of confidential or proprietary information, prevent employees from posting discriminatory comments and protect companies from harm to their reputations from disparaging remarks. These remain valid concerns, so don't throw your policy out, but do give it a second look. Your policy should be written or reviewed with counsel and distributed to all employees.

An effective social media policy should include, at a minimum, the following elements:

- A statement that employees must comply with all company policies against unlawful sexual harassment.
- Protections against the disclosure of confidential or proprietary information of the company or its clients.
- Prohibition on posting copyrighted materials without permission.
- Restrictions on the use of corporate logos, branding and intellectual property.
- A prohibition against illegal activities (e.g. downloading pirated software or data).
- An instruction to employees to always identify themselves and to always be honest in postings.
- A statement that employees should not use profane or inappropriate language in their postings.
- A requirement that if the employee mentions the company, he/she should include a disclaimer that the opinions of the employee are not the opinions of the employer.
- A definition of "acceptable use"; for example – business use only, limited personal use or unlimited personal use.
- Contact information for a management person to answer questions or address concerns.
- A statement that the policy is not intended to violate the NLRA and that no application of your company policy will violate any applicable local, state or federal law.
- A clear statement of the disciplinary process for violation of the policy.

Avoid prohibitions against "disparagement," as this seems to be overbroad in context of the recent administration law judgments. Employers will now be limited in their ability to discipline their employees for Facebook postings and tweets.

It's an important element of an effective social media policy to reduce the level of privacy employees expect in their company e-mail or any other information stored or accessed on company computers. For example, a statement that all e-mail is subject to review by management or that employees' use of the e-mail system grants consent to review of any of the messages to or from employees in the system. Courts routinely consider whether an employer has a policy for electronic communication in determining whether an employee had a reasonable expectation of privacy. Make sure you review your policy annually with your counsel to ensure that it incorporates any changes in the law; this is a rapidly-changing area.

Using Social Media to Your Advantage

Any attempts to block an employee's access to social networking sites are likely futile given that most mobile phones contain social networking applications. Alternatively, limited and controlled access by employees to social networking sites can alleviate workplace stress and boredom. Employers ought to consider that social media and other Web-based tools can be an important resource for client development, brand development, product launches, marketing campaigns and collecting industry knowledge.

For example, take a page from the IBM playbook; this 100-year-old computing giant has embraced social media wholeheartedly. IBM has "Social Computing Guidelines" that encourage employees "not to forget their day jobs," but states further, "If your use of social media helps you, your coworkers, your clients or your partners to do their jobs and solve problems; if it helps to improve knowledge or skills; if it contributes directly or indirectly to the improvement of your company's products, processes and policies; if it builds a sense of community; or it helps to promote your company's values, then it is adding value."

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