BNA Insights

SOCIAL MEDIA

The National Labor Relations Board general counsel's office has investigated and analyzed dozens of cases involving employer discipline of employees for statements posted on social media and has taken the position that overly broad social media policies can violate employees' rights under federal labor law, management attorney Tina M. Maiolo observes in this BNA Insights article.

Even nonunion employers must craft work policies carefully in this regard, Maiolo warns. She analyzes two recent reports from the NLRB acting general counsel that help to illustrate where employer policies and actions can cross the line and chill concerted activity even if not banning it outright.

Employees Punished for Social Media Postings: A Problem or Perfectly Fine?

BY TINA M. MAIOLO, ESQ.

There can be no dispute that the recent rapid advances in technology have helped employers run their businesses in a more effective and efficient manner. At the hands of email, voicemail, cell phones, and remote access, most businesses can operate successfully from anywhere around the world. With the benefits of the advances in technology, however, come the detriments.

We now operate in a time when each employee has the world at her fingertips through social media sites, such as Facebook, Twitter, MySpace, and Tumblr. No longer do employees air their grievances to one another in the break room. Now, employees immediately take to their Facebook or Twitter accounts to let the world know just how awful they think their supervisors are or how unfair they think their work environment is.

So, what is the problem? The employer can always discipline employees who publicly degrade the company on social media sites, right? *Wrong*.

According to the National Labor Relations Board's acting general counsel, who has analyzed dozens of cases on this very issue in the past several months, an employee's undesirable comments—posted for the world to see—may, in fact, be protected concerted activity under Section 7 of the National Labor Relations Act. 29 U.S.C. § 157. If it is a concerted activity, the employer (whether currently unionized or not) is precluded by law from taking disciplinary action against the employee for her postings.

In an attempt to avoid this situation altogether, many employers are now drafting personnel policies to deter—or outright disallow—any social postings about the workplace. NLRB, however, has also attacked these policies.

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Must an employer turn a blind eye to potentially damaging postings from disgruntled employees?

According to NLRB, if the employer's social media policy can be reasonably interpreted to ''interfere with, restrain or coerce employees'' in the exercise of their right to communicate for the purpose of collective bargaining or to affect the terms and conditions of employment (their ''Section 7 rights''), the policy is unlawful. 29 U.S.C. § 158(a)(''Section 8(a)(1)'').

So, what is the employer to do? Must the employer turn a blind eye to potentially damaging and destructive postings from disgruntled employees? Can the employer *ever* take disciplinary action against an employee for postings in these social media outlets? Can the employer gain any control whatsoever of the comments being made about it on these social media sites, or must the employer allow the employees to have an unrestrained free-for-all even if harmful to the compa-

ny's reputation? Unfortunately, there is no clear answer to any of these questions.

How to identify protected concerted activity in social media is such a prevalent issue for employers that the NLRB acting general counsel, who investigates and prosecutes unfair labor practice cases, took the unusual step of publishing two reports within a six-month period summarizing several social media cases analyzed by his office over the past year. The first report, addressing 14 social media cases, was published Aug. 18, 2011. Office of General Counsel, Division of Operations Management, OM 11-74 (8/18/11) (160 DLR AA-1, 8/18/11). The follow-up report, which was issued Jan. 24, 2012, updates the earlier report with discussions regarding 14 more social media cases. Office of General Counsel, Division of Operations Management, OM 12-31 (1/24/12) (16 DLR A-2, 1/25/12).

The reports provided some guidance, through examples, as to when policies are unlawfully over broad, as well as what type of social media postings by employees are considered protected concerted activity.

What Constitutes an Unlawful Social Media Policy? One of the issues addressed by the acting general counsel in the reports is when an employer's policy prohibiting employees from ''[m]aking disparaging comments about the company through any media, including online blogs, other electronic media or through the media'' is unlawful.

The general counsel explains that ''[a]n employer violates [the NLRA] through the maintenance of a work rule if that rule 'would reasonably tend to chill employees in the exercise of their Section 7 rights' '' citing *Lafayette Park Hotel*, 326 NLRB 824, 159 LRRM 1243 (1998), enfd. 203 F.3d 52 (D.C. Cir. 1999). The acting general counsel described the two-step analysis NLRB conducts to determine if a work rule would have such a ''chilling'' effect.

First, a rule is clearly unlawful if it *explicitly* restricts Section 7 protected activities. An example of an ''explicit'' restriction on Section 7 protected activities would be a policy that expressly prohibits employees from discussing or degrading the employees' terms and conditions of employment in any forum.

If the rule does not *explicitly* restrict protected activities, it will only violate the NLRA upon a showing that: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights. Policies that fall into this category of ''unlawful'' restrictions on concerted activity are not as easily defined.

In one leading case on this issue, described in the acting general counsel's second (Jan. 24, 2012) report, the employer's rule prohibited employees from ''disparaging'' the employer through any media, including social media sites. The employee in that case was disgruntled after the employer, a collections agency, moved her from one position (taking inbound calls) to another (making outbound calls), which she believed would negatively affect her earning capacity.

In response, the employee posted a status update on Facebook. In her status update, the employee, using expletives, stated that her employer had ''messed up,'' and that she was no longer going to be a good employee. The employee was ''friends'' with approximately 10 co-workers, including a direct supervisor. Several of her co-workers commented on her post in agreement with her frustration. The employer then terminated the employee as a direct result of her Facebook postings.

NLRB: 'Appropriate Manner' Too Vague. Finding that the employer's policy ''would reasonably be construed to restrict Section 7 activity, such as statements that the Employer is, for example, not treating employees fairly or paying them sufficiently,'' the acting general counsel took the position that the employer's policy violated the NLRA, and its termination of the posting employee was unlawful.

Finding that the policy ''would reasonably be construed to restrict Section 7 activity, such as statements that the Employer is, for example, not treating employees fairly or paying them sufficiently,'' the acting general counsel took the position that the employer's policy violated the NLRA, and its termination of the posting employee was unlawful.

In a similar case, the acting general counsel alleged that the employer's social media policy and nonsolicitation rules were unlawful even though the actual termination of the employee did not violate the NLRA. In that case, the employer, who operates a chain of home improvement stores, precluded employees from identifying themselves as employees of the company unless ''discussing terms and conditions of employment in an appropriate manner.'' The acting general counsel found that the policy did not define ''appropriate manner.'' Accordingly, employees could reasonably interpret the policy to prohibit protected activity.

The policy also contained a ''savings clause'' that stated the policy would not be ''interpreted or applied so as to interfere with employee rights to self-organize, form, join, or assist labor organizations, to bargain collectively through representatives of their choosing, or to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from engaging in such activities.'' The acting general counsel, however, determined that the ''savings clause'' did not adequately cure the ambiguities in the policy or remove its chilling effect on an employee's Section 7 rights.

The acting general counselalso interpreted a ''no-solicitation rule'' by the same employer to be unlawfully overbroad. That policy stated that ''employees may not solicit others on company time or in work areas.'' The acting general counsel interpreted this policy as potentially prohibiting the solicitation of co-workers in nonwork areas and/or during nonwork (e.g. break) times. Such policies, under board precedent, are presumed to be unlawfully overbroad unless there is evidence of spe-

  DLR ISSN 0418-2693

cial circumstances that make the rule necessary to maintain production or discipline.

In another case, an employer's policies provided that ''insubordination or other disrespectful conduct'' and ''inappropriate conversation'' are subject to disciplinary action. In that case, the employer operates a restaurant chain. The employee, who was Facebook ''friends'' with co-workers, former co-workers and customers, posted that another employee was ''screwing over'' customers. The same employee later posted that ''dishonest employees along with management that looks the other way will be the death of a business.''

Some co-workers expressed concern to management about the postings and, specifically, their fear that the customers would see them. The employee was fired for violating work rules—specifically, using ''unprofessional communication on Facebook to fellow employees.'' With regard to the policy, the acting general counsel viewed the policy as unlawfully overbroad. He determined that the prohibitions on ''disrespectful conduct'' and ''inappropriate conversations'' would reasonably be construed by employees to preclude Section 7 activity.

The message employers should take from this sample of cases from the two NLRB reports is to carefully review their social media policies to ensure that they cannot be reasonably interpreted to infringe on an employee's Section 7 rights. To do this, employers should consult with counsel. Counsel should review the policy and compare it with those addressed by NLRB to confirm it does not run afoul of the NLRA.

When Is Social Media Activity Protected? As the acting general counsel provided guidance as to what social media policies run afoul of the NLRA, he also provided direction as to what type of social media postings constitute protected concerted activity.

For example, in the first case above involving the collection agency employee who complained on Facebook about being transferred to a position with less money-making potential, the acting general counsel took the position that her termination was unlawful because she was engaged in protected concerted activity.

The acting general counsel stated that ''an activity is concerted when an employee acts 'with or on the authority of other employees and not solely by and on behalf of the employee himself' '' citing *Meyers Industries,* (Meyers I), 268 NLRB 493, 120 LRRM 3392 (1984), revd. sub nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), cert. denied 474 U.S. 948 (1985), on remand *Meyers Industries* (Meyers II), 281 NLRB 882 (1986), affd. sub nom. *Prill v. NLRB*, 835 F.2d 1481, 127 LRRM 2415 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988). Specifically, the definition of 'concerted activity' has been determined to include those situations in which individual employees seek to initiate, induce, or prepare for group action. Id.

In that case, the employee provoked a Facebook discussion with co-workers and former co-workers about her employer's decision to transfer her to a less financially productive position. In that discussion, other co-workers/former co-workers indicated their agreement and support for her position, while one suggested filing a class action. In this case, therefore, the conversation involved complaints regarding the work conditions and fell within NLRB's definition of concerted activity.

In contrast, in the case addressed above involving the employee of the restaurant chain, the acting general counsel alleged that termination of the employment of that employee was not unlawful under the NLRA. In that case, the employee was a bartender at one of the employer's restaurants. In 2012, the restaurant hired a new general manager, who in turn hired a personal friend as another bartender. The employee immediately began having trouble with the new bartender, including complaints about the new bartender getting a more lucrative schedule and the new bartender's failure to perform certain job duties.

In another case, the employer's terminating the employee for her postings was not unlawful because her concerns had only a tangential relationship to the terms and conditions of employment, the NLRB acting general counsel said.

The employee also learned, a couple months later, that the new bartender was serving drinks made from a premade mix while charging them for drinks made from scratch with more expensive liquor. Soon thereafter, the employee posted on Facebook that she had learned that a co-worker was ''screwing over'' customers and that dishonest employees, along with management who looks the other way, will be the death of a business. While co-workers expressed agreement with the employee's concern regarding the new bartender's making things more difficult, they did not indicate that they shared her concern regarding the substitution of premium liquor with less expensive versions.

The acting general counsel indicated that the employer's terminating the employee for her postings in this case was not unlawful because her concerns had only a tangential relationship to the terms and conditions of her employment. The acting general counsel asserted that employee protests over the quality of service provided by an employer are not protected where such concerns have only a tangential relationship to employee terms and conditions of employment.

On the other hand, when employees engage in conduct to address the job performance of their co-workers or supervisor that adversely impacts their working conditions, their activity is protected. In this case, the acting general counsel found that the employee's posts ''had only a very attenuated connection with terms and conditions of employment . . . . She did not reasonably fear that her failure to publicize her coworker's dishonesty could lead to her own termination.'' Her termination, therefore, was lawful.

These few cases alone demonstrate the complexity of the issues surrounding an employer's determination of what policies and/or job actions may violate the NLRA. The acting general counsel has already taken action in dozens of other similar cases, and more cases are certain to follow.

So, What Is the Employer to Do? To determine whether a policy is potentially unlawfully overbroad under the NLRA, the employer must examine all reasonable interpretations of the policy, in the broadest manner possible, and determine whether the policy can be viewed as ''interfering with, restraining, or coercing employees in the exercise of their Section 7 rights.''

If so, the policy is unlawfully overbroad and can be deemed in violation of the NLRA. The unlawful policy must be eliminated in its entirety or redrafted to narrowly meet the needs of the employer without infringing on the employees' Section 7 rights. Employers should also insert limiting language in their social media or similar employee conduct policies to assure that the policies do not prohibit protected concerted activities.

With regard to adverse job actions resulting from social media postings, the employer must examine the actions of the employee and determine whether the postings represented a single individual's personal gripe or whether that individual was speaking on behalf of himself/herself and other employees. Individual gripes do not rise to the level of protected concerted activity, while complaints on behalf of a group do.

Furthermore, the employer must not automatically assume that trash talking, sarcasm, vulgarity, or profanity is unprotected. Instead, employers must examine the comments or postings, while sifting through the inappropriate comments, and see if there is protected concerted activity involved before terminating an employee for postings.

Finally, employers should employ the protections of a third-party opinion and have legal counsel review its policies and procedures to ensure they do not run afoul of the NLRA. Similarly, all employers should always consult legal counsel before terminating any employee based on the employee's conduct involving other employees and the terms and conditions of employment—regardless of whether the conduct takes place through social media venues.

  DLR ISSN 0418-2693