



NLRB Makes "Concerted" Effort to Protect Employees' Facebook, Twitter Posts

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The Office of the General Counsel for the National Labor Relations Board ("NLRB") has released a Report ("Report") detailing the results of 14 recent social media cases, which provide clarification and guidance regarding the lawful scope of employers' social media policies and the type of social media communication by employees which receives the protection of Section 7 of the National Labor Relations Act.

According to the Report, employees' social media postings will be protected when they meet the definition of "concerted activity." Under Section 7, 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." Concerted activity also includes circumstances where employees seek to initiate or prepare for group action, and where employees bring group complaints to management's attention.

In four cases involving employees' posts on Facebook, the NLRB determined that employees were engaged in "protected concerted activity" when their posts discussed terms and conditions of their employment with fellow employees. The Facebook posts in these cases involved: discussion in protest of supervisory action; appeal to coworkers for assistance in preparation for a meeting with management; sentiment shared by coworkers following a meeting with management; and contemplated future group activity among coworkers. In one such case, the NLRB held that an employee was wrongfully terminated for posting photographs and commentary criticizing an event held by his employer. The NLRB found that the postings were



protected concerted activity because they vocalized the sentiments of the employee's coworkers relating to terms and conditions of their employment, and because the posts were not so egregious or "opprobrious" as to lose Section 7 protection.

Based on the Report, an employee's expression of frustration with an employer's policy or action is protected as long as it does not disparage the employer's product or demonstrate disloyalty. It should also be noted that, according to the NLRB, a concerted social media communication will not lose its protected status even if it includes expletives, sarcasm, name-calling, or otherwise defamatory statements, so long as the communication is objectively innocuous, not accompanied by verbal or physical threats, and not maliciously false.

In contrast, the NLRB has advised that an employee's social media communication will not receive Section 7 protection when it merely amounts to an expression of an "individual gripe," does not relate to terms and conditions of employment, or does not seek to involve other employees in issues related to employment. In one case, an employee's Twitter postings criticizing his employer's policies did not amount to concerted activity where the employee never discussed his concerns with coworkers or management. In a second case, the NLRB found an employee's Facebook post complaining about the "tyranny" of his workplace to be unprotected, as it merely expressed frustration regarding an individual dispute with management and contained no language suggesting the employee sought to initiate coworker to engage in group action. In another case, an employee posted complaints on Facebook regarding his employer's tipping policy. The NLRB held that, while the posting concerned terms and conditions of employment, it did not amount to concerted activity because the employee did not discuss his posting with his coworkers and no coworker responded to his posting. In these cases, the



employers' termination or discipline of the employees who posted unprotected communications was upheld.

Additionally, the Report provides guidance regarding the lawful scope of employers' social media policies and cautions that overbroad provisions may infringe on protected Section 7 activity. Examples of overbroad provisions include the restriction of "inappropriate discussions" about the employer, the prohibition of disparaging remarks when discussing the company or supervisors and the prohibition of any depiction of the company in any form of media without permission. The NLRB has found that such provisions are too broad because they fail to contain limiting language to inform employees that the policy does not apply to Section 7 activity. For example, where a provision of an employer's social media, blogging and social network policy broadly prohibited employees from any communication or post that constitutes embarrassment, harassment or defamation, the NLRB determined that employees could reasonably construe such provision to prohibit protected activity.

However, the NLRB has determined that social media policies are lawful when employees, reading their employers' policy provisions objectively, cannot reasonably interpret the provisions as restricting Section 7 activity. For example, one policy provision that precluded employees from pressuring coworkers to connect or communicate by means of social media was found to be sufficiently specific and applicable only to harassing conduct. Moreover, a media relations policy that prohibited employees from using cameras in the store without corporate approval and required employees to respond to media questions by replying they were not authorized to comment was found to be valid because an employer seeking to ensure a controlled media



message and limiting employee contact with the media cannot be reasonably interpreted to restrict Section 7 activities.

So what does the NLRB's Report mean for employers? The NLRB generally lacks authority to impose its rules against non-union employers. However, we anticipate that the courts, as well as the Equal Employment Opportunity Commission and the state's administrative agencies, will look to the NLRB's Report for guidance in evaluating employment-related matters where social media is relevant, such as wrongful termination, disciplinary action and discrimination claims. Accordingly, it is advisable to review your social media policy to determine whether it may be overbroad, or viewed as restricting employees' rights to discuss terms and conditions of their employment, including but not limited to compensation, management and unionization. However, an employee's use of social media to communicate an individual complaint or disparage a supervisor or employee to non-employees will likely not receive Section 7 protection.

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