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Private Sector Employers Beware - The National Labor Relations Board has Expanded Employees' Rights

By Dianna D. McCarthy and Robyn Silvermintz
November 2010

The National Labor Relations Board ("NLRB") has accused a company of illegally firing an employee after criticizing her supervisor on Facebook. In a case of first impression, the NLRB has argued that employees' criticism of their bosses or companies on a social network website are generally protected activity subjecting employers to violations of the law for punishing employees for such speech. The NLRB's complaint was filed against American Medical Response of Connecticut for firing an emergency medical technician for violating a company policy that bars employees from depicting the company "in any way" on any social media site where the employees posts pictures of themselves.

The NLRB's general counsel stated, "This is a fairly straightforward case under the National Labor Relations Act – whether it takes place on Facebook or at the water cooler, it was employees talking jointly about working conditions, in this case about their supervisor, and they have a right to do that." Moreover, the NLRB found that the employee's Facebook postings constituted protected concerted activity. The NLRB also found that the company's blogging and internet posting policy was unlawful, because it prohibited employees from making disparaging remarks when discussing the company and/or supervisors and it prohibited employees from depicting the company in any way over the internet without company permission.

The company has responded to the NLRB's Complaint by asserting that the employee was terminated based on numerous complaints about her behavior and because of negative personal attacks against a co-worker that were posted on Facebook. In addition, the company asserts that the terminated employee's statements were not concerted activity protected under the law.

The case is scheduled to be heard before an administrative law judge on January 25, 2011. While a broad company rule that states one cannot make disparaging comments about supervisors is illegal under labor law, employees' criticizing a company or supervisor on Facebook is not necessarily protected activity. Rather, if a social media network conversation involves several other co-workers, it is more likely to be viewed as protected concerted activity.

So what does this case mean for public sector employers? Pending the outcome of the hearing, it is advisable to review your internet and social media policies to determine whether it infringes on employees' rights to discuss working conditions, salary and unionization. However, an employee disparaging a supervisor over something unrelated to work will probably cross the line into unprotected territory.

If you have any questions or would like to discuss this issue, please contact:

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