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Can You Fire an Employee for a Facebook Post?

What You Need to Know about the National Labor Relations Act (NLRA) and Social Media

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The National Labor Relations Act (NLRA)

■ Section 7 (29 U.S.C. § 157)

- Employees have the right to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection.
 - Even in the absence of a labor union, an employee is protected.
 - Covered employees can include almost any non-supervisory employee.
 - Covered employers are all private employers that have an impact on interstate commerce.
 - Approximately six million employers nationwide

Is a Social Media Post Protected Concerted Activity?

- Concerted – is activity “engaged with or on the authority of other employees, and not solely by and on behalf of the employee himself”
 - *Meyers Industries*, 281 NLRB 882 (1986)
 - Includes “circumstances where individual employees seek to initiate, induce or prepare for group action” and where individual employees bring “truly group complaints” to management’s attention
 - Excludes comments made solely by and on behalf of the employee himself or “mere griping” by an employee who does not seek any action
 - A post is more likely to be protected concerted activity when it:
 - Is directed to co-workers or
 - Grows out of an earlier discussion among co-workers about terms and conditions of employment

Is a Social Media Post Protected Concerted Activity?

- Protected – activity is for employees' mutual aid or protection
 - Wages;
 - Terms of employment; and/or
 - Working conditions

The National Labor Relations Board (NLRB) and Social Media

- Since 2010, the NLRB has prioritized NLRA claims involving social media.
 - Nothing new – applying traditional analysis to new media
 - The NLRB makes no distinction between water cooler conversations and social media conversations.
 - Cases typically allege that the employer committed an unfair labor practice by wrongfully interfering with, restraining or coercing employees in their Section 7 right to engage in concerted activity.
 - Usually concerns protests or complaints about pay and working conditions
 - Remedies include reinstatement with full back pay, plus interest.
 - Employers are often required to post a notice regarding the violation and the remedy

Examples of Terminations Which Violated the NLRA

- Nonprofit unlawfully discharged five employees for Facebook® comments relating to allegations of poor job performance
 - conversation was initiated by one co-worker who sought assistance from other co-workers regarding job performance and staffing levels
- Employee posted a negative remark about her supervisor on her personal Facebook® page, which drew supportive responses from co-workers and led to further negative comments about the supervisor
 - Conversation was about the employees' working conditions

Source: NLRB Office of the General Counsel, August 18, 2011 Memorandum concerning social media cases

Employee Terminations for Violating Workplace Rules May Violate the NLRA

- Once protected conduct is found, subsequent related but different events may also be protected
 - If a social media post is protected concerted activity, terminating an employee for violating another company rule may be considered a violation of the NLRA
 - For example, if an employee's social media post regarding company dress code is protected concerted activity, and the employee takes pictures of co-workers to support her view, terminating her for violating the company's "no photographs" rule may violate the NLRA

Examples of Terminations that Did Not Violate the NLRA

- Employer terminated employee for responding to a non-coworker's facebook question with complaints about the company's tip policy, lack of raises, and with inappropriate comments about customers, such as calling them "rednecks"
 - Conversation didn't grow out of a conversation with co-workers, no employee meetings about raises or tip policies occurred, and no co-workers took part in conversation.
- Employer disciplined an employee for profane Facebook® comments which expressed employee's frustration regarding an individual dispute with his assistant manager
 - Employee didn't seek to initiate or induce co-workers to engage in group action.

Source: NLRB Office of the General Counsel, August 18, 2011 Memorandum concerning social media cases

Risk Control

- Be careful when disciplining and/or terminating an employee for social media posts.
 - Ensure that their actions will not be deemed protected concerted activity.
 - Because this is a developing area of law, it may be best to consult an employment attorney to review employment decisions before taking action.

- Review social media policy and other policies.
 - Ensure that policies and protocols do not prohibit activities that could be deemed protected concerted activities.

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