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NLRB Continues to Scrutinize Employers for “Facebook Firings”

For many employers, the NLRB’s enforcement actions have created uncertainty when dealing with a decision to discipline or discharge an employee for inappropriate social media postings. A recent survey by the United States Chamber of Commerce indicates that more than 129 cases involving social media have been reviewed by the NLRB. Although few have been litigated so far, these cases make it clear that employers need to tread very carefully while disciplining employees for their social media posts. Even more troubling is the ability to draft social media policies that can survive the NLRB’s scrutiny. Recently, the NLRB’s Division of Advice shed some light on the line between protected and unprotected activity in the context of social media by providing examples of unprotected activity – at least in its view. This Client Alert highlights the NLRB’s perspective on social media.

Types Of Cases Triggering Unfair Labor Practice Charges

Last year, the National Labor Relations Board (“NLRB” or “Board”) caught the attention of employers across the nation when it issued a complaint alleging that an employer violated federal labor law when it discharged an employee for posting criticisms of her supervisor on the social media website, Facebook. The NLRB claimed that the “Facebook firing” violated the National Labor Relations Act (“NLRA”), which prohibits employers from interfering with, restraining, or coercing employees engaged in protected concerted activity. Employees are engaged in “protected concerted activity” when they act for their mutual aid or protection regarding terms and conditions of employment.

In May, the Board issued two more complaints against employers for Facebook firings. The first complaint involved car salesmen who were upset that their sales commissions could suffer because of the dealership’s decision to only provide hot dogs and bottled water at an event promoting a new car. After the event, one of the salesmen posted images and comments on his Facebook page that were critical of the quality of the food and beverages provided by his employer. After the salesman complied with a request to remove the posts, the dealership terminated his employment.

The second complaint involved workers at a non-profit that provides social services to low-income clients. An employee posted a co-worker’s allegation that employees did not do enough to help the non-profit’s clients. Several co-workers responded to the post by posting comments defending their performance and criticizing working conditions. The non-profit terminated all of the employees that participated in the Facebook conversation.

Situations Where The NLRB Is “Backing-Off”

As mentioned above, three new advice memoranda reveal examples of when the NLRB has considered pursuing an employer for disciplining employees for the social media postings, but instead concluded that, in its view, the employees’ conduct was not protected.

In one case, a bartender was fired after criticizing his employer’s policy regarding tip-sharing in a conversation with his step-sister on Facebook. None of the bar’s employees responded or commented to the bartender’s posting. Although the

bartender had complained about the policy to a co-worker months earlier; he did not discuss his posting with any other employees. The Division of Advice concluded that the bartender did not engage in concerted activity because he did not discuss his posting with other employees. The bartender “was merely responding to a question from his step-sister about how his evening at work went.” See *JT’s Porch Saloon & Eatery Ltd.*, NLRB Div. of Advice, No. 13-CA-46689 (July 7, 2011).

In another case, an employee working for a provider of mental health services engaged in a Facebook conversation while she worked an overnight shift. Her conversation included comments regarding the employer’s mentally disabled clients and that it was “spooky” working in a “mental institution” at night. The employee did not discuss her posts with other employees, receive any responses or comments from other employees, or seek to encourage collective action. As a result, the NLRB’s Division of Advice concluded that the employee had not engaged in concerted activity. The Division of Advice also noted that the employee had not engaged in protected activity because the Facebook posts “did not even mention any terms or conditions of employment.” The employee “was merely communicating with her personal friends about what was happening on her shift.” See *Martin House*, NLRB Div. of Advice, No. 34-CA-12950 (July 19, 2011).

The final case involved a Wal-Mart employee suspended for posting a comment on his Facebook page stating “Wuck Falmart! I swear if this tyranny doesn’t end in this store they are about to get a wakeup call because lots are about to quit!” A couple of co-workers responded to the post with brief comments. The employee responded to those comments by stating that he had been “chewed out” by management and that he was going to discuss his situation with management. The Division of Advice concluded that the employee was not engaged in concerted activity because his posts “were an expression of an individual gripe” rather than an effort to encourage collective action. See *Wal-Mart*, NLRB Div. of Advice, No. 17-CA-25030 (July 19, 2011).

Conclusion

Notwithstanding these advice memoranda, employers still must exercise care when disciplining employees for social media posts. Protecting the business while complying with the NLRB’s standards is still quite challenging. Drafting policies which adequately protect the business and do not chill protected conduct is also challenging, particularly in light of the realities of how social media is used. Employers can still take action in this area, but they should only do so with care.

Navigating through these social media in the workplace issues, including tailoring policies to conform to the NLRB’s narrow and often confusing rules, will be a focus of an upcoming Butzel Long webinar. Details about this webinar will be sent out soon.

If you have any questions regarding legal issues involving social media in the workplace, please contact your Butzel Long attorney or the authors of this Client Alert.

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