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CAN BASHING YOUR BOSS ON FACEBOOK GET YOU FIRED?

NLRB Facebook Firing Case Settled

On February 7, 2011, a case between the National Labor Relations Board (NLRB) and American Medical Response of Connecticut, Inc. (AMR), stemming from the termination of an employee after she posted negative remarks about her boss on her Facebook page, was settled. Under the settlement, AMR agreed to revise its internet posting policy to make the policy clearer and to avoid interfering with employees' protected rights.

This case provides another signal to employers of the need to review their social media policies to ensure the policies are clear and don't improperly interfere with employees' rights including, for unionized workforces, compliance with collective bargaining laws. This alert provides a brief discussion of the case and outlines issues employers should consider when drafting social media policies.

The Case

From her home computer, an employee of AMR made a posting on her Facebook page calling her supervisor a "scumbag" and comparing AMR management to "psychiatric patients." AMR responded to the post by firing the employee for violating a company policy that prohibited employees from disparaging the company or commenting on the company online without permission.

In its complaint regarding the firing, the NLRB alleged that AMR's nondisparagement policy was "overbroad" because it potentially infringed on an employee's right to discuss working conditions with other employees in violation of the National Labor Relations Act (NLRA). The NLRB also claimed that AMR's termination of the employee was illegal because she was complaining about the general terms and conditions of her employment and her prompting of other employees to "comment" and join the discussion, according to the NLRB, constituted "protected concerted activity" under the NLRA.

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We specialize in providing labor and employment advice, counseling and litigation services to public and private employers.

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The Settlement

The case settled on February 7, 2011. As part of the settlement, AMR agreed to modify its Internet posting policy to include the following elements:

- Employees will be allowed to discuss wages, hours, and working conditions with other employees outside of the workplace.
- The company will not discipline or fire an employee for engaging in such discussions.

Things to Keep in Mind About the Settlement

The following should be kept in mind regarding the settlement between the NLRB and AMR:

- This was not a ruling or decision by a court or the NLRB. It was only a settlement of a case that was filed by the NLRB. It was based on a specific set of facts and has no precedential effect.
- The complaint also involved other claims – such as denial of the employee's Weingarten rights to representation at an investigatory interview – so the settlement was not just based on the employer's internet/social networking policy.
- This was not a First Amendment free speech case. The complaint alleged that the employer's internet/social media policy was (1) overly broad, and (2) as applied, interfered with Section 7 of the NLRA – the right of employees to engage in protected concerted activity regarding wages, hours and terms/conditions of employment. The complaint alleged that the exchange of Facebook comments by employees that were critical of management constituted "protected concerted activity" under the NLRA. The complaint didn't allege or claim that policies which restrict or limit work-related comments on social networking sites necessarily violate the NLRA or are per se invalid.
- Many restrictions on comments on social networking sites – e.g. linking work with inappropriate activities by an employee or hostile, profane, threatening language – are clearly okay to restrict or prohibit.

The Impact

What does this case mean for employers? While the settlement was not a ruling or a decision by a court or the NLRB, it points out potential issues with social media policies and the need for employers to review their policies. The following questions will prompt a good analysis in creating or revising a social media policy:

Does the policy address off-duty conduct? Employers should be cautious when restricting employees' off-duty activities. For example, avoid policies that invade areas where employees have an elevated expectation of privacy (personal e-mail, password-protected Web pages), or discipline employees for engaging in protected union activity (e.g., discussing working conditions with co-workers). On the other hand, a policy prohibiting employees from disparaging the employer's product or services likely is enforceable. Further, public employers need to be cautious not to infringe on employees' First Amendment rights.

Does the policy fit the company's work culture and environment? Creating a policy addressing employee use of social media should reflect the company's unique culture and values. What tone do you want to set for your workplace? What types of activities do you want to encourage or prohibit for your employees? Guidelines for use of social media on and off-duty should reflect your company's goals and culture.

How will employees have notice of the policy? Once the company has finished drafting or revising its social media policy, the policy must be enacted and enforced in order to be effective. Employees and supervisors should be notified in writing and educated about the new policy, especially with regard to significant changes that have been made.

The fast-moving area of social media law can expose employers to risk who, like AMR, inadvertently enact or enforce "overbroad" social media policies. You should have your social media policies reviewed by an experienced employment lawyer. "Social media in the workplace" is a rapidly developing area of law and there are a number of different laws that may apply and create traps for the unwary.

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