LABOR AND EMPLOYMENT LAW UPDATE

CAN THE LANGUAGE OF A SOCIAL MEDIA POLICY VIOLATE THE NATIONAL LABOR RELATIONS ACT?

Citing such concerns as business reputation and legal liability, many employers have adopted written policies regulating the use of social media by employees. A common prohibition of such policies is the disparagement of an employer's executive leadership or employees, in blogs, message boards, social networks and other types of online media.

Labor unions have charged that social media policies can be construed to unlawfully "chill" online union activities protected by the National Labor Relations Act ("NLRA"). Until recently, the National Labor Relations Board ("NLRB") had not been receptive to such charges. As late as December 4, 2009, an Advice Memorandum of the Office of General Counsel opined that a policy adopted by Sears and K-Mart did not violate the NLRA.

The termination of an employee of American Medical Response of Connecticut, Inc. ("AMR") who had criticized her supervisor in a Facebook discussion with other employees, in apparent violation of a social media policy, prompted the NLRB to take a different position. On October 27, 2010, the agency filed a Complaint alleging unfair labor practices by AMR. Significantly, the Complaint alleges that the social media policy itself, and not just the employee's termination violated the NLRA.

SHOULD NON-UNION EMPLOYERS BE CONCERNED? Yes. The NLRA protects more than the right of employees to unionize; the Act protects the right of employees to "engage in … concerted activities for the purpose of … mutual aid or protection." Examples of protected "concerted activities" by non-union employees include:

1) Two or more employees addressing their employer about improving their working conditions and pay;

2) One employee speaking to an employer on behalf of himself and one or more co-workers about improving workplace conditions; and

3) Two or more employees discussing pay or other work-related issues with each other.

WHAT IS THE LEGAL BASIS FOR CHALLENGING A SOCIAL MEDIA POLICY? The NLRA prohibits more than mere discrimination against employees who engage in "concerted activities"; the Act prohibits the adoption or enforcement of human resources policies which "reasonably tend to chill employees in the exercise of" such rights. The NLRB has stated that a policy can have a "chilling effect" if:

1) It explicitly restricts "concerted activities";

2) Employees would reasonably construe the language to prohibit "concerted activities";

3) It was promulgated in response to "concerted activities"; or

4) It has been applied to restrict or discipline employees who have engaged in "concerted activities."

WHY IS THE AMR POLICY BEING CHALLENGED BY THE NLRB? That an employee was fired shortly after engaging in protected activity - protesting work conditions in a Facebook discussion with other employees - is a primary reason for the challenge. The Complaint also implies that the following quoted language from the policy can reasonably be construed to ban concerted activities:

Employees are prohibited from posting pictures of themselves in any media, including but not limited to the Internet, which depicts the Company in any way, including but not limited to a Company uniform, corporate logo or an ambulance, unless the employee receives written approval from the EMSC Vice President of Corporate Communications in advance of the posting;

Employees are prohibited from making disparaging, discriminatory or defamatory comments when discussing the Company or the employee's superiors, co-workers and/or competitors.

Standards of Conduct [prohibiting the following conduct]:

* Rude or discourteous behavior to a client or coworker.

* Use of language or action that is inappropriate in the workplace whether racial, sexual or of a general offensive nature.

HOW WAS THE SEARS AND K-MART POLICY DIFFERENT FROM THE AMR POLICY? This is an interesting question since the Sears and K-Mart Policy similarly prohibited the "[d]isparagement of company's or competitor's products, services, executive leadership, employees, strategy, and business prospects." Although the Complaint against AMR may represent a shift in the NLRB's thinking, the following circumstances were cited by the agency in its December 4, 2009 Advice Memorandum:

1) The policy contained sufficient examples and explanation of its purpose for a reasonable employee to understand that it prohibited egregiously inappropriate language, not "concerted activities"; and

2) There was no evidence that the policy had been used to discipline employees for engaging in "concerted activities."

WHAT ACTIONS SHOULD EMPLOYERS TAKE IN RESPONSE TO THE AMR COMPLAINT? Even though the Complaint represents only the initiation of legal proceedings against AMR and not any legally binding decision, employers with social media polices should immediately undertake the following:

1) Review and, if necessary, revise the policies to make it abundantly clear that protected "concerted activities" are neither prohibited or discouraged; and

2) Investigate each alleged policy violation before disciplining any employee to make sure that "concerted activities" are not being punished.

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