"My Employee Said What On Facebook!?!" How To Discipline Workers For Social Media Posts That Cross The Line

Insights
12.01.15

There is little more frustrating than your employees spouting off on social media and disparaging the workplace. Unfortunately, the National Labor Relations Board (NLRB) maintains that employees have wide latitude to criticize their employers on social media.

In fact, the NLRB has ruled in favor of employees in some very egregious situations, including employees who made vulgar and profane posts involving their employers or their supervisors. In light of these decisions, you should think twice before disciplining an employee for an errant or obnoxious post.

So when do employees' social media actions legally cross the line? Here's a rundown on when you can discipline an employee for going too far on Facebook, Instagram, Twitter, or elsewhere.

Why Does The NLRB Even Care About Social Media Posts?
The NLRB enforces the National Labor Relations Act (NLRA), which gives employees the right to support or oppose unionization. In addition, the NLRA states that employees may engage in other "concerted activity" for mutual aid and protection. This can include discussing or encouraging group action among coworkers, even if the ultimate objective is not to start a union.

Because the NLRB recognizes that social media is the modern-day watercooler, it will scrutinize whether an employee who got in trouble over a social media post was possibly engaging in concerted, protected activity.

Is The Post About Union Activity Or Union Organizing?
As you might imagine, the NLRB will usually find that employee posts that expressly involve unionization or labor unions are protected. This can include posts in support of a union drive, asking employees to sign union cards, or asking employees to come to a union meeting. In most cases, the Board will find the post protected even if it contains some off-color words or disparaging language.

Is The Post Directed At Wages, Hours, Or Working Conditions?
The NLRA covers more than just union organizing. The NLRA also protects concerted activity among employees undertaken to discuss or protest "wages, hours, and working conditions." As such, the NLRB holds that social media discussions about wages, benefits, and employment policies are protected under federal labor law, even if the post does not mention joining or supporting a union.

In a recent example, a waiter posted a comment to his social media page questioning the employer's payroll tax withholding rate. Several co-workers "liked" the employee's post and added their own comments on the topic. In that case, the Board held that all of the employees engaged in a protected discussion about the employer's wages, hours, and working conditions, and a federal appeals court recently agreed with the Board and upheld that decision.

But Isn't That Information Confidential?

A knee-jerk reaction that the employee has violated the company's confidentiality policy by posting sensitive wage or other employment information can get you in hot water. In most cases, if the employee's post pertains to wages, hours, or working conditions, the NLRB will find that the employee's right to discuss the topic outweighs your interest in maintaining confidentiality.

That said, an employee cannot post confidential business information that pertains to trade secrets and proprietary information not related to wages, hours, or working conditions. For example, the NLRB will generally not protect the following post: "People always ask me – what's in the delicious secret sauce? Answer: habanero and vinegar."

Do I Have To Put Up With This Disloyalty?

The NLRB draws a distinction between posts that are merely "prejudicial" to the employer's reputation, and posts that are so "disloyal" as to lose the protection of the NLRA. As a practical matter, the NLRB will afford a high degree of protection to any social media post that protests wages, hours, or working conditions, even if that post casts the employer in an overall negative light.

In fact, the NLRB affords employees a high degree of latitude to criticize their employers, as long as the criticism is tangentially related to wages, hours, and working conditions. For example, the NLRB has held that employees can, as part of a protest for more sick days from the employer, "warn" the public that the employer's food products may have been contaminated by germs spread by sick workers (because the employer's sick leave policy is a relevant working condition).

But That's Just Not True!

The NLRB also holds that employees cannot post intentional or maliciously false statements about their employer. At the same time, the NLRB holds that employees do not need to be 100% factually accurate when making protected social media posts. Federal labor law still protects employees who make innocent or negligent mistakes of fact. The burden is yours to prove that an employee posted a malicious falsehood as opposed to an innocent mistake of fact.

What About Vulgarity?

Much to the chagrin of employers, the NLRB tolerates a certain amount of vulgarity or profanity on social media. The NLRB will evaluate several factors to determine whether a profane post exceeds the protection of the NLRA:

- Did the employee act impulsively? The NLRB gives employees some leeway for profane outbursts made in the heat of the moment.
- Did the employee act in response to some type of employer provocation? The NLRB doesn't "like" when you commit a labor law violation that prompts an employee's profane outburst.
- Do you tolerate similar profanity in your workplace? If so, it would be harder to discipline a worker for his or her online conduct.

As an example, the NLRB may find the following post to be protected: "Supervisor Bob told me to throw out my union card. That fatso is a lazy anti-union piece of s***." The agency will evaluate whether the employer's unfair labor practice provoked the impulsive outburst on social media. You can bet that the current NLRB will usually stretch to find some rationale to protect the employee's social media post.

In Conclusion

Unfortunately, the NLRB says you have to stomach a high degree of misbehavior from employees on social media. Understanding where you can draw the line between protected activity and inappropriate conduct will make all the difference between a clean separation and an unfair labor charge (or worse).

A version of this article also appears in the December 2015 issues of the Westlaw Journal Employment and the Westlaw Journal Computers & the Internet. *For more information, contact the author at BGarrett@laborlawyers.com or 949.798.2137.*

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