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EMPLOYER LAW BLOG

Employer Liability for Disciplining Employees Based on their Facebook Likes…OMG?!

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Social media allows people to connect with people that they know and investigate people that they do not know. Employers commonly use social media as a tool to discover information about job applicants and to monitor their employees' online activities. However, employers should beware of the litigation potential before disciplining their employees for social media conduct they consider to be disloyal, insubordinate or offensive to the company.

Both unionized and non-unionized work forces should consider the National Labor Relations Act (NLRA) before making decisions based on an employee's social media posts and commentary in response to those posts. The NLRA protects the rights of employees to act together to address conditions at work, with or without a union. This protection extends to certain work-related conversations conducted on social media, such as Facebook and Twitter. Since the social media boom, the National Labor Relations Board (NLRB) has taken an active interest in cases that involve company policies and discipline for employees' activities on social media. Employees may allege that their employer committed an unfair labor practice because the content of their social media posts constituted concerted protected activity.

Concerted protected activity is associated with employees voicing their concerns or opinions about the way they are treated or paid on the job. While mere gripes unrelated to group activity are not protected, the discussion of wages and working conditions amongst employees is protected. The NLRB has made it clear that social media is another platform for engaging in concerted activity, no different from a labor protest or labor rally.

The NLRB's recent decision in Three D, LLC d/b/a Triple Play Sports Bar and Grille extends protected activity on social media to "likes" of a fellow employee's post about the employer. In that case, Triple Play Sports Bar, a non-union employer, made mistakes on its tax filings that required their employees to pay additional taxes. One of the employees candidly expressed her frustration with the sports bar's mistake by posting on Facebook: "[Triple Play] can't even do the tax paperwork correctly!!! Now I OWE money...Wtf!!!" Several other employees chimed in on the post, sparking a conversation and "likes" related to the post. The sports bar terminated one of the commenters for disloyalty to the company. It also interrogated another employee about the meaning of his "like" on the post and ultimately terminated him and threatened a lawsuit for defamation. This did not go over well with the NLRB.

The NLRB found that the sports bar violated the NLRA when it interrogated the employees about their Facebook activities, threatened discharge for their online activities and ultimately discharging their employment. The NLRB also found that the sports bar's "blogging policy," which was instituted to prevent employees from making negative comments about the bar, was an unlawful effort to chill protected concerted activity. Triple Play has appealed the NLRB's decision to the 2nd Circuit Court of Appeals.

While the 2nd Circuit considers the NLRB's common employee-friendly decision with regard to social media policies and disciplinary decisions, all employers must consider the NLRA when drafting their social media policies and disciplining employees, regardless of whether their employees are unionized or not. Ultimately, whether or not social media activity is protected is a fact-intensive inquiry. Employers' liability risk for committing an unfair labor practice may include reinstating the employee, back pay with interest to the employee, rescission of invalid policies and other penalties. Employers should speak with counsel to review their social media policies and before making any disciplinary decisions with regard to their employees' social media posts.

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