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Does Your Social Media Policy "Chill" Protected Speech?

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Horror stories abound of employees using social media to bash their employers, their products and services, and their co-workers. Also frightening are well-publicized estimates of lost employee productivity due to employee use of social media during company time. In response to these increasing problems, many employers have adopted policies governing employee use of social media such as Facebook, Twitter, and MySpace, both inside and outside the workplace. However, very recent legal developments have shown that there is a serious risk that adopting an overly restrictive social media policy may be construed as a violation of the National Labor Relations Act ("NLRA").

The NLRA prohibits employers from interfering with or restraining employees' rights to engage in "concerted activity," i.e., to communicate with coworkers about the terms and conditions of employment. Generally, two or more employees engage in a concerted activity when they act together to improve their terms and conditions of employment. A broad rule prohibiting employees from criticizing their employers is invalid. However, certain employee criticism may be so egregious, offensive, and/or vulgar that it may lose its protected status. Whether and the circumstances in which employee criticism constitutes "concerted activity" is highly dependent on the facts of each case, and therefore does not lend itself to bright line rules. Importantly, this restriction against chilling employee "concerted activity" applies to union *and* non-union employers.

Recently, the National Labor Relations Board ("NLRB"), the federal agency which enforces the NLRA, has taken the position that social media policies which broadly prohibit employees from disparaging their employers and coworkers in social media, even when off duty and while using personal computers, violate the NLRA because such policies can "chill" protected speech. (This is in contrast to the opposite position taken by the NLRB's General Counsel on this same issue about one year earlier.)

The recent activity by the NLRB shows how much the currently configured agency is willing to expansively read and enforce the NLRA. The first test case on this subject recently settled (*In re American Medical Response of Connecticut, Inc.*), with the employer agreeing to change its social media policies. This is clearly a fluid issue which will take some time to get sorted out at the NLRB and ultimately through the courts.

In the meantime, however, companies should be very cautious about adopting policies that broadly prohibit employees from criticizing, disparaging or bad-mouthing their employers and coworkers through social media. Employers should consult with counsel before implementing such a restriction and before taking disciplinary action against an employee for engaging in such behavior.

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