Social Media Tips and Traps for the Employer

It's no understatement to suggest that technology and social media have fundamentally altered every aspect of modern life at near breakneck speed, and the attendant growing pains are coming fast and furious. Nowhere else is this more apparent than in the employer-employee relationship. Recent decisions of the National Labor Relations Board ("NLRB") underline the importance of understanding what employers can and can't do in relation to employees, social media and the workplace.

While employment in Kentucky is generally at-will, there are several provisions of federal law that protect certain activities of employees. The National Labor Relations Act ("NLRA") protects employees' rights to "engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection…"1 The NLRB has issued several rulings expressing that employees generally have the right under this section to try to improve employment conditions through social media discussions. The result is that employers can't take negative action against employees for certain types of social media postings, but the line between protected and unprotected social media content is sometimes quite thin.

In October 2012, the NLRB ruled in *Karl Knauz Motors, Inc.* that not all social media posts concerning an employer are protected. The BMW dealership at issue terminated a salesman over a Facebook posting, the first case of its kind before the NLRB. When a 13-year-old at a sales event accidentally drove a Land Rover into a lake, a salesman posted a picture of the incident on Facebook with a sarcastic comment. Word got back to the employer and the salesman was fired. The NLRB ruled that the picture and comment did not pertain to employment conditions of the employee, and thus not protected under the NLRA. It did, however, take issue with the employer's courtesy policy in the employee handbook, which stated that employees couldn't use language that would injure the image or reputation of the dealership. That policy, the NLRB said, could reasonably chill an employee's right to discuss employment conditions at the dealership.

After this case, however, the NLRB began to delineate just what may or may not be protected in terms of employee speech in social media, culminating in a line of cases in 2014 that further cemented the standards.

In Triple Play Sports Bar and Grille, the NLRB found that the decision to dismiss two employees for participating in a (sometimes obscene) discussion on Facebook was a violation of their rights under the NLRA, even though the postings might be construed as disloyalty. After a former employee of Triple Play Sports Bar and Grille posted a comment expressing frustration at a perceived failure of management to correctly withhold payroll taxes, several others commented sympathetically, including one current employee. That employee was fired, as well as another who merely clicked the "Like" button for the initial status. The NLRB ruled that both the comment on the status and the clicking of the "Like" button constituted protected, concerted activity under the NLRA. That finding should be reiterated – an employee merely clicking the "Like" button on a Facebook status is a protected form of employee communication.

Another important takeaway of the *Triple Play* case is that it expanded on the ruling in Knauz with respect to its social media policies. The company had a social media policy that prohibited any inappropriate discussions about the company, its management or co-workers. The NLRB once again found that this prohibition with respect to social media discussion had a chilling effect on employee discussions under the NLRA and was impermissible under the law.

The NLRB did draw a line as to when social media chatter concerning employment crosses the line into an unprotected zone in the October 2014 case of Richmond District Neighborhood Center. In that case, the employer sent rehire letters to two employees, but rescinded them after reading an exchange between the two employees on Facebook. The employees did complain about some working conditions, but also suggested that employees intended to flout policies, ignore management and be subordinate at every turn. This language was a step too far for the NLRB, which suggested that a reasonable employer shouldn't have to risk that the employees in this case weren't joking about their intentions.

The general bent of these decisions is that while employees have expansive rights in social media discussion involving their employer, those rights are finite. Employers should tread cautiously, however, when making any employment decisions based on social media commentary by employees. While the NLRB ultimately decided in the employer's favor in two of the decisions above, the line between protected discussion and unprotected discussion is not a bright line.

Finally, a consistent lesson from these cases is that any policy on employee conduct, whether in person or online, should refrain from preventing employee speech that might be reasonably construed to discuss terms and conditions of employment. Employee conduct policies should identify exactly the types of unprotected activities that can be reasonably curtailed by the employer, such as a sexual harassment, defamation, racist language, and disclosure of confidential business information, to name a few. Employers should be wary of any conduct policy that openly states an intent to protect the image of the company; some of these prohibitions might be permissible, but the opportunity to muddy the waters with respect to employee rights is an ever-present specter.

1 29 U.S.C. § 157

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