Federal Law Protects Facebooking

by Marie McCrary

Facebook posts are permanent and public. Recent studies have revealed that more than half of employers review social media activity when screening potential job applicants. But employers should tread softly when prohibiting, monitoring, and disciplining social media activity of its current employees. Over the last couple of years, the National Labor Relations Board ("Board") has become more aggressive at policing employer's activities in non-union workplaces for violations of the National Labor Relations Act ("NLRA"). The NLRA protects the rights of ***all employees*** to engage in protected concerted activity – even on the Internet.

The Board recently issued a supplemental report describing the cases it has handled recently in the social media context. The report reveals that the two most common issues before the Board dealing with social media are: (1) whether an employer unlawfully discharged or disciplined an employee for the content of her social media posts; and (2) whether an employer has overbroad policies restricting employee use of social media.

Section 7 Rights

Section 7, the heart of the NLRA, defines employee protected rights, including the employee's right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in ***other concerted activities for the purpose of*** collective bargaining or other ***mutual aid and protection***. Section 8 of the NLRA prohibits employers from interfering with employees' exercise of their Section 7 rights. In the social media cases, the Board has established that an employer violates Section 8 of the NLRA if it interferes with an employee's exercise of his Section 7 rights on the Internet, in particular, his right to engage in concerted activities.

Concerted Activity

An employee engages in concerted activity when he acts with, or on the authority of, other employees, and not solely by, and on behalf of, the employee himself. Social media activities are concerted, and therefore protected under Section 7, if they are focused on group issues or are made to initiate or advance group action. For example, the Board has found that an employee's Facebook post criticizing his working conditions is concerted activity when the post is a continuation of "offline" discussions among employees about the conditions. Likewise, if the employee's co-workers comment on her post to discuss the employee's grievances, the employees, including the original poster, are engaging in concerted activity. On the other hand, if the employee is using Facebook to complain about a truly individual gripe, she is not engaging in protected concerted activity. Additionally, the Board has found it relevant whether the employee's co-worker "friends" respond (or not) to the original post.

To be protected, the concerted social media activity must also relate to terms and conditions of employment. For example, employee posts on the Internet regarding wages, the employer's treatment of employees, the quality of the employer's supervisors or supervision, the opportunities for promotion, the discharge of co-workers, or employer investigations are all protected activity. Section 7 does not protect remarks critical of an employer's clients or complaints about the employer's quality of service or products. Additionally, statements that constitute a "sharp, public, disparaging attack" upon the quality of a company's product or its business policies in a manner reasonably calculated to harm the company's reputation and reduce its income will lose their protected status. Thus, pursuant to Sections 7 and 8 of the NLRA, employers are limited in their ability to terminate an employee because she complains on the Internet about her employment. The employer must determine whether the employee was engaging in protected, concerted activity, and if so, she cannot be terminated for exercising her Section 7 rights.

Social Media Policies

Given that employees have a Section 7 right to discuss the terms and conditions of their employment amongst themselves, an employment policy or rule that precludes or chills employees from sharing information regarding the terms and conditions of their employment is unlawful under Section 8. Therefore, an employer's social media policy can be unlawful if it explicitly restricts Section 7 rights or if it would cause employees to reasonably construe the rule to prohibit Section 7 activity. Thus, an employer's social media policy that prohibits employees from making "inappropriate" or "disparaging" remarks about the employer on the Internet violates Section 8. The Board has stated that a policy prohibiting employees from using the employer's name on their Facebook profiles is a particularly egregious violation since that function helps employees find and communicate with their coworkers online. Even if the employer does not terminate any employees pursuant to an unlawful social media policy, the maintenance of the policy is an independent violation of Section 8. Thus, all employers should re-evaluate their social media policies and limit them to restrict only unprotected activity.

Marie McCrary is an associate at Bell Nunnally and Martin in the labor, employment, and commercial litigation practice groups.