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NLRB puts kibosh on some employer social media policies

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The National Labor Relations Board ("NLRB") continues to closely scrutinize employers' social media policies and practices. As employers struggle to craft policies that promote productivity while at the same time protect employees' rights, both unionized and non-unionized employers need to be aware of recent NLRB decisions and their impact on employer policies:

Social-Media Based Termination Can Be Acceptable, But Rule Requiring "Courtesy" Is Not

On September 28, 2012, a three-member panel of the NLRB affirmed the termination of a car salesman who posted photographs on Facebook ridiculing his employer, but it rejected the employer's rule requiring courteous behavior. (*Karl Knauz Motors Inc.*, 358 N.L.R.B. No. 164, Sept. 28, 2012 [released Oct. 1, 2012]). *Knauz* marked the first time a panel of the NLRB decided a case involving social media; previously, all NLRB guidance in this area came from ALJ decisions or the Board's General Counsel Memoranda. In *Knauz*, a sales employee had complained on his Facebook page about his employer, a BMW car dealership, posting photos and criticizing bad food the dealer offered at a sales event; he had also discussed those concerns with other coworkers. He also posted critical comments and photos about an accident during a test drive at the dealership. The employer terminated the employee for his Facebook postings and for violating the employer's courtesy policy. That policy stated that "[e] veryone is expected to be courteous, polite and friendly to our customers, vendors and suppliers, as well as to their fellow employees," and that "[n]o one should be disrespectful or use profanity or any other language which injures the image or reputation of the Dealership."

The NLRB ultimately declined to decide whether the employee's complaints about the food were protected activity under the NLRA. The ALJ below had held the food complaints were protected because the employee and his coworkers conceivably were concerned that the low-quality food offered at the sales event would deter customers from coming, thus leading to lower sales commissions for the employees. Instead, the NLRB upheld the employee's termination, agreeing with the ALJ that the employee's Facebook postings relating to the on-site accident were not related to any employees' terms or conditions of employment.

Most interestingly, the NLRB decided, in a 2-1 split decision, that the employer's rule on courtesy violated the NLRA because it could reasonably be construed by employees as

prohibiting protected concerted activities, "such as employees' protected statements—whether to coworkers, supervisors, managers, or third parties who deal with the Respondent— that object to their working conditions and seek the support of others in improving them."

Employer Cannot Prohibit Use of Social Media During "Company Time"

On September 20, 2012, an ALJ found that an employer's policy prohibiting the use of social media on "Company time" violated the NLRA. (*EchoStar Techs. LLC*, NLRB ALJ, No. 27-CA-066726, Sept. 20, 2012). This decision is consistent with recent NLRB General Counsel Memoranda (here and here), which tend to distinguish between "company time" and "work time." Indeed, the General Counsel has explicitly ***approved*** a social media policy that directs employees to "[r]efrain from using social media while on ***work time*** or on equipment we provide." A restriction as broad as prohibiting social media use during ***"company time"*** would encompass nonworking time, such as paid breaks, which could interfere with employees' ability to exercise their rights to concerted activity under the NLRA.

The employer argued that the social-media prohibition was a common-sense rule designed to prevent employees from engaging in personal activities on the job—a problem that has become pervasive in the workplace, substantially affecting productivity. The employer also argued that the "Company time" prohibition was reasonable in context because it was included in a policy restricting the use of ***company equipment***, which the employer argued it could restrict whether during working time or nonworking time. Without significant discussion, the ALJ simply ruled that the prohibition was unlawful and must be removed from the employee handbook.

What to Take Away

The NLRB law on social media policies is continuing to evolve in favor of employees. It is a delicate line to balance between (1) appropriate limitations on the use of social media, and (2) protecting employees' rights of concerted activity under the NLRA to confer for their mutual benefit regarding the terms and conditions of employment. It seems clear, however, that broad -based bans on the use of social media during work-time, and efforts to control the nature of employees' communications on social media as they relate to working conditions, will not be viewed favorably by the NLRB.

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