

NLRB Issues Second Social Media Report

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On January 25, 2012, the NLRB released its second report on social media cases handled by the National Labor Relations Board (NLRB). According to an announcement sent to subscribers of the NLRB updates,

The Operations Management Memo covers 14 cases, half of which involve questions about employer social media policies. Five of those policies were found to be unlawfully broad, one was lawful, and one was found to be lawful after it was revised.

The remaining cases involved discharges of employees after they posted comments to Facebook. Several discharges were found to be unlawful because they flowed from unlawful policies. But in one case, the discharge was upheld despite an unlawful policy because the employee's posting was not work-related.

The report underscores two main points made in an earlier compilation of cases:

- *Employer policies should not be so sweeping that they prohibit the kinds of activity protected by federal labor law, such as the discussion of wages or working conditions among employees.*
- *An employee's comments on social media are generally not protected if they are mere gripes not made in relation to group activity among employees.*

The cases covered by the report include:

- Discharge of an employee for Facebook comments and for violation of non-disparagement rule was held unlawful;
- Discharge of an employee for Facebook comments was lawful, but social media policy and no-solicitation rule were overly broad;
- Work rules were overbroad, but discharge under rules was lawful because employee's Facebook posts were not protected;
- Employer's social media policy was overbroad, but employee's Facebook posts were not protected;
- portions of employer's communications systems policy were overbroad;
- Employer's initial social media policy was overbroad, but amended version was lawful;
- Provisions in drugstore operator's social media policy withstand scrutiny;
- Employee was unlawfully discharged for her Facebook complaint about reprimand;
- Employees' Facebook postings about supervisor and promotion selection were protected concerted activity;
- Employee's Facebook postings about manager's attitude and style were protected concerted activity;
- Employee's critical online postings were protected concerted activity that did not lose act's protection;
- Employee's Facebook postings about irritating coworker and workplace incident were not protected;

- Truck driver was not engaged in concerted activity and was not constructively discharged; and
- Employee's Facebook criticism of supervisor was venting and was not concerted.

As you can see, cases concerning the protected and/or concerted nature of employees' postings on social media websites and the lawfulness of employers' social media policies and rules continue to be big concerns among practitioners, human resource professionals, the media, and the public.

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