Employment Edge 117th Edition—Firing For Facebook Posts Can Get You In Trouble With The National Labor Relations Board

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The Hartford, Connecticut regional office of the National Labor Relations Board (NLRB) recently issued a complaint against American Medical Response of Connecticut, Inc. (AMR), alleging that AMR violated federal labor law by terminating an employee for posting negative comments about a supervisor on Facebook. The complaint also alleges that AMR's social media policy itself violates the labor law.

The Complaint

According to the NLRB, AMR denied a request made by its employee, Ms. Dawnmarie Souza, to have a union representative present at a disciplinary meeting with the employer. The NLRB also alleges that AMR threatened Ms. Souza with discipline for requesting union representation. In a modern twist, Ms. Souza complained about this employer conduct—and, more specifically, about her supervisor—on her Facebook page, and her fellow employees joined in the criticism. In public statements, AMR claims that it fired Ms. Souza for more than just her online comments. The NLRB complaint, however, alleges that AMR fired Ms. Souza for making disparaging comments about AMR on Facebook.

Like many employers, AMR maintained a social media policy for employees in its employee handbook. AMR's policy—which is similar to many employers' social media policies—provided that:

Employees are prohibited from making disparaging, discriminatory, or defamatory comments when discussing the Company or the employee's superiors, co-workers and/or competitors.

The NLRB complaint alleges that both by simply maintaining the policy and by enforcing it against Ms. Souza, AMR violated employees' rights under Section 7 of the National Labor Relations Act (NLRA). Section 7 protects employees' right to organize and to engage in "concerted activities for the purpose of collective bargaining or other mutual aid or protection." In addition, the complaint alleges that Ms. Souza's firing violated Sections 8(a)(1) and (3) of the NLRA because AMR fired Ms. Souza due to of her union activities and for the purpose of discouraging other employees from engaging in similar activities. A hearing on the complaint is scheduled for January 25, 2011.

The Takeaway For Employers

The NLRB's stance on social media policies is important news for non-unionized and unionized employers alike. Section 7 of the NLRA applies to all employees covered by the Act, regardless of whether there is a union representing them.

Employers should start by analyzing whether their social media policies could "reasonably" be construed as discouraging employees from exercising their Section 7 rights, which include the right to publicly criticize their employer. Although the NLRB's complaint in the AMR case takes the position that a nondisparagement provision in a social media policy violates employees' Section 7 rights, in contrast, a December 4, 2009 NLRB Division of Advice memorandum found that a similar nondisparagement provision did not "chill" employees' Section 7 rights and therefore did not violate the law. Until the law is more settled, policies should at a minimum contain a disclaimer that the policy is not intended, and will not be enforced, to abridge employees' rights under Section 7 of the NLRA. However, the better approach will be to avoid using broad words like "nondisparagement" in policies and to instead focus instead on the non-protected employee activity the policy intends to prevent.

Employers must also think carefully about enforcement of their social media and other policies. Although employers may discipline employees for their online conduct, particularly when the conduct threatens the company's reputation, employers must take care not to discipline employees for conduct that could be reasonably construed as concerted activity protected by Section 7.

Employers must keep in mind that the medium—in this case, social media—does not change the applicable law. Although social media is the new kid on the block, the same labor law rules apply. Just as an employer could not lawfully fire employees for complaining to each other about work conditions, an employer may not maintain or enforce a social media policy that effectively does the same for online activity.

The attorneys of Gray Plant Mooty's Employment and Labor practice group are available to assist employers with workplace policies, training and compliance, as well as litigation and dispute resolution. If you have questions about labor law, social media, or other workplace issues, please contact Mark Mathison (mark.mathison@lathropgpm.com, 612.632.3247).