After months of confusion, the National Labor Relations Board has issued a guidance document clarifying when company social media policies violate federal law by intruding on protected employee rights. This document gives some insight into what steps employers can take to regulate employee statements about the Company and management on social media sites without getting into legal trouble.

**Concerted Protected Activity and Social Media**

Since 2010, the National Labor Relations Board has taken the position that an employee’s postings to a social media site such as Facebook or MySpace could be protected concerted activity (i.e., statements by employees regarding terms and conditions of employment designed to bring about changes in the workplace). Under such a designation, an employer is legally prohibited from disciplining an employee for negative or derogatory postings about the Company or management even where the post violates a company’s social media policy. (See Archer and Greiner Client Alert “Employees Fired for Facebook Posts Entitled to Reinstatement and Backpay:” http://www.archerlaw.com/firm.php?category=September+21+2011.)

This position by the NLRB has left Companies in a bind: What steps can a Company legally take to protect its reputation and good will from attacks by its own employees in cyberspace without running afoul of the law? Unfortunately, despite a number of decisions declaring company social media policies overly broad, the NLRB left few clues regarding an answer. And an NLRB report released late in 2011 regarding other social media cases did little to help.

This week, the NLRB released a second report regarding social media cases it has reviewed over concerns of concerted protected activity. (Read the full report here: https://www.nlrb.gov/news/acting-general-counsel-issues-second-social-media-report.) Among other things, this January 25, 2012 Operations Management Memo reviews several decisions where the NLRB determined whether a company’s social media policy was so overly broad that it restricted an employee’s right to engage in concerted protected activity. One case in particular stands out, because the policy in question was first found to be unlawful, but then passed NLRB muster after the Company revised it.

**A Helpful Study in Contrasts**

The Company’s initial social media policy prohibited “discriminatory, defamatory, or harassing web entries about specific employees, work environment or work-related issues on social media sites.” The NLRB found this language unacceptable, because “[t]he listed prohibitions, which contain broad terms such as ‘defamatory’ entries, apply specifically to discussions about work-related issues, and thus would arguably apply to protected criticism of the Employer’s labor policies or treatment of employees.”
The employer in that case amended its policy to instead prohibit “the use of social media to post or display comments about coworkers or supervisors or the Employer that are vulgar, obscene, threatening, intimidating, harassing, or a violation of the Employer’s workplace policies against discrimination, harassment, or hostility on account of age, race, religion, sex, ethnicity, nationality, disability, or other protected class, status, or characteristic.”

In drawing a distinction between the two policies, the NLRB stated that “a rule's context provides the key to the 'reasonableness' of a particular construction.” Since the list of prohibited conduct in the amended policy was limited to clearly inappropriate activity, and did not prohibit comments regarding workplace conditions, an employee would not reasonably reach the conclusion that he or she was prevented from engaging in protected concerted activity.

The Take-Away

The NLRB will strike down any policy that curtails employee discussion of working conditions on social media outlets. However, Companies can properly prohibit offensive or illegal remarks regarding the Company or its employees so long as the context of the prohibitions make it clear that protected concerted activity is not limited. Stated differently, the Company must narrowly tailor its social media policy to prohibit “plainly egregious conduct,” as opposed to issuing sweeping generalities that potentially infringe on protected employee rights.

As Companies come to terms with the power and scope of social media, drafting a social media policy is an important first step in protecting its image against inappropriate employee comments. But, those policies cannot infringe upon the right of employees to openly discuss working conditions. Policies that only prohibit plainly egregious conduct will pass legal muster—and at least cause employees to think before they vent about work through social media.

If you have questions about or would like to discuss the NLRB’s guidance document or a related matter, please contact John P. Quirke, Esquire, at (908) 788-4307 or jquirke@archerlaw.com.

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