

NLRB Update: Social Media



January 29, 2016

Anil S. Karia
Tedesco Law Group
anil@miketlaw.com
866.697.6015
www.tedescolawgroup.com

Special thanks to Denis Westlind of Providence Health & Services for his help in creating a prior version of this presentation.

2

Section 7 Rights

- Section 7 of the NLRA
 - Right: Protected Concerted Activity
- Two or more employees acting together to address wages or working conditions
- Single employee actions if s/he involves co-workers before acting, or acts on behalf of others
- Not protected concerted activity:
 - Reckless or malicious behavior, such as sabotaging equipment, threatening violence, spreading lies about a product, or revealing trade secrets.



Section 7 Rights

- Section 7 rights extend to social networking
- Does not matter whether the workplace is union or non-union
- Broad, sweeping policies and rules against disparaging company or supervisors, discussing work, sharing personal or company information, using profanity, or "inappropriate discussions" will be found unlawful



Social Media Cases & NLRB

Two ways employers violate Section 7 rights:

- (1) Unlawful discipline or response to social media
 - Employee discharged for social media activity
 - Employee threatened for using social media
- (2) Overbroad social media policy
 - Provisions in social policy are unlawful

5

Unlawful Discipline

Three D LLC, 361 NLRB 31 (Aug. 22, 2014):

- Former employee posted a "status update" on her Facebook page complaining that owners failed to handle payroll withholding taxes properly.
- Several employees posted comments about owners.
 - Waitress Jillian Sanzone posted "I owe too. Such an asshole."
 - Bartender Vincent Spinella used Facebook's "like" feature.
- Both were unlawfully discharged according to the NLRB – *why?*

6

Unlawful Discipline (cont.)

Three D LLC, 361 NLRB 31 (Aug. 22, 2014):

- Both employees were engaged in NLRA-protected activity.
- Discussion about mishandled payroll taxes.
 - Sanzone's comment about tax withholding "effectively endorsed" the original complaint that the employer had mishandled payroll taxes.
 - Spinella's "like" signified that he approved of the original status update.
- Employee statements weren't "so disloyal, reckless, or maliciously untrue as to lose the Act's protection."
- Note: Profanity alone does not lose protections of the Act!

7

Lawful Discipline

Richmond Dist. Neighborhood Center,
361 NLRB No. 74 (Oct. 28, 2014):

- Two employees of a teen center got rehire offer letters.
- They have Facebook conversation on a public page.
 - We're going to have parties at the teen center, take students on unauthorized field trips, and "take advantage, play loud music, get artists to come in and teach the kids how to graffiti up the walls and make it look cool."

8

Lawful Discipline (cont.)

Richmond Dist. Neighborhood Center,
361 NLRB No. 74 (Oct. 28, 2014):

- The following day, the teen center's management rescinded the offer letters.
- NLRB: employers have the right to terminate employees who make statements on social media demonstrating an intention to commit insubordination.

9

Unlawful Social Media Policies

- Three NLRB General Counsel Memos on social media cases that summarize the rapidly-evolving case law in this area.
 - OM 11-74 (Aug. 18, 2011)
 - OM 12-31 (Jan. 24, 2012)
 - OM 12-59 (May 30, 2012) – *Model Policy*
- Since then, the Board has issued a number of opinions that evaluate employer policies.

<http://www.nlr.gov/reports-guidance/operations-management-memos>

10

Do You Have a Social Media Policy?

- Model Social Media Policy courtesy of NLRB General Counsel.
- Unionized workplaces: just cause + Section 7 rights.
- Non-unionized workplace: Section 7 rights.

11

Is Our Social Media Policy Unlawful?

The key question in assessing a policy is whether reasonable employees could perceive the policy to prohibit their Section 7 right to engage in protected concerted activity.



12

 **Unlawful Policy?** 

Lawful

- Narrow rule against sharing confidential, proprietary information with specific examples.

Unlawful

- Broad rule against sharing “confidential or non-public information” without specific, clear definition or examples of what’s “confidential.”

13

 **Unlawful Policy?** 

Lawful

- Prohibit sharing of protected health information, trade secrets, attorney-client communications or any other legally restricted information.

Unlawful

- Prohibit or broadly restricts sharing information “about the company.”

14

 **Unlawful Policy?** 

Lawful

- Prohibits employees from infringing on company logos, brand names, taglines, slogans, or other trademarks” and instructs employees to cite copyrighted works identified in online communications.
- Allows non-commercial use of company logo, trademark, etc. while employee engages in Section 7 activities.

Unlawful

- Prohibits any use of employer’s name or identifying themselves as working for employer.
- Prohibits any use of the employer’s name or logo.

15

 **Unlawful Policy?** 

<p style="text-align: center;"><u>Lawful</u></p> <ul style="list-style-type: none"> • Prohibit comments about employer/coworkers/supervisor that are vulgar, obscene, threatening, intimidating, harassing, malicious, or violate EEO/harassment policies. • Require employees to indicate that any views expressed are their own, not the employer's. 	<p style="text-align: center;"><u>Unlawful</u></p> <ul style="list-style-type: none"> • Broad rule against "disparaging," "disrespectful," "negative" or "inappropriate" comments about supervisors or the company. • No profanity. • Require all social networking communications to be honest, professional, appropriate, and completely accurate. • Broad "no gossip" rules.
--	---

16

 **Bad Policy Ideas** 

- Prohibiting social media "on company time" or "in the workplace."
- Requiring employees to report other employees for "unusual or inappropriate" social media activity to be unlawful.
 - (An employer can't encourage employees to report other employees' protected activity.)

17

 **Bad Policy Ideas** 

- Instructing employees to "think carefully about 'friending' co-workers."
 - (It discourages communications among co-workers, and thus it necessarily interferes with Section 7 activity.)
- Prohibiting employees from commenting on any legal matters.
 - (It specifically restricts employees from discussing the protected subject of potential claims against the Employer.)

18

 **Bad Policy Ideas** 

- Requiring employees "to resolve concerns about work by speaking with co-workers, supervisors, or managers."
 - (It will have the effect of precluding or inhibiting employees from the protected activity of seeking redress through alternative forums.)
- Restricting communications with media and government agencies.
 - (Problematic: exposing unsafe working conditions to government regulator or media would be protected activity).
- Any rule that requires employees to secure permission from an employer as a precondition to engaging in Section 7 activities.

19

 **Good Policy Ideas** 

- Include a statement that employee communications protected by Section 7 of the Act are excluded from any rules contained in the policy.
 - BE CAREFUL: Rules that are ambiguous about their application to Section 7 activity or rules that lack language that clarifies that the rule does not restrict Section 7 rights are unlawful.
 - A broad saving clause will not save otherwise offending prohibitions.

20

 **Good Policy Ideas** 

- Prohibit "unauthorized postings" in the name of the Company.
- Prohibit representing "any opinion or statement as the policy or view of the Company or of any individual in their capacity as an employee or otherwise on behalf of Company."
- Give examples of what info the policy is really intended to limit, with business reasons.
 - Use specific examples and include examples of clearly illegal or unprotected conduct, such that they would not reasonably be construed to cover protected activity.

21

A Few Final Thoughts...

- Don't get worked up over profanity in social media. The NLRB won't care.
- Check your policies. The NLRB does care about those.
- Employers' biggest risk may come from individual managers' own informal "policies."
- Employee comments can and will be discoverable in litigation, and they can be held personally liable in some cases.

Profanity
makes talking FUN!



22
