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SOCIAL MEDIA ISSUES GENERALLY IN THE EMPLOYMENT CONTEXT: A PRAGMATIC OVERVIEW

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An emerging area in employment law concerns employees' social media activity and an employer's ability to discharge or discipline employees for comments posted on social media Websites such as Facebook and Twitter.

The National Labor Relations Act (NLRA) provides the operative framework that governs these employment-related social media issues. It protects employees' social media posts to the extent that the comments amount to concerted activity regarding the terms and conditions of employment. That is, the NLRA protects employees' rights to converse in an effort to address conditions at work, irrespective of whether those conversations take place in a brick-and-mortar office or on a digital Facebook "wall." Thus, when an employer learns that an employee has posted disagreeable comments to a social media Website, the employer must consider the NLRA's implications before taking disciplinary action against the employee.

An employee's activities, including social media comments, are "concerted" under the NLRA when an employee acts "with or on the authority of other employees, and not solely by and on behalf of [him or herself]" and when the activity is done for the "mutual aid or protection" of a group of employees. *Meyers Indus. Inc.*, 281 NLRB 882, 885 (*Meyers II*), *aff'd sub nom., Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), *cert. denied*, 487 U.S. 1205 (1988).

Concerted activity thus contemplates collaboration between employees or an expression on behalf of multiple employees. Accordingly, protectable concerted activity would include a conversation between employees about their wages and the actions they plan to take to improve their pay.

And, although at first glance a particular communication might not seem "concerted" because collaboration among multiple employees is not apparent, a single employee's attempts to "initiate[,] induce or prepare for group action" are protectable, as are instances where an individual employee brings complaints clearly on behalf of the group to management's attention.

In contrast, however, when an employee raises issues "solely by and on behalf" of him or herself, the employee does not engage in concerted

activity and therefore is not protected by the NLRA. As the National Labor Relations Board (NLRB) has explained, 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.

Collaboration among employees alone, however, is not sufficient to trigger NLRA protection. Rather, the concerted activity must pertain to terms and conditions of employment and must relate to the mutual aid or protection of the employees. "The conditions of employment which employees may seek to improve are sufficiently well identified to include wages, benefits, working hours, the physical environment, dress codes, assignments, responsibilities and the like." *New River Indus., Inc. v. NLRB*, 945 F.2d 1290, 1294 (4th Cir. 1991). With respect to mutual aid or protection, the Fourth Circuit has stated, "When employees collaborate to criticize matters that are not related to the mutual aid or protection of the employees, this activity is not protected 'concerted activity.'"

Even if comments or conduct conceivably amount to concerted activity, however, they may lose NLRA protection if the comments or conduct are vulgar, crude, threatening, socially unacceptable, or disparaging. *Media Gen. Operations, Inc. v. NLRB*, 394 F.3d 207, 213 (4th Cir. 2005) ("[T]he crude and socially unacceptable nature of [the employee's] remarks placed him outside the broad boundaries of the Act."); *Carleton Coll. v. NLRB*, 230 F.3d 1075, 1081 (8th Cir. 2000) (indicating that vulgar conduct is not protectable). Moreover, "[c]oncerted activity that ... constitutes insubordination or disloyalty may be found to fall outside the scope of the NLRA even if undertaken in the interest of self-organization or collective bargaining." *Media Gen. Operations, Inc.*, 394 F.3d at 213.

Social media issues like these first came before the NLRB in 2010, when it began receiving charges challenging disciplinary actions taken in response to employees' social media comments as well as employers' social media policies. The NLRB investigated these charges and determined that some social media communications were not protected and, consequently, the challenged disciplinary actions did not violate the NLRA. But the NLRB found reasonable cause to believe that other communications were protected and, consequently, the challenged disciplinary actions did violate federal labor law.

By way of example, the NLRB concluded that several employees' Facebook postings about an employer's tax-withholding practices constituted protected, concerted activity involving a term and condition of employment and that the employer's decision to terminate two employees because of their Facebook conversation was therefore unlawful.

In that case, several current and former employees of a sports bar and restaurant became upset when they discovered that they owed state income taxes. One employee brought the tax-withholding issue to the employer's attention by requesting that the matter be discussed at the next management meeting. Thereafter, a former employee posted a comment to Facebook indicating that she was displeased about owing money and stating that the employer could not properly complete paperwork. Another employee responded by clicking "Like." Several others then commented on the initial post, including a third employee who asserted that she also owed money and referred to one of the employer's owners with a derogatory name.

The employer terminated two employees because of their social media comments, and the employees challenged their terminations. The NLRB reasoned that the Facebook conversation related to the employees' shared concerns about a term and condition of employment, namely, the

employer's administration of income tax withholdings, and noted that the concern had been brought to the employer's attention by an employee who requested that the issue be discussed at an upcoming meeting. Thus, the NLRB concluded, the Facebook conversation involved group complaints about a term or condition of employment that contemplated future action. Accordingly, their conduct was protected and their terminations violated the NLRA. *NLRB, Office of the General Counsel, Memorandum OM 11-74* (August 18, 2011).

In contrast, the NLRB concluded that a series of "unprofessional and inappropriate tweets" posted by a newspaper reporter to a Twitter account did not constitute protectable concerted activity. The social media posts at issue involved comments criticizing the newspaper's copy editors as well as an area television station, tweets about homicides in the city and comments containing sexual content. The NLRB concluded that the newspaper's decision to terminate the reporter was lawful because the Twitter comments did not involve protected concerted activity and did not relate to the terms and conditions of the reporter's employment.

To ensure consistent enforcement, NLRB's general counsel issued three memoranda between 2011 and 2012, describing the investigations and results in several social media cases that challenged employers' disciplinary actions and social media policies. With respect to employers' social media policies, the NLRB has stated generally that the 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."

These memoranda provide helpful guidance with respect to social media policies and discipline for employees' social media posts. Thus, when fashioning social media policies or contemplating disciplinary action against an employee as a consequence of the employee's social media activity, employers should consider the familiar NLRA framework, which curtails employers' ability to discipline employees for engaging in concerted activity that involves terms and conditions of their employment.

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