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Social Media And Confidentiality: Gray Areas For Employers

Law360, New York (September 10, 2013, 3:48 PM ET) -- Many employers have been surprised by recent rulings that two common employment policies relating to social media and the confidentiality of investigations may run afoul of the National Labor Relations Act. These rulings apply to policies covering any nonmanagement employee, including employees who are not covered by a collective bargaining agreement.

Faced with the digital-age risk that employee comments and criticisms can be quickly disseminated worldwide, many employers have adopted social media policies limiting what employees may post on Facebook or Twitter about their work, their employer or their co-workers. And confronted with repeated U.S. Supreme Court decisions encouraging appropriate investigation of harassment complaints, employers have adopted procedures for investigating sexual harassment and other complaints that place confidentiality restrictions on what employees may reveal to their co-workers or others about the allegations.

According to recent decisions, however, both policies may violate Section 7 of the NLRA, which permits employees to engage in “concerted activity” for “mutual aid and protection.”

Section 7

It is well established under the NLRA that employees may confer with one another about their wages and other terms of employment and may take “concerted” action in an effort to improve their working conditions. Employees (but not managers) are protected by Section 7 of the NLRA, whether or not they are members of a union.

Increasingly, employers are finding that employees are relying on Section 7 to challenge company policies that address social media use and the confidentiality of complaint investigations.

Overbroad Social Media Policies

In an effort to protect their image, reputation and proprietary information, as well as the confidentiality interests of their employees, many employers have issued comprehensive social media policies governing what employees can and cannot post on social media websites or blogs.

These policies have come before the National Labor Relations Board in several cases involving employees disciplined or terminated for posting comments on Facebook or Twitter about their employer or co-workers in violation of the employer’s social media policy.

The NLRB has struck down a number of these social media policies. At issue is whether employer policies are so sweeping in their prohibitions that they bar the kinds of activity protected by Section 7, such as the discussion of wages or working conditions among employees, or could be reasonably construed by employees to do so.

The board has distinguished between comments that amount to "protected concerted activity" and mere gripes not made in relation to group activity among employees, although the line is hardly a bright one. Thus, it was an unlawful employment practice to terminate three employees who posted messages on Facebook criticizing a manager for not being responsive to safety concerns expressed by the employees, and the employer was ordered to rescind portions of the policy on which the discipline was based. Design Technology Group LLC (April 19, 2013).

And in Karl Knauz Motors Inc. (Sept. 28, 2012), the board ordered an employer to rescind its social media policy, which contained, among other statements, a provision requiring employees to be "courteous, polite, and friendly" to customers and fellow employees and not to use "language which injures the image or reputation" of the employer.

The NLRB held that the "courtesy" rule violated the NLRA because employees could "reasonably construe its broad prohibition against 'disrespectful' conduct and 'language' which injures the image or reputation of the Dealership as encompassing Section 7 activity."

There are limits to Section 7 rights, however. A recent advice memorandum from the NLRB's Office of the General Counsel concluded that an employee's profanity-laced comments about the company and her supervisor in a private group message on Facebook in which she allegedly told her supervisor to "back the freak off" and suggested that the employer could "FIRE ME … Make my day" constituted unprotected "boasting and griping." Advice Memorandum in Tasker Healthcare Group, d/b/a Skinsmart Dermatology (May 8, 2013).

Confidentiality of Complaint Investigations

Enforcement guidance issued by the Equal Employment Opportunity Commission directs employers conducting investigations of workplace harassment to assure complainants that they "will protect the confidentiality of harassment complaints to the extent possible."

Employers thus routinely adopt policies asking employees who are part of workplace investigations, either as complainant or witness, to keep such investigations confidential. Such policies help ensure the integrity of investigations, prevent workplace retaliation for participation in investigations, protect the privacy of complainants and foster an environment where employees will readily report harassment concerns.

Nonetheless, an NLRB judge in The Boeing Co., case no. 19-CA-089374 (July 26, 2013), held that two notices issued by Boeing violated Section 7 of the NLRA: one "directing" employees not to discuss workplace investigations with each other and a subsequent notice "recommending" that employees not discuss such investigations with other employees.

The Boeing decision relies on last year's NLRB ruling in Banner Health System, d/b/a Banner Estrella Medical Center, case no. 28–CA–023438 (July 30, 2012), which prohibited blanket confidentiality rules whose potential (if unintended) effect may be to chill or prohibit the exercise of protected Section 7 rights.

While acknowledging that blanket confidentiality rules served some useful purposes, the Boeing judge concluded that he was bound to follow board precedent. Although the board indicated in Banner Health that confidentiality may be requested in specific situations, involving a case-by-case inquiry, such individualized determinations could be unworkable for a large employer that frequently and routinely conducts workplace investigations.

Next Steps

The two policies struck down by the NLRB have been adopted by many sophisticated employers in an effort to protect employee confidentiality and privacy. The NLRB's rulings under Section 7 threaten these policies, and it is not clear that the NLRB gave sufficient consideration to the privacy concerns that justify these policies.

Employers are likely to challenge adverse NLRB decisions — as Boeing has indicated it will. Some have suggested that the NLRB's decisions since Jan. 1, 2012, are void and of no effect because the D.C. Circuit Court of Appeals ruled in Noel Canning v. National Labor Relations Board, 703 F.3d 490 (D.C. Cir. 2013), that three members of the board were invalidly appointed. (That decision will be reviewed by the U.S. Supreme Court in the next term.)

In the meantime, however, employers should consider reviewing existing policies and prohibitions to take into account the NLRB's expansive view of Section 7 rights.

In the case of social media policies, the NLRB has provided some guidance on how to draft social media policies to avoid Section 7 issues. But for procedures governing the investigation of complaints, there is no easy way to reconcile the conflict between the EEOC's concern for employee privacy and the NLRB's enforcement of Section 7 rights.

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