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Employers Face A Social Media Catch-22

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It's 9 am Monday when one of your company's employees informs you that over the past weekend another of your employees posted "F*#k the company" on his Facebook page. Understandably, you feel upset and think about terminating the employee immediately. However, before taking action you would be best served to learn more about the offensive post (and its context), or risk stepping into a legal quagmire. You ask for the details and you learn that the employee that posted it also stated that the employees at your company are "underpaid and overworked." It is precisely the inclusion of this statement in the post that makes all the difference as to the actions you should take regarding your employee. (Hint: It is not immediate termination!)

Certain employee speech on social media platforms like Facebook may be interpreted as "concerted activity" under the National Labor Relations Act ("NLRA"). Section 7 of the NLRA states "Employees shall have the right to self-organization to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other *concerted activities* for the purpose of collective bargaining or other mutual aid or protection."

If you decide to terminate the employee, the National Labor Relations Board may rule that you violated Section 7 because the employee's post was part of a discussion with other employees regarding the terms and conditions of employment, such as salary and hours, and you terminated him for engaging in protected activity. Naturally, you may wonder if the employee's use of profane, vulgar language in his post imperils this protection, however Section 7 has been interpreted to allow employees to express themselves using vulgar language and profanity, as long as such language is not threatening. You may also wonder about the fact that the statement is false, that your employees are not underpaid and overworked. However, Section 7 has been held to protect employee communication even if statements are false or misleading, as long as the employee has not acted with a malicious motive. In other words, if the employee knowingly published false statements or published them with reckless disregard for the truth, an employer's disciplinary action may be upheld. However, employers may find that proving intent is often difficult to accomplish.

Hence, the Catch-22 for employers when it comes to such use of social media by employees. Given the broad protection of Section 7 of the National Labor Relations Act, how should an employer respond to the above situation? If the employer takes disciplinary action against the employee despite the risks relative to Section 7, the employer might argue that the post was not "concerted action" and/or that the employee acted with a malicious motive. However, an employer should first understand that such an assertion may generate a complicated legal situation for him or her to resolve.

The other alternative is to tolerate such behavior. Of course, this is not a good alternative because such postings may lead to workplace disruption, poor morale, and/or damage to an organization's reputation, impacting its ability to recruit new employees or conduct business unfettered by the impact of such public statements.

Nonetheless, under current law, the best response for an employer is to proactively prevent such situations by establishing and communicating a policy to protect itself against the type of employee postings against which it can legally protect, such as: exposure of employer confidential information, language which violates the employer's anti-harassment and discrimination policies, and threatening language.

Takeaway: Employers must be careful in disciplining employees for social media posts.

Have a question about social media use and employment law or establishing strong policies? Contact Stephanie Gironda or any member of our employment law team at: 732-352-9858.

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