Publications

Labor and Employment Alert: One for the Employer: Social Media Posting Results in Lawful Termination

Related Attorneys

Nelson D. Cary

Ashley M. Manfull

Related Services

Labor and Employment

Labor Relations

CLIENT ALERT | 11.11.2011

Recent actions by the NLRB's acting general counsel and administrative law judges (highlighted in prior posts on the Vorys on Labor blog: "ALJ Determines..." and "Acting General Counsel Issues...") have caused great concern for labor professionals grappling with the inappropriate comments of employees posted on social media. The fear, based on these prior actions, is that disciplinary action will result in an unfair labor practice charge for interference with protected concerted activity. However, in its most recent Advice Memorandum (pdf), the NLRB's Office of the General Counsel (Office) has affirmed that employee social media postings are not automatically protected by Section 7 of the NLRA and may be grounds for termination in appropriate circumstances.

In the Memorandum, the Office opined that an employer did not engage in an unfair labor practice by dismissing an employee who named his employer on his LinkedIn profile and used a vulgar, derogatory term for his job title. The former employee claimed that the fake job title was only meant as a joke and had been on his LinkedIn page for over a year before his discharge. The employee alleged that the true reason for his termination was his recent discussions with coworkers regarding a successful employee wage and hour lawsuit at another company and whether the employer's similar overtime policy may be unlawful.

The Office determined that even though the discharge occurred in close proximity to the former employee's protected discussions with his coworkers, there was no link between those discussions and his termination. Rather, the employer had only recently discovered the offensive LinkedIn posting when it reviewed employee posts as part of an assessment of problems with its own LinkedIn page. Upon observing his LinkedIn profile, the employer discharged the employee based on its communications usage policy, prohibiting obscene, defamatory, harassing and/or abusive language regarding the employer.

While the Office commented that the employer's policy may be overbroad by including the word "harassing," which could reasonably be construed to preclude protected conduct, it found no violation. The Office reasoned that the former employee's comment on LinkedIn clearly was not protected activity. The "fake" job title was offensive on its face and had nothing to do with the former employee's verbal conversations with coworkers regarding the company's overtime policies.

It is important to note that the Memorandum is not a decision by the NLRB. Rather, it is an administrative pronouncement by the division of the NLRB responsible for deciding whether a violation occurred and, if so, initiating enforcement proceedings. Thus, until the NLRB rules on these issues, the law will continue to evolve.

Labor professionals are well-advised to review employee disciplinary events arising from social media postings on a case-by-case basis. The Memorandum makes clear that all such postings are not automatically protected under Section 7. It does, however, demonstrate the need to consult with qualified labor counsel when confronted with questions of protected concerted conduct.

Read more from the Vorys on Labor blog.