

Is Your Social Media Policy Overly Broad?

By Ronald W. Schneider, Esq. | February 23, 2011

Very recently the National Labor Relations Board reached a settlement agreement with a Connecticut employer, an ambulance service company, to resolve the NLRB's complaint that the employer's social media policy was overly broad. The policy stated, "Employees are prohibited from making disparaging, discriminatory or defamatory comments when discussing the Company or the employee's superiors, co-workers or competitors." The NLRB had alleged that such a policy illegally denied employees the right to engage in "concerted activity," which is a right all employees have regardless of union affiliation to discuss wages, hours and working conditions with fellow employees and others while not at work.

Many of you may remember that we discussed this case with you before and have been waiting for the result. While the resolution of the case does not provide a ruling that offers clear guidance, the settlement agreement is a warning to all employers that they must be careful about disciplining employees for their conduct in cyberspace. In this case, the terminated employee had referred to her supervisor as a mental patient and made other admittedly derogatory remarks on her Facebook page. Her fellow employees responded to her posts. The NLRB took the position that the employee had engaged in protected concerted activity with her co-workers and could not be fired for her comments. The settlement included a requirement that the ambulance company post a notice to its employees advising them of their rights to engage in concerted activity and declaring that the company "will not discharge or discipline you ... because you discuss your wages, hours and working conditions with your fellow employees and others while not at work."

Should incidents arise that implicate a potentially overbroad policy already in existence, employers should take care as to how they implement such a policy. We encourage employers to review their social media policies and revise such policies that blanketly prohibited all disparaging and defamatory remarks about the employer and the workplace. It is important to understand, however, that employers should still have social media policies that warn employees that they may be subject to discipline for what they say and do in cyberspace. The NLRB's complaint and the resolution of that complaint does not alter the reality that, depending on the circumstances, employers may discipline employees for misbehavior on social networking sites and may be personally liable for defamatory and discriminatory remarks.

If you do not have a social media policy or would like to discuss the revision of your social media policy, you may contact Ron Schneider (rschneider@bernsteinshur.com) or Linda McGill (lmcgill@bernsteinshur.com) in Portland (207 774-1200) or Karen Aframe (kaframe@bernsteinshur.com) in Manchester (603 623-8700).