NLRB and Social Media

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Concerted Activities & Unfair Labor Practices

National Labor Relations Act (NLRA) Section 7 (29 U.S.C. § 157)
• Guarantees the right of workers to engage in concerted activities for the purpose of mutual aid and protection

NLRA Section 8(a)(1) (29 U.S.C. § 158(a)(1))
• It is an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights
Coverage

Sections 7 and 8(a)(1) apply to all private sector, nonsupervisory employees

- Not just union employees

Jurisdictional thresholds:

- Retail employers with gross annual volume of at least $500,000
- Non-retail employers with annual inflow or outflow of at least $50,000
- Law firms: minimum $250,000 in gross annual volume
Key Issues

Firing or disciplining employees due to social media posts
  • Has the employer interfered with employees’ Section 7 rights?

Social media policies
  • Do they prohibit, or would employees reasonably believe they prohibit, Section 7 activities?
Sources of Authority & Guidance

Court cases
  • None (directly related to social media)

Board Decisions
  • Don’t worry about *NLRB v. Noel Canning*

ALJ Decisions

GC Advice Memoranda
What Is a Protected Concerted Activity?

Concerted activity includes circumstances where individual employees seek to initiate or to induce or to prepare for group action, and where individual employees bring truly group complaints to management’s attention.

Concerted activity includes employees discussing shared concerns among themselves prior to any specific plan to engage in group action.
What Is a Protected Concerted Activity?

On the other hand, comments made solely by and on behalf of the employee him or herself are not concerted.

Moreover, mere griping by employees who fail to look forward to any action at all is not protected.

Group conversation within Facebook among 7 current and 3 former employees

- Current employee 1: “They [employer] are full of s**t” . . . Fire me . . . Make my day”
- Current employee 2: “You make me laugh . . . it’s getting bad there [at the workplace] . . . it’s just annoying as hell”
Protected Concerted Activity?

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Comments merely expressed an individual gripe rather than any shared concerns about working conditions

Advice Memo re: Tasker Healthcare Group, d/b/a Skinsmart Dermatology, 04–CA–094222 (May 8, 2013)
Protected Concerted Activity?

Facebook conversation among 3 current employees

- Holli: “I need a new job. I’m physically and mentally sickened”

- Brittany: “It’s pretty obvious our manager is an immature person. The way she treats us is NOT okay but no one cares because everytime we try to solve conflicts NOTHING GETS DONE!!”

- Vanessa: “hey dudes it’s totally cool, tomorrow I’m bringing a California Worker’s Rights book to work. My mom works for a law firm that specializes in labor law and BOY will you be surprised by all the crap that’s going on that’s in violation 8) see you tomorrow!”
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Postings were complaints among employees about the conduct of their supervisor as it related to their terms and conditions of employment and about management’s refusal to address the employees’ concerns.

Design Technology Group, LLC d/b/a Bettie Page Clothing, 359 NLRB No. 96 (2013)
In many cases, social media posts are a continuation of conversations that had taken place at work

- They must be read in conjunction with those workplace conversations
- For example, in *Bettie Page*, female sales clerks had expressed safety concerns regarding store’s late hours
Protected Concerted Activity?

Facebook conversation between 2 employees

• Zalewski: “Well no longer a butler employee . . . Gotta love the fact a ‘professional’ company is going to go off what a dementia pt says and hangs up on you when you are in the middle of asking a question”

• Norvell: “Sorry to hear that but if you want you may think about getting a lawyer and taking them to court . . . You should check with Procare [a competing ambulance company] . . . You could contact the labor board too”
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Norvell was responding to a post in which Zalewski stated she had been terminated for commenting to a patient about the condition of the employer’s vehicles. The condition of the employer’s vehicles was a matter of mutual concern to its employees. By advising Zalewski to obtain legal counsel or contact the Labor Board, Norvell was making common cause with Zalewski regarding a matter of concern to more than one employee.

Butler Medical Transport, Nos. 5–CA 97854, 94981(NLRB Div. of Judges Sept. 4, 2013)
Protected Concerted Activity?

Facebook conversation

[Former employee] LaFrance: “Maybe someone should do the owners of Triple Play a favor and buy it from them. They can't even do the tax paperwork correctly!!! Now I OWE [the state] money . . . Wtf!!!!”

[Current employee] Spinella: 👍

[Current employee] Parent: “I F***ING OWE MONEY TOO!”

LaFrance: “I’m calling the labor board to look into it because [the owner] still owes me about 2000 in paychecks. . . . Hahahaha he’s such a shady little man. He probably pocketed it all from all our paychecks. I've never owed a penny in my life till I worked for him. That [sic] goodness I got outta there.”

[Current Employee] Sanzone: “I owe too. Such an a**hole.”

Parent: “Yeah me neither, I told him we will be discussing it at the meeting.”
Protected Concerted Activity?

Facebook conversation

[Former employee] “LaFrance: Maybe someone should do the owners of Triple Play a favor and buy it from them. They can't even do the tax paperwork correctly!!! Now I OWE [the state] money . . . Wtf!!!!”

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The employees who posted comments, including Spinella’s “Like”, specifically discussed the issues they intended to raise at an upcoming meeting and avenues for possible complaints to government entities.

Three D, LLC d/b/a Triple Play Sports Bar & Grille, No. 34-CA-12915 (NLRB Div. of Judges Jan. 3. 2012)
Summary

To be protected:

• Must be related to working conditions
• Must see some sort of call to action or banding together
  • Or discussions logically leading that way
Summary

Not protected

• Threats of violence
• Highly disruptive (particularly racist) comments
• Conversations not involving coworkers
• Simple work–related griping
• Simple commiseration
  • “Dude, that sucks!” is not enough
What Is an Unlawful Workplace Rule?

The Rule explicitly restricts Section 7 activity, or

1. Employees would reasonably construe the language of the rule to prohibit Section 7 activity

2. The rule was promulgated in response to Section 7 activity

3. The rule has been applied to restrict the exercise of Section 7 activity

Unlawful Workplace Rule?

1. Employees should display a positive attitude toward their job. A bad attitude creates a difficult working environment and prevents the Dealership from providing quality service to our customers.

2. Courtesy is the responsibility of every employee. Everyone is expected to be courteous, polite and friendly to our customers, vendors and suppliers, as well as to their fellow employees. No one should be disrespectful or use profanity or any other language which injures the image or reputation of the Dealership.

3. As a means of protecting yourself and the Dealership, no unauthorized interviews are permitted to be conducted by individuals representing themselves as attorneys, peace officers, investigators, reporters, or someone who wants to “ask a few questions.” If you are asked questions about the Dealership or its current or former employees, you are to refer that individual(s) to your supervisor.

4. All inquiries concerning employees from outside sources should be directed to the Human Resource Department. No information should be given regarding any employee by any other employee or manager to an outside source.
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No. 2 could reasonably be construed to chill Section 7 activity; Nos. 3 and 4 restrict Section 7 rights.

358 NLRB No. 164 (2012)
Information published on your social networking sites should comply with the company’s confidentiality and disclosure of proprietary information policies [which include prohibitions against disclosure of any information pertaining to terms and conditions of employment of employees such as their job duties, payroll or accounting records and practices, personnel policies and practices]
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This nondisclosure rule is so broadly written employees would reasonably believe they are prohibited from discussing wages and salary information, disciplinary and discharge policies and practices and other information they are entitled to discuss and share with coworkers and even with third parties that might be able to assist them with the terms and conditions of their employment

Hoot Winc LLC, No. 31-CA-104872 et seq. (NLRB Div. of Judges May 19, 2014)
Unlawful Workplace Rule?

If you identify yourself as an associate of the Company and publish any work-related information online, you must use this disclaimer: “The postings on this site are my own and do not necessarily represent the postings, strategies or opinions of The Kroger Co. family of stores.”
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The requirement that a disclaimer be posted by the employee every time he or she speaks on work related issues and is identifiable as an employee of the employer, is unduly burdensome, well beyond any legitimate interest of the employer, and will have a tendency to chill legitimate Section 7 speech by the burden it brings to it.

The Kroger Co., No. 07-CA-098566 (NLRB Div. of Judges Apr. 22, 2014)
Unlawful Workplace Rule?

When online, do not engage in behavior that would be inappropriate at work—including, but not limited to, disparagement of the Company’s (or competitors’) products, services, executive leadership, employees, strategy and business prospects.
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Barring employees from online behavior that is “inappropriate at work” and “that will reflect a negative or inaccurate depiction of our Company” is an unlawfully overbroad restriction. Through this rule Kroger would reasonably appear to be barring a range of concerted and protected protests, comments, and activities that criticize and challenge the Respondent’s treatment of employees and many other issues related to wages, hours, and terms of condition.

The Kroger Co., No. 07–CA–098566 (NLRB Div. of Judges Apr. 22, 2014)
What Is a Lawful Workplace Rule?

Narrowly tailored; specific
  - Prohibits harassment, bullying, and threats

Reflects legitimate employer concerns
  - Prohibits disclosure of truly confidential information
  - Prohibits disparaging customers

Don’t bother with a “savings clause”
  - It will not save an otherwise invalid rule

See Acting GC Memo (May 30, 2012)
Employment-at-Will

Be cautious before firing someone who has criticized employer/management through social media posts

- Examine whether posts are (could be considered) protected concerted activity
- If they are or could be, employee becomes (may be) protected
- Firing employee within close temporal proximity to posts can raise inference employee was fired for engaging in protected concerted activity
Plaintiff’s Bar Alternatives

Unlike antidiscrimination laws, no private right of action under NLRA

Only alternatives

• Wrongful discharge
• Violation of Stored Communications Act (SCA)
• Invasion of Privacy (maybe)
Deborah Ehling & MONOC

Ehling, a nurse, was Acting Union President. Ehling and union had filed numerous agency complaints against MONOC. Resulting in one OSHA fine and pending state Dept. of Health investigation.

Had also filed numerous unfair labor practice charges.
Deborah Ehling & MONOC

Ehling email: “Remember, if MONOC management lips are moving, they are lying”

Ehling Facebook Wall post:
An 88 yr old sociopath white supremacist opened fire in the Wash D.C. Holocaust Museum this morning and killed an innocent guard (leaving children). Other guards opened fire. The 88 yr old was shot. He survived. I blame the DC paramedics. I want to say 2 things to the DC medics. 1. WHAT WERE YOU THINKING? and 2. This was your opportunity to really make a difference! WTF!!!! And to the other guards .... go to target practice.

• Restricted only to “friends”
Coworker revealed Facebook post to MONOC management
MONOC suspended Ehling pending a psychological exam and reported her to nursing board

- Management was concerned that Ehling might withhold care if she was personally offended by a patient
NLRA Charge Against MONOC

NLRB’s GC found no evidence of violation of Section 8(a)(1)

While other postings on Ehling’s Facebook page clearly involved protected communications regarding terms and conditions of employment and ongoing labor disputes, the specific comments cited by MONOC as the basis for her suspension did not involve Section 7 concerns and were in no way related to the postings that did.

GC Advice Memo, MONOC, No. 22–CA–29008 (May 5, 2010)
Ehling v. MONOC

Ehling alleged coworker who provided Facebook post to management was coerced into providing it

N.J. Dist. Ct. Judge ruled this was sufficient to survive a motion to dismiss on SCA and invasion of privacy claims

Subsequent discovery revealed coworker voluntarily provided Ehling’s Facebook post to Management

No SCA claim: Coworker was a Facebook “friend” and was therefore authorized to view post

No Invasion of Privacy: MONOC was the passive recipients of information that it did not seek out or ask for; Ehling voluntarily gave information to her Facebook friend, and her Facebook friend voluntarily gave that information to someone else

Questions?