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The Perils of Acting on Information Obtained from Social Media

Services

Labor & Employment

Traditional Labor Relations

In a case set for hearing in January 2011, the National Labor Relations Board (NLRB) has concluded that an employer's termination of an employee based in part on Facebook postings critical of the employer and its supervisors, was improper because such posting constituted concerted activity protected by the National Labor Relations Act. This complaint adds another potential risk for employers utilizing internet sources to obtain information about its employees and using that information in making employment decisions.

The rapid expansion of social media by the work force has raised significant issues for employers. Many employers have responded by developing detailed policies defining limits on an employee's rights and responsibilities, placing the employee on notice of limitations on their expectations of privacy, and obtaining express consent to the employer's access to this information. However, as this NLRB charge points out, employers must be careful that their policies are not overly broad and be aware that using information from such sites can give rise to liabilities under federal and state law.

Section 7 of the National Labor Relations Act (the Act) protects employees' right to engage in concerted activity for the purpose of "mutual aid and protection." Employers interfering with these rights may have violated section 8(a)(1) of the Act. It is also important to note that these rights are *not* limited to the union setting. Employees are protected by Section 7 even if they are not part of a union work force.

In the case now before the NLRB, the company's blogging and internet posting policies barred employees from making disparaging remarks about the company or its supervisors, and further prohibited employees from depicting the company on the internet without permission of the company. When the employee was terminated after making her remarks, she filed an unfair labor practice charge with the NLRB. The facts, according to the NLRB, were as

follows: After a customer complained about the employee's conduct, she was approached by her supervisor to prepare an incident report about the interaction with the customer. The employee claimed that she had requested representation from her union, but the supervisor threatened to discipline her for making that request. After the employee went home that day, she posted negative comments on her personal Facebook page from her home computer. This posting drew responses from co-workers, which led to further negative comments about the supervisor by the employee. The employee was terminated several weeks later.

After its investigation, the NLRB determined that the postings were "protected concerted activity" within the meaning of the Act, and discipline taken as a result of the postings was a violation of the Act. The Board also found that the company's social media policies contained unlawful provisions, including those that barred employees from making disparaging remarks when discussing the company or supervisors, and those which prohibited employees from depicting the company in any way on the internet without permission. "Such provisions constitute interference with employees in the exercise of their right to engage in protected concerted activity," according to the NLRB.

Potential liability for using such publicly available information is not limited to the NLRA. An employer acting on the basis of information obtained from Facebook, other social media, or email, can create liability for claims of discrimination or retaliation. For example, if an employer learns about a disability from an examination of social media sites, and denies employment on the basis of that information, the employer would be potentially liable for violations of the Americans with Disabilities Act and/or its state law counterpart. An employer that learns of complaints or objections about the way it treats its minority employees and takes disciplinary action on the basis of that information could be found liable for retaliation for opposing acts of the employer perceived to be unlawful. Most federal employment discrimination statutes protect employees and applicants from discrimination and retaliation for exercising their rights under those statutes, including Title VII of the Civil Rights Act of 1964, as amended (race, color, sex, national origin and religion), the Age Discrimination in Employment Act (age 40 or over), the Family and Medical Leave Act (for exercising rights under the Act), the Genetic Information Nondiscrimination Act (genetic information), the Fair Labor Standards Act (for exercising rights under the Act), and the multitude of state and federal whistleblower laws imposing liability for taking actions against employees who "blow the whistle" on their employer's perceived misconduct. Moreover, selective use or non-use of such information can also give rise to claims of discrimination based upon disparity in treatment.

What This Means to You

Social media policies must be drafted with care to be sure that they give the employees fair notice of limitations of their expectations of privacy, yet must not be so overbroad in their prohibitions as to rise to a violation of the law. Employers should be particularly cautious in utilizing information

obtained from social media sites such as Facebook or a Google search. Once the employer purposefully or accidentally acquires information about an employee's or prospective employee's protected status or involvement in protected activity, it is difficult, if not impossible, to unring that bell.

Contact Info

Should you have any questions about employee misclassification, please contact your Husch Blackwell attorney.

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