Webinar 12 – June 26, 2024

Strategies Related to Social Media, Monitoring Employees and Privacy Concerns in the Workplace

WEBINAR OUTLINE

INTRO/SETTING THE STAGE

- What Legal Protections of Expression and Speech Do Employees Have in the Workplace?
  - 1st Amendment
  - NY Labor Law
  - National Labor Relations Act

THE NLRB'S POSITION ON REGULATING EMPLOYEES' SOCIAL MEDIA USAGE

NEW YORK PROHIBITS EMPLOYERS FROM ACCESSING EMPLOYEES' PERSONAL SOCIAL MEDIA ACCOUNTS

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WEBINAR CONTENT

INTRO/SETTING THE STAGE

Overview: What Legal Protections of Expression and Speech do Employees Have in the Workplace?

1st Amendment

Many people believe that the First Amendment grants them the right of unrestricted free speech, including on social media. But employees are often surprised to learn that the First Amendment protects specifically from government intrusion on free speech – it does not apply to intrusion on free speech by private employers.

Since the First Amendment limits only the government's ability to suppress speech, private-sector employees generally do not have First Amendment protections in the workplace.

However, some state laws (including NY) protect employees from discipline, termination, or other penalties based upon certain political or recreational activities.

NY Labor Law

NY Labor Law § 201-d makes it unlawful for an employer to refuse to hire, employ or license, or to discharge from employment or otherwise discriminate against an individual because of certain "political activities."

The term "political activities" is defined as "(i) running for public office, (ii) campaigning for a candidate for public office, or (iii) participating in fundraising activities for the benefit of a candidate, political party or political advocacy group.

An individual's "political activities" are only protected if they occur "outside of working hours, off of the employer's premises, and without use of the employer's equipment or other property, [and] if such activities are legal."

National Labor Relations Act

The National Labor Relations Act ("NLRA") protects the rights of both union and non-union employees to engage in "concerted activities" for purposes of "mutual aid and protection," such as improving the terms and conditions of employment.
Under the NLRA, protected concerted activity includes:

> (1) statements by lone employees addressing their coworkers to initiate, induce, or prepare for group action;
>
> (2) a lone employee's communications with management to convey a truly group complaint;
>
> (3) statements made to elicit group action from like-minded coworkers for a personally held view about working conditions; and
>
> (4) communications involving "inherently concerted" discussions about vital aspects of workplace life.

An employer generally may not lawfully discipline employees for discussing with coworkers the terms and conditions of their employment, including compensation, benefits, hours, staffing levels, discipline, and other important aspects of the employment relationship.

Evidence that the employee(s) had brought, or intended to bring, these issues to management's attention or take other steps to advance their collective position will increase the likelihood that the NLRB will conclude that the employee(s) engaged in concerted activity.

By contrast, the NLRB will not consider social media activity to be concerted when it does not involve coworkers but merely reflects personal gripes. Thus, an employer can terminate or discipline an employee for such activity without violating the NLRA.

Even if an employer reasonably concludes that an employee has engaged in concerted activity, it must also determine if the concerted activity is protected under the NLRA. Concerted activity can lose the NLRA's protection if it is:

- Maliciously untrue and made with the knowledge of its falsity –or–
- So egregious that it loses protection of the NLRA

Importantly, the NLRB stringently applies both of these exceptions. With respect to the first exception, the NLRA protects an employee's criticism of an employer even if the criticism is false or defamatory.

Inherently Concerted Activity

Conduct is considered inherently concerted where, even though it is not expressly indicated, the actor implies a desire to induce group action by virtue of the subject matter discussed.

A desire to induce group action is implied when employees discuss:

1. higher wages,
2. changes in work schedule, or
3. job security.

The National Labor Relations Board ("NLRB") has suggested that "discussions about quality of supervision" should be added to this list.

THE NLRB'S POSITION ON REGULATING EMPLOYEES' SOCIAL MEDIA USAGE

National Labor Relations Board's (NLRB) recent decisions involving social media to enable you to better counsel employers on how to lawfully regulate and respond to employees' use (or misuse) of social media.

The same principles are also useful for employers on how to respond to employees' statements in other workplace contexts, such as video meetings, as well.

An employer's social media policy that infringes upon employees' Section 7 rights, or that could reasonably be interpreted by employees as infringing upon them, will be vulnerable to unfair labor practice charges. Likewise, employers that discipline employees for social media activity that is protected concerted activity under Section 7 likely will be found to have violated the NLRA.

Note:
Employers should expect the NLRB to vigorously police both employers' social media policies and their disciplinary actions that relate to employees' social media activity.

NEW YORK PROHIBITS EMPLOYERS FROM ACCESSING EMPLOYEES' PERSONAL SOCIAL MEDIA ACCOUNTS

- On September 14, 2023, New York Governor Kathy Hochul signed legislation to restrict employers from requesting access to an employee's or job applicant's private social media account.
- The law states that an employer cannot request, require or coerce any employee or applicant for employment to:
    - disclose any username and password, password, or other authentication information for accessing a personal account through an electronic communications device;
    - access the employee's or applicant's personal account in the presence of the employer; or
    - reproduce in any manner photographs, video, or other information contained within a personal account obtained by the means prohibited in this paragraph.

Notes:
There are several exceptions to the law in which employers may lawfully access an employee's or applicant's private social media account, including:

- *An employer may require an employee to disclose any user name, password or other means for accessing nonpersonal accounts that provide access to the employer's internal computer or information systems.*
- *The law does not prohibit an employer from requesting or requiring an employee to disclose access information to an account provided by the employer where such account is used for business purposes and the employee was provided prior notice of the employer's right to request or require such access information.*
- *An employer may request or require an employee to disclose access information to an account known to an employer to be used for business purposes.*

The law also does not prohibit an employer from accessing an electronic communications device paid for in whole or in part by the employer where the provision of or payment for the electronic communications device was conditioned on the employer's right to access such device and the employee was provided prior notice of an explicitly agreed to such conditions. However, this does not permit an employer to access any personal accounts on the device.

NLRB DECISIONS AND EXAMPLES

The Context for Social Media Restrictions Matters

When drafting and reviewing social media policies, the purpose and context of any particular restriction or prohibition will play an important role in whether the provision complies with the NLRA.

Example: Restricting Social Media Activity to Ensure Compliance with Securities Regulations

According to the NLRB, employees could construe a policy that limits employee social media activity to topics unrelated to the company as restricting them from communicating about the terms and conditions of employment.

Nevertheless, in this context, the NLRB found that employees would reasonably interpret the drugstore chain's policy to address only those communications that could implicate securities regulations.

Notes:
A national drugstore chain had a social media policy that directed its employees to confine their social media activity to matters that were unrelated to the company if necessary to ensure compliance with securities regulations and other laws. The policy further prohibited employees from using or disclosing confidential and/or proprietary information, including personal health information about customers or patients. The NLRB concluded that these restrictions were lawful.

Examples of Concerted Activity

An employer generally may not lawfully discipline employees for discussing with coworkers the terms and conditions of their employment, including compensation, benefits, hours, staffing levels, discipline, and other important aspects of the employment relationship.

Evidence that the employee(s) had brought, or intended to bring, these issues to management's attention or take other steps to advance their collective position will increase the likelihood that the NLRB will conclude that the employee(s) engaged in concerted activity. For example:

Employees who "liked" another employee's post criticizing the employer's tax withholding calculations engaged in concerted activity.

Notes:
*In a Second Circuit case, a former employee posted a Facebook status criticizing the employer's calculation of the former employee's tax withholding. A current employee "liked" the status, while another employee commented on the status. Affirming the NLRB's decision, the Second Circuit concluded that the two employees who "liked" and commented on the status engaged in protected, concerted activity. The court specifically held that merely clicking the "like" button was sufficient to fall within the protections of the NLRA and that the second employee's comment did not lose protection under the NLRA even though it contained obscenities and was viewed by the employer's customers. Thus, the court agreed with the NLRB that the employer's termination of the employees for their social media activity violated the NLRA. See Three D, LLC v. NLRB, 2015 U.S. App. LEXIS 18493, at *8-9 (2d Cir. Oct. 21, 2015). Because the Second Circuit has explicitly declined to publish this decision, it has persuasive authority, but not precedential authority. See*

P. 32.1. However, employers should still consider this case when analyzing employees' social media activity.

Employee's public livestream complaining about late wages constituted concerted activity.

An employee that worked remotely as the director of engineering for a digital advertising and marketing consulting services firm was routinely paid late, just as his coworkers were. The employee appeared in a livestream video on Facebook while a coworker with whom he was in a cohabitating relationship was present.

The employee claimed that he used the livestream to seek advice from the public about how to respond to his employer's late payment of wages, although he had not named his employer. Following the livestream, his company's CEO posted on Facebook that the employee was now available for other employment and informed the employee that he had fired himself via the livestream.

Although the CEO later claimed that the decision to terminate the employee had been made before the livestream, the ALJ found that the CEO did not terminate the employee until after he became aware of the livestream. The ALJ further concluded that the employee's livestream was concerted protected activity because it concerned working conditions, was made in concert with another employee, and addressed a concern of other employees.

Notes:
That the public was the primary audience for the livestream was irrelevant because Section 7 protects employees' use of channels outside the immediate employee-employer relationship. Blitzmetrics, Co., 2021 NLRB LEXIS 162 (N.L.R.B. April 28, 2021).

Single employee's email to chairman of board of directors complaining about working conditions engaged in concerted activity.

The NLRB also recognizes as concerted activity a single employee enlisting the support of fellow employees for their mutual aid and protection.

Notes:
A teacher at a private, not-for-profit independent day school in New Albany, Ohio spoke with fellow teachers about workplace concerns, including the teacher pay scale and the display of favoritism. Thereafter, she informed coworkers that she planned to email the chairman of the school's board of directors about the workplace concerns, and subsequently emailed the chairman. In response to the email, the chairman issued the teacher a written warning for sending the email and a corrective plan that conditioned continued employment on her refraining from such conduct. After the teacher shared the warning and corrective action plan with coworkers and board members, the head of the school withdrew the teacher's contract and terminated her

employment. The NLRB determined that the terminated teacher's email was concerted activity because it was written with, and on behalf of, other teachers. For example, the teacher had discussed the contents of the email with other teachers and had shown a draft to another teacher. The teacher was requested by other teachers to send the email, after the others told her that they were concerned about retaliation if they sent their own emails . The employer also knew or believed that the teacher was engaging in concerted activity. Marburn Academy, Inc., 368 NLRB No. 38, 10-11 (N.L.R.B. August 1, 2019).

Restaurant employees who responded to group email complaining about working conditions engaged in protected activity.

A former employee of a New York state restaurant chain who had recently resigned sent a group email to several current employees complaining about the wages, work schedules, tip policy, and treatment of workers at one of the chain locations. The email also explicitly referenced government agencies to whom the employees could complain. Four of the current employees responded to the email chain agreeing with the concerns raised by the former employee.

After reviewing the email chain, restaurant management terminated the four employees because the emails were "extremely insulting," "deeply insubordinate," and because they contained vulgar language. After the now-former employees filed NLRB charges, an ALJ and then a unanimous NLRB concluded that the terminations violated the NLRA because the employees' activity was clearly concerted (that is, the email chain was among a group of employees purporting to act on behalf of each other in raising complaints). In addition, there was no disruption to the business, and the limited profanity in the email chain was not so egregious as to lose the protection of the NLRA. See Mexican Radio Corp., 2018 NLRB LEXIS 155, 366 NLRB No. 65 (April 20, 2018).

Employee who made a Facebook post encouraging his coworker to take the employer to court engaged in concerted activity because the post was of mutual concern to coworkers and related to working conditions.

In another case, an EMT posted on a former coworker's Facebook page that he should "think about getting a lawyer and taking [the employer] to court" and "contact the labor board too." The EMT made these remarks in response to a different employee's post about getting fired for commenting on the condition of the company's vehicles to a patient.

The ALJ held that, viewed in its context, the EMT's posts were protected concerted activity because vehicle condition implicated working conditions and was a matter of mutual concern. The ALJ rejected the employer's argument that the employee's Facebook posts lost the NLRA's protection because they were accessible to customers or other third parties, noting the NLRB's long-standing position that concerted activity does not lose its protection just because it may

have an adverse effect on a company's business. See Butler Med. Transp., LLC , 365 NLRB No. 112, 1 (N.L.R.B. July 27, 2017).

Employee who posted that her supervisor was responsible for a negative work environment in response to coworkers' posts about the work environment engaged in concerted activity.

Another example of concerted activity involved an employee making negative comments about a supervisor on Facebook. The employee—responding to coworkers' Facebook conversation about drama in the workplace and another coworker's discipline—posted that she hated the employer and couldn't wait to get out of there. She also blamed the operations manager for much of the drama and for the poor work environment. These statements followed previous workplace conversations and employee complaints to management about the operations manager's negative attitude and supervision. Although the post was phrased in terms of the employee's own dissatisfaction with the operations manager and the employer's operation generally, the NLRB found that the employee's Facebook post amounted to concerted activity.

The employee shared her views as part of an ongoing conversation with coworkers relating to the terms and conditions of employment, including the discipline of another employee, inadequate supplies, and work scheduling. See NLRB, Report of the Acting General Counsel Concerning Social Media Cases, 2012 NLRB OM Memo LEXIS 287, at 22-25 (Jan. 24, 2012).

Examples of Non-concerted Activity

By contrast, the NLRB will not consider social media activity to be concerted when it does not involve coworkers but merely reflects personal gripes. Thus, an employer can terminate or discipline an employee for such activity without violating the NLRA. For example:

Employee who posted that he wished the employers' customers would choke and that the customers were rednecks did not engage in concerted activity. A bartender who engaged in a Facebook conversation with a relative, in which he complained about his employer's tipping policy, commented that the employer's customers were "rednecks," and wished that the bar's patrons choked on glass as they drove home drunk, did not engage in concerted activity.

No coworkers participated in the Facebook conversation and the bartender's posts did not continue any conversation with coworkers about the terms and conditions of employment. See JT Porch Saloon & Eatery, Ltd., 2011 NLRB GCM LEXIS 24 (Aug. 18, 2011); see also NLRB, Report of the Acting General Counsel Concerning Social Media Cases, Memorandum OM 11-74—2011 NLRB OM Memo LEXIS 385, at *28–30 (Aug. 18, 2011).

Employee's personal gripe about manager without attempt to initiate group action did not constitute concerted protected activity. In another "personal gripe" case, the NLRB found that a

retail employee's complaint on Facebook was merely a personal gripe about a bad interaction with a manager about mispriced or misplaced items. His coworkers responded with comments of emotional support.

The NLRB emphasized that the posting did not suggest that the employee sought to initiate group action with his coworkers. Rather, he merely expressed frustration over the interaction. His coworkers also appeared to interpret the employee's post as a personal gripe; their comments did not reveal any past or future group activity regarding the employees' terms and conditions of employment. See NLRB, Report of the Acting General Counsel Concerning Social Media Cases, Memorandum OM 11-74—2011 NLRB OM Memo LEXIS 385, at *34–36 (Aug. 18, 2011).

Employers can proactively manage some of these risks by implementing a thorough social media policy in place. Without such a policy, a company risks exposure to legal, financial, and reputational harm. A company's best defense against such problems is a well-drafted and enforceable policy. Employers should be sure not to restrict employees' rights to discuss wages and other working conditions but should not allow employees to post content regarding co-workers that could be regarded as threatening, harassing, or discriminatory. Employees can also be prohibited from using company equipment and resources to post personal content or from doing so on company time.