

Social media on the job

# Guidelines to disciplining employees for their social media conduct

*Editor's note: As a result of the response from an eight-part series this summer on the use of social media in the workplace, we are continuing it as a monthly topic. These columns will appear the third week of each month in Inside Tucson Business.*

The National Labor Relations Board (NLRB), Office of the General Counsel, recently provided guidance to employers about what social media conduct employers may lawfully prohibit without running afoul of the concerted activity provisions of the National Labor Relations Act (NLRA).

The NLRA applies to most employers, not just union employers, but does not protect all employees. Certain supervisory and management level employees, as well as independent contractors, are not "employees" under the NLRA. The NLRB Social Media Report, issued Aug. 18, details the outcome of 14 NLRB cases involving social media.

The NLRB's purpose was to give employers guidance on the types of social media conduct that employers may discipline and/or fire employees for versus the conduct that is protected concerted activity.

Here is some guidance on situations employers may face:

• **May an employer fire employees who 'stir the pot'?**

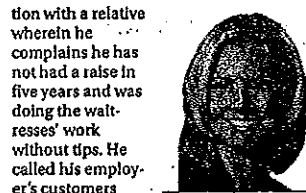
It depends. One NLRB case involved a nonprofit social services worker who, in response to criticism from an outside non-employee advocate regarding job performance and staffing levels and in preparation for a meeting with the executive director, sought comments from co-workers via Facebook. The initiator and the co-workers were all terminated.

The NLRB found the employees were engaged in "textbook" concerted activity and therefore protected. The Facebook postings directly implicated the terms and conditions of employment and were initiated in preparation for a meeting with the employer to discuss matters related to those issues and were therefore protected concerted activity for "mutual aid or protection."

• **Was it a valid rant or did the employee improperly bash the employer?**  
Compare these four examples:

1. A car salesman posted photographs of a recent car launch event on his Facebook page and remarked he was happy to see the employer had gone all out for the important event by providing small bags of chips, inexpensive cookies from a warehouse club, semifresh fruit and a hot dog cart where clients could get overcooked hot dogs and stale buns.

2. A bartender has a Facebook conversa-



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tion with a relative wherein he complains he has not had a raise in five years and was doing the waitresses' work without tips. He called his employer's customers "rednecks" and stated he hoped they choked on glass as they drove home drunk.

3. An emergency services dispatcher posted negative comments on the "wall" of one of the U.S. Senators who represented her state saying, among other things, that the only reason her employer had contracts with several fire departments was because it was the cheapest service in town and paid employees \$2 less than the national average. She went on to complain that her employer only had two trucks for an entire county and described an incident where the responding crew did not know how to perform CPR. Her employer found out about the comments and fired her.

4. An employee's supervisor asked her to prepare an incident report concerning a customer complaint about her work. The employee asked for but did not receive a union representative while she prepared

the report. Later that day, from her home computer, she posted a negative remark about the supervisor on her personal Facebook account. She received supportive responses from her coworkers which led the employee to make additional negative comments about the supervisor. She was suspended for violating her employer's internet policies.

Example 1 was a valid rant. It turns out the employee's complaints were an outgrowth of his discussions with other employees about their displeasure with the quality of the event and potential impact on their commissions, a term and condition of employment. The employees had voiced their concerns with the quality of the event during the staff meeting announcing the event. They again discussed their concerns among themselves after the staff meeting and during and after the event. The fired employee had told the others he would post the photographs on Facebook. Thus, the photographs and comments were a direct outgrowth of the discussion among the salespeople that followed the meeting with management and were therefore protected concerted activity. The employee's actions regarding the sales event were protected. This case highlights the need for employers to investigate the matter before taking disciplinary action to determine if concert-

ed activity is involved.

In example 2, the employer permissibly fired the employee. Although the employee was discussing his pay, a term and condition of employment, there was no evidence of concerted activity. The employee only discussed the issue with his family, not any coworkers, and there was no employee meeting or attempt to initiate group action.

Example 3 was also a permissible firing. The employee's comments referenced the terms and conditions of her employment but she was not engaged in concerted activity. She had not discussed the postings with any other employee, including her spouse who was employed by the same company. She admitted she was not trying to take her complaints to management and did not expect the senator to help her situation. Her purpose was to make a public official aware of the condition of emergency medical services in her state, and that her employer's kind of company was not helping the situation.

Example 4 was a valid rant. The employee was engaged in protected activity (requesting a union representative) and was discussing supervisory actions with coworkers in her Facebook post. The NLRB said "(i)t is well established that the protest of supervisory actions is protected conduct" and therefore the firing ran afoul of the NLRA. In contrast, the NLRB held that an employee who protested his supervisor's action against him by calling him a "super mega puta" on Facebook was expressing an individual gripe and was not protected. Although he drew supportive comments from other employees, there was no indication he sought to initiate group action.

The bottom line is if covered employees are discussing, posting or tweeting about the terms and conditions of their employment, then employers should use caution and determine if the employees are engaged in protected concerted activity before taking action.

Employers can help protect themselves through a carefully crafted social media policy which sets reasonable and permissible expectations about online conduct. The NLRB Report offers examples of overly broad social media policies that violate the NLRA and offers guidance on permissible terms which will be discussed in a subsequent article.

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