

Ask the Lawyer: Observing, Establishing Social Media Polices

By Mathew B. Tully

Question:

Can I bar my employees from saying anything bad about my business on Facebook?

Answer:

For better or for worse, social media websites such as Facebook and Twitter connect people. Opinions can be shared in an instant and with wide audiences. Some posts are positive, while others are negative. As much as business owners would like to eliminate all negative comments from the web — and the employees who post them — there are times when employers cannot pursue such actions. That is not to say employers are powerless in preventing employees from saying disparaging or derogatory things about them online.

Currently, employers can establish workplace policies designed to preserve and protect their online reputation, but only insofar as they do not infringe on employees' rights. For example, an employer cannot prevent employees from engaging in concerted activities protected by the National Labor Relations Act (NLRA). Section 7 of the NLRA provides employees with the right to self-organize and to form, join, or assist labor organizations. Further, employees have a right to “engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.”

Under Section 8 of the NLRA, it is deemed an unfair labor practice for employers “to interfere with, restrain, or coerce” employees from engaging in these protected concerted activities. This is where employers reacting to or attempting to limit employees' online activities commonly break the law. Earlier this year the acting general counsel for the National Labor Relations Board (NLRB), which enforces the NLRA, issued a report detailing recent case decisions on workers' use of social media.

As the report notes, the NLRB has defined protected concerted activity as an activity in which the employee “acts with or on the authority of other employees, and not solely by and on behalf of the employee himself.” Therefore, employers may not be able to stop employees from communicating with other employees via Facebook if they are discussing the terms and conditions of their employment.

As a specific example, the NLRB's report revealed a nonprofit social services provider wrongfully terminated five employees for their Facebook posts relating to a complaint about inadequate services. The NLRB said this was a “textbook” case because it involved one co-worker appealing to others for assistance on a job performance and staffing issue.

It is a different story, the NLRB noted, if an employee posts negative comments about an

employer in an appeal or in response to people who are not co-workers. That was the case of a bartender who complained to a relative on Facebook about his wages and spoke poorly about customers, according to the report.

Employers interested in establishing social media policies or who want to understand the delicate process of disciplining employees who post negative comments about their company online should consult with an experienced labor and employment law attorney.

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