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Our employees can do what?...and that's legal?: Navigating the legal landmines of the NLRA.

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Goals And Purpose Of This Training

- HAVE FUN!!!!
- Make sure everyone understands Section 7 rights

- To discuss positive management:
  - Signs
  - Indicators
  - How to keep things positive

Protected Concerted Activity

Employee Rights

Under the National Labor Relations Act

What is Section 7???

Section 7 Of The NLRA

"Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other **concerted activities** for the purpose of collective bargaining or other mutual aid or protection."

- We will focus on the "concerted activities" portion of Section 7.

What is Protected Concerted Activity?

- **Protected concerted activity**: Typically, two or more employees acting together to attempt to improve their terms and conditions of employment (i.e. wages, hours, working conditions).
- Employees are protected by the NLRA against retaliation for concertedly discussing or complaining about terms and conditions of employment.
- Section 7 of the NLRA covers protected concerted activity by employees only.
- Applies equally to unionized and union-free workplaces.
- Applies in the workplace and on-line.
- Further, the Board takes the position that company rules that appear on their face or that employees would reasonably construe to prohibit Section 7 activity, are unlawful.

How Do We Know Whether An Employee Has Engaged In PCA?

- In determining whether employee activity is entitled to the protections of Section 7, the Board looks at the following:
  - Whether the activity is “concerted”;
  - Whether the activity is “for **mutual** aid or protection”;
  - Whether the activity is protected or has lost the protection of Section 7 by reasons of (1) its means or (2) its objectives.

Who are we talking about?

- <u>Who can engage in protected concerted activities “PCA”?</u>
- 2(11) Supervisors?
  - NO!!!!
- One Single Employee?
  - Maybe?
    - The Board has said that certain topics are inherently “concerted”
    - even if only engaged in by one single employee.
- At least two or more employees or one employee acting at the request of an on behalf of others.

What Is Protected … Examples

- Employee alone, complains about dangerous working conditions?
- Jointly complaining with others about working conditions?
- Lawsuits related to working conditions?
- Speaking with the news media about the Company?
- Employee alone complains about her raise or bonus?

Protected Concerted Activity

- In Greater Omaha Packing Co., Inc., 360 NLRB No. 62 (Mar. 12, 2014), the Board held an employer **violated** the Act by terminating three non-union employees who were **planning a strike**.

- The Board found the employees' plan to walk off the job to protest working conditions qualified as protected concerted activity.

Protected Concerted Activity

- In Fresh & Easy Neighborhood Market, 361 NLRB No. 12 (Aug. 11, 2014), the Board held an employee engaged in protected concerted activity when she solicited coworkers to **sign a sexual harassment complaint** she intended to file with the Employer.
- Even though the employee raised a personal complaint and not one shared by her coworkers, the concerted nature of her conduct was not dependent on shared objectives or an agreement with coworkers. Rather, an employee may act partly from selfish motivations and still be engaged in concerted activity if she seeks to initiate, induce or prepare for group action, or brings a group complaint to the attention of management, even if she is the only immediate beneficiary of the action.

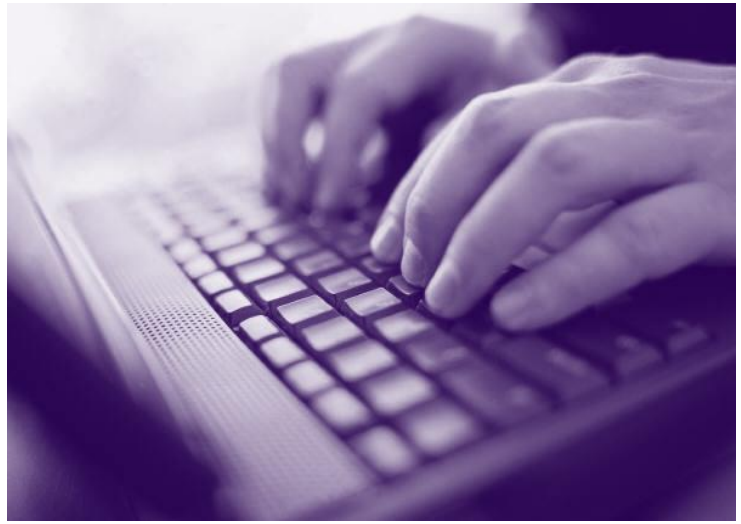
Employee Conduct Rules

- Employees have a Section 7 right to **criticize** or **protest** an employer's policies or treatment of employees
  - Rules that prohibit protected concerted criticism of the employer will be found unlawfully overbroad
  - Rules that prohibit employees from engaging in **disrespectful**, negative, inappropriate, or **rude** behavior toward employees or management, absent sufficient clarification or context, will be found unlawful
- Rules that prohibit **insubordinate** conduct will **not** be construed as limiting protected activities

Employee Use Of Company Email

What about Employees' use of **Company email** to engage in Section 7 activities?

Employee Use Of Company Email

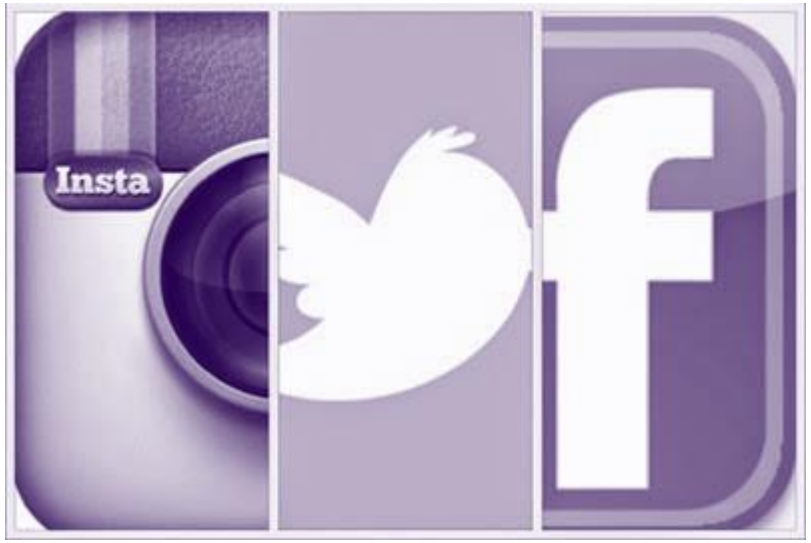


- Current NLRB Rule:
  - Absent special circumstances to justify a total ban or limits on use, employees may use e-mail system in exercising right to discussion/join union on non-work time
- Employers May:
  - Monitor for legitimate reasons, such as
    - Ensuring productivity
    - Preventing harassment or other activities giving rise to employer liability
  - Tell employees they have no expectation of privacy
- Decision Not Applicable to:
  - Other types of communication systems (telephones)
  - Non-employees
  - Employees not granted access to email system
  - Working time communication

Source: Purple Communication Inc. (12/11/14)

Please Don’t Touch My Twitter

How the NLRB views Social Media and Savvy Approaches to Stay Compliant



Social Media & Concerted Activity

NLRB extends protection of concerted activity to social media.

Board is and has been reviewing cases involving all forms of social media and electronic communication.

Issues Arising In Social Media

- Overbroad policies
- Discipline for posted comments
- Surveillance
- Other Forms of Discrimination

Social Media Policies

- An electronic communications or social media policy that prohibits an employee from (for example) *criticizing or disparaging or making false or offensive or injurious* statements about his/her employer or supervisor electronically, including on Facebook or Twitter or on a message board, etc. likely **is illegal**.
- An electronic communications or social media policy that prohibits an employee from making *malicious or slanderous or defamatory* statements about the company or anyone working for the company likely **is legal**.

Knowing The Context Is Critical

- Conduct which appears inappropriate and would seem a proper basis for discipline may, in fact, be protected
- Employees are permitted some leeway for impulsive behavior when engaging in protected activity
- Protections can extend to individual employees, e.g., when an employee speaks individually to his or her employer on his or her own behalf and on behalf of one or more co-workers about improving working conditions as a prelude to bringing some kind of group action in opposition to working conditions or directed at working conditions

The Costco Decision

- The NLRB issued its first social media policy decision on Sept. 7, 2012 in Costco Wholesale Corp., 358 NLRB No. 106 (2012).
- Finding: Costco policy which prohibited Costco employees from making statements on social media that could damage the company or other employees' reputations was unlawful.

The Knauz Decision

- In Knauz BMW, 358 NLRB. No. 164 (Sept. 28, 2012), a sales employee for a car dealership complained on his Facebook page about the poor choice of food (hot dogs and bottled water) the employer chose at a sales event.
- The Board finds no violation where employee is fired based on social media post that was irrelevant to his working conditions.

Triple Play Sports Bar & Grill

- In Triple Play Sports Bar & Grille, 361 NLRB No. 31 (Aug. 22, 2014), a former employee updated her Facebook page to read: "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 money…[expletive deleted]!!!!"
  - Several individuals commented on her post, including two customers and several current employees. One current employee called a co-worker allegedly responsible for the tax paperwork issue an "a#$hole" and another current employee hit the "Like" option under the initial status update. Both current employees were terminated.
  - The Board found that "liking" the status update was an "expression of approval" and therefore concerted activity. The comments were not "disloyal enough" to lose protection under the Act.

Recommendations For Employer Consideration

- Prohibit vulgar, obscene and defamatory language, *but not* disparaging, derogatory, negative, or unfavorable language.
- Avoid vague or unidentified terms within policies, as any ambiguities will be construed against the employer.
- Do not require “respectful” posts unless you use examples or narrowing language.
- Include specific examples of prohibited conduct in a policy, so employees will be less likely to construe the policy as prohibiting or limiting concerted activity.
- Consider including a statement that the policy does not limit employees from lawfully discussing the terms and conditions of their employment. It won’t save a facially invalid policy, but it may help in a close case.

The Four Step Inquiry For Analyzing Online Posts

Does the posting seek to initiate, induce or prepare for group action?

Does the posting reference conversations with co-workers that occurred before the postings were made so that the posting is a logical outgrowth of the conversations?

Does the posting seek to bring group complaints to the attention of others?

Is the posting so outrageous, disloyal or disparaging of the Company's product or service so as to lose the protection of the Act?

Camera Phones

- Employee photographing and videotaping is protected activity (e.g. documenting unsafe workplace equipment, working conditions, inconsistent application of rules)
- Policy that said: “camera phones may not be used to take photos on property without permission from leadership” was unlawfully overbroad
- Employer did not tie/link it to any particularized interest (privacy of customers)

Source: Caesars Entertainment (8/27/15)

WHOLE FOODS and rules on recordings

In 2015, the issue before the Board was whether or not Whole Foods had violated the NLRA by maintaining rules in its Handbook that **prohibited recording in the workplace without prior management approval.**

The Board found (overturning the ALJ) that the rule might be construed by employees as prohibiting protected activities.

The Board said there was no overriding employer interest in prohibiting all recordings.

The Board found examples where photography or recording, often covert, were essential in protecting and vindicating employees in exercising Section 7 rights.

In June of 2017, The U.S. District Court for the Second Circuit, affirmed the Board's decision.

The court found that a prohibition on all recording had a "chilling" effect on the exercise of the employee's Section 7 rights.

The court said the policy was overboard because it included recording of activities that were protected as well as activities that might not be.

Confidentiality Rules In Investigations

- Blanket confidentiality instructions are found to be a violation of the NLRA. Banner Health System d/b/a Banner Estrella Medical Center, 358 NLRB No. 93. (2012).
- Six Exceptions:
  1. Protect a witness.
  2. Prevent fabrication of testimony.
  3. Prevent release of confidential, private information.
  4. Prevent a cover-up.
  5. Prevent destruction of evidence.
  6. Must rationalize your need for confidentiality on a case-by-case basis.

Confidentiality Rules

Employees have a Section 7 right to discuss **wages**, **hours**, and other **terms and conditions** of employment with fellow employees (or non-employees)

- An employer's **confidentiality** policy may protect proprietary information from competitors, but must be **narrowly tailored** so as not to restrict employees from discussing their terms and conditions of employment
- Confidentiality rules that broadly encompass "employee" or "personnel" information, without further clarification, will reasonably be construed to restrict Section 7 protected communications

Scenario 1

- During a very complicated and complex sexual harassment investigation, your manager of Human Resources instructs all interviewees, including the accused, to “not discuss the investigation with co-workers.” It is reported that the accused is speaking with numerous individuals about the investigation.
- He is terminated.

Discipline And Investigation Policies

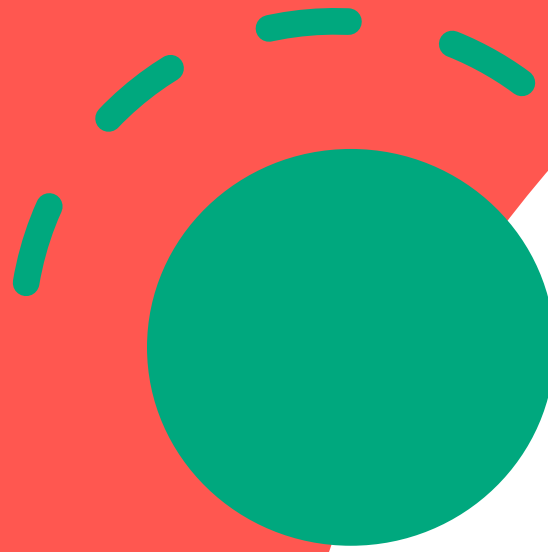
- In Banner Health System, 358 NLRB No. 93 (July 30, 2012), the Board held the employer's maintenance and application of a rule prohibiting employees from discussing internal complaints that were under investigation was unlawful.
- Employer's "generalized concern" regarding the need to protect the integrity of its investigation was insufficient against Section 7 rights.
- NLRB Division of Advice Memo (Verso Paper, January 2013) found **an employer has a compelling interest in protecting the integrity of an investigation if there is a need to protect witnesses from harassment, intimidation and retaliation, to keep evidence from being destroyed, and to ensure testimony is not fabricated.**

Scenario 2

- Three workers complained to the Human Resources Department about a coworker using profanity, discussing her sexual experiences in the workplace and bullying other employees. You, the HR Rep/Manager, immediately commence an investigation. While the investigation is ongoing, the employee sends a group email on behalf of herself and three other employees about their concerns over your employee annual evaluation process. The next day, your manager of Human Resource meets with the employee who admitted to discussing her personal sexual experiences. She is terminated.

Protected Concerted Activity vs. Inappropriate Conduct

- In holding that the termination violated the Act, the NLRB found the employer would not have suspended and discharged the employee in the absence of her protected activity (sending the group e-mail), particularly where evidence showed that offensive language was a part of the culture in the workplace. Inova Health System, 360 NLRB No. 135 (June 30, 2014).



Questions?

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Thank you.