New Risks to Employers That Design and Enforce Social Media Policies

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In several recent cases this year, the National Labor Relations Board has issued complaints against employers that have disciplined or fired employees for using Social Media, like Facebook and Twitter, to complain about their workplaces, according to Thomas Lenz, the head of the Traditional Labor Practice at Atkinson, Andelson, Loya, Ruud & Romo in Cerritos, California.

In August 2011, the National Labor Relations Board released a report from the Acting General Counsel providing examples of cases involving employers' Social Media policies. The cases involved employees who faced repercussions such as dismissal for their Social Media activity. The cases focused on whether the employee activity was legally protected and whether the employers acted lawfully in the face of such employee activity.

The NLRB took the view that some employee activity, like Facebook postings about workplace issues, have legal protection and that employer reactions, such as discharge, are unlawful. The NLRB also took the view in other cases that some employee Social Media activity did not involve the workplace and therefore lacked legal protection. As a result, employer action against such activity does not violate the National Labor Relations Act.

That should surprise some employers as traditional employment law rules allow companies to implement and enforce Social Media policies in the workplace, particularly as they strive to protect trade secrets and privacy, and limit harassment and discrimination. Yet they are now facing legal scrutiny from a federal agency, the NLRB. This new trend adds complexity to those traditional rules and in some cases actually conflicts with them, according to Lenz, who formerly practiced with the

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National Labor Relations Board in Los Angeles.

"By asserting that negative comments posted on Facebook and other online Social Media tools can be considered protected concerted activity under traditional labor rules, the National Labor Relations Board has thrown a monkey wrench into what most employers thought were well-established rules," Lenz said. "As a result of this confusion, employers are frequently asking us if and how they can construct and enforce Social Media policies in the workplace. The repercussions for not following the NLRB's new approach to Social Media can be costly and severe. "Labor law allows employees, whether unionized or not, to discuss the terms and conditions of their employment with co-workers and others, Lenz explained. But now it appears that posting negative comments about co-workers, employers and management on Social Media tools like Facebook and Twitter may be protected speech as well. This could conflict directly with policies on insubordination and computer use, which allow employers to discipline or release employees who disparage their employers, managers or co-workers.

"This development seems to go far beyond historic protections of union organizing and into a world where employees can say many things, however damaging and disruptive, about their employers online," Lenz said. "Employers are concerned that this will create a free-for-all for employees in which any sense of online decorum and professionalism can no longer be enforced."

The issue came to a head in February when the National Labor Relations Board settled a complaint with an employer that had fired an employee for posting negative comments about a co-worker. Under the settlement, the company agreed to change its employment policy to allow this "protected" speech. Similar cases were brought this year against a Chicago auto dealership, a Buffalo, New York nonprofit and a Chico, California-based online retailer. In each case, the board alleged that those employers had unlawfully fired employees for complaints they had made about their employees on Facebook. In September 2011, the Board ruled that the Buffalo nonprofit acted unlawfully in terminating employees for activity on Social Media."

"We are still waiting for a test case from the appellate courts to see whether this trend will stick or whether it will be considered overreaching by the Board," Lenz said. "Of course, courts have mostly been siding with the Board in similar cases, including one remarkable decision earlier this year that said that allegedly threatening speech in the workplace could also be considered protected concerted activity. Employers are rightly concerned that such decisions will erode well-reasoned workplace policies and foster hostile environments."

Lenz has been following these developments closely and is advising clients on how to comply with the law as it evolves.