



Labor and Employment Law Alert

The Aftermath of the “Facebook Firing” Don’t Throw Out Your Social Media Policy...At Least Not Yet!

By Matthew J. Durket and Rebecca A. Dietzen

On November 2, 2010, the National Labor Relations Board (the “NLRB”) announced that its regional office had filed a complaint against an employer (American Medical Response of Connecticut, Inc.), alleging that the employer had violated the National Labor Relations Act (“NLRA”) by terminating an employee for posting negative comments about her supervisor on her Facebook page. While the announcement made for sensational headlines and put fear in the heart of many an employer, a closer look at the facts surrounding the “Facebook Firing” demonstrate that NLRB’s actions were not as severe, or as significant, as many initially thought. And while the NLRB announced on February 7, 2011 that it had settled the complaint against AMR, prior to a hearing or a formal ruling on the complaint, the incident nonetheless provides employers with an opportunity to thoughtfully review their own social media policies.

This article will review the facts of the “Facebook Firing,” briefly touch on the applicability of the NLRA to other employers and provide suggestions for your social media policy.

The “Facebook Firing”

The AMR case focused on comments posted on the Facebook page of an employee and union member, Dawnmarie Souza (“Souza”). Souza, a medical technician, was reportedly denied access to a union representative after her supervisor asked her to prepare a report regarding a customer’s complaint about Souza’s job performance. Later that day, Souza, via her Facebook page and her personal computer, posted negative and derogatory comments about her supervisor. Several of Souza’s union coworkers responded to Souza’s comments offering support for her and joining in the criticism of the supervisor. Souza was thereafter fired. AMR cited Souza’s “rude and unprofessional conduct” as the chief reason her employment was terminated and cited two complaints, within ten days of each other, from patients and hospital staff as other examples of the employee’s inappropriate conduct.

AMR’s social media policy prohibits employees from disparaging the company and its supervisors in social media posts, even when using their personal computers on their own time. Specifically, AMR’s policy provides:

“Employees are prohibited from making disparaging, discriminatory or defamatory comments when discussing the Company or the employee’s superiors, co-workers and/or competitors.” But, unlike many employers, AMR’s policy apparently did not include a statement that the policy would not be construed or applied in a manner to interfere with union employee rights under the NLRA. The NLRB seized on AMR’s action and its “overly broad” social media policy as potentially interfering with an employee’s right, under Section 7 of the NLRA, to engage in “concerted activities for the purpose of collective bargaining...”

Does the “Facebook Firing” Affect My Company?

Many employers may wonder what effect the NLRB complaint has on them and the answer is simple -- it depends.

The NLRA guarantees the right of employees to organize and bargain collectively with their employers and to *engage in other protected concerted activity*. It prohibits employers from interfering with, restraining or coercing employees who exercise those rights. “Concerted activity” requires some cooperative effort of two or more employees. Protected concerted activity usually involves union activity or activities related to collective bargaining, but can be broadly interpreted to include anytime when employees act together for their mutual aid or protection with respect to their wages, benefits, or working conditions. This broad standard means that nearly every employer may be affected by the NLRA in these situations. However, the NLRB has limited the assertion of its discretionary powers to those cases that, under its adopted guidelines, have a substantial effect on commerce.

Based on the foregoing, it is important for Employers to analyze whether the employee conduct, which is the subject of the employer’s actions, is a protected right under the NLRA. Section 7 of the NLRA identifies four broad categories of employee rights:

1. The right to *self-organization*;

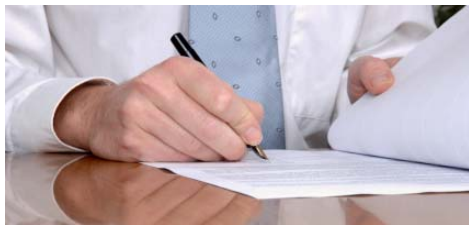
2. The right to *bargain collectively*;
3. The right to *engage in other concerted activity* for the purpose of collective bargaining or other mutual aid or protection; and,
4. The right to *not engage in the rights* enumerated in 1, 2, and 3.

While we do not have a definitive decision from the NLRB on the “Facebook Firing”, we know the Board’s primary concerns. Specifically, the NLRB viewed the company’s termination of the employee as interfering with the employee’s rights to engage in a protected and concerted activity—in this situation, the alleged concerted activity was engaging in an interactive forum through her Facebook post and her co-workers subsequent comments. We also know that the NLRB considered the company’s general social media policy against defaming and disparaging the company, supervisors and/or co-workers to be overbroad as it relates to protected concerted activities.

The “Facebook Firing” arose in a very fact specific union context and does not wholesale preclude employers from restricting social media use or using social media as a tool to monitor, and in appropriate situations, reprimand employee conduct. The law recognizes that employers may legitimately restrict employee’s use of social media sites under certain circumstances. Accordingly, it remains vital that every employer adopt a meaningful social media policy or review their existing policy to make sure that it is appropriate for the employer’s particular situation.

What Should Your Social Media Policy Contain?

Facebook, and social media in general, have not changed the law. Instead, social media has simply provided a bigger stage upon which employees and employers can broadcast their transgressions and mistakes. As a result, your social media policy should provide guidance to employees in order to protect the interests of your Company, your employees, and third parties. This is not



an issue of “free speech.” In fact, it has long been established that employers have a right to dictate how employees represent the

company in public, including on the internet, regardless of whether the speech is on the employee’s free time. After all, the Company may be held liable for things its employees say or do regardless of whether the actions or statements were “on the clock.”

Accordingly, the following are some of the basic provisions that should be in every social media policy:

1. **Exercise Common Sense and Respect Others.** Consider the consequences of what you write before you post because the internet never forgets. Do not post negative or disparaging comments about the Company, co-workers, customers or competitors. You may be disciplined or held legally liable for any actions that are unlawful or for information posted that may be defamatory, proprietary, confidential, or harassing. A good rule of thumb is to consider whether you would feel comfortable making the same statement to someone’s face or in the Company break room.
2. **Social Media Sites Should Not Be Considered Private.** Even where you are using certain privacy settings, you should expect that what you say and write will be available for public viewing.
3. **Company Policies Still Apply/Monitoring.** Rules against harassment and inappropriate conduct as set forth in the Company Handbook apply to your online activities. We may monitor employee social media communications or employee’s computer usage to ensure compliance with Company policies.
4. **Make Appropriate Distinctions Between You and the Company.** Use your own email address to identify yourself so that no confusion is made regarding to whom the statement is attributed. You should always make clear that you are speaking on behalf of yourself and not on behalf of the Company.
5. **Stay Productive.** There are many benefits of social media. Your social media participation should be meaningful for you both personally and professionally while not interfering with your work obligations.

Ultimately, a social media policy should be tailored to the specific needs and uses of each employer. As such, the above list is not intended to be an exhaustive list. And, notably, employers should consider the need to include a statement that its social media policy is not intended to interfere with employees’ rights under the NLRA. Every employer should take the “Facebook Firing” as an opportunity to evaluate its own social media policy to determine whether it is fully and appropriately addressing the employer’s social media needs and obligations.

Murphy Austin Adams Schoenfeld LLP, a premier law firm in the Sacramento region, is committed to client service and professional excellence. We value our long-standing relationships with our many exceptional clients as the highest form of professional compliment.

Please be assured that we make every effort to make certain that the information contained in this article is current at the time the article was prepared. Because laws and legislation are constantly changing, please contact us if you are unsure whether this material is still current. Nothing contained herein is meant to be legal advice. Please contact us to answer any questions you may have.