Employers Must Be Careful Using Non-Disparagement Clauses to Discourage Employees' Negative Online and Social Media Posts

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In recent years, there has been backlash against non-disparagement clauses pertaining to online reviews, specifically those attempting to restrict honest—albeit negative—feedback about companies. In fact, California passed a law in August 2014 prohibiting anti-negative review policies, while the Federal Trade Commission filed its first ever lawsuit over similar non-disparagement clauses last September.

Beyond potentially restricting the speech of customers, businesses must also be careful about non-disparagement clauses relating to employees, such as those incorporated in employee handbooks or other agreements.

Contracts and policies prohibiting or limiting workers from speaking about their employment, such as sharing information about wages—including on social media or other websites, such as Glassdoor—have drawn greater scrutiny from the National Labor Relations Board (NLRB) in recent years.

In fact, in early 2013, an administrative law judge (ALJ) found that non-disparagement provisions incorporated in Quicken Loans, Inc. employment agreements (as well as Quicken Loans' confidentiality clause) violated Section 8(a)(1) of the National Labor Relations Act (NLRA) by restricting employees' rights under Section 7 of the NLRA.

Under Section 7, employees have the right to choose to engage in "concerted activities for the purpose of collective bargaining or other mutual aid or protection," such as discussing wages, benefits and other terms and conditions of work with other employees. Section 8(a)(1) restricts employers from interfering with employees attempting to exercise their Section 7 rights.

In the aforementioned action, a former Quicken Loans employee alleged that her rights had been violated by both "overly broad and discriminatory rules in [Quicken Loans'] Mortgage Banker Employment Agreement." Specifically, the non-disparagement provision, which required employees to refrain from publicly "cricitiz[ing], ridicule[ing],

disparage[ing] or defam[ing]" the company, arguably interfered with her (and other employees') rights under Section 7 of the NLRA.

Judge Joel P. Biblowitz agreed, finding that Quicken Loans' rules, including the non-disparagement provision, could reasonably have been read as restricting the Quicken Loans employees' rights to engage in protected activities. In the opinion—which was affirmed later that year by an NLRB judge—Judge Biblowitz noted that "[t]he line between lawful and unlawful restrictions is very thin and often difficult to discern."

Nonetheless, the ALJ, considered the non-disparagement provision to be void and ordered Quicken Loans to stop incorporating it and other overly broad rules into its employment agreements, so as to avoid interfering with employees' rights.

This Quicken Loans decision and others similarly decided do not prohibit employers from ever incorporating non-disparagement provisions into employment agreements, nor is employee speech always protected and immune from consequences. However, these rulings should caution businesses—who have or are considering implementing non-disparagement clauses—from maintaining or drafting potentially overbroad language in employer/employee documents.

Thus, businesses considering non-disparagement clauses should consult with experienced labor and employment counsel before incorporating potentially impermissible language. And all other businesses, which have such provisions already, should consider conferring with attorneys to review their existing forms and documents to ensure legal compliance.

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