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Client Alert: Privacy Issues for Employers: NLRB Aggressively Pursuing Social Media Policies and Terminations

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For most of its existence, the National Labor Relations Board (NLRB) has focused on fairly traditional issues related to unionization and other efforts by employees to collectively address the terms and conditions of their employment. But as union membership has fallen, the NLRB has increasingly turned its attention to issues only tangentially related to its core mission. One of the areas the board seems more interested in pursuing relates to employee use of – and employer policies concerning – social media. Over the last several years the agency has reversed the terminations of employees fired for offensive online comments, upheld other seemingly similar terminations, and cast a thumbs up or thumbs down on various employers' social media policies, while its general counsel has issued a series of reports attempting – with only limited success – to articulate the board's position on the nuances of these issues. Amidst all the confusion, a recent case illustrates the board's current approach and gives employers some guidance for avoiding unnecessary entanglements.

In August of this year, the NLRB struck down portions of a social media policy of restaurant chain Chipotle. Chipotle's policy prohibited employees from posting "incomplete, confidential, or inaccurate information" online and from making "disparaging, false, or misleading statements." While some secrets are indeed meant for keeping – and while employers are required by law to maintain the confidentiality of certain sensitive information about their employees - , the board nevertheless found that a ban on spreading "confidential" information would be an unlawful restriction of employee's' rights under Section 7 of the National Labor Relations Act.

Section 7 gives workers the right to engage in "concerted activities for the purpose of collective bargaining or other mutual aid or protection." Because pursuit of those activities necessarily requires sharing of some types of employee information, Section 7 also prohibits employers from trying to prohibit their employees from talking about their working conditions and those of their co-workers, all of which may fall under the definition of "protected concerted activity" (including union organizing). The scope of the law is, by design, very broad.

Consequently, whether the employer is unionized or not, much of its workforce is likely to be protected by Section 7.

In the Chipotle case, the board found that a social media policy may be impermissibly broad under Section 7 in any of three scenarios:

- Employees would reasonably construe the policy's language to prohibit activity protected by Section 7;
- The policy was issued in response to union activity; or
- The policy was applied for the purpose of restricting the exercise of employees' Section 7 rights.

Because "confidential information" *might* be interpreted by employees to include information about their own wages or that of their co-workers -- information likely to be relevant in a unionization effort – the Chipotle policy was found to be, in effect, a prior restraint on their ability to share protected information and therefore a violation of the Act. Similarly, the policy's prohibition on "disparaging" statements could *conceivably* be a ban on any negative comments about the employer, which would also likely be problematic in any effort to form or administer a union. Consequently, the board stuck down both of those provisions.

In addition to looking very closely at social media policies in the abstract, on numerous occasions the board has also examined cases in which employers applied those policies to terminate employees for various kinds of online communications on Twitter, Facebook, and similar platforms. As is the case with its policy analysis, the Board's approach to these cases has been somewhat inconsistent but generally focused on protecting employees who post comments about issues such as company policies, wages, benefits, and similar matters of potentially collective concern. The primary issue in these cases is not when or where the communication took place, and whether the employee was on or off the clock when it was made, but rather the specific content of the communication and the degree to which it is an individual complaint vs. an expression of collective concern. The closer it is to constituting or facilitating "concerted activity" the more likely it is to be protected by the NLRB.

Employers attempting to steer clear of the NLRB's activism on social media policies should carefully review their existing social media policies to determine both whether they are really serving the company's own policy objectives and whether they are consistent with the NLRB's aggressive approach to social media polices, and then carefully consider whether disciplinary action should be taken against employees who violate those polices. For questions on these and other workplace privacy matters, contact Jackie Ford or your Vorys attorney.