HR CORNER

FEES & BURGESS, P.C.

Volume 8, Issue 7

October 2012

Employees Using Social Media to Discuss Conditions in the Workplace: Concerns for Union and Non-Union Shops

Congress enacted the National Labor Relations Act (NLRA) in 1935 in an effort to protect the right of employees to organize, to encourage collective bargaining, and to curtail certain management practices in private industry that were considered detrimental to the general welfare of workers and the U.S. economy. Many private-sector employers that do not operate union shops largely ignore the NLRA and incorrectly assume its provisions to do apply to them. In the last few years, with the increased use of social media by employees to voice their concerns and complaints about conditions at work, there is a greater need than ever for all employers to understand the restrictions placed on them under the NLRA.

Section 7 of the NLRA protects employees who engage in "concerted activity" for their "mutual air or protection." In order for concerted activity to be protected, it has to be engaged in by two or more employees. One employee voicing his or her complaints or concerns about management or working conditions, whether to non-employees or even directly to management, is not protected concerted activity. It is an unfair labor practice under Section 8 of the NLRA for an employer to interfere with, restrain, or coerce employees in the exercise of the right to engage in protected concerted activity. This rule applies to all employers, regardless of the number of people they employ and regardless of whether the company has an existing union presence.

Social media, things like Facebook, Twitter, YouTube, blogs, podcasts, and instant messaging, among others, presents forums for employees to express their opinions regarding management and working conditions with one another, in or outside of the office, at any time, with ease. For employers, social media presents a greater risk of negative comments about the employer being circulated in places where larger groups of people can hear or read them. In response, a number of employers have adopted social media policies for their companies that prohibit using social media in certain ways, including using social media to make disparaging comments about the employer or other employees. Several employers, in enforcing such policies, or acting without a policy, have disciplined employees upon learning that those employees were using social media to transmit negative comments about the employer, the employees' co-workers, or working conditions at the company. While it is understandable that an employer would want to prevent this kind of activity, adopting social media policies or taking disciplinary action against employees for their use of social media to collectively criticize conditions in the workplace, without considering the limitations put in place by the NLRA, can give rise to administrative actions claiming that the employer engaged in an unfair labor practice.

Employees Using Social Media to Discuss Conditions in the Workplace: Concerns for Union and Non-Union Shops

continued from page 1

For example, in United Buffalo, Inc., No. 3-CA-27872 (Sept. 2, 2011), the National Labor Relations Board (NLRB) found that an employer violated the NLRA when it terminated five employees for a conversation they had on Facebook discussing criticism of their work performance by a co-worker. One of the criticized employees made a comment from her home computer, outside of work hours, specifically addressed to "My fellow coworkers," asking what they thought about the criticisms leveled against them by their co-worker. This prompted several co-workers to respond with harsh and profane comments. At least one of the criticized employees indicated an expectation that the complaining employee would take her complaints to management. These postings were seen by the employee who made the critical comments about her co-workers, and she reported the issue to management. The five employees that participated in the Facebook conversation were terminated for violating the company's anti-harassment policy. The NLRB found that the Facebook discussion was protected concerted activity, because the initial comment posted on Facebook was aimed at initiating or inducing group action as to matters affecting employment. The NLRB said that the Facebook conversation was a "first step towards taking group action to defend" against the complaining employee taking her criticisms to management.

The NLRB has taken up many such cases in the last few years, suggesting this will continue to be an area of growing administrative action. The cases that have already gone before the NLRB regarding these types of social media issues are very fact-dependent. The specific comments made by an employee, who they are made to, and how other employees respond can factor into whether an employer's response to the initial comment or follow-on comments by co-workers is permissible. So, it would be wise, before taking disciplinary action to punish employees for their comments made using social media, to consult with an attorney who can review the specific comments and circumstances involved in your case and advise you whether taking disciplinary action, under those facts, may put you at risk of a claim that you have violated the NLRA.

Another way an employer can try to reduce its risk of ending up in front of the NLRB due to the employer's handling of these kinds of social media comments is to start with a social media policy that is mindful of the restrictions under the NLRA. Policies that are overly broad and could be read as chilling the exercise of employee rights under the NLRA can constitute an unfair labor practice. For instance, policies that prohibit using social media to make disparaging comments about the company or other employees can be viewed as chilling protected concerted activity. Even policies prohibiting offensive conduct or rude behavior using social media, if stated broadly enough, could violate the NLRA. If an employer wants to use broad statements along these lines in its social media policies to discourage things like workplace bullying and harassment, it is recommend that the policy also include a statement making it clear that it will not be a violation of the company's policy to use social media to engage in any concerted activity protected under the NLRA.

Upcoming Events

Advanced Personal Injury: Mastering Your Practice

Date: October 17, 2012
Location: Best Western Plus Madison-Huntsville Hotel - Madison, Alabama

Date: October 18, 2012
Location: Cahaba Grand Conference Center-Birmingham, Alabama

Course Content:

- Calculating and Proving Damages
- Working With Expert Witnesses
- Maintaining an Ethical Practice
- Presenting Damages and Expert Testimony at Trial
- Preserving Issues for the Appeal
- Analyzing and Establishing Tort Liability

For more information, including how to register, please click here, or call (800) 930-6182 (weekdays 7:00AM -5:30PM CST). This seminar qualifies for 6 hours of Continuing Legal Education.

Customizable Seminars and Training Sessions

The lawyers of FEES & BURGESS, P.C., combined, have many years experience working in various fields, as both in-house and private counsel, representing a diverse clientele. This wide field of knowledge enables us to provide quality training on various topics, including, but are not limited to:

Americans with Disabilities Act

Conducting Effective Workplace Investigations

Construction Contracting

Diversity Training

Electrical Manufacturing Services Contract

Employment Law Survival Training for Managers

Ethics, Business Conduct and Compliance in Government Contracting

Immigration Compliance

Incoterms® 2010

Indemnity and Limitation of Liability Clauses

International Contracting

Limiting Liability for Sexual Harassment

Managing Employee Use of Internet and E-mail in the Workplace

Managing Gender Identity Issues in the Workplace

Reducing Employee Benefits Costs

Reducing Risk in Purchasing Terms and Conditions

Reduction in Workforce Strategies

Retaliation and Whistleblowers

Violence in the Workplace

For more information on these and other programs, please visit us online at www.feesburgess.com; contact us by e-mail at seminars@feesburgess.com; or by phone at (256) 536-0095.

HR CORNER

FEES & BURGESS, P.C.

Volume 8, Issue 7 October 2012

SPEAKERS

FEES & BURGESS, P.C., provides speakers, training programs, seminars, and webcasts for various trade associations; business groups; and clients. For information regarding a program, contact seminars@feesburgess.com.

NEWSLETTERS

FEES & BURGESS, P.C., also publishes *F&B Quarterly Bytes,* focusing on multiple practice areas; and *F&B SCM Memo,* focusing on the supply chain management industry. To receive any of these newsletters, please e-mail newsletters@feesburgess.com with your contact information.

To remove your name from our mailing list, please e-mail newsletters@feesburgess.com.

Michael L. Fees
mfees@feesburgess.com

Allen L. Anderson
anderson@feesburgess.com

Stacy L. Moon
smoon@feesburgess.com

Ryan G. Blount
rblount@feesburgess.com

FEES & BURGESS, P.C.
213 Green Street
Huntsville, Alabama 35801
Telephone (256) 536-0095
Facsimile (256) 536-4440

www.feesburgess.com

C. Gregory Burgess
gburgess@feesburgess.com

Jeffrey L. Roth
jroth@feesburgess.com

Allison B. Chandler
achandler@feesburgess.com

HR Corner should not be construed as legal advice or a legal opinion on any specific facts or circumstances. The contents are intended for general information purposes only. Anyone needing specific legal advice should consult an attorney.

"No representation is made that the quality of legal services to be performed is greater than the quality of legal services performed by other lawyers."