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Richard D. Alaniz, JD • Jul. 01, 2014

Positive workplace policies have long been uncontroversial. Typically, these policies set the expectation for employees that they will represent their employer in a positive light, and won't make negative comments or engage in gossip about the company, customers, or fellow employees. This seems common sense—what could go wrong?

Recently, Hills and Dales General Hospital found out the hard way what could go wrong. The hospital fell under the scrutiny of the National Labor Relations Board (NLRB), the federal agency responsible for policing our nation's labor laws. The NLRB took a long hard look at three of the hospital's policies governing positive employee conduct. Although one may very well ask what Facebook posts have to do with labor laws from the 1930s, the NLRB found that these seemingly innocuous positive workplace rules violated employees' labor law rights—specifically the right to act together to improve working conditions, known as "protected concerted activity."

The NLRB's stance here is not an isolated incident. The Board has become increasingly embroiled in the workplace policies of a vast slew of employers, a very large number of which are non-union. In fact, the NLRB is even considering throwing out its own precedent on whether employers can limit company email to business-related matters, on the basis that exercising this type of control violates the National Labor Relations Act.

As workers find more and different ways to communicate with each other and those

employees are unionized or not. Employees who believe their rights have been violated can file charges against their employers through the NLRB's regional offices.

Understanding "protected concerted activity" has become very important in light of the NLRB's changing focus. According to the NLRB's website: "The law we enforce gives employees the right to act together to try to improve their pay and working conditions, with or without a union.

If employees are fired, suspended, or otherwise penalized for taking part in protected group activity, the National Labor Relations Board will fight to restore what was unlawfully taken away. These rights were written into the original 1935 National Labor Relations Act and have been upheld in numerous decisions by appellate courts and by the U.S. Supreme Court."

Although always a political entity, in recent years the NLRB has become more partisan and very active in reviewing different types of employer policies to determine if they infringe or could infringe on protected activity. As an interesting aside, just last month, the U.S. Supreme Court ruled that several of President Obama's recess appointees to the NLRB were placed there unconstitutionally.

Accordingly, by at least one count, around 128 cases have been effectively overturned because they were decided by an unconstitutional Board. Others have placed the estimate of affected cases as high as 800. The NLRB is likely to continue on the same anti-employer trend that it has been on for the last several years, but the need to revisit these cases may hinder the Board's agenda. Notwithstanding, employers should still expect a very pro-union, pro-employee, and anti-employer NLRB.

Social Media

As employers grapple with comments and postings their employees make on Facebook, LinkedIn, and other social media outlets, they must do so with an eye

toward the National Labor Relations Act. Common social media policies, such as

According to the NLRB, "Valero Services agreed to notify employees that it will rescind its unlawful social media policy and to post NLRB notices at its 52 facilities nationwide, as well as to mail notices to employees, advising them that they will not be prohibited from using social media to discuss their terms and conditions of employment."

Communication Policies

In the Hills and Dales case, the NLRB considered the company's "Values and Standards of Behavior" policy. The NLRB found several aspects of the policy were unlawful on their face, because the policy could prohibit protected concerted activity.

The paragraphs in question read:

Teamwork

11. We will not make negative comments about our fellow team members and we will take every opportunity to speak well of each other.

16. We will represent Hills & Dales in the community in a positive and professional manner in every opportunity.

Attitude

21. We will not engage in or listen to negativity or gossip. We will recognize that listening without acting to stop it is the same as participating.

In 2011, the hospital cited paragraph 16, which required employees to present the hospital in a "positive and professional manner," when it issued a written warning

to an employee for posting an explicit comment on Facebook aimed at fellow

In a case that began with a failed unionization vote at Purple Communications Inc., the NLRB is now considering whether to allow employees to use their work email in unionizing and other protected activities. That would overturn a 2007 ruling in the *Register Guard* case, which found that "employees have no statutory right to use the Employer's e-mail system for Section 7 purposes."

In the *Purple Communications* case, the employer's rule regarding limiting company equipment for work-related purposes came under fire after an attempt to unionize failed. The union complained that the company's policy that prohibited employees from using company hardware, Internet, and email systems to engage with those who had "no professional or business affiliation with the Company" constituted an unfair labor practice.

Purple Communications said the rule was designed to keep viruses from infecting its call centers. However, the union argued it was overbroad and interfered with employees' Section 7 rights.

While the administrative law judge in the case dismissed the union's allegations, the NLRB's general counsel and the union asked the NLRB to reconsider. The NLRB asked both parties for responses in the case, as well as other interested parties to weigh in. Among the questions the NLRB is considering: "If the Board overrules *Register Guard*, what standard(s) of employee access to the employer's electronic communications systems should be established? What restrictions, if any, may an employer place on such access, and what factors are relevant to such restrictions?"

A reversal of the *Register Guard* decision could have significant implications on the type of control that employers can exercise over their own communication systems. For example, it could open up the ability for an employee to send an explicit or inappropriate email company-wide, and then rely on labor law to protect his job. It

would also limit or perhaps even eliminate an employer's right to monitor its email

Employers should work very closely with in-house and outside counsel when drafting or updating policies. They should also proceed carefully before taking any actions to discipline or terminate employees for violating any type of communication policy.

When reviewing and revising company policies, employers should avoid broad terms, such as "negativity." Instead, employers should include examples and clarification of such terms, making clear, for example, that policies are directed toward discrimination, harassment, or other types of unlawful activity.

Employers must also proactively stay on top of changes in policy, regulations, and enforcement by the NLRB. Even if they don't have a unionized workforce, NLRB decisions can have profound impact on employers' day-to-day operations.

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