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To Post or Not to Post: NLRB, Social Media & the Workplace

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At the core of federal labor law is an employee's right to engage in concerted activities for the purpose of mutual aid and protection, even if it is not a union shop. Where confusion may arise, however, is when an employer must determine whether certain conduct constitutes "concertedness" and/or "mutual aid or protection" in the context of social media. This task is complex when an employee's actions take place from behind a computer, and the product of those actions is plastered to social media for all to see. The Division of Advice recently released a bundle of Advice Memoranda offering direction about whether employees can be disciplined or even discharged as a result of their social media posts. The Advice Memorandum discussed below addresses a central issue: whether an employee's posts to Facebook constitute protected concerted activity under Section 7 of the National Labor and Relations Act (the Act).

In one of these Advice Memorandum (Colorado Professional Security Services, 27-CA-203915 et al.), the Division of Advice addressed a similar set of facts to determine whether an employee's Facebook posting was protected by Section 7. In that case, an employee was disciplined on numerous occasions by the employer for not wearing the proper uniform on the job. Following one incident in which the employer disciplined the employee for wearing improper footwear, the employee posted a 23-minute live video of himself to Facebook while on the job and in uniform. In the video, the employee discussed the discipline imposed by the employer for wearing improper shoes, the overbroad confidentiality provision in the disciplinary notice, and the employer's allegedly unfair treatment. The employee also made crude and disparaging jokes and comments about the employer and his supervisor. The employee was subsequently discharged for the Facebook video based on, among other things, his insubordination and his making insidious remarks regarding the employer's company name, business, security officers, and clients while on duty and in uniform.

The Division of Advice first addressed the employer's policy prohibiting employees from criticizing the employer under Boeing, which established a new standard for evaluating whether a company's facially neutral policy or rule interferes with an employee's ability to exercise their rights under the Act. The Division of Advice found that the provisions of the employer's social media policy in this case were overly broad. However, the Division of Advice also determined that the discharge of the employee was not unlawful because the "Facebook video did not constitute protected concerted activity, and it was so egregious that other employees would not connect discharge to the overbroad aspect of the rules." The Division of Advice considered whether the Facebook video constituted protected concerted activity since the employee referred to a number of Section 7 subjects in the video. The Division of Advice found, however, that the employee's comments in the Facebook video were entirely individual complaints and that there was "no indication that [the employee] was speaking for other employees or seeking to act in concert with others." Instead, [the employee's] comments were more in the nature of "mere griping," which is not protected under Section 7 of the Act.

The emergence of social media continues to pose obstacles for employers and employees alike, particularly in the context of Section 7 of the Act. In this day and age, many employees choose to use social media platforms as sounding boards to voice their thoughts, opinions, or concerns about certain issues in the workplace. However, issues may arise when an employer restricts an employee's Section 7 rights to engage in protected concerted activity. On the other hand, an employee's conduct must be proven to be both concerted and for the

purpose of mutual aid or protection. As the Advice Memoranda demonstrate, an employee's personal gripes and complaints about work are simply not enough. One important takeaway that should be gleaned from these decisions is that an effective social media policy does not come in a one-size-fits-all package. No employer should blindly adopt or implement a social media policy without first discussing the proposed policy with informed attorneys and HR professionals. Strong social media policies not only protect employers, but they help employers ensure that social media is used to their advantage.

For additional information regarding the NLRA and social media issues, please contact the author, Mary Katherine Smith, or any member of Baker Donelson's Labor & Employment Group.