Published on *The National Law Review* https://www.natlawreview.com

Only Certain Types of Speech Are Protected In The Workplace

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This past week, talk abounds over Google's firing of a software engineer after he posted a lengthy memo criticizing the company's diversity policy and culture on the company's internal website. Google says he crossed a line and violated its Code of Conduct. The engineer says he engaged in protected speech and filed an unfair labor practice charge against Google with the National Labor Relations Board (NLRB). The case will be interesting to follow, especially to the extent that it resolves the dispute between Google's conduct policy and this employee's criticisms of his former employer.

No Free Speech Guarantee

Some discussions about the Google memo have centered around the belief that employees should have free speech protections to say whatever they like, even about their employer. U.S. workers employed by private entities, however, do not have so-called free speech rights. The First Amendment to the U.S. Constitution prohibits Congress from making any laws that abridge the freedom of speech. But it applies only to government actions and does not prohibit private employers from limiting or taking employment actions based on what an employee says or does.

NLRA Concerted Activities Are Protected

The National Labor Relations Act (NLRA) guarantees employees the right to form and join unions. But it also gives employees the right to engage in other "concerted activities for the purpose of collective bargaining or other mutual aid or protection." These rights under Section 7 of the NLRA extend to protecting non-union employees who discuss and/or act together to try to improve the terms and conditions of their employment, such as their pay, benefits, policies, and workplace safety issues. Employers may not threaten, discipline, or fire employees who engage in such protected activities.

When it comes to employee memos and social media posts, content generally will be protected if it relates to or grows out of group action, such as when an individual employee solicits other employees to take action to fix work-related problems or seek improvements in the workplace. But mere griping by an individual employee will not be protected as a protected concerted activity. Additionally, even communications that would be deemed concerted activities can lose NLRA protection if they express egregiously offensive, abusive, or knowingly and malicious false statements.

When Company Policies Clash With Concerted Activities

When a company policy prohibits employees from engaging in certain conduct, such as prohibiting disparagement of the company or its managers, or restricting discussion among co-workers of confidential information, the NLRB may consider whether it restricts or "chills" employees' Section 7 rights to engage in protected concerted activities. If the NLRB finds that a policy is overly broad and potentially restricts concerted activities, the company can be found to have violated the NLRA.

Before Discipline and Discharge

Anytime your organization seeks to discipline or terminate an employee for writing emails, posting on social media, or otherwise communicating about the company, consider the following:

- Does the communication discuss with or seek to engage co-workers in relation to the terms and conditions of their employment?
- Could the communication be seen as an effort to form a union or another form of group action related to the workplace?
- Is the employee reaching out to a third party, such as the media or union organizers, on behalf of multiple employees?
- If the basis for the discipline or discharge is a company policy, is the policy narrowly defined or is it too broad so that it interferes with employees' Section 7 rights?

Employers have a great deal of authority to discipline or get rid of at-will employees based on inappropriate or undesired communications or actions. Just make sure to evaluate whether employees are engaging in protected concerted activities prior to imposing a detrimental employment decision so as not to violate the NLRA.

National Law Review, Volumess VII, Number 226