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NLRB’s “Facebook Firing” Complaint – The First Publicized NLRB Experience

• NLRA Sections 7 and 8 provide the right to engage in protected “concerted activity” – both union and non-union employees for “mutual aid or protection.” 29 U.S.C. §-157- 58

• NLRB filed a complaint in October 2010 against American Medical Response of Connecticut, alleging the company engaged in unfair labor practices by firing an employee (DS) after she posted the following negative comments about her supervisor and the company on her private Facebook page.
Company Accused of Firing Over Facebook Post

The New York Times – Nov. 8, 2010

DS: looks like Im getting some time off. Love how the company allows a 17 to be a supervisor!

Commenter: What happened?

Commenter: What now?

DS: Frank being a [expletive deleted].

Commenter: I’m so glad I left there!

Commenter: Ohhh, he’s back, huh?

DS: yep has a [expletive deleted] as usual [sic]

Commenter: I am sorry, hon! Chin up!

Note: A “17” is the employer’s code for a psychiatric patient.
NLRB’s “Facebook Firing” Complaint, contd

• The NLRB’s complaint also alleges employer’s blogging and internet posting policy was overly broad, based on the employer’s prohibitions on disparaging the company or individual supervisors, and on depicting the company on the internet in any way without permission.

• The case was scheduled for hearing, but settled before a determination.
NLRA §§ 7 and 8(a)(1) Rights as Applied in Social Networking Setting

- Employee blogging and social networking may be protected if:
  - The employee notified other employees about the blog;
  - Discussed the work environment/terms of employment;
  - Allowed other employees to post responses and comments.
Costco Wholesale Corp., 358 N.L.R.B. No. 106 (September 7, 2012)

• Costco’s Social Media Policy stated: “Employees should be aware that statements posted electronically (such as to online message boards or discussion groups) that damage the Company, defame any individual or damage any person’s reputation or violate the policies outlined in Costco’s Employee Agreement, may be subject to discipline, up to and including termination of employment”.

• In September 2012, the NLRB ruled that Costco Wholesale Corp’s employee policies covering the use of the internet, specifically social networking sites, were “too broad”. The policy was considered unlawful and a violation to Section 7 of the NLRA, which addresses employee rights.
Knauz BMW Case NLRB Decision – An Instructive Distinction

• The NLRB found that the posts of the Land Rover were not protected under the NLRA because it was posted “as a lark” without any communication or connection to other employees relating to working conditions.

• However, the NLRB found that post regarding the Hot Dog catering was protected because the topic was earlier discussed with another employee and how this could affect his compensation.

• The NLRB decided that the termination of the employee was not unlawful because the dealership fired him solely off of the posts about the Land Rover incident.
NLRB General Counsel Guidance

• Acting general counsel for the NLRB issued three separate reports – from August 2011 through May 2012 – on employer social media policies.


• NLRB General Counsel provides an example of a lawful social media policy.
States Whose Off-Duty Conduct Statutes Extend Beyond Protecting the Consumption of Lawful Products – A Few Examples

- **California**: lawful conduct occurring during nonworking hours away from the employer’s premises.
- **Colorado**: lawful activities that are off duty and off employer’s premises.
- **New York**: lawful political activities, legal use of consumable products, recreational activities occurring off the employer’s premises, membership in a union, and human organ donation.
Social Media: Practical Considerations