NLRB approves employer's social media policy

EMPLOYER ADVOCATE | JUL 24, 2015

In *Landry's Inc. v. Flores*, Case no. 32–CA–118213, the National Labor Relations Board ("NLRB") upheld Bubba Gump Shrimp Restaurants, Inc.'s (its parent company is Landry's Inc.) social media policy. Now, in light of what we have seen Administrative Law Judges ("ALJ") and the NLRB do in the past few years in striking down nearly every social media policy to come in their cross-hairs, let us take a minute to truly understand the significance of this decision.

With this decision, we have another example of a social media policy that has been reviewed, scrutinized, challenged, and ultimately given a stamp of "LAWFUL – NOT A VIOLATION OF THE NLRA" by the NLRB. This policy joins just a handful of others reviewed and given the same stamp before it.

So, what was the social media policy language the NLRB found not in violation of the National Labor Relations Act ("NLRA")? The social media policy reviewed contained the following language:

> While your free time is generally not subject to any restriction by the Company, the Company urges all employees not to post information regarding the Company, their jobs, or other employees which could lead to morale issues in the workplace or detrimentally affect the Company's business. This can be accomplished by always thinking before you post, being civil to others and their opinions, and not posting personal information about others unless you have received their permission.

The NLRB's General Counsel argued, not surprisingly, that Bubba Gump Shrimp employees could reasonably construe the language to prohibit protected activity under the NLRA. The ALJ who first reviewed the case said it did not, and the NLRB agreed.

But why? Why not strike this one down as illegal like so many other social media policies? Well, the NLRB found that Bubba Gump Shrimp employees reasonably would not construe the policy to prohibit protected activity. It noted that the challenged language referenced "morale" and "being civil to others and their opinions", which reflected the policy's intent to regulate the manner in which employees posted information, not the content of what they were actually posting. The NLRB also found that the language was used to promote good morale among employees and avoid workplace conflict, not stifle communication, such as communications among employees about compensation information, or the terms or conditions of their employment.

TAKEAWAYS

While this decision is certainly not cause for management-side labor practitioners to go dancing in the streets as the NLRB is still pretty hostile toward many employer social media and other policies, it is a step in the right direction and, if nothing else, gives employers another example of a social media policy found lawful under the NLRA. Employers should still be cognizant of the NLRB's position on overbroad workplace policies and be careful when drafting workplace policies and procedure to avoid language that could reasonably be interpreted by employees as chilling communication about the terms and conditions of their employment, including compensation, workplace complaints, safety, and other issues.