



## MANUFACTURERS' ASSOCIATION OF SOUTH CENTRAL PENNSYLVANIA

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1/5/11

**To: MASCPA Members & Affiliates**

**Good News / and Bad....**

**Good news:** employers now have a template they can publish that has passed the review of a NLRB Administrative Judge

**(See Policy Text highlighted in blue on next page)**

**Bad news:** The policy won't protect employers from being charged with unfair labor practices if employee(s) discharged for protected concerted activity on Facebook, i.e., conversations (and other social networks) about wages, hours and working conditions.

When an employee is fired for posting on Facebook or another online site, they have the right to access the NLRB for assistance. Representation will be determined by the basis of the termination and on whether the information posted was protected by the National Labor Relations Act. An employee stating an opinion to another employee on working conditions is engaged in a protected activity. Employees, regardless of whether they are talking around a water cooler in an office or on Facebook have the right to discuss working conditions.

So, even with an "iron-clad policy" in place, employers need to think twice before terminating an employee for posting information online to be sure they are in compliance with the NLRA.

*Jim*

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**The Detailed “Decision” is accessible at the link below, if you prefer to read all 26 pages!  
If not, what follows is an “EXECUTIVE SUMMARY”**

**January 3, 2012**

**Summary of Administrative Law Judge Decision**

**NATIONAL LABOR RELATIONS BOARD**

**NEW YORK BRANCH OFFICE**

**The ALJ ruled that the maintenance of the Internet/Blogging policy in its Employee Handbook did not violate Section 8(a)(1) of the Act.**

**The “Internet/Blogging Policy” contained in the Employer’s Employee Guidelines is stated as follows:**

**The Company supports the free exchange of information and supports camaraderie among its employees. However, when internet blogging, chat room discussions, e-mail, text messages, or other forms of communication extend to employees revealing confidential and proprietary information about the Company, or engaging in inappropriate discussions about the company, management, and/or co-workers, the employee may be violating the law and is subject to disciplinary action, up to and including termination of employment.**

**Please keep in mind that if you communicate regarding any aspect of the Company, you must include a disclaimer that the views you share are yours, and not necessarily the views of the Company. In the event state or federal law precludes this policy, then it is of no force or effect.**

The ALJ found that two employees were discharged for their participation in a Facebook conversation that was deemed to be a protected concerted activity.

The ALF found that given the location and subject matter of the Facebook discussion, the nature of the “outburst,” and the extent to which the outburst was provoked by Employer’s conduct, the two employees’ comments on a co-worker’s Facebook account remained protected activity; and, the employees’ comments did not constitute disparaging and disloyal statements which would have caused them to be unprotected.

The ALJ further ruled that a *prima facie* case was successfully established and the Employer failed to establish by a preponderance of the credible evidence that it in fact discharged the two employees for other, legitimate, reasons.

The issues in this situation were related to wages, including the tax treatment of earnings, and directly related to the employment relationship, which formed the basis for protected concerted activity within the meaning of the NLRA.

The evidence established that the Facebook discussion was part of a sequence of events, including other face-to-face employee conversations, all which concerned employees’ complaints regarding the Employer’s tax treatment of their earnings. These are deemed concerted activity “encompasses those circumstances where individual employees seek to initiate or to induce or to prepare for group action.”



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The employees who posted comments on Facebook specifically discussed the issues they intended to raise at an upcoming meeting and avenues for possible complaints to government entities. As a result, the employees' Facebook discussion were found to be part of an ongoing sequence of events involving their withholdings and taxes owed to the State and was therefore concerted activity.

The ALJ commented that the protections of the NLRA are not to be contingent upon an employee's level of engagement or enthusiasm; so long as the topic is related to the employment relationship and group action, only a "speaker and a listener" is required. Merely selecting the "Like" option, on Facebook, so that the words like(s) this" appeared on the account, constituted, in the context of a "Facebook" communications, an assent to the comments being made, and a meaningful contribution to the discussion.

The ALJ commented, that statements during otherwise protected activity lose the Act's protection only where they are "so violent or of such serious character as to render the employee unfit for further service" and that the protections of the Act must "take into account the realities of industrial life and the fact that disputes over wages, bonuses, and working conditions are among the disputes most likely to engender ill feelings and strong responses."

The discharged employees' comments occurred during a Facebook conversation, and not at the workplace itself, so there is no possibility that the discussion would have disrupted the Employer's work environment. As a result, the situation at issue here is materially different from conduct occurring in an employer's establishment, which customers engaged in ordinary business transactions with the employer would be forced to witness.

In addition, the evidence established that the discharged employees' statements were not directed to the public as part of a campaign to raise public awareness of the employees' dispute with the Employer. The more reasonable conclusion is that the participants were, in the Facebook account owner's words, "venting" their frustration with one another.

The statements were directly related to the ongoing dispute between the employees and Employer's management and were not a gratuitous attempt to injure the Employer's business or an attack on the Employer's product. They did not address, for example, the quality of the food, beverages, services, or entertainment at the Employer's restaurant and bar.

See details of this recent (January 3, 2012) ALJ Decision below

***Three D, LLC d/b/a Triple Play Sports Bar and Grille*** ([34-CA-12915, et al.; JD\(NY\)-01-12](#))