



This article presents general guidelines for Georgia nonprofit organizations as of 6/15/2012 and should not be construed as legal advice. Always consult an attorney to address your particular situation.

@NONPROFITS, HOW #NLRA LIMITS EMPLOYERS' ABILITY TO DISCIPLINE EMPLOYEES FOR THEIR SOCIAL MEDIA ACTIVITY

After a frustrating day at work, an employee comes home, logs onto Facebook, and posts on her wall that she hates her boss, her co-workers are incompetent, she doesn't get paid enough, and she works too many hours. When her boss learns about the posting, the employee is fired. Under federal labor laws, this firing might be illegal.

With the use of social media on the rise, employers are facing the difficult decision of what to do when employees discuss work-related issues on social media. This is especially a concern for nonprofits, which rely on public image and trust to remain sustainable. In each situation, employers must react carefully so as to not tread on employees' rights under federal law.

I. The National Labor Relations Act of 1935

The National Labor Relations Act of 1935 (NLRA) protects employees' rights to engage in group action to address employer grievances, labor disputes, wages, rate of pay, hours of employment, or conditions of work. Under the NLRA, employers are prohibited from discouraging, by any means, such labor organization.

This matters to nonprofits because the NLRA protects the rights of *all* employees, union and non-union, to take steps toward group action, which includes communicating about the terms and conditions of employment. The National Labor Relations Board¹ (NLRB) has filed complaints against employers, including nonprofits, for disciplining or terminating employees for their social media postings.

II. Protected Employee Activity

Nonprofit organizations, like all other employers, have the right to maintain order in the workplace, but certain types of employee activity, including certain social media activity, are protected under the NLRA. In each case, employers should be cautious and weigh the costs and benefits of disciplining or terminating an employee based on his or her online activity.

Activity Must Be Protected and Concerted

For an employee's activity to fall within the rights protected by the NLRA, the activity must be both protected and concerted. *Protected activity* includes actions addressing the terms or conditions of employment, such as wages and working conditions. *Concerted activity* includes actions engaged in by an employee with, or on the authority of, other employees. Activity is generally considered concerted when it is in response to concerns expressed by employees

¹ Some smaller nonprofit organizations may not fall within the jurisdiction of the NLRB. Seek legal counsel for assistance in making this determination.

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collectively or seeks to initiate group action or bring group complaints to management's attention. Activity is generally not considered concerted when an employee acts solely by and on behalf of himself to express an individual gripe or when an employee's individual rant has no clear audience of other employees. However, responses from other workers and the development of a discussion may convert an individual rant into concerted activity.

If an activity is both protected and concerted, an employer is prohibited from discouraging it through an employee policy or by disciplining or terminating an employee.

Discipline Allowed

The NLRA does not prohibit an employer from disciplining an employee for activity that is reckless, maliciously untrue, or so egregious that it renders the employee unfit for service (such as public outbursts against a supervisor). The use of obscenities typically is not enough to be considered reckless or egregious.

Keep in mind that even if an employee's activity falls under the NLRA, discipline or termination may still be lawful if the employee engaged in some other activity that is not protected or concerted. In such a case, the employer must make explicitly clear that the other activity forms the actual basis of the employee's discipline or termination.

III. Social Media Policies

Many employers use social media policies to deal with the issue of employees' online activity. While having a social media policy is a good idea, it must be drafted carefully so as to not infringe upon employees' rights. A social media policy will be unlawful if it explicitly restricts, has been applied to restrict, or could reasonably be interpreted by an employee to restrict protected and concerted activity.

Rather than prohibiting broad categories of behavior (some of which may be protected under the NLRA), social media policies must be specific enough to narrow the scope of restricted activity so that it does not include protected and concerted activity. For example, a social media policy that prohibits employees from using social media to resolve work-related concerns; from posting disparaging, defamatory, or disrespectful comments about an employer or employee on social media; or from posting images on social media that depict the employer or its logo without permission would be unlawful without specific examples of or limitations on the prohibited activity. To ensure a social media policy is legal, it *should*

- provide specific examples of prohibited and allowed activity;
- avoid ambiguous or unclear language, especially that restricts employee speech;
- use limiting language to narrow the scope of restricted activity so that it does not include protected and concerted activity;
- include a disclaimer that the policy is not intended and should not be interpreted to restrict employees' rights under the NLRA (however, such savings language is insufficient by itself);
- provide purpose and context for the policy that reflect legitimate business concerns, such as limiting company risk; and
- be reviewed by an employment or human resources professional.

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The law in this area changes quickly and often. Seek legal assistance in drafting a social media policy and before disciplining or terminating any employee for his or her social media activity.

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