Employee Social Media Complaints: Employers Beware

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The National Labor Relations Board's new general counsel, the top prosecutor who oversees all regional offices, had previously signaled an intention to expand the types of employee conduct that might qualify as protected, concerted activity.

A recent advice memorandum from the general counsel's Division of Advice doubles down on that approach. The Division of Advice memo recommended that Region 10 in Georgia file a complaint over an employee's termination that had followed workplace complaints raised on Facebook. In doing so, the Division of Advice pushed for the same expanded definition of protected, concerted activity.

At issue was an employee of a medical practice who posted a meme on Facebook that blamed bad management for employee attrition issues. Two other employees commented on the post, one with a supportive message and the other with a supportive emoticon. The next day, the employee who was the original poster was terminated for alleged patient complaints.

Generally, to be protected under Section 7 of the National Labor Relations Act, employee conduct must be both "concerted" and "for the purpose of . . . mutual aid or protection." The manner in which an employee's actions are linked to those of their coworkers determines whether the employee's activity is concerted.

The Division of Advice opined that the Facebook post was protected because it complained of a workplace issue and "elicited support from coworkers over these management practices and employee attrition—issues that had been topics of concern for the employees."

But more troubling, the Division of Advice took the position that the post was also "inherently concerted activity," an argument that purports to expand

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protected activity by finding that even activity not calling for group action or “mutual aid or protection” can be protected if it discusses “vital categories of workplace life such as wages, scheduling, or job security.”

In addition, the Division of Advice took the position that even if unprotected, the employer’s action in terminating the employee was still unlawful as a “‘preemptive strike’ against future protected concerted activity.” In short, the employer violated the act by terminating the employee so that other employees would not engage in similar activity.

The advice memorandum shows how far the current general counsel is willing to go to advocate for a broader view of protected, concerted activity. Both unionized and non-union employers should consider this decision when taking disciplinary action where conduct is arguably protected, concerted activity, due to the current activist approach taken by the general counsel.