

[Subscribe](#)[Share](#)[Past Issues](#)[Translate](#)

NLRB Upholds Facebook Posting Discharge.

The Bennett Law Firm *Client Update*

Trusted Advisor to Management for 50 Years
Labor Relations ~ Employment Law ~ Business Litigation

NLRB Upholds Facebook Posting Discharge But Finds Employer Violated the National Labor Relations Act by Maintaining a "Courtesy Rule" in its Handbook

In a mixed decision, the NLRB ruled on Monday that an employer has the right, in limited circumstances, to terminate an employee for an inappropriate Facebook posting. However, in the same decision, the NLRB found that the employer violated the National Labor Relations Act ("NLRA") by maintaining a rule in its handbook prohibiting disrespectful communications that injures the image or reputation of the employer.

Inappropriate Facebook Posting Mocking a Customer

In June 2010, a BMW dealership in Illinois discharged a salesman after he posted photos on his Facebook page of an embarrassing and potentially dangerous accident at its adjacent Land Rover dealership. A customer allowed his 13 year old son to sit behind the wheel of the Land Rover following his test drive. The child accidentally stepped on the gas, ran over his parent's foot and drove the vehicle over a wall and into a pond. The salesperson posted the photo with a sarcastic comment: "OOPS."

The National Labor Relations Act protects group actions of employees who are discussing or trying to improve their terms and conditions of employment because this behavior is considered protected concerted activity. An individual employee's conduct can also be protected if that employee has undertaken action on behalf of a group of employees. In a rare decision in favor of an employer by the current "Obama" Board, the Board agreed that the employee posted the photos with commentary without his having any discussion with other employees. Also importantly, the Facebook posting had no connection to the terms and conditions of employment. Because the employee's callous behavior was not protected conduct, the Board upheld the termination of his employment.

[Subscribe](#)[Share](#)[Past Issues](#)[Translate](#)

NLRB Bans Workplace Rule That Prohibits Disrespectful Conduct

The BMW dealership had a handbook that included a so called courtesy provision. The rule stated: "Courtesy: Courtesy is the responsibility of every employee. Everyone is expected to be courteous, polite and friendly to our customers, vendors and suppliers, as well as to their fellow employees. No one should be disrespectful or use profanity or any other language which injures the image or reputation of the Dealership."

In a 2-1 vote, the NLRB found that this seemingly common sense provision violated the NLRA and ordered the employer to rescind the provision. The NLRB found that the courtesy rule tended to chill employees in the exercise of their Section 7 rights. Under Section 7, employees are entitled to act in concert with one another with regard to terms and conditions of employment. This is the case in both union and non-union settings. Statements that employees make to coworkers and others that deal with terms and conditions of employment are typically protected by this Section 7, sometimes even if the statements are rude or disrespectful. The NLRB found that the broad prohibition against disrespectful communication that injures the image of the employer could include a prohibition of employee speech that is protected under Section 7. Therefore, the NLRB found that the courtesy rule violated the NLRA. The NLRB did suggest that the first part of the courtesy rule that simply encouraged employees to be courteous, polite and friendly might be acceptable but did not formally rule on that issue. The NLRB ordered the employer to provide a rescission notice to employees and to post a notice for sixty days promising to comply with the law in the future. This type of remedy is a not so subtle effort to embarrass the employer.

Recommended Action

Employers should review their handbooks and other policies and procedures that address behavioral requirements. In light of this Board decision, these provisions may very well violate the NLRA. Please contact either Peter Bennett at pbennett@thebennettlawfirm.com or Rick Finberg at rfinberg@thebennettlawfirm.com if you have any questions or would like assistance with reviewing your current rules and/or with drafting NLRA compliant employee conduct rules.

Our Mailing address is:

P.O. Box 7799, Portland, ME 04112

Offices in:

Boston, MA & Portland, ME

(617) 973-1550 | (207) 773-4775