Insight

IN-DEPTH DISCUSSION

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NLRB Ruling in Social Media Case Provides Useful Guidance for Employers

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Drafting a social media policy in compliance with Section 7 of the National Labor Relations Act ("NLRA" or "the Act") has become increasingly challenging for employers, as the National Labor Relations Board ("NLRB" or "the Board") continues to parse individual words and phrases in employers' social media policies. Enforcing that policy can be even more challenging as the Board and counsel struggle to apply the 1930s concept of "protected concerted activity" to employees' burgeoning 21st century social media activity. The Board's August 18, 2016 decision in *Chipotle Services LLC*[1] provides employers with useful guidance on both drafting provisions commonly seen in social media policies, and enforcing the policy in response to employees' social media posts.

Key Takeaways from the Board's Review of Chipotle's Social Media Policy and Other Handbook Policies

Restriction on Use of Chipotle's Logo

A corporate logo often has substantial value, and employers, understandably, frequently publish policies, including social media policies, that bar employees from using the corporate logo in social media entirely or without the employer's consent. Chipotle included the following provision in its "Confidential Information" policy: "... The improper use of Chipotle's name, trademarks, or other intellectual property is prohibited." The Board's General Counsel alleged that this policy violated employees' Section 7 rights because it would be understood to prohibit them from using Chipotle's logo when engaging in protected concerted activity, such as wearing a T-shirt with a red "X" over the logo while conducting a group protest of working conditions.

1 *Chipotle Services LLC d/b/a Chipotle Mexican Grill*, 364 NLRB No. 72 (Aug. 18, 2016).

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The Administrative Law Judge ("ALJ") who initially heard this case acknowledged that the Board's General Counsel cited precedent establishing that an employer cannot promulgate a rule banning employees from displaying an employer's logo or trademark while engaged in union activity during nonworking time.[2] Yet the ALJ still held that an employer's rule prohibiting specific, unprotected uses of the employer's logo does not violate Section 7 of the Act. The ALJ reasoned that "[a]n employer may protect its proprietary interest, including its trademarks and logo."

The General Counsel did not challenge this ruling on appeal, so the Board did not squarely address the issue. The General Counsel may have been acquiescing in the ALJ's ruling that a prohibition on "improper use" of a corporate logo is permissible. By contrast, the Board recently held that a social media policy that prohibited employees from using an employer's logos in any manner violated the Act.[3] These developments, taken together, suggest that employers can limit use of the corporate logo in a social media policy provided that the restriction is narrowly tailored to prevent improper use, such as violation of the employer's intellectual property rights, without prohibiting use of the logo in the course of employees' activity protected by Section 7.

Confidentiality, Falsehoods, and Non-Disparagement

As with restrictions on the use of the corporate logo, employers routinely include in their social media policies restrictions on the disclosure of confidential information and prohibitions on "disparagement" and "false statements." The social media policy at issue in *Chipotle* included the following policy provisions on those topics:

- "If you aren't careful and don't use your head, *your online activity can … spread* incomplete, *confidential*, or inaccurate *information*"; (emphasis supplied)
- "*You may not make disparaging, false, misleading, harassing or discriminatory statements* about or relating to Chipotle, our employees, suppliers, customers, competition, or investors." (emphasis supplied)

The ALJ ruled that Chipotle's policies prohibiting employees from posting "incomplete, confidential, or inaccurate information" and preventing employees from making "disparaging, false, [or] misleading" statements were unlawful, and the Board affirmed that ruling. With respect to the policy prohibiting disclosure of "confidential" information, the ALJ reasoned that the term "confidential" was not defined. Consequently, employees reasonably could understand the prohibition to cover matters protected by Section 7, such as employees' compensation and benefits.

The ALJ further determined that the prohibition on "false" statements was overbroad because, under Board precedent, false statements are protected unless they are maliciously false, *i.e.*, knowing or recklessly false. Finally, the ALJ equated "disparaging" statements with those that are derogatory and ruled that employees have a protected right to make derogatory statements about the terms and conditions of employment.

Harassment and Discrimination

The ALJ rejected the challenge by the Board's General Counsel to Chipotle's prohibition of "harassing or discriminatory statements," which was part of the policy provision barring "disparaging, false, misleading, harassing or discriminatory statements" (see above). Even though Chipotle did not define the operative

2 *See Pepsi-Cola Bottling Co.*, 301 NLRB 1008, 1019-1020 (1991).

3 *See, e.g., Boch Imports d/b/a Boch Honda*, 362 NLRB No. 83 (2015) (holding social media policy that prohibited employees from using the employer's logos "in any manner" violated the NLRA)..

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terms in the policy, the ALJ reasoned that the "mere fact that the rule could be read to address Section 7 activity does not make it illegal." The ALJ also cited Board precedent recognizing employers' right to expect that employees will "comport themselves with general notions of civility and decorum." Perhaps tellingly, the General Counsel also did not challenge this ruling on appeal to the Board, so the Board did not address this issue.

Disclaimer

As is common in social media policies, Chipotle's social media policy included the following disclaimer: "[t]his [social media] code does not restrict any activity that is protected by the National Labor Relations Act." The ALJ ruled that the disclaimer, which appeared at the conclusion of the social media policy, did not cure the unlawful provisions in Chipotle's social media policy.

Board Rejected the ALJ's Overbroad Definition of "Concerted" Activity

Like so many employers, Chipotle learned through social media monitoring by its corporate communications group that one of its line employees had posted negative comments related to the Company on Twitter. Local management met with the employee, presented him with the corporate social media policy, and asked him to delete the tweets. The employee agreed. The Board's General Counsel challenged Chipotle's removal request as violating the employee's right to engage in protected concerted activity.

Because the parties did not dispute that the tweets were "protected," *i.e.,* related to the terms and conditions of employment, the ALJ's analysis focused on whether the tweets were "concerted," i.e., for the purpose of "mutual aid or protection".[4] The ALJ's analysis on this issue centered around three tweets:

1. In response to a news article concerning hourly workers having to work on snow days when certain other employees were off and public transportation was shut down, the employee addressed Chipotle's communications director and stated: "Snow day for 'top performers' Chris Arnold?"
2. In response to a customer who tweeted "Free chipotle is the best thanks", the employee tweeted "nothing is free, only cheap #labor. Crew members make $8.50hr how much is that steak bowl really?"
3. In response to a tweet posted by a customer about guacamole, the employee wrote "it's extra not like #Qdoba, enjoy the extra $2" – a reference to the fact that Chipotle charges extra for guacamole, whereas the restaurant chain Qdoba does not.

Although the ALJ acknowledged that the employee's tweets "did not pertain to any current dispute between Chipotle's employees and its management" and the employee did not "consult or discuss with other employees any intention to post these tweets", the ALJ still concluded that the employee's tweets were concerted activity, and not an individual complaint. The ALJ reasoned that the tweets were "visible to others", and ruled – without pointing to any evidentiary support – that the employee's complaints about the wages paid to crew members, and the price Chipotle charged for guacamole, were "truly group complaints." As further support for the ruling that the tweets reflected concerted activity, the ALJ stated: "[a]ll these postings had the purpose of educating the public and creating sympathy and support for hourly workers in general and Chipotle's workers in specific."

The Board rejected this reasoning, ruling that the employee's tweets did not constitute concerted activity and, therefore, Chipotle did not violate the Act by requesting that the employee remove the tweets.[5] The

4 Although Chipotle's managers "requested" that the employee delete the tweets, and did not order the employee to delete them, the ALJ ruled that this was a distinction without a difference because the request came from a higher-level manager.

5 Interestingly, the Board noted that Chairman Pearce would have affirmed the ALJ's finding that the employee engaged in protected concerted activity when he posted the following tweets: (1) "Snow day for 'top performers' Chris Arnold?" and "nothing is free, only cheap #labor."

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Board did not provide any reasoning for its reversal, but the logic appears obvious: the General Counsel failed to elicit any evidence that the employee's complaint was anything more than an individual's gripe. The Board's decision is a welcome one for employers because taking the ALJ's reasoning to its logical extension, almost any post by a non-management employee in publicly available social media related to the terms or conditions of employment would be "concerted" and, therefore, subject to protection under Section 7 of the NLRA.

Takeaways for Employers

The Board's decision in Chipotle provides a roadmap to employers when drafting social media policies. Here are some key takeaways:

1. Employers should avoid broadly prohibiting employees from using the employer's logo or name in non-work related social media communications. Such action may be deemed to infringe upon employees' Section 7 rights. Instead, employers should consider narrowly tailoring any restrictions on the use of the corporate logo to prevent improper use.
2. Although the ALJ ruled that the bare prohibition in Chipotle's social media policy on harassing or discriminatory statements did not violate the Act, employers should still consider defining these terms by referencing harassment or discrimination policies.
3. Policy language that is general or establishes subjective standards, such as "confidential" or "inaccurate information," could raise a red flag for the Board and reviewing courts unless accompanied by examples that make it clear to a reasonable employee that the general language is not intended to encompass protected speech.
4. Employers should not expect that a disclaimer will save an otherwise overbroad provision in a social media policy, especially if that disclaimer is only general nature and appears at the end of the policy.
5. Employers should consider consulting with counsel when drafting or updating their social media policy.

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