

Davis Brown Employment and Labor Law Blog

Fight the COVID-19 Virus, Not Employee Protected Speech – April 2, 2020

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With the ongoing issues employers are facing with the COVID-19 pandemic, employers need to remember that employees may still be free to comment/share on social media or even to the media on issues faced by their employer.

On Monday, the NLRB ordered a Maine hospital to rehire an employee it fired for writing a critical letter to the editor of her local paper, a development that comes as employers may seek to limit what workers can say to the media.

In *Maine Coast Memorial*, the hospital activities coordinator was fired for violating a policy like those some hospitals have rolled out or reiterated as COVID-19 spreads. The policy in that case provided:

No hospital employee may contact or release to news media information about the hospital, its member organizations or their subsidiaries without the direct involvement of the Hospital Community Relations Department or of the chief operating officer responsible for that organization. Any employee receiving an inquiry from the media will direct that inquiry to the Hospital Community Relations Department, or Community Relations staff at that organization for appropriate handling.

An employee of the hospital wrote to the local newspaper in response to a series of articles about ongoing clashes between the hospital and its nurses' union over staffing cuts, which the union said put patients at risk. The employee, who was not a nurse, and was not represented by the nurses' union, cosigned these concerns in her letter. The hospital fired the employee the day her letter was published, citing a policy barring staff from talking to reporters about the hospital without its permission.

The employee challenged the termination alleging that her firing violated Section 7 of the NLRA, making it illegal for businesses to punish workers who take action to help their colleagues. The NLRB has long held that under Section 7 of the National Labor Relations Act ("NLRA"), employees covered by the NLRA and engaged in activity for mutual aid and protection are protected from retaliation. Under Section 7, employees have the "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."



This ability to freely comment on their employer is not limited to unionized employees. This provision protects workers even if they are not represented by a union; but it does not shield workers who speak out about purely personal concerns.

An administrative law judge and the NLRB sided with the employee saying board precedent holds that workers are protected when "they use a letter to the editor or another [third]-party channel to protest deficiencies in staffing levels or other working conditions that have an effect on patient care."

In addition to upholding the reinstatement of the employee, the NLRB also blocked the hospital from enforcing a rule requiring it to "involve or obtain permission from" management before speaking to the media, but allowed an updated policy exempting NLRA-protected comments.

The Big Picture

To be clear, this caution does not prohibit discipline for using social media during work hours, making false or misleading statements, or any postings creating HIPAA violations.

If employees comment or raise concerns (such as on social media or to the news media) about their employer's response to COVID-19, employers should be cautious before disciplining employees for violation of employer social media/media policies. Employees have the right to express opinions about wages, working conditions, or other conditions of employment protected by Section 7, and if discipline runs afoul of the NLRA, employers may receive a complaint from the NLRB—even if they do not have a union.

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