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Blog Post

Be Careful About Restricting Employee Communications with Media

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Employers that bar staff from communicating with the media should take another look at those prohibitions, following a recent federal appellate decision finding such a policy unlawful under the National Labor Relations Act (NLRA). An employee's critical letter to the editor might be embarrassing, but taking action against the author for writing it *may* be unlawful.

Multiple news accounts have detailed incidents where employees were disciplined or terminated for complaining about the lack of workplace safety precautions. Doctors and nurses have been particularly vocal, speaking out about inadequate staffing or Personal Protective Equipment. However, employers must be careful in responding, as such complaints *may* be protected under both the NLRA and the Occupational Safety and Health Act (OSH Act), or similar state laws.

A Maine hospital recently learned that lesson after terminating an activities coordinator in the rehabilitation department for writing a letter to the editor expressing support for nurses and doctors in their respective labor disputes, and urging management to heed nurses' staffing demands and concerns about risk to patient safety. Her letter criticized management as out of touch with patient care and negatively affecting hospital staff and the local community.

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The hospital had a policy providing that no employee "may contact or release to news media any information" about the hospital "without the direct involvement" of the media relations department or the COO. The policy provided that if an employees received an inquiry from the media, the employee should direct it to the media relations staff.

Immediately after the activities coordinator's letter to the editor was published, she was fired for violating that policy. The National Labor Relations Board (NLRB) brought charges on behalf of the nurse.

While employees have the right under Section 7 of the NLRA to engage in "protected concerted activity," did she do so? After all, the nurse was *not* a member of the union, was *not* directly affected by the alleged understaffing, and did *not* discuss her letter with any other employee prior to submitting it. Nevertheless, the Administrative Law Judge who presided over the NLRB proceeding thought she engaged in protected concerted activity, the NLRB affirmed that decision, and the federal First Circuit Court of Appeals (covering Maine, Massachusetts, New Hampshire, Puerto Rico, and Rhode Island) agreed.

Activity is "concerted" and therefore protected "if it is engaged in with or on the authority of other employees." But the appellate court noted there are circumstances where concerted activity can include conduct engaged in by a single employee even if it is *not* specifically authorized by others. Instead, the key inquiry is not whether the employee acted individually, "but rather whether the employee's actions were in furtherance of a group concern," the court said.

Concerted activity may arise where employees use "channels outside the immediate employee-employer relationship to air shared grievances," the court said, noting that employee outreach to media outlets and governmental bodies has been found to be concerted activity. While the appellate court

expressed concern that “the facts here may be at the edge of the Board’s definition of concerted activity,” it nonetheless accepted the letter to the editor as such, and affirmed that the activities coordinator was unlawfully fired.

In addition to reinstating the activities coordinator and providing back pay, the hospital also was required to post notices stating that it would not “discharge, discipline or otherwise discriminate against employees for engaging in protected concerted activities and/or for supporting” the nurses’ union.

The case serves as a reminder that in general, employees – whether unionized or not – have the right to engage in protected concerted activity, and that media and social media policies must be carefully crafted with those rights in mind.

Note however, that the right to engage in protected concerted activity does not necessarily extend to all employees. Employees in supervisory roles with authority to hire, fire, or discipline others, and those in managerial roles with authority to make, alter, or allow exceptions to policies are not covered by the protections of the NLRA. In addition, non-employees – such as physicians who have privileges to work at a hospital but are not employed by the hospital – would not be protected by the NLRA.

But employees with workplace complaints, regardless of whether they are in supervisory roles, have a second avenue under the OSH Act. All employees are entitled to a healthy and safe workplace under the OSH Act. Employers are obligated to keep the workplace free of known health and safety hazards, and employees have the right to speak up about hazards without fear of retaliation. It is illegal for an employer to fire, demote, transfer, or otherwise retaliate against an employee who complains to the Occupational Safety and Health Administration (OSHA).

Keep in mind that OSHA enforces 22 whistleblower laws, some of which provide protection to *non-employees*. For example, with respect to some types of fraud, a whistleblower can be a public or private employee, a contractor or subcontractor, or a non-employee. When it comes to workplace safety, the OSH Act provides that an employer cannot take an adverse action against an employee for engaging in activities protected by whistleblower law. Protected activities can include filing an administrative action, testifying or otherwise assisting in an investigation, and even reporting an alleged violation to a supervisor.

OSHA encourages employers to have broad whistleblower protections that cover not just employees, but all workers. “An anti-retaliation program that enables all members of the workforce, including permanent employees, contractors and temporary workers, to voice their concerns without fear of retaliation can help employers learn of problems and appropriately address them before they become more difficult to correct,” OSHA says.

To ensure that all workers on a jobsite are protected, OSHA employs a multi-employer worksite doctrine pursuant to which it can cite more than one employer for a hazardous condition that violates an OSHA standard.

Moreover, although a non-employee or independent contractor, such as a non-employee physician with hospital privileges, may not be considered protected under the OSH Act when making a complaint, such a non-employee can still make a health and safety-related complaint to OSHA that could trigger an onsite investigation. The same non-employee could be covered under a different whistleblower protection provided by federal or state law. And regardless of protected status, the same individual could assist hospital employees in bringing health and safety complaints, and acting as a witness on their behalf.

The takeaway for employers: Encourage your employees to bring their concerns to the attention of management, listen to those concerns, and address them. Employers can lawfully adopt policies that prohibit employees from speaking to the media *on behalf of the employer*, but should not seek to prohibit employees from discussing their terms and conditions of employment.

For assistance with your media policies or other workplace issues, contact your Akerman attorney.
