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The NLRB's Continuing Clarification of the Impact of Social Media Policies on NLRA Rights

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On August 7, the National Labor Relations Board (Board) issued a decision providing additional guidance to employers regarding acceptable social media policies that do not violate an employee's Section 7 rights under the National Labor Relations Act (NLRA). The decision, *Bemis Co., Inc.*, clarified the Board's view of whether a social media policy will violate Section 7 rights under the NLRA. It provided additional context to the Board's earlier *Boeing Co.* decision from 2017 regarding the Board's view of social media policies.

Section 7 of the NLRA allows employees to self-organize, bargain collectively, and "engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection," a broad, wide-ranging right. Section 8 provides that an employer violates the NLRA by interfering with an employee's rights under Section 7.

Section 7 rights apply to even non-unionized workforces, and in recent years, employers' social media policies have come under scrutiny as possible means of violating an employee's Section 7 rights. Generally, employees can use social media to raise complaints or issues with their working conditions, and the use of social media for these purposes can be protected under the NLRA. In the *Boeing Co.* decision, the Board determined that it would seek to balance the impact of an employer rule on an employee's NLRA rights with the legitimate business justifications for the rule. It provided a set of three categories of possible employer policies and rules: Category 1, rules that were lawful and did not impact NLRA rights; Category 2, rules that warranted individual scrutiny regarding whether they impacted NLRA rights; and Category 3, rules that were unlawful due to their impact on NLRA rights. Pursuant to the *Boeing* decision, the Board examines employer policies to determine their appropriate category and whether they impact an employee's Section 7 rights.

The *Bemis Co.* case involved the discipline and discharge of a long-time employee who was a vocal union supporter. The union brought a charge against the employer, a multi-national company making shrink-wrap plastic products, claiming that the employer had violated Section 8 of the NLRA. The union claimed that the employee had been terminated due to her support of union rights, and the company was thus unlawfully motivated by a discriminatory purpose in discharging her. After finding that the union had demonstrated the employer acted with discriminatory animus and that the employee's actions were protected concerted actions under the NLRA, the Board addressed the employer's social media rule.

The Board reversed the administrative law judge's ruling that the employer's social media policy violated Section 8 of the NLRA. The employer maintained a social media policy that stated:

Employees are expected to be respectful and professional when using social media tools. With the rise of websites like Facebook, MySpace, and LinkedIn, the way in which employees can communicate internally and externally continues to evolve. We expect our employees to exercise judgment in their communications relating to Bemis so as to effectively safeguard the reputation and interests of Bemis.

Employees should: Communicate in a respectful and professional manner. Avoid disclosing proprietary information; and Each employee is responsible for respecting the rights of their co-workers and conducting

themselves in a manner that does not harass, disrupt, or interfere with another person's work performance or in a manner that does not create an intimidating, offensive, or hostile work environment.

The judge had found that the first paragraph of the policy violated Section 7 rights, and he reasoned that, as written, by requesting that employees not communicate about anything that might harm the employer's reputation, the policy might discourage employees from communicating about their working conditions. The judge further determined that the burden on the employees' Section 7 interest outweighed the employer's interest in protecting its reputation and its brand.

The Board disagreed and reversed the judge's decision. The Board determined that the social media rule had to be read as a whole, and the first paragraph could not be read without examining it with the context of the whole policy, including the second paragraph. The Board disagreed with the judge's conclusion that the rule had the potential to interfere with an employee's private conversations; instead, the Board viewed the social media policy as making clear to employees that they should avoid affecting the employer's *public* reputation. The Board believed that the rule, as written, did not attempt to interfere with an employee's private conversations. The Board also disagreed with the judge's finding that the social media rule violated the NLRA simply because it could have been written more narrowly.

By upholding the employer's social media policy, the Board indicated a willingness to review the impact of a policy as a whole when read objectively in its entirety by a reasonable employee. It also indicated that an employer's social media policy did not violate the NLRA merely because it could have been drafted more narrowly. By reviewing the employer's complete policy rather than discrete parts of the policy, the Board signaled a willingness to uphold an employer's right to protect its public reputation and its legitimate interests, such as protecting its confidential information and prohibiting harassing behavior.

Takeaway

Employers should review their social media policies to ensure they describe the company's legitimate interests to be protected by the policy, such as protecting a public reputation, protecting proprietary and confidential information, and protecting employees from harassment.

If you have any questions, please contact any member of Baker Donelson's Labor & Employment Team.