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The Water Cooler

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Are All Employee Facebook Posts Protected Concerted Activity?

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Over the past several years, there has been a great deal of hype over the increased focus of the National Labor Relations Board (NLRB) on employees' social media communications regarding terms and conditions of employment and employers' social media policies that limit or restrict employees' use of social media. For example, we have written about several NLRB complaints filed against companies that terminated employees for negative Facebook posts about their employers.

The early trend in these complaints did not appear favorable for employers. But more recent events beg the question: has the NLRB signaled a retreat? Perhaps. Last month, the NLRB refused to issue complaints in three instances where employees had been disciplined for social media posts. In addition, the NLRB's Acting General Counsel issued a report summarizing the NLRB's recent social media decisions.

Protected Concerted Activity (PCA)

Section 7 of the National Labor Relations Act (NLRA) protects employees who engage in "concerted activity" for their "mutual aid and protection." Generally, the NLRB's test for protected concerted activity (PCA) is whether the activity is "engaged in with or on the authority of other employees" (i.e., not solely by and on behalf of the individual employee). PCA may also be found when it is the "logical outgrowth of concerns expressed by the employees collectively."

The NLRB's Division of Advice indicated that these situations did not qualify for protection:

- A bartender had a Facebook conversation with his stepsister in which he complained that he had not had a raise in five years and did the job of a server without receiving tips. The conversation also contained rude comments about customers. No co-worker responded to the comments.
- A recovery specialist at a non-profit residential facility for homeless people had a Facebook conversation while at work with two non-employee friends. She posted comments about how the overnight shift was "spooky" and made jokes about the clients. No co-worker responded to the posts.
- A customer service employee at a large retail store posted disparaging remarks about her manager and later added a profane rant about the incident that precipitated the original post on Facebook. Co-workers responded only with "hang in there"-type remarks.

These cases suggest that online personal attacks that are posted generally or sent to non-employees, and do not evidence group action, are not guaranteed protection under the NLRA.

On the other hand, the Acting General Counsel's report discussed several situations the NLRB found to be PCA, including the following:

- An employee's negative Facebook post about her supervisor that drew supportive comments from co-workers and led to further negative comments by the employee.
- A former employee posted dissatisfaction that she owed state taxes because of her employer's tax withholding policy and inability to do paperwork correctly. One employee clicked "Like" and other employees asserted they also owed money and intended to discuss it at a meeting.

These situations lead to some guiding principles that should be helpful when an employer considers an employee's social media activity. For example, a single employee griping about his or her job is typically not PCA. Also, the content of co-workers' supportive comments is important -- a co-worker merely expressing sympathy might not constitute PCA, but a call to collective action likely does.

Policy Concerns

A work rule or policy violates the NLRA if the work rule restrains or explicitly restricts employees from

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exercising their rights under the NLRA, including their right to engage in PCA. A rule is unlawful if (1) employees would reasonably construe the language to prohibit (or "chill") the exercise of their rights under the NLRA, (2) the rule was promulgated in response to union activity, or (3) the rule has been applied to restrict the exercise of the employees' rights under the NLRA.

The report discussed several examples of social media policies that violated the NLRA. Specifically, the following social media policies were unlawful:

- Prohibiting employees from making "disparaging comments" or engaging in "inappropriate discussions" about the company, superiors or co-workers.
- Prohibiting employees from posting pictures of themselves which depict the company in any way.
- Prohibiting "offensive conduct" and "rude and discourteous behavior" in a broad manner, without limiting language that would remove the rule's ambiguity with regard to PCA.

In general, the NLRB finds that broad prohibitions reasonably tend to chill the exercise of employee rights under the NLRA.

Conclusion

Employers must exercise caution in both drafting and enforcing social media policies. All employers, whether union or non-union, should review their social media policies to determine whether the policy could reasonably tend to chill employees in the exercise of their rights to discuss terms or conditions of employment and workplace concerns. If the answer is yes, the policy should be modified. Further, employers must remember that social media activity must be analyzed on a case-by-case basis with an eye towards the audience and the content of supportive comments. In case of doubt, legal counsel should be consulted to help evaluate the risks of enforcing the related work rule policies.

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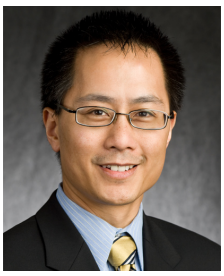
Proposed Amendment to the Ohio Constitution Seeks to Invalidate the Federal Health Care Mandate in Ohio



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This November, Ohioans will vote on a proposed amendment to the Ohio Constitution ("Ohio Amendment"), which purports to exempt Ohio from certain aspects of the federal "Patient Protection and Affordable Health Care Act of 2010" (the "Health Care Act"), the national health care overhaul enacted last year. Here is a primer on the Ohio Amendment.

The Text and Purpose of the Ohio Amendment

If passed, the Ohio Amendment would add Section 21 to Article I of the Ohio Constitution. The full text of the proposed constitutional amendment is as follows:

Preservation of the freedom to choose health care and health care coverage

> **Section 21(A)** No federal, state, or local law or rule shall compel, directly or indirectly, any person, employer, or health care provider to participate in a health care system.

Section 21(B) No federal, state, or local law or rule shall prohibit the purchase or sale of health care or health insurance.

Section 21(C) No federal, state, or local law or rule shall impose a penalty or fine for the sale or purchase of health care or health insurance.

Section 21(D) This section does not affect laws or rules in effect as of March 19, 2010; affect which services a health care provider or hospital is required to perform or provide; affect terms and conditions of government employment; or affect any laws calculated to deter fraud or punish wrongdoing in the health care industry.

Section 21(E) As used in this Section,

(1) "Compel" includes the levying of penalties or fines.

(2) "Health care system" means any public or private entity or program

whose function or purpose includes the management of, processing of, enrollment or individuals for, or payment for, in full or in part, health care services, health care data, or health care information for its participants.

(3) "Penalty or fine" means any civil or criminal penalty or fine, tax, salary or wage withholding or surcharge or any named fee established by law or rule by a government established, created, or controlled agency that is used to punish or discourage the exercise of rights protected under this section.

The Ohio Amendment's purpose is to nullify in Ohio one of the most controversial features of the Health Care Act — the mandated purchase of health insurance. The Ohio Amendment would also prohibit Ohio from enacting a law requiring some minimum level of insurance coverage.

The Ohio Amendment Will Likely be Challenged if Passed

Passage of the proposed amendment to the Ohio Constitution promises to be only the first chapter in a battle over its validity. Proponents of the federal Health Care Act would likely seek to have the Ohio Amendment declared unenforceable as being inconsistent with the Supremacy Clause of the United States Constitution.

The Supremacy Clause states that the federal Constitution and the federal laws "shall be the supreme Law of the Land," binding all states to follow federal law over inconsistent provisions of state law. Proponents of the federal law would therefore argue that Ohio is bound by the Health Care Act regardless of what the Ohio constitutional amendment purports to do.

On the other hand, proponents of the Ohio Amendment would likely counter that the Health Care Act is itself unconstitutional because the law exceeds the power of the federal government. Accordingly, the argument goes, the Health Care Act cannot be the "supreme Law of the Land."

A group of federal lawsuits challenging the federal Health Care Act have already been winding their way through the courts, one or more of which will ultimately (in all likelihood) be decided by the United States Supreme Court.

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Electors Entitled to Reasonable Amount of Time to Vote

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Election Day is November 8, 2011. With this date fast approaching, employers should consider their rights and obligations with respect to employees' exercise of their rights to vote.

Ohio election law prohibits an employer, and its officers or agents, from:

- Discharging or threatening to discharge an elector for taking a reasonable amount of time to vote on Election Day;
- Requiring or ordering an elector to accompany the employer, officer or agent to a voting place on Election Day;
- Refusing to permit an elector to serve as an election official on any registration or Election Day; or
- Indirectly using any force or restraint, threatening to inflict any injury, harm, or loss, or otherwise intimidating an elector in order to induce or compel such person to vote or to refrain from voting for or against any person, question or issue submitted to the voters.

What Is "A Reasonable Amount of Time to Vote"?

The law does not specify what constitutes "a reasonable amount of time" for an elector to be absent from work to vote. Thus, an employer must make a judgment call as to what meets the standard. In evaluating this, we suggest that employers consider relevant factors, such as an employee's travel time from the worksite to the particular polling site and back and the employee's means of travel (i.e., personal car vs. public transportation). Employers should also consider any known characteristics of a particular polling site that may cause delay.

Are All Employees Entitled To This Protection?

Notably, the statute does not use the term "employee." Rather, the term "elector" is used and does not necessarily encompass all employees. An "elector" meets the following requirements:

- U.S. Citizen;
- At least 18 years old;
- Resident of Ohio at least 30 days immediately preceding Election Day;
- Resident of the county and precinct in which the citizen offers to vote; and
- Registered to vote at least 30 days prior to Election Day.

With the level of detail involved in this definition, an employer may find it difficult to readily verify whether a particular employee is an "elector" entitled to the law's protection. Thus, it may be prudent and/or more efficient for an employer to accept an employee's self-identification as an "elector."

Are Electors Entitled to Paid Time Off?

The answer depends upon whether an elector is a salaried employee or an hourly employee. According to a longstanding Ohio Attorney General opinion, employers cannot dock the pay of salaried employees for their reasonable absence from work to vote. In contrast, employers are not required to pay workers employed on a piecework, commission, or an hourly basis for their time away from work to vote. The reasoning behind this distinction is that the latter group of employees is entitled only to compensation for work actually performed or for the amount of time actually spent in their employment; thus, the employees do not incur a loss or a reduction in compensation when absent from work due to voting.

If an employer were to reduce a salaried employee's wages for the reasonable time spent voting, such action would result in an "injury" or "loss" to the employee and amount to a withholding of wages. If the employer did so in order to induce or compel the employee to vote or refrain from voting for or against any person, question, or issue on the ballot, the employer would violate Ohio Election Law and be subject to a fine varying between $50 and $500 per incident. In addition, such a practice may run afoul of the Fair Labor Standards Act and/or Ohio wage and hour law.

Laws of Neighboring States

A few of Ohio's neighboring states also provide employees with time off to vote in certain circumstances. For example, Kentucky permits unpaid absences of not less than four hours, and West Virginia permits paid absences of up to three hours, with exceptions. Unlike Ohio, both of these states require advance notice from the employee. In contrast, Indiana, Michigan and Pennsylvania do not have time-off-to-vote laws. If you are an employer with workers in these states, you should familiarize yourself with the specifics of the applicable state laws.

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Employee Political Activity and the National Labor Relations Act

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Under Section 7 of the National Labor Relations Act (NLRA), employees have the right to engage in concerted activity for their mutual aid and protection. Both the National Labor Relations Board and the United States Supreme Court have held that this protection applies not only to activity concerning employees' immediate terms and conditions of employment with their own employer, but also concerted activity that is "in support of employees of employers other than their own" as well as activity to "improve their lot as employees through channels outside the immediate employee-employer relationship." One such channel is political activity.

There are, however, limitations on the protection of political activity under the NLRA. In order for activity to be protected, there must be "a direct nexus between the specific issue that is the subject of the advocacy and a specifically identified employment concern of the participating employees."

Examples of protected political activities would include calling for support for raising the minimum wage, mandatory paid sick leave, or other issues relating to employees' working conditions. In contrast, issues that are unrelated to employees' specific working conditions, such as support for election of a particular candidate or a slate of candidates without

reference to specific employment-related issues, would not fall within protected activity.

Employees' concerted *economic* activity, such as a strike, walkout, or leaving work early to support a political cause, is more limited and is protected only if the activity is directed at an employer who has *control* over the subject matter of the disputed issue. Thus, employees who leave work without permission to mobilize public sentiment or to urge legislative action would not be protected, as such matters are outside of their employer's control. In addition, a work slowdown is unprotected regardless of the employees' objectives.

In sum, *unprotected* activity includes:

- Political advocacy where the subject has no nexus with a specific employment concern.
- Political advocacy that results in disruption to the workplace operations, where the employer has no control over the outcome of the issue.

Even if particular political activity is protected, the means employed to carry out the activity in the workplace must be appropriate. If the activity takes place on company time or in work areas, the activity is subject to lawful and neutrally applied work rules restrictions, such as solicitation and distribution, political decorations or accessories, or e-mail usage policies.

Employers should take the following preventive steps to control political conduct in the workplace:

- Be sure all employees have received copies of company policies regarding solicitation and distribution, e-mail usage, and political decorations, accessories or clothing;
- Draft these policies to prohibit broad types of actions, rather than targeting narrower activity; and
- Enforce these policies consistently and even-handedly, without regard to the political viewpoint or the topic.

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