

The Legal Strategist

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TEXAS ESOTERIC FACTS

These days, most people who are of working age have some kind of online presence, whether it takes the form of a personal Twitter feed, MySpace, LinkedIn account, Facebook page, or posted comments and reviews on products, news articles, company websites, or other people's social media pages. It's not too hard for employers to find you online, but what can they do with that information once they discover it? Are there any protections for what you post?

The Feature Topic is a cursory review. If you would like more information on this, or any other topic previously covered in our newsletter, which can be viewed on [The Legal Strategist](#) tab of my web site, please contact my office. *Scott Barrett*

Texas experiences the most tornadoes in the United States, with an average of 139 per year. Tornadoes occur most often in North Texas and the Panhandle.

FEATURE TOPIC: Federal Protection for Employees Using Social Media

There are a handful of potential protections for employees who post, including state laws that protect employees from discrimination based on their off-duty conduct, political opinions, or religious beliefs. Lately, however, employees have received the strongest protection from the federal National Labor Relations Board (NLRB), which has determined that labor laws prohibit employers from firing or disciplining employees for certain job-related posts.

Federal labor laws, which generally regulate the relationship among employees, unions, and management, protect employees who engage in "concerted activity" to increase their pay, improve working conditions, or resolve other workplace problems. Employees are protected whether or not they are in a union. Even in a non-union workplace, employees who act together on workplace issues – by, for example, meeting with a manager to lobby for better benefits or having a group discussion about the company's safety record – are protected from employer retaliation.

An activity is concerted only if it involves more than one employee's concerns. For example, an employee who complains about her own performance evaluation is not taking concerted action. But an employee who complains, after consulting with or on behalf of coworkers, that the company's performance evaluation system unfairly penalizes employees who speak up in safety meetings is engaged in concerted action. As the NLRB puts it, "personal gripes" are not protected.

Even if employees are clearly acting in a concerted way, they won't be protected if they cross the line from constructive behavior to malicious or reckless actions. Employees who reveal company trade secrets or make threats of violent behavior, for example, won't have any recourse if they are fired for these activities.

Recently, the NLRB has shown great interest in applying these protections to online employee posts and comments. Here are some examples:

- An employee was having a dispute with a coworker about job performance, staffing levels, and how well the employer (a nonprofit that provided services to the public) was serving its clients. In a Facebook post, the employee asked coworkers for their input on the issues, and several responded in online comments. All were fired because of the online conversation. The NLRB found that they were engaged in protected concerted activity, even though some of the comments were sarcastic or included profanity, because they were discussing working conditions in advance of a meeting with management.
- An employee made disparaging comments about a supervisor on Facebook, and a number of coworkers chimed in. The employee had been denied union representation to help her in responding to a customer complaint. The NLRB found that the employee's comments were protected concerted activity.
- While on a lunch break following a dispute with a supervisor, an employee updated her Facebook status to an expletive and the name of the employer's home improvement chain. Several coworkers "liked" her status. She later posted that the employer didn't appreciate its employees; no coworkers responded to this online. She was fired for the posts. The NLRB found that she was not engaged in concerted activity because she was neither acting on behalf of other employees nor seeking their input or support to turn her complaint into a group action. Instead, the NLRB found she was airing a "personal gripe," which was not protected.

As these cases show, employees are often protected if they are discussing employer policies or practices that apply broadly. Protection is also more likely if employees are having an online discussion to prepare to discuss issues with management. The more personal the post (for example, calling a supervisor names), the less likely the employee is protected. On the other hand, even if a post includes expletives and name-calling, it might still be protected if it is a complaint, responded to by other employees, about practices employees see as unfair or unwarranted.

If you would like more information on social media policies and the law, please contact [Scott Barrett](#) to set up a consultation.