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The NLRB, EEOC And Social Media

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Be careful, the National Labor Relations Board (NLRB) is not the only federal agency interested in the interplay between social media and workplace decisions. On August 24, the Equal Employment Opportunity Commission (EEOC) Training Institute held a workshop where it addressed, among other things, the Commission's interest in social media's impact on the enforcement of federal employment discrimination laws.

How can an employer get tripped up? Consider a case alleging that an employee was terminated – before she was clearly "showing" – on the basis of pregnancy discrimination. The employee typically will need to establish that the decision-maker was aware of her pregnancy when the decision to terminate was made. If the plaintiff can establish she prominently posted her pregnancy on her Twitter or Facebook page – and can establish that the decision-maker had knowledge of such posts (for example, by being her Facebook friend) – the plaintiff will have a much better chance of avoiding summary judgment and getting her case before a jury.

How does an employer protect itself from that scenario? A blanket ban on employees "friending" each other on social media networks likely runs afoul of the employees' right to engage in "protected concerted activity" under the National Labor Relations Act, and in any event is impractical and probably bad recruiting and employee relations. Some employers already restrict supervisors from friending subordinates which, if consistently adhered to and enforced, might help in the above scenario.

Bottom line: The interplay between social media and workplace issues only becomes increasingly complex. Its inherent newsworthiness also makes it an attractive target for enforcement agencies wanting to show they are aggressively pursuing what they see as their mandate. Accordingly, expect to see the EEOC ramp up enforcement in this context during the coming months.

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