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#Hashtag Headaches... Employee Rights In A Social World

ABC Lobster is a fictitious restaurant with an award-winning lobster roll. Unfortunately, despite its success, the restaurant has real issues managing inventory. Three times over the past month ABC Lobster has failed to order enough lobster meat to make lobster rolls. ABC Lobster's wait staff has lost significant tips when the lobster roll is off the menu. The wait staff expressed its concerns at a staff meeting. However, the problem continued. One night a waiter, let's call him Alex, had enough. Alex tags a photo of ABC Lobster's menu to his personal Instagram page stating "ABC Lobster...the most unorganized restaurant in town...trust us we work here" #sloppy #Wheresthelobster @ABCLOBSTERemployees @ABCLOBSTER. Over the next two days, five other employees "Like" Alex's post and two employees post comments in support. Can ABC Lobster fire Alex for creating this mess? *Probably Not.* Here's why:

The National Labor Relations Board (the "NLRB"), established through the National Labor Relations Act (the "Act"), protects, in part, the ability of employees to participate in a "concerted activity." A concerted activity protects the rights of employees to act together to address issues such as pay, benefits and working conditions. The NLRB will prosecute employers who wrongfully discharge employees who participated in a concerted activity. A concerted activity, by its very definition, must be made for the betterment of a group of employees, not by one employee for his/her own personal gain. The Act was originally passed by Congress in 1935. Obviously a lot has changed over the past 79 years. The NLRB has recently been forced to interpret the intent of the Act as it relates to employees' use of social media. The first of such decisions were handed down in 2011 and the NLRB has been refining its position ever since.

So what about Alex? To find our answer we must dive deep into the facts surrounding his Instagram post. The first inquiry should be whether management of ABC Lobster had prior notice of the complaints from employees regarding this situation. As we see above, employees expressed concern/complaints regarding the lack of the lobster roll at a prior staff meeting. Further, it is also important to recognize that Alex tagged the username @ABCLOBSTERemployees. By the very nature of an "employees" username, Alex's post is meant to include and support

other employees at ABC Lobster. Finally, and maybe most importantly, Alex's post has been "Liked" and supported by comments from other ABC Lobster employees. Recent decisions by the NLRB focus heavily on whether a social media post by an employee is answered by other employees, the substance of those answers, and whether other employees "Like" the post. Above, Alex's post was "Liked" by five employees and two comments expressed support. This is likely evidence that Alex's post was for the benefit of other employees at ABC Lobster and therefore it is a protected concerted activity. Therefore ABC Lobster would be in violation of the Act and subject to potential prosecution by the NLRB if it terminates Alex for the Instagram post.

So how does your restaurant avoid the same fate as ABC Lobster? Create a comprehensive social media plan for your restaurant. Whether you like it or not, your employees are going to use social media and sometimes this use is going to implicate your restaurant. The NLRB has stated that "policies should not be so sweeping that they prohibit the kinds of activity protected under the Act, such as the discussion of wages or working conditions among employees." However, it is possible to tailor a social media policy so that it protects your restaurant while respecting the rights of employees under the Act.

Finally, this past June, the United States Supreme Court overturned three recess appointments by President Obama to the NLRB. The case, *NLRB v. Noel Canning*, affects more than one thousand recent decisions by the NLRB, some of which deal with social media at the workplace. Whether the NLRB will reissue these decisions is yet to be seen. However, it underscores and highlights that this area of the law is constantly changing and therefore you should revisit your social media policy periodically.

This article is intended for informational purposes only and should not be construed as legal advice. Readers are encouraged to consult counsel of your choice concerning any specific legal questions you may have.

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