Social Media Still a Hot Topic For Employers

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The ever-increasing use of social media by employees who comment and post on work-related topics continues to be a focal point for the National Labor Relations Board. In August 2011, the NLRB published a report that summarized recent cases involving social media issues, and, on January 24, the agency released another report with updates in this area of law. The latest report focuses on several issues including whether employer policies that limit employee social media use are overly broad and could reasonably be interpreted as restricting employee communications that are protected under the National Labor Relations Act.

The report details fourteen cases, seven of which involve the lawfulness of employer social media policies, particularly with regards to whether the policies contain overly broad restrictions on employee social media posts. The Board's decisions emphasize the language used by employers in their policies and whether the policies contain examples or contextual qualifiers that could be understood as placing limits on application of the social media policy.

In one case, an employer's policy prohibited employees from engaging in unprofessional communication that could harm the employer's reputation or mission. The NLRB found this policy too broad because, according to the Board, it could reasonably be interpreted by employees as a prohibition on discussing the terms and conditions of their employment, activity that is protected under the NLRA. Similarly, the NLRB found unlawful a policy that prohibited employees from identifying themselves as employed by the company when using social media sites unless the employee was discussing the terms and conditions of their employment in an "appropriate manner." The NLRB deemed this policy too vague since it did not define what an "appropriate" discussion of terms and conditions of employment would be. Because there was no definition of this key term, "appropriate," the NRLB reasoned that employees would interpret the policy to restrict activity that is protected by law.

In another particularly interesting case, the Board examined an employer's initial social media policy and then a revised version of the same policy. The first policy prohibited "discriminatory, defamatory or harassing web entries about specific employees, work environment, or work-related issues on social media sites." This was found unlawful and overbroad because it contained the term "defamatory" without any clarification as to what constituted a "defamatory" posting. The NRLB reasoned that a complaint about working conditions might be considered defamatory by the employer, but would still be protected speech under the NLRA.

The same employer's amended policy, however, was found lawful. This policy prohibited "the use of social media to post or display comments about coworkers or supervisors or the Employer that are vulgar, obscene, threatening, intimidating, harassing, or a violation of

the Employer's workplace policies against discrimination, harassment, or hostility on account of age, race, religion, sex, ethnicity, nationality, disability, or other protected class, status, or characteristic." The Board looked at the amended rule in light of the contextual language and found that the rule could not reasonably be construed to apply to protected activity since it appears within a list of "plainly egregious conduct." Thus, the employer's policy withstood scrutiny because it provided the necessary context to clarify that only harassing or discriminatory communications are prohibited.

Social media use in the workplace is a continuously evolving area of law. The cases in the NLRB's latest report illustrate that questions surrounding employee social media posts and employer policies are extremely fact-specific. In devising a social media policy, employers should avoid using overly broad language and should clearly define key terms so that the policy is not construed as restricting lawful employee activity.