NLRB Provides Guidance On Acceptable Corporate Social Media Policies

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The rise of social media, and the ease with which people may communicate over such channels, can lead to thorny workplace issues as employers now struggle to define rules that restrict the use of social media by their employees.

One area of concern when drafting such policies is the National Labor Relations Act (NLRA), which protects the right of employees to organize and join unions in the workplace, seek collective bargaining, and engage in other concerted activities.

The National Labor Relations Board (NLRB) has offered opinions in numerous cases involving social media policies, primarily whether social media policies that restrict employee posting or communication via such channels are overly broad and violate an employee's right to engage in concerted action under the NLRA.

On May 30, 2012, the Acting General Counsel of the NLRB issued a third Memorandum and Report on social media policy cases. The report specifically addressed seven different employer policies. Only one of the cases involved a revised social media policy that the Acting General Counsel determined was lawful under the NLRA. That policy is set forth in full at the end of the Memorandum and Report. The Report opined that all of the other six employer policies and rules included at least some provisions there were "overbroad and thus unlawful under the National Labor Relations Act."

The NLRB's primary concern in this area are social media rules that restrict, prohibit or discipline employees for exercising rights protected under Section 7 of the NLRA which reads in part:

"Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities . . ."

The social media policy in the seventh case was considered lawful even though it:

- Prohibits "inappropriate postings that may include discriminatory remarks, harassment and threats of violence or similar inappropriate or unlawful conduct";
- Asks employees to "Be Respectful" and "fair and courteous" in the posting of comments, complaints, photographs, or videos;
- Requires that employees avoid posts that "could be viewed as malicious, obscene, threatening or intimidating;
- Prohibits "harassment or bullying" that includes "offensive posts meant to intentionally harm someone's reputation" or "posts that could contribute to a hostile work environment on the basis of race, sex, disability, religion or any other status protected by law or company policy."

- Requires employees to maintain the confidentiality of the Employer's trade secrets and private and confidential information

The foregoing provisions were considered lawful because the policy includes sufficient examples of prohibited conduct that employees would not reasonably read them as prohibiting Section 7 activity under the NLRA.

Including sufficient examples of prohibited conduct, and ensuring that these examples do not impinge on Section 7 activity is crucial when drafting an appropriate social media policy that will be acceptable to the NLRB. http://bit.ly/OEay0s

Tharpe & Howell can assist you in drafting a social media policy for employees and other employment matters.

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