## Social Media Policy: You're Probably Doing It Wrong

***By Christopher B. Hopkins***

Your law firm's and clients' social media policies are likely unlawful. The National Labor Relations Board (NLRB) has issued opinions striking down employer internet policies so frequently that it has turned to issuing Cliff Notes-like "guidance memoranda" three times in less than two years in order to concisely explain the law. But the violations continue: from large corporations down to, yes, even law firms. Policies which ban employees' use of social media are frequently found to be unlawful but so are more gentle "be respectful" guidelines. Overbroad policies may arise from an overprotective corporate lawyer – hoping to "contract away" liability and risks – or if the job was handed to a lawyer deemed an expert on social media simply because she has a Facebook account. This is an area of the law which requires a fundamental understanding and a willingness to keep up with the newest cases. Pull a copy of your firm's or your clients' policies and compare them to the provisions below.

Generally speaking, an employer violates section 8 of the National Labor Relations Act (NLRA) if it has a workplace policy which would "reasonably tend to chill employees in the exercise of their section 7 rights." Lafayette Park Hotel, 203 F.3d 52 (D.C. Cir. 1999). Section 7 rights include organizing and communicating about work conditions, pay, and labor policies. The NLRB uses a two step inquiry to determine if an employer's policy violates the NLRA: (1) the policy explicitly limits section 7 activities or (2) there is a showing that (a) employees would reasonably construe the policy to limit section 7 activities; (b) the policy was implemented in reaction to union activity; or (c) the policy had been applied in an unlawful way. Lutheran Heritage Village-Livonia, 343 NLRB 646, 647 (2004). It is critical to understand that employee behavior which can be viewed as "concerted activity" (when an employee acts with on or on authority of other employees and not solely by and on behalf of the employee himself) is protected and cannot be inhibited or prohibited.

Here are some recent employer social media policies which, according to the guidance memoranda, the NLRB recently held to be in violation of the NLRA:

- ***No posting of pictures or images of the company, its logo, or vehicles:*** this type of restrictive policy is unlawful since, while an employer may have intellectual property rights, non-commercial use (e.g., wearing company logos on picket-line shirts) is protected and this rule might encompass such protected activity.
- ***No "inappropriate discussions":*** in the absence of non-protected examples of prohibited discussions, this rule violates the NLRA because it uses broad terms which commonly apply to protected criticism of an employer's labor policies, treatment of works, or terms and conditions of employment.
- ***No social media posting which might violate, compromise, or disregard rights and reasonable expectation of privacy of any person:*** This rule was overbroad because it provided no guidance or definition as to what the employer deemed to be private/confidential. The absence of such a definition (and how it was applied in a specific case) made it unlawful.
- ***No posts which would embarrass, harass, or defame an employee, officer, or director:*** This rule was overbroad as it would include terms that would commonly apply to protected criticism of the employer's labor policy or treatment of employees. The policy failed to define the terms or limit them in any way that would exclude section 7 activity.
- ***No revealing personal information of employees, clients, partners, or customers:*** This restriction on revealing personal information was unduly broad and could reasonably be construed as restraining section 7 activity. For example, employees have a right to discuss wages and other terms and conditions of employment; a rule which prohibits sharing personal or other employee information violates section 8. This type of rule would need a clear context and/or limitations and definitions.
- ***No making disparaging comments about the company:*** This rule was unlawful because it would reasonably be construed to restrict section 7 activity, such as statements that the employer is not treating employees fairly or paying them sufficiently.
- ***No posts which are unprofessional, could negatively impact the employer's reputation, or interfere with employer's mission:*** Absent some limitations and examples (e.g., no display of obscene material or revealing of trade secrets), this rule would chill protected communications and activity.
- ***No publication of any representation about the company without prior approval by management:*** An employer's rule which prohibits employee communication to the media or requests prior authorization is unlawfully overbroad; this rule goes further in that it prohibits all such public statements regarding the company and would reasonably include protected section 7 communications.
- ***Inclusion of a "savings clause" that nothing in the policy is intended to inhibit protected activity:*** Good effort but not enough; a savings clause is insufficient to cure the ambiguities in the rule and remove the chill upon protected activity. According to the NLRB, an employee would not reasonably be expected to know that the savings clause encompassed discussions which the employer had forbidden in other sections.

Does this mean any social media policy will violate the NLRA? No, the NLRB is looking for employers to craft policies which plainly exclude protected activity. Employers can use examples which show that the general rule is not intended to prohibit section 7 activity. Employers can also avoid liability if the employee's conduct at issue actually interfered with any employee's work or otherwise actually interfered with operations (and that was the reason for disciplining the employee). Other defenses – such as establishing that the employee was not engaging in section 7 activity – also exist. The critical starting place, however, is a solid social media policy written by knowledgeable counsel.

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