Social Media Law Blog
Highlighting Legal Issues Regarding Social Media
Presented By SheppardMullin

Your Social Media Policy May Need Revamping

October 3, 2011 by Michelle Sherman

If your company adopted a social media policy more than two months ago, or, if your company modeled its policy after one of the sample policies available on the Internet, then there is a very good chance that your social media policy is overbroad and needs to be revised. For example, if your social media policy prohibits social media activity that disparages the company without making it very clear that this prohibition does not include protected concerted activity (as more fully described below), then your policy needs to be amended.

1. An Overbroad Social Media Policy Can Hurt Your Company's Bottom Line

The financial incentive for making sure your policy, and how you apply it to your employees' social media activity, is done correctly is underscored by a September 2, 2011 administrative law judge opinion. In *Hispanics United of Buffalo, Inc.*, the ALJ ordered the non-profit Hispanics United of Buffalo, Inc. ("HUB") to rehire and provide back pay to five employees who were fired over Facebook posts in which they were complaining about criticisms of their job performance by another HUB employee. Their posts were held to be "concerted activity" on a subject matter protected by Section 7 of the National Labor Relations Act ("NLRA"), and their termination was in violation of Section 8(a)(1) of the NLRA. Individual action is concerted if it is engaged in with the object of initiating or inducing group action. In terms of dollars for a company, this type of

ruling can mean hundreds of thousands of dollars in salary to the employees hired to replace the terminated employees, back pay and attorneys' fees and costs in defending the action.

2. The NLRB Has Issued Helpful Guidelines For How To Respond To Your Employees' Social Media Activity

This is the first decision involving the firing of employees for work related social media activity. However, it is not the first time that the National Labor Relations Board ("NLRB") has communicated its official position on the parameters for a social media policy. On August 18, 2011, the Acting General Counsel for the NLRB reported on the outcome of investigations into 14 cases involving the use of social media and employer's social media policies. Acting General Counsel Lafe Solomon stated, "I hope that this report will be of assistance to practitioners and human resource professionals." In four cases, the NLRB found that the employees were engaged in "protected concerted activity" because their social media activity was an online discussion of the terms and conditions of their employment with co-workers. The NLRB report also stated that employers had the most problems with overbroad policies.

Another helpful guide for employers was issued on August 5, 2011 by the U.S. Chamber of Commerce (Labor, Immigration & Employee Benefits Division) in which the Chamber reported that the NLRB has reviewed more than 129 cases involving social media in some way. "The issues most commonly raised in the cases before the Board allege that an employer has overbroad policies restricting employee use of social media or that an employer unlawfully discharged or disciplined one or more employees over contents of social media posts."

The relevant law for HR professionals and businesses to consider when speaking to employees about their social media activity are Sections 7 and 8(a)(1) of the NLRA. Section 7 provides in pertinent part that: "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". In practice, this means that employers cannot chill, or penalize communications between employees concerning work conditions, terms and conditions of employment (salary, benefits), managers and management.

A further wrinkle added by social media to this statutory protection of employees is that most employees who are on a social networking site, such as Facebook, are connected with other employees, and those employees may comment on their co-worker's online complaint about work, thereby, giving possibly rise to "protected concerted activity." Even a "like" of the co-worker's post – short of a comment – may possibly give rise to protected activity. The NLRB has even held that a comment that seems on its face to be outside the scope of protected activity is off limits for sanctioning an employee. For example, the NLRB has held that employees should not have been terminated for the following content on a social networking site:

1. An employee complained about the cheap food that his luxury car dealership employer gave away at a sales event for customers. The rationale was that the employee and the co-workers, who commented on his Facebook post, were concerned that giving away cheap food would result in a negative impression of the car dealership, less cars being sold, and thus reduced sales commissions for them.

2. An employee used profanity and sarcasm in soliciting comments from her work colleagues on Facebook about a victim advocate who worked with them and was critical of the client services they were providing. Her comments did not lose their protected status even with the strong language she used.

Section 8(a)(1) provides that employers cannot "interfere with, restrain, or coerce employees in the exercise of the right guaranteed in Section

7 of this Act." Employers are also prohibited from "unlawful surveillance" of their employees, which means that employers should not try to access social media activity of their employees that is not public and concerns protected activity.

3. Not All Social Media Activity Is Protected: Employees Cannot Harass Or Bully Other Employees, Or Defame Their Employers Indiscriminately

This does not mean that employers cannot take action against employees for social media posts concerning the company and its management if:

(1) the employee is bad mouthing the company and/or management, and the statements clearly do not concern work conditions, benefits, wages and other terms and conditions of employment – employers are entitled to loyalty from their employees;

(2) the employee is discussing privileged and confidential client communications; and

(3) the employee is harassing, threatening, or making racist statements directed at a co-worker.

4. Conclusion

The good news is that the revision or drafting of a social media policy by an attorney who stays current with social media legal issues is relatively inexpensive and easily executed. Companies do not need to resort to boilerplate policies that may be overbroad, and create unnecessary legal exposure for the company.

For further information, please contact Michelle Sherman at (213) 617-5405. (Follow me on Twitter!)