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Employment & Benefits

April 2012

Employers *Must* Update Their Social Media Policies

According to a second report on social media cases issued by the Acting General Counsel of the federal National Labor Relations Board (NLRB) earlier this year (the first report was issued in August 2011), the federal National Labor Relations Act (NLRA) does not permit many of the provisions typically contained in social media policies. Employers therefore must consider updating their social media policies for compliance with the NLRA (and/or should consider adopting compliant social media policies in the event they have not done so yet).

According to the NLRB's press release, one of the main points underscored by the second report is that "[e]mployer policies should not be so sweeping that they prohibit the kinds of activity protected by federal labor law, such as the discussion of wages or working conditions among employees." The NLRA permits union and non-union employees who are not "supervisors" to engage in concerted action for their mutual aid and protection, including discussing their terms and conditions of employment. Such discussions are increasingly taking place on social media such as Facebook, Twitter and the like.

The following highlights the main findings of the report with respect to enforceability of social media policies. According to the report—which does not in itself have the force of law, but does represent the formal position of the NLRB's General Counsel's office—the following types of prohibitions commonly featured in employers' social media policies **are overbroad under the NLRA**:

- Prohibiting "[m]aking disparaging comments about the company through any media, including online blogs, other electronic media or through the media."
- Providing that employees should generally avoid identifying themselves as employed by the employer unless discussing terms and conditions of employment in an "appropriate" manner.
- Prohibiting "insubordination or other disrespectful conduct" and "inappropriate conversation."
- Prohibiting employees from engaging in unprofessional communication that could negatively impact the employer's reputation or interfere with the employer's mission or unprofessional/inappropriate communication regarding members of the employer's community.
- Prohibiting the sharing of confidential information related to the employer's business, including personnel actions.

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- Prohibiting disclosure or communication of information that is confidential, sensitive or non-public concerning the employer on or through company property to anyone outside the company without prior approval of senior management or the law department.
- Prohibiting use of the employer's name or service marks (including logo) outside the course of business.
- Prohibiting employees from publishing any representation about the company (including to the media) without prior approval. [However, as stated in a prior NLRB report on social media cases, employers have a legitimate business interest in limiting who can make official statements for the company and can adopt a media policy that "simply seeks to ensure a consistent, controlled company message and limits employee contact with the media only to the extent necessary to effect that result."]
- Requiring social networking site communications to be made in an honest, "professional" and "appropriate" manner, without defamatory or inflammatory comments regarding the employer and its subsidiaries, and their shareholders, officers, employees, customers, suppliers, contractors and patients.
- Requiring employees to get approval prior to identifying themselves as employees of the employer and, if they do so identify themselves, to state expressly and each time that they use social media that their comments are their personal opinions and do not necessarily reflect the employer's opinions. "[P]ersonal profile pages...enabl[e] employees to use online social networks to find and communicate with their fellow employees."
- Requiring that employees first bring any "work-related concerns" to the employer.
- Prohibiting discriminatory, defamatory or harassing web entries about specific employees, work environment or work-related issues on social media sites. The report finds that the use of broad terms such as "defamatory" as applied specifically to work-related issues is overbroad.

Notably, the report states that including a "savings clause," which provides that the policy is not intended to interfere with employees' NLRA rights, may not be sufficient to save an otherwise overbroad policy.

On the other hand, the report finds that the following types of policies **may be valid** under the NLRA:

- Prohibiting 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 policies against unlawful discrimination or harassment. "[A] rule's context provides the key to the 'reasonableness' of a particular construction...The rule appears in a list of plainly egregious conduct, such as violations of the Employer's workplace policies against discrimination [and] harassment."
- Prohibiting "statements which are slanderous or detrimental to the company" that appeared on a list of prohibited conduct including "sexual or racial harassment" and "sabotage."
- Requiring employees to confine their social networking to matters unrelated to the company, if necessary, to ensure compliance with securities regulations and other laws.
- Prohibiting use or disclosure of confidential and/or proprietary information, including personal health information about customers or patients. "Considering that the Employer sells pharmaceuticals and that the rule contains several references to customers, patients and health information, employees would reasonably understand that this rule is intended to protect the privacy interests of the Employer's customers and not restrict [protected rights under the NLRA]."
- Providing that employees must indicate that their views were their own and did not reflect those of their employers and prohibiting them from using their employers' names or publishing any promotional content, where such provisions appear in a section entitled "Promotional Content" that explains that "special requirements apply to publishing promotional content online," defines such content and refers to related regulations of the Federal Trade Commission.

Of course, even with social media policies that comply with the NLRA, employers must exercise caution so that any disciplinary action taken against employees for their social media use does not otherwise violate such employees' rights under the NLRA.

NY/0412/ECBEL/A/06922_4