

## LABOR & EMPLOYMENT LAW

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### NLRB Memo Provides Further Guidance on Employee Use of Social Media

The National Labor Relations Board (NLRB) has continued to invalidate employer social networking policies for interfering with protected activity by employees. In a memo issued last week, NLRB Acting General Counsel Lafe Solomon disclosed that in five of seven recently decided cases, the Board found the employer's policy to be unlawful and would have struck down a sixth if not for an employer rewrite.

The Acting General Counsel's Operations Management Memorandum, which followed a similar August 2011 report, actually discussed 14 new cases, some concerning questions about social media policies maintained by employers, and others concerning discharges of employees after the employees posted comments to Facebook. It provides further guidance to employers seeking to implement effective policies without subjecting themselves to undue legal risk.

Regarding social media policies, the memorandum addressed seven cases. Policies considered unlawfully broad included the following prohibitions:

- "Making disparaging comments about the company through any media, including online blogs, other electronic media or through the media"
- Identifying oneself as the Employer's employee unless discussing terms and conditions of employment in an appropriate manner
- Using social media to engage 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
- Disclosing or communicating information of a confidential, sensitive, or non-public nature concerning the company without prior approval; Using the company's name outside the course of business without prior approval; Publishing any representation about the company without prior approval; Failing to obtain approval from the company prior to identifying as an employee of the company on social networking sites

#### HIGHLIGHTS

**NLRB memo provides further guidance on employee use of social media**

**The memo addresses seven social media policy cases. Within those cases, five policies were found to be unlawfully broad.**

**Employers are cautioned to ensure that social media policies do not chill or limit discussions regarding wages and working conditions among employees**

The one policy considered lawful provided examples of the type of information it prohibited employees from posting to social media sites, such as “personal health information about customers or patients” and “‘embargoed information,’ such as launch and release dates and pending reorganizations.”

The remaining cases addressed discharges of employees after those employees posted comments to Facebook. The NLRB upheld one discharge because the employee’s posting was not work-related. In the other cases, the discharges were found unlawful because they were based on unlawful policies.

The memorandum confirms two main situations in which employers may face issues:

1. The implementation of overbroad policies that can be read to prohibit discussion of wages and working conditions among employees; and
2. Termination or other discipline based on an employee’s social media post discussing or planning group action regarding wages or working conditions (though the NLRB confirms that an employee’s comments on social media are generally not considered protected activity if they are “mere gripes not made in relation to group activity among employees”).

Employers are cautioned to ensure that social media policies do not chill or limit discussions regarding wages and working conditions among employees and, prior to taking action against employees for comments made on Facebook or other social media outlets, that such comments do not amount to the type of speech protected by the NLRA.

To obtain more information, please contact the Barnes & Thornburg Labor and Employment attorney with whom you work, or a leader of the firm’s Labor and Employment Law Department in the following offices:

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**Happy New Year from the B&T Labor Team!**

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