

Another Social Media Report by the NLRB Offers Needed Guidance for Employer Policies

June 5, 2012

Attorney Articles

The National Labor Relations Board released its second Social Media Report in January of this year providing the General Counsel's analysis of 14 challenged employer social media policies (see our [February 27 eUpdate](#)). The Board last week released another Report reviewing seven additional employer policies. The Board alleged that six of these policies interfered with employees' rights under the National Labor Relations Act, and found one policy to be lawful. While much of the new Report reiterates prior analysis, the Board significantly expands upon its views of employees' rights to discuss confidential company and coworker information online. Most importantly, the Board expressly approves and fully quotes one particular social media policy, which may serve as a useful guide for employers to review or create their own policies.

As we discussed in our earlier eUpdate on this subject, an employer should not broadly prohibit employees from disclosing confidential, sensitive, or non-public information concerning the employer or fellow employees, or from revealing personal information about other employees or the employer's clients or customers. Employees have a right to discuss their wages and other working conditions with coworkers or third parties, thus broadly prohibiting posts about employees' personal or the company's non-public information is seen by the General Counsel as potentially chilling that type of discussion with fellow employees or third parties (e.g., potential union representatives).

In the new Social Media Report, the General Counsel expands his views on the extent to which employers may not permissibly prohibit the posting of private or confidential company or coworker information. The General Counsel found unlawful several employer social media policies that broadly barred employees from posting non-public company information on a public website, even when that information was explained by the employer to be the company's private financial performance data, customer wins or losses, customer plans, maintenance, cost increases, customer news, business related travel plans or schedules, or personal information about coworkers. In the General Counsel's view, information about company performance, cost increases, and customer wins or losses has potential relevance in collective-bargaining negotiations regarding employees' wages and other benefits. Because this information specifically encompasses the protected activities of discussing terms and conditions of employment, employees could reasonably construe such a policy as precluding them from having protected discussions among themselves or with non-employees.

In addition to discussing the posting of confidential and non-public information, the General Counsel also provides again, as in the second Social Media Report, lengthy lists of prohibited employer policies. These lists of prohibited policies only get employers so far in ensuring their own policies are lawful. This recent Report

Authors

Douglas R. Christensen
Joel O'Malley

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may be more useful to employers, however, in that the General Counsel finally sets forth a complete social media policy that, in the General Counsel's view, is lawful under the National Labor Relations Act. This pre-vetted policy may provide a useful starting point for employers to develop their own policies that can meet their specific needs in different industries and with unique workplace cultures. The policy is quoted in full below:

Social Media Policy

At [Employer], we understand that social media can be a fun and rewarding way to share your life and opinions with family, friends and co-workers around the world. However, use of social media also presents certain risks and carries with it certain responsibilities. To assist you in making responsible decisions about your use of social media, we have established these guidelines for appropriate use of social media.

This policy applies to all associates who work for [Employer], or one of its subsidiary companies in the United States ([Employer]).

Managers and supervisors should use the supplemental Social Media Management Guidelines for additional guidance in administering the policy.

GUIDELINES

In the rapidly expanding world of electronic communication, social media can mean many things. Social media includes all means of communicating or posting information or content of any sort on the Internet, including to your own or someone else's web log or blog, journal or diary, personal web site, social networking or affinity web site, web bulletin board or a chat room, whether or not associated or affiliated with [Employer], as well as any other form of electronic communication.

The same principles and guidelines found in [Employer] policies and three basic beliefs apply to your activities online. Ultimately, you are solely responsible for what you post online. Before creating online content, consider some of the risks and rewards that are involved. Keep in mind that any of your conduct that adversely affects your job performance, the performance of fellow associates or otherwise adversely affects members, customers, suppliers, people who work on behalf of [Employer] or [Employer's] legitimate business interests may result in disciplinary action up to and including termination.

Know and follow the rules

Carefully read these guidelines, the [Employer] Statement of Ethics Policy, the [Employer] Information Policy and the Discrimination & Harassment Prevention Policy, and ensure your postings are consistent with these policies.

Inappropriate postings that may include discriminatory remarks, harassment, and threats of violence or similar inappropriate or unlawful conduct will not be tolerated and may subject you to disciplinary action up to and including termination.

Be respectful

Always be fair and courteous to fellow associates, customers, members, suppliers or people who work on behalf of [Employer]. Also, keep in mind that you are more likely to resolve work related complaints by speaking directly with your co-workers or by utilizing our Open Door Policy than by posting

complaints to a social media outlet. Nevertheless, if you decide to post complaints or criticism, avoid using statements, photographs, video or audio that reasonably could be viewed as malicious, obscene, threatening or intimidating, that disparage customers, members, associates or suppliers, or that might constitute harassment or bullying. Examples of such conduct might include 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.

Be honest and accurate

Make sure you are always honest and accurate when posting information or news, and if you make a mistake, correct it quickly. Be open about any previous posts you have altered. Remember that the Internet archives almost everything; therefore, even deleted postings can be searched. Never post any information or rumors that you know to be false about [Employer], fellow associates, members, customers, suppliers, people working on behalf of [Employer] or competitors.

Post only appropriate and respectful content

- Maintain the confidentiality of [Employer] trade secrets and private or confidential information. Trade secrets may include information regarding the development of systems, processes, products, know-how and technology. Do not post internal reports, policies, procedures or other internal business-related confidential communications.
- Respect financial disclosure laws. It is illegal to communicate or give a "tip" on inside information to others so that they may buy or sell stocks or securities. Such online conduct may also violate the Insider Trading Policy.
- Do not create a link from your blog, website or other social networking site to a [Employer] website without identifying yourself as a [Employer] associate.
- Express only your personal opinions. Never represent yourself as a spokesperson for [Employer]. If [Employer] is a subject of the content you are creating, be clear and open about the fact that you are an associate and make it clear that your views do not represent those of [Employer], fellow associates, members, customers, suppliers or people working on behalf of [Employer]. If you do publish a blog or post online related to the work you do or subjects associated with [Employer], make it clear that you are not speaking on behalf of [Employer]. It is best to include a disclaimer such as "The postings on this site are my own and do not necessarily reflect the views of [Employer]."

Using social media at work

Refrain from using social media while on work time or on equipment we provide, unless it is work-related as authorized by your manager or consistent with the Company Equipment Policy. Do not use [Employer] email addresses to register on social networks, blogs or other online tools utilized for personal use.

Retaliation is prohibited

[Employer] prohibits taking negative action against any associate for reporting a possible deviation from this policy or for cooperating in an investigation. Any

associate who retaliates against another associate for reporting a possible deviation from this policy or for cooperating in an investigation will be subject to disciplinary action, up to and including termination.

Media contacts

Associates should not speak to the media on [Employer's] behalf without contacting the Corporate Affairs Department. All media inquiries should be directed to them.

For more information

If you have questions or need further guidance, please contact your HR representative.

The General Counsel found that this policy was not unlawful because "it provides sufficient examples of prohibited conduct so that, in context, employees would not reasonably read the rules to prohibit Section 7 activity."

If you wish to discuss this recent guidance, feel free to contact an attorney in Dorsey & Whitney's Labor & Employment group, Douglas R. Christensen at 612-340-8875, or Joel O'Malley at 612-492-6727 or omalley.joel@dorsey.com.

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