Is it Time to Reconsider Your Social Media Policy in Light of the NLRB's Most Recent Social Media Report?

Authors

Douglas R. Christensen
Joel O'Malley

Related Services

Labor and Employment

February 27, 2012
Attorney Articles

Employers rightly want to stay attuned to their employees' use of social media in order to protect their public reputation and goodwill. The National Labor Relations Board's quickly evolving positions on employer social media policies are making this increasingly challenging. And the pace of change is startling. A social media policy crafted only last year in compliance with Board guidance may include provisions that now would be deemed unlawful. The Board's Office of General Counsel has released two Social Media Reports (the first on August 18, 2011, and most recently on January 25, 2012), that review the General Counsel's analysis of about a dozen challenged social media policies. When the various cases summarized in the Reports are read together, they suggest employers should reconsider their social media policies to ensure compliance with the Board's current positions.

Under the National Labor Relations Act, which the Board enforces, employees of virtually all employers—both unionized and non-unionized—have the right to discuss with others the terms and conditions of their employment. The NLRA also prohibits employers from interfering with the exercise of those rights. Thus, if an employer relies on an overbroad social media policy to discipline an employee for engaging in protected conduct, that employee can seek damages and employment reinstatement under the NLRA. But the risk may be even greater for an employer without a union. That is, if employees in a non-unionized workplace attempt to organize a union but lose a representation election, the Board can use the employer's overbroad social media policy to overturn the election results and order a new election. In effect, a poorly drafted social media policy can give a union two bites at the election apple.

In light of this, *all* employers should review carefully their policies governing employee use of social media. Although the General Counsel's statements in the Reports are case and fact specific, a synthesis of the reviewed cases provides some general lessons concerning the kinds of social media policies the Board now disfavors.

- **Do not broadly prohibit employees from posting comments that embarrass, harass, disparage, or defame the company, or that demonstrate inappropriate, insubordinate, disrespectful, unprofessional, offensive, rude, or discourteous behavior. Rather, use specific examples of impermissible conduct.**

The Board will not permit an employer to broadly prohibit employees from saying bad things about the employer. And although counterintuitive, the Board also will not permit an employer to broadly require employees' social media posts to be

made in an “honest, professional, and appropriate manner.” Such broad restrictions, without definitions or examples that clearly exclude protected activity from their reach, are viewed by the General Counsel as precluding protected complaints about working conditions. Unfortunately, many employee posts that would fall into these prohibitions—harassing, disparaging, or defamatory comments—would in fact not be protected, and could rightly be the basis for disciplinary action. In other words, while an employee cannot spread lies online about her employer, the employer cannot issue a broad up-front ban prohibiting the employee from doing so; unfortunately, the employer must deal with the employee after the lies have been spread.

All is not lost, though. While an employer cannot broadly prohibit an employee from posting bad things about the employer, it can prohibit posts that obviously would be impermissible if uttered in the workplace. For example, the General Counsel found permissible a policy that prohibited vulgar, obscene, threatening, intimidating, or harassing comments, or those that violated the employer’s workplace policies against illegal discrimination and harassment. In the General Counsel’s view, such a policy could not reasonably be construed to apply to protected activity because it appeared alongside a list of obviously impermissible conduct.

- **Do 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. Instead, tie prohibitions specifically to adherence with securities, health, or similar laws.**

Employees have a right to discuss their wages and other working conditions with coworkers or third parties. Broadly prohibiting posts about employees’ personal information could chill that type of discussion, in the General Counsel’s opinion. In addition, in the General Counsel’s view, employees could reasonably understand such provisions to prohibit them from communicating with third parties (e.g., potential union representatives) about wages and working conditions.

Employers may, however, issue social media prohibitions related to adherence to securities regulations, health privacy rules, and the like. The General Counsel found permissible a national drugstore chain’s policy requesting employees to confine their social networking to matters unrelated to the company to the extent necessary to ensure compliance with securities regulations and other laws. The policy also prohibited employees from disclosing confidential personal health information about customers or patients. Because the policy included these express references, employees reasonably could understand the policy was intended to protect customers’ privacy interests and the employer’s regulatory compliance, and not to restrict protected communications.

- **Do not broadly prohibit employees from depicting the employer, its name, property, or logo, or from identifying themselves as the employer’s employees. Rather, make clear the employer must speak with one online voice.**

The General Counsel disfavors prohibitions on the use of the employer’s name and logo on the ground they could be read as barring an employee from posting a picture of employees carrying a picket sign with the employer’s name, or wearing a t-shirt showing the employer’s logo in connection with a work protest. In addition, the General Counsel views an employee identifying herself with a particular employer as critical to the employee’s ability to connect online with others in

furtherance of protected activity (i.e., finding likeminded union supporters). Thus, for example, an employer cannot bar its employees from incorporating the employer's name in the employee's Twitter username, or from identifying the employer on a Facebook personal profile page. Finally, while the Board has recognized an employer has a proprietary interest in its service marks and in a trademarked or copyrighted name, the General Counsel appears to believe employee use of these marks generally does not infringe on that interest.

While employees may not be prohibited from using the employer's name and logo in social media posts, employers may instruct employees not to post comments *on behalf of* the employer if the policy makes clear that its purpose is to allow the employer to have a consistent, controlled company message. Such an instruction, however, must clarify that employees may post comments *about* the employer and their terms and conditions of employment. In addition, employers may preclude employees from pressuring coworkers to connect or communicate via social media. While it is not permissible to restrict employees from attempting to "friend" or otherwise contact colleagues for the purposes of engaging in protected activity, it is permissible to prohibit pressuring and harassing behavior

- **A savings clause does not save a bad policy.**

Finally, many employers incorporate into their social media policies supposed savings clauses stating, for example, that nothing in the policy is designed or intended to restrict an employee's right to engage in protected activity under the NLRA. The General Counsel has not been persuaded by such clauses. Instead, the General Counsel is looking for clear language that reasonably informs employees that protected communications are not prohibited.

In sum, based on these new pronouncements by the National Labor Relations Board's Office of General Counsel, many existing social media policies—even those recently drafted or revised—may now inadvertently violate federal labor law, including the policies of employers without unionized workforces. Finally, since social media policies are subject to laws in areas in addition to the NLRA (for example, Federal Trade Commission's Guides Concerning the Use of Endorsements and Testimonials in Advertising), they also should be reviewed for compliance with these regulations.

© 2012 Dorsey & Whitney LLP. This article is intended for general information purposes only and should not be construed as legal advice or legal opinions on any specific facts or circumstances. An attorney-client relationship is not created or continued by reading this article. Members of the Dorsey & Whitney LLP group issuing this communication will be pleased to provide further information regarding the matters discussed therein.