Social Media Policies And The NLRB: What Employers Need To Know

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Social media policies. Chances are your company has one, is in the process of drafting one, or is worried about not having one. Employees continue to gripe about their jobs and their bosses on Facebook, as states like California enact legislation prohibiting employers from demanding access to employees' social networking pages. Meanwhile, employers are left to navigate the murky waters of social media regulation without much in the way of clear direction.

Once considered merely an enforcer of union laws and regulations, the National Labor Relations Board ("NLRB") has found new life in the modern world of social media. In large part, this is true because the NLRB's actual charge is much broader than many employers realize: the NLRB's primary responsibility is interpretation and enforcement of a federal statute called the National Labor Relations Act ("NLRA"), and the NLRA applies to *all* employers, *unionized or not*. Most relevant to the area of social media, the NLRA protects an employee's right to engage in "concerted activity," which occurs under Section 7 of the statute "when two or more employees take action for their mutual aid or protection regarding terms and conditions of employment." The NLRA's protection of "concerted activity" covers many different activities, including employee discussions about pay, work conditions, or even safety concerns. In light of the provisions of the NLRA, which apply regardless of whether employees are organized under a collective bargaining agreement, employers desiring to implement a social media policy must walk a very fine line between prohibiting unwanted conduct – such as revealing confidential information or making disparaging comments about the company – and avoiding undue restrictions on protected activities.

A great many employers are finding that walking this line effectively is a struggle. Through the *Costco*, *Dish Network*, and *Knauz* decisions, as well as prior advice memoranda, the NLRB has attempted to provide employers with guidance on what will and will not pass muster under the NLRA. The Board and its General Counsel have analyzed myriad policies and the General Counsel even blessed what he considered to be an acceptable policy. So far, the NLRB's memoranda and decisions provide the only real guidance regarding the intersection between social media and Section 7 rights; unfortunately, this guidance is not intuitive for employers, at times seems inconsistent, and can be difficult to interpret. Adding to the uncertainty, the NLRB has been overruled before and ultimately the courts will need to weigh in on this issue, especially in light of recent challenges to the President's 2012 appointments to the NLRB, which jeopardize the validity of its rulings for the past year. Still, even with the pending challenges, the NLRB has continued its focus on overbroad workplace policies, including in a recently published advice memorandum from the General Counsel. Thus, until further word to the contrary, employers should be mindful of the NLRB's stance on social media policies and protected activity.

Generally, the NLRB and its General Counsel have taken a fairly expansive reading of social media (and other workplace) policies in assessing their impact on protected activity. For example, in the *Costco* decision, the NLRB held that a provision in Costco's employee handbook prohibiting employees from electronically posting statements that "damage the company, defame any individual or damage any person's reputation or violate the policies outlined in the Costco Employee Agreement" violated the NLRA by chilling Section 7 rights. The Board specifically pointed out that the provision did not include "accompanying language that would tend to restrict its application," therefore allowing employees to "reasonably assume" it applied to protected concerted activity. Later, in the *Dish Network* decision, the Board affirmed the *Costco* decision by holding that similar language in Dish's social media policy prohibiting "disparaging or defamatory comments" about the company violated the NLRA.

Fortunately, the NLRB has recognized that not all of an employee's online activity – even when addressed to workplace matters – comprises protected activity. Thus, in the *Knauz* decision, the NLRB found that the employer did *not* violate the NLRA when it terminated an employee for his Facebook commentary on a car accident at an adjacent, employer-owned dealership, since the comment was not related to his terms and conditions of employment. Still, even though the termination was lawful, the Board nonetheless found that the employer's "courtesy" rule – which required employees to be "courteous, polite and friendly to customers, vendors and suppliers [and] fellow employees" and disallowed "disrespectful … or any other language which injures the image or reputation of the [employer]" – violated the Act.

These cases are perfect examples of how employers' well-intentioned language can inadvertently violate the NLRA. But they also provide some degree of guidance on what the NLRB considers acceptable (and not) in social media policies. Distilling this guidance into a few concrete tips, employers should do the following when drafting social media policies:

- **Be mindful of the NLRA**. This statute applies to your business whether you realize it or not, and regardless of whether any portion of your workforce is unionized. It is therefore best to avoid overbroad statements and ambiguous words that could be interpreted to "chill" Section 7 rights. The NLRB has disfavored terms and phrases such as "confidential information" and "disparaging comments" – without further explanation or context – as being too vague and likely to violate the NLRA.

- **Provide examples whenever possible**. The NLRB has repeatedly indicated that a particular policy might have been lawful if it had included specific examples of prohibited conduct. Thus, instead of stating that the policy prohibits "inappropriate behavior," consider providing examples such as harassment, bullying, etc.

- **Include a savings clause**. These clauses exclude protected Section 7 activity from the scope of a social media policy. Although (per the NLRB) a savings clause will not cure an otherwise unlawful and overbroad policy, it might cure a slightly flawed policy, and there is no downside to including it.

In the end, social media policies are not a "one size fits all" proposition. They must be tailored to fit the employer and drafted to avoid violating the NLRA.

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