NLRB GC outlines federal protections for employee social media activity

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Report addresses what employers can and can't do when an employee goes all @normarae

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The Office of General Counsel of the National Labor Relations Board ("NLRB") issued a sprawling Report of the General Counsel ("Report") on the interaction of employee social media activity and the National Labor Relations Act yesterday. The Report summarizes the Office of General Counsel's findings in a wide array of cases submitted for its review and provides some useful guidance for employers grappling with employee social media activity. As a reminder, the NLRB has jurisdiction over union and non-union workplaces.

A recent survey by the U.S. Chamber of Commerce found that the NLRB has reviewed more than 129 cases involving social media in some way. In April, the Office of General Counsel, in a commendable attempt to ensure consistent enforcement, directed the NLRB's various regional offices across the country to submit social media cases to the NLRB's Division of Advice. In essence, the Office of General Counsel was taking a step back and looking over the whole field of cases in the interest of articulating some general principles as to the NLRB's enforcement position on social media. While the Office of General Counsel's Report does not represent a binding ruling by the NLRB, the way unfair labor practice charges involving social media will be handled at the regional level is now much clearer.

McDonald Hopkins will be providing a comprehensive review of NLRB's social media enforcement position, but we wanted to immediately provide clients with an initial take on the Office of General Counsel's Report:

- **Employers are well advised to review their social media policy to ensure that it is narrowly tailored. (Yes, we know you just implemented your policy.)**

The Report frequently notes provisions of employer social media policies that the Office of General Counsel concluded could be reasonably interpreted as prohibiting protected activity under Section 7 of the National Labor Relations Act (which, amongst other

things, provides employees with the right to engage in "concerted activities for the purpose of … mutual aid or protection") and, therefore, were overly broad and unlawful.

Example: An employer policy that "prohibited employees from making disparaging remarks when discussing the company or supervisors, and from depicting the company in any media, including but not limited to the internet, without company permission" was deemed overly broad. In the first instance, "disparaging remarks" about the company or supervisors may include concerted activity for the purposes of mutual aid or protection. More subtly, barring media depictions of the company could be reasonably interpreted as prohibiting the posting of "a picture of employees carrying a picket sign depicting the company's name" or the wearing of "a t-shirt portraying the company's logo in connection with a protest involving terms and conditions of employment."

Another Example: An employer policy that, in part, "prohibited employees from using any social media that may violate, compromise, or disregard the rights and reasonable expectations of privacy or confidentiality of any person or entity" was deemed overly broad. The Office of General Counsel noted that the rule provided no definition or guidance as to what the employer [here, a *hospital*] considered to be private or confidential. Accordingly, the rule "could be reasonably interpreted as prohibiting protected employee discussion of wages or other terms and conditions of employment."

Yet Another Example: A newspaper's management repeatedly tells a reporter that the tweets on his Twitter account, which identifies him as a reporter for the paper and links to the newspaper's website, should exclusively address news items pertinent to his beat after he blasts the paper's copy desk in a tweet, picks a fight with a local television station in a tweet, and tweets about recent crimes, some of which were sexual in nature. Here, the Office of General Counsel concluded that newspaper management's oral instructions to the reporter did not constitute formal work "rules," but rather direction in the context of individual discipline over specific misconduct and therefore were not overly broad – but suggested that similar orally promulgated rules implemented more broadly would be violative of Section 7.

The Office of General Counsel's fine-tooth comb analysis dictates, at minimum, prominent disclaimer language that the employer's social media policy does not prohibit the exercise of Section 7 rights. Even employers who have recently implemented social media policies should consider a quick review of the policy by legal counsel in light of the General Counsel's recent Report.

- **Employers may reasonably get mad about an employee's online antics, but should talk to counsel before getting even.**

A substantial portion of the Report is devoted to making distinctions between mutual aid and protection as to terms and conditions of employment (protected) and individual

griping about the job (not protected). Given the NLRB's legislative mandate to promote and protect employee rights, the Office of General Counsel not surprisingly takes an expansive view of what constitutes protected activity.

Example: A "luxury" automobile dealership puts on a sales event that includes complimentary food and beverages. Some of the dealership's sales professionals believe the assortment of "small bags of chips, inexpensive cookies from the warehouse club, semi-fresh fruit, and a hot dog cart where clients could get overcooked hot dogs and stale buns" are, ahem, *déclassé*. One of the sales professionals posts his thoughts on the sales event on Facebook, including photos of the allegedly lackluster spread, other sales professionals posing by the offending snack table, and one of the dealership's promotional banners. As the Office of General Counsel subtly notes, "the employee included comments along with the photographs, reflecting his critical opinion of the inexpensive food and beverages provided." The sales professional was ultimately terminated. The Office of General Counsel concluded that the Facebook posts were protected concerted activity as they reflected the consensus of a number of the dealership's sales professionals and employee discontent as to promotional efforts was directly relevant to the terms and conditions of employment *because the sales professionals were commissioned employees*. The Office of General Counsel also noted that, while some employee conduct can be so outrageous as not to be protected, the Facebook post in question was "much less offensive than other behavior found protected by the Board" and "did not refer to the quality of the cars or the performance of the dealership and did not criticize the employer's management."

Another example: A number of former and present employees of a sports bar are informed by their state that they owe taxes on certain income earned at the bar. The tax assessment upsets the employees and the issue is placed on the agenda for an upcoming meeting. A former employee subsequently posts about her discontent on Facebook (including, as the Office General Counsel notes, "a shorthand expletive") and asserts that the employer "could not even do paperwork correctly." A current employee clicks that he "likes" the post. A second current employee responded to the post, calling one of the bar's owners a term not acceptable under the standards of Midwestern nice. Both current employees are terminated. The employee that "liked" the original Facebook post was "told he would be hearing from the employer's attorney." The employee that actually added additional commentary received a letter from employer's counsel informing her that the employer intended on filing suit for defamation if she did not delete the post. The Office of General Counsel concluded that both employees had engaged in protected concerted activity in expressing "truly group complaints," noting further that even an allegedly defamatory statement will not lose its protected status unless it is not only false, but maliciously false. More instructively, the Office of General Counsel concluded that the *threat* of lawsuit, even if there was a reasonable basis for legal action, violated Section 7 of the National Labor Relations Act as it interfered with the right to mutual aid and protection.

Overall, the take away is that, despite the Office of General Counsel's best efforts, general principles of what is protected and what is not protected will necessarily give way to the specific facts of a given case – and a lot of judgment calls. Employers are advised to consult with legal counsel in determining the best response to even the most egregious employee conduct in the social media realm.

As noted above, the Report of General Counsel is sweeping in its scope and addresses other finer points of law such as the legal bounds of union use of social media, policies governing co-workers "pressuring" other co-workers to use social media, and policies governing employee contact with the media.

McDonald Hopkins will continue to provide further guidance in the near term, including a long-form alert that deals with the Report and other related legal developments comprehensively. In the interim, if you have any questions, please do not hesitate to contact one of us.