NLRB Issues Guidance For Lawful Employer Social Media Policies

Employers take note: the social media policy you put in place to curtail employee comments on Facebook, LinkedIn, Twitter and other areas of the digital world may get you in hot water with the National Labor Relations Board (NLRB). In what may signal an attempt to strike a balance between employee rights and employer concerns, a recently released policy memo from the NLRB's Office of the General Counsel provides employers with some guidance in crafting acceptable social media policies.

Don't be fooled by chatter suggesting that the laws enforced by the NLRB only apply to unionized work forces. Several aspects of the National Labor Relations Act (NLRA) have been applied to protect non-unionized employees as well. Section 7 of the NLRA, in particular, protects employees engaged in "concerted activities for mutual aid and protection" from retribution by their employers.

The policy memo is long – 25 pages –but should be read by employers who have or are adopting social media policies prohibiting conduct in the digital world by their employees. The memo does not have the force of law, but does provide insight into how the NLRB interprets and applies the NLRA.

In sum, social media policy language will be found unlawful if it can be construed to chill or penalize employees in the exercise of their protected rights under the NLRA. The policy does not need to expressly restrict protected speech to be unlawful – language that is ambiguous as to its impact or contains no limiting language also can be unlawful.

Examples cited in the memo of unlawful provisions in social media policies included:

> "Don't release confidential guest, team member or company information . . . ."
>
> "Be sure that your posts are completely accurate and not misleading and that they do not reveal non-public company information on any public site.
>
> "When in doubt about whether the information you are considering sharing falls into one of the above categories, DO NOT POST."
>
> "Offensive, demeaning, abusive or inappropriate remarks are as out of place online as they are offline, even if they are unintentional."
>
> "Don't comment on any legal matters, including pending litigation or disputes."

Most of these examples were construed as potentially preventing employees from discussion their own terms of employment, discussing potential claims against the employer, posting criticisms of the employer, or a impermissibly requiring an employee to secure permission before undertaking protected speech.

All is not lost, however. The NLRB, perhaps recognizing how difficult it is for employers to protect their legitimate concerns through a social media policy in light of the many prohibited provisions, did attach a sample of a lawful social media policy to the memo. This acceptable policy, while brief, provides a framework for all employers – union and non-union – to build a lawful and effective social medial policy for its workforce.

A copy of the NLRB's memo may be found at http://www.nlrb.gov/publications/operations-management-memos (*Report of the Acting General Counsel Concerning Social Media Cases*, Memorandum OM 12-59 (May 30, 2012).

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