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EMPLOYMENT LAW ALERT

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NLRB Report Changes Social Media Landscape

By: Jeffrey M. Schlossberg

If you have not updated your company's social media policy in the last 4 weeks, it is out of date. That is because in January, the National Labor Relations Board ("NLRB") published its second report on what it referred to as the "hot topic" of social media cases. The good news is that we are getting direction on which social media policy provisions are acceptable and which are not. The bad news is that many provisions thought to be lawful must now be modified. This month we provide a summary of the most significant points identified in the NLRB's report.

Preliminarily, we have previously explained that Section 7 of the National Labor Relations Act protects an employee's right to engage in concerted activities for the purpose of mutual aid and protection. And, remember, *the NLRA applies even if your company does not have any union employees*.

Let's test your familiarity with the state of the law on social media policies:

1. Is it permissible to have a policy that prohibits "making disparaging comments about the company through any media, including online blogs or other electronic media"? No. The NLRB concluded that this policy restricts Section 7 activity because it is overbroad and would prohibit an employee from stating that the company is not treating employees fairly.

2. Your policy prohibits employees from disclosing or communicating confidential, sensitive or non-public information concerning the company on company property to anyone outside the company without prior approval of senior management. Certainly a company can protect its confidential information, right? Not so fast. The NLRB explained that employees have a right to discuss their wages and other terms and conditions of

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employment. The policy provision at issue precludes employees from discussing such issues with fellow employees or outside parties and, thus, was ruled unlawful. Further, the policy offered no examples of what was considered confidential or sensitive.

3. A company's policy provides a disclaimer stating that the policy should not be interpreted so as to interfere with employee rights to self-organize, form, join, or assist labor organizations, to bargain collectively, or to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. Lawful? It depends. The NLRB ruled that the disclaimer itself could not save a prohibition on making "inappropriate" comments because employees would not reasonably understand what "inappropriate" meant. The lesson here is that while employer disclaimers are not per se unlawful, the disclaimer by itself will not make an otherwise unlawful prohibition lawful. In other words, employers must be as specific as possible in stating what is and is not prohibited activity.

4. A policy provides that in social networking situations, employees should avoid identifying themselves as company employees unless discussing terms and conditions of employment in an "appropriate manner." Is it okay to limit an employee's communication in such a manner? No. The NLRB found that this provision was unlawful because the term "appropriate manner" was not defined. Thus, the policy could be interpreted as prohibiting lawful Section 7 activity.

5. Is it permissible to prohibit the use of the company's name or trademark outside the course of business without prior approval? No; the NLRB found this unlawful because employees have a right to use the company's logo to communicate with other employees or the public about a labor dispute. The NLRB noted that while employers do have proprietary interests in their marks, use by employees in furthering their Section 7 rights would not impinge on the employers' trademarks.

6. A policy states that employees need approval to identify themselves as company employees and those that do identify themselves as company employees are required to state that their comments are their personal opinions and do not necessarily reflect the opinions of the company. Can an employer impose such a requirement? After reading this much, you likely know the answer. The NLRB stated that personal social media pages serve an important function in enabling employees to communicate. Thus, requiring employees to get prior approval or insert a disclaimer was particularly harmful and poses a significant burden on employees' ability to engage in concerted activity.

As a final note, employers should take from all of this that an employee's communication with his or her coworkers on Facebook may be activity that is protected under federal law. The NLRB report identified numerous situations in which such communication was deemed protected concerted activity.

Unlike any other issue in recent memory, social media in the workplace will continue to raise novel legal issues. Changes in the legal landscape can be expected to occur as often as a new version

of the iPhone is created. Companies are encouraged to stay ahead of the curve on this hot topic by updating their social media policies and consulting with counsel prior to implementing policy provisions or imposing discipline on an employee for social media comments.

Avoid being on the wrong end of an NLRB unfair labor practice charge and possibly a topic in the NLRB's *next* report.

Please let us know if we can be of assistance in helping you address this or any other employment law issue.

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