



NLRB's position on social media policies remains a bungled mess

by Jonathan Hyman

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Oh! what a tangled web we weave

When first we practice to deceive!

– [Walter Scott](#), *Marmion*, Canto VI, Stanza 17 (1808)

Yesterday, NLRB Acting General Counsel Lafe Solomon issued his [third report on social media cases brought to the agency \[pdf\]](#). This report focuses entirely on “policies governing the use of social media by employees.” If you read the employment law blogs today, my guess is that you will find a whole bunch of management-side employment bloggers critical of Mr. Solomon ([Molly DiBianca](#), [Eric Meyer](#), and [Dan Schwartz](#), for starters). Allow me to add my name to the mix. I apologize in advance for my treatise-length post.

As you might recall, I was very [critical of Mr. Solomon's 2nd report](#) in its treatment of employer policies. Has the Acting GC solved any conundrums for employers with his latest missive? Can a company draft a social media policy with any teeth that the NLRB will conclude passes muster? Don't count on it. In fact, Mr. Solomon's latest missive is as galling of a piece of legal analysis I have ever read. It's nothing short of intellectual dishonesty masquerading as hair splitting. How else can you explain the following razor-thin distinctions?

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- i A policy that prohibits the “release [of] confidential guest, team member or company information” is illegal, but a policy that cautions employees to be suspicious when asked to disclose confidential information is okay.
- i This policy is illegal: “When in doubt about whether the information you are considering sharing falls into one of the [prohibited] categories, DO NOT POST. Check with [Employer] Communications or [Employer] Legal to see if it's a good idea.” And this policy is illegal: “Offensive, demeaning, abusive or inappropriate remarks are as out of place online as they are offline” are illegal.” Yet, this policy is legal: “Employees should avoid harming the image and integrity of the company and any harassment, bullying, discrimination, or retaliation that would not be permissible in the workplace is not permissible between co-

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workers online, even if it is done after hours, from home and on home computers”.

- i “Get permission before reusing others’ content or images” is illegal, while “Respect all copyright and other intellectual property laws. For [Employer’s] protection as well as yours” is legal.

Other baffling illegal policies?

- i “Think carefully about ‘friending’ co-workers.”
- i “Report any unusual or inappropriate internal social media activity.”
- i “Don’t comment on any legal matters, including pending litigation or disputes.”
- i “Adopt a friendly tone when engaging online. Don’t pick fights.... Remember to communicate in a professional tone.... Don’t make any comments about [Employer’s] customers, suppliers or competitors that might be considered defamatory.”
- i “You are encouraged to resolve concerns about work by speaking with co-workers, supervisors, or managers.”
- i “Avoid harming the image and integrity of the company.”

Mr. Solomon also invalidated various “savings clauses,” including one that provided:

This policy is for the mutual protection of the company and our employees, and we respect an individual’s rights to self-expression and concerted activity. This policy will not be interpreted or applied in a way that would interfere with the rights of employees to self organize, form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, or to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection or to refrain from engaging in such activities.

This unlawful policy is not all that different from the [workplace posting](#) that the NLRB wanted to have in every break room in America, yet it’s not good enough for any employer’s social media policy? Where is the logic and consistency? This is the exact breed of intellectual relativism that makes me furious.

Here's the kicker. If challenged, Mr. Solomon would have to take issue with his own agency's internal social media policy. Thanks to [Mike VanDervort's The Human Race Horses](#) and [Human Resources Executive Online](#), we can take a peek at the NLRB's own social media policy, which prohibits: "Comments that the NLRB Office of Public Affairs deems inappropriate." How is the NLRB's own policy substantively different than any of the policies Mr. Solomon thinks are overly restrictive of employees' rights to engage in protected concerted activity?

So, what's the takeaway? The NLRB's position on social media policies remains an absolute mess. If anything, it's more confusing now than before Mr. Solomon issued his 3rd report. Employers need to be able to adopt bright line rules to guide their employees towards proper conduct. Yet, this report puts employers in the dangerous position of being fearful of drawing even the simplest of lines. The result, I'm afraid, is that businesses won't adopt any rules, creating online anarchy among their employees. As a emerging communication tool, social media is unstructured enough. Do we really want to create unnecessary legal impediments to disincentivize employers from drafting the rules their employees desperately need?

Perhaps the answer for employers lies in this policy, which Mr. Solomon concluded was lawful:

Use your best judgment and exercise personal responsibility. Take your responsibility as stewards of personal information to heart. Integrity, Accountability and Respect are core [Employer] values. As a company, [Employer] trusts—and expects—you to exercise personal responsibility whenever you participate in social media or other online activities. Remember that there can be consequences to your actions in the social media world—both internally, if your comments violate [Employer] policies, and with outside individuals and/or entities. If you're about to publish, respond or engage in something that makes you even the slightest bit uncomfortable, don't do it.

[Think before you click?](#) My four-word social media policy might be a whole lot closer to reality.

Epilogue: If you scroll down to the last 3 pages of Mr. Solomon's report, you will find a form social media policy on which the NLRB signed off. If you want to err on the side of abundant caution, this policy is the one you should be using (with the input of your attorney). Until the federal courts

weigh in on this issue, however, we will have to live in world of uncertainty over the permissible scope, reach, and breadth of social media and other workplace communication policies.