General Counsel's Recent Report on Social Media Is.....Interesting?

Once upon a time there was this board that told businesses and organizations that they effectively had little to no control over how employees presented them to the public via social media. The End.

At least that's what I took away from the General Counsel's Report on Social Media that was recently released (InsideCounsel discusses its release here).

I've seen the report pop up all over the blogosphere but not much discussing its sheer depth. Provisions social media experts, and attorneys, found to be fairly standard we found out were consistently being struck down.

But I applaud the office for issuing a survey of the recent cases as it seems social media is one of those areas where everyone sits on the edge of their seat waiting for the next case. At least now, businesses and org's have a somewhat comprehensive understanding as to how the National Labor Relations Board is leaning.

Takeaways From the Report

I won't replicate the entire report but I do think there are a couple of important takeaways for organizations that have, or are looking to implement, a social media policy. I've provided a few of them below.

Provisions That Are Unlawful (Not Acceptable)

The most interesting part of the report, at least for me, was seeing the long list of provisions the board held to be unlawful. A few of these include (note the numbers following each one are page numbers):

- Broad provisions prohibiting employees from disparaging a company in the media;
- broad provisions prohibiting employees from disclosing proprietary or confidential information of the company (7);
- provisions requiring employees to refrain from identifying themselves with a company unless it is for a business purpose (7/8);
- provisions prohibiting employees from soliciting other employees via social media during company hours or on company property (7/8);

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- provisions restricting employees from being able to use the company trademark's, business name or insignia's without company approval (14);
- prohibitions on employees making statements about a company without company approval (14); and
- provisions requiring employees to clearly state their posts are of their own opinion (15).

Again, these are just are just a few of the provisions that were held unlawful. But they serve as a good example of how disparate the gap is between the Board and the business world. Particularly since I've seen all of these provisions in more policies (and policy templates) then I can count. Note, the rule of thumb is, would an employee reasonably interpret a provision to restrict the exercise of their rights under Section 7 of the National Labor Relations Act, that being, the ability for them to discuss the terms and conditions of their employment. For example, prohibiting an employee from disclosing confidential information is unlawful because in order to exercise their Section 7 rights confidential information may have to be disclosed.

Provisions That Are Lawful (Acceptable)

The Board made clear that when it comes to provisions being held lawful context is king. So you'll find many of the provisions listed above as unlawful are in fact lawful when used in the right context. For example, some provisions held lawful were:

- Provisions that prohibit employees from posting disparaging statements but went further and detailed that these are obscene, threatening, harassing, slanderous, etc.(16);
- provisions that restrict the disclosure of confidential information where the disclosure is tied to something specific such as the violation of security laws or the disclosure of confidential health information (17); and
- prohibitions against inappropriate behavior where examples of such inappropriate behavior are provided (8).

Not surprisingly, there were far fewer provisions held lawful than those held unlawful. But the few provided were still insightful. In each case, the drafter provided context as to why there was a prohibition or restriction. Where certain behavior was prohibited, such as the prohibition against "inappropriate" behavior, examples of what inappropriate behavior was, as well as similar behavior found to be inappropriate, were also provided.

Terms Defined

Not too long ago the NLRB made clear that posts regarding the "terms and conditions" of one's employment would be the posts protected under the law. The report provided a little more understanding with regard to what "terms and conditions" are. The two examples provided are:

- A post that dealt with how an employer chose its co-manager's and where the employee aired concerns over "the quality of [its] supervision" as well as "the opportunity to be considered for promotion"; and
- An employee's complaints over its supervisors attitude and performance.

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The term "concerted activity" (that which the employee must be engaged when discussing the terms and conditions of its employment) are also defined on page 4.

Exceptions

There are instances where an employee's otherwise protected posts lose protection. These are discussed on page 24 and are essentially:

- where a post is so disparaging of the employer or product as to lose protection and;
- where the post would disrupt or undermine company discipline.

I gotta say, I'm all for employee rights but this is a bit much. How can an organization conduct itself when its rights (and arguably the rights of other employees) can be made tertiary to a collective few? So an organization has no say as to how its trademark, its very namesake, is used when an employee wants to use Facebook as a therapy session?

You and I both know the reality is that Facebook is rarely used a means of inciting revolution. What <u>really</u> ends up happening is I gripe, then my friends gripe. If some of those friends happen to be co-workers and gripe just enough my post becomes protected collective action? Eeks!

Sadly, I fear that the Boards strict (and somewhat invasive) stance with social media will end up doing more harm to employees than good. Because believe you and me, businesses will find some type of work-around.

But in the meanwhile it would be of benefit for organizations to revisit their policies regarding social media. As I mentioned before, many of the provisions the Board found unlawful were one's most experts felt were acceptable. Consequently, they were included in policies from the big companies as well as many form books and websites.

Nonprofits must also keep in mind that though the rules refer primarily to "companies" non-profits all over the country have gotten popped as well.

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