Coming Into Focus

Insights
7.02.12

(Labor Letter, July 2012)

An Overview Of The NLRB's Most Recent Guidance On Social Media And Confidentiality Policies

In the last ten months, the National Labor Relations Board has issued three separate reports on social media. The first two reports, which were released in August 2011 and January 2012, left no doubt that the Board was paying close attention to employers' treatment of social media use by employees and scrutinizing policies that restricted employees' use of social media. The two reports focused primarily on employers' discipline of employees for content posted on social media sites and left many employers feeling like the Board's position on what was acceptable content for social media and related policies was lacking clarity.

The most recent report, the third, was released by the Board's General Counsel on May 30, 2012, and provides for the first time a sample social media policy which the Board deems lawful, as well as several examples of unlawful policies and rules on topics including social media, confidentiality, privacy and contact with the media and government agencies.

The May 30 report will require nearly all employers to review and revise existing policies to make them more narrowly tailored. But it brings into focus the current standards for social media and confidentiality policies and provides employers with a roadmap for revamping their policies.

How To Prevent The Chills – Use Examples
An employer violates the National Labor Relations Act if it maintains a policy or rule that could reasonably tend to chill employees in their exercise of protected rights (these are usually referred to as "Section 7 rights"). For example, a policy which chilled employees' right to discuss terms and conditions of their employment, including wages, hours and working conditions, would be unlawful. According to the Board, "[r]ules that are ambiguous as to their application to Section 7 activity, and contain no limiting language or context that would clarify to employees that the rule does not restrict Section 7 rights, are unlawful."

The Board stressed throughout the report that it is important for employers to provide examples in their policies regarding the types of content and activity that the policy lawfully restricts. For example, one policy reviewed in the report instructed employees not to "release confidential guest, team member or company information." The Board found the policy unlawfully overbroad because

without examples it could be construed by employees to prevent them from discussing their wages or other conditions of employment. Similarly, a rule which prohibited employees from disseminating "non-public information," without defining that term was found overly broad.

By contrast, the policy deemed lawful by the Board, instructed employees to "[m]aintain the confidentiality of ...trade secrets and private or confidential information. Trade secrets may include information regarding the development of systems, processes, products, know-how and technology." The report indicated that because the policy provided specific, lawful examples of the type of information that could not be disclosed by employees the policy was unambiguous and lawful.

"**Accuracy" And "Professionalism" Are Overbroad Expectations**

Many employer policies encourage employees to exercise good judgment when posting content online. The Board's report underscores that you must be careful when defining what you mean by "exercise good judgment." For example, while it is lawful to require employees to "[m]ake sure you are always honest and accurate when posting information or news, and if you make a mistake, correct it quickly," a policy is unlawful and overbroad if it requires employees' posts to be "completely accurate and not misleading." The Report, issued by the Acting General Counsel, indicated that latter policy "is overbroad because it would reasonably be interpreted to apply to discussions about, or criticisms of, the employer's labor policies and its treatment of employees that would be protected...so long as they are not maliciously false."

Similarly, the report indicated that a policy which prevented employees from posting "[o]ffensive, demeaning, abusive or inappropriate remarks" was overly broad – as was a warning that employees should not "pick fights" online – because employees could interpret both provisions to restrict lawful criticism of employers or their policies.

By contrast, it was lawful for a policy to prohibit statements, photographs or other content "that reasonably could be viewed as malicious, obscene, threatening or intimidating, that disparage customers, members, associates or suppliers, or that might constitute harassment or bullying" and that provided specific, lawful examples of what was considered an offensive post.

Leggo My Logo

The May 30 report reaffirmed that an employer may not blanketly prohibit all employee use of company logos or trademarks. While the Board recognized that employers have a proprietary interest in their trademarks, including logos if trademarked, nevertheless a prohibition of all use by employees was unlawfully overbroad. In particular, employees' non-commercial use of an employer's logo or trademarks while engaging in protected activities does not infringe on the employer's interest, according to the NLRB.

Therefore, just as an employee is allowed to use a company's logo on a picket sign, he or she may use it when engaging in protected activity on social media sites. An employer is permitted, however

use it when engaging in protected activity on social media sites. An employer is permitted, however, to require employees to respect all copyright and other intellectual property laws and show proper respect to both trademarks and other intellectual property owned by others and the employer.

Disclaimers Deemed Lawful

In a deviation from past guidance, the Board report indicated that employers are allowed to prohibit employees from posting anything in the name of their employer or in a manner that could be attributed to the employer. So it's permissible, for example, to require employees to express only their personal opinions, to prohibit representing themselves as speaking for the company, and to advise employees to include a disclaimer that the views they post do not necessarily reflect the views of the employer.

Savings Clauses Don't Save You

Since the release of the Board's first report on social media, many employers have added "savings clauses" to their policies on social media, confidentiality, and employee conduct. Savings clauses are generally at the end of the policy, and state, in some form, that nothing in the policy should be construed to interfere with employees' Section 7 rights. The May 30 report found that such policies are insufficient to cure unlawfully overbroad policies.

The basis for the Board's finding is that employees would not understand from the disclaimer that activities protected by the law are, in fact, permitted, and are not likely to understand the significance of the provisions because they are often written in legalese. For example, most employees would not understand what their right to engage in "protected, concerted activity" actually permits and, therefore, the utility of a savings clause with such language is very limited.

Avoiding Social Snafus

In light of this most recent report, it's important to pull out and review your social media policies, even if they have been reviewed recently, to ensure that the policies comply with the guidance and provide sufficient context and examples so as to be unambiguous from the perspective of employees. Additionally, the guidance gleaned from this report is not applicable solely to social media policies, but also to policies on confidentiality, media contact, and employee conduct.

Since the NLRB takes the view that a company policy on almost any subject could be construed as chilling employees' protected rights, it's critical to conduct a careful review of your policies to avoid a social media policy snafu. You don't want to wind up as one of the examples of unlawful policies in future Board guidance!

For a copy of the lawful policy distributed by the Board or if you'd like help in reviewing your policies, please contact your local Fisher Phillips attorney.

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