Elements of an Acceptable Social Media Policy
Post NLRB Guidance Reports

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In August 2011 and January 2012, the Acting General Counsel of the National Labor Relations Board (NLRB) issued reports that dealt with NLRB cases arising in the context of employee communications via social media. Those reports provided a glimpse into the NLRB's rationale for dealing with cases in which employees claim that an employer's disciplinary action based on a social media posting violated Section 7 of the National Labor Relations Act (NLRA).

On May 30, 2012, the Acting General Counsel issued its third report. This report was dedicated primarily to social media policies. It summarized seven different policies, pointing out provisions in the first six which may be in violation of Section 7 of the NLRA, but holding up the seventh policy.

Section 7 of the National Labor Relations Act (NLRA) protects the right of employees to engage in "concerted activities" with each other for the purpose of collective bargaining or in efforts to improve working conditions and terms of employment. These concerted activities typically used to be done in person and now are occurring with more frequency through electronic media.

Employment policies are found to be unlawful when they interfere with the rights of employees under the NLRA, such as the right to discuss wages and working conditions with co-workers. Employers who decide to terminate an employee based upon a social media posting that is determined to have been "protected concerted activity" may be violating Section 7 of the NLRA.

Examples of unlawful social media policies outlined in the third report include:

- A company policy that stated employees who were in doubt as to whether an action may violate the policy should "check with [Employer] Communications or [Employer] Legal to see if it's a good idea . . . ." was deemed a violation of law because a "rule that requires employees to secure permission from an employer as a precondition to engaging in Section 7 activities" automatically violates the NLRA.

- A company's policy that required employees to assure that "posts are completely accurate and not misleading and that they do not reveal non-public company information on any public site" was deemed to be unlawfully overbroad and, according to the NLRB, could "reasonably be interpreted to apply to discussions

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about, or criticism of the Employer's labor policies and its treatment of employees that would be protected by the [NLRA]. . . ."

- A company policy that stated, "Offensive, demeaning abusive or inappropriate remarks are as out of place online as they are offline," was found to violate Section 7 because it "proscribes a broad spectrum of communications that would include protected criticisms of the Employer's labor policies or treatment of employees."

Unfortunately, the common savings clause typically used in employment policies (for example, "This policy will be administered in compliance with applicable laws and regulations, including Section 7 of the NLRA.") will not prevent the NLRB from finding the policy to be unlawful. Such a provision "does not cure the ambiguities in [a] policy's overbroad rules."

How to comply with the NLRB's Social Media Guidelines

The NLRB provided a roadmap for compliance in the form of an "acceptable" policy. According to the NLRB, the key to a policy's lawfulness is that it provides "sufficient examples of prohibited conduct so that, in context, employees would not reasonably read the ruled to prohibit Section 7 activity."

The NLRB exemplar policy is not a one-size-fits all. A good practice is to review the NLRB exemplar policy carefully, and tailor its core concepts to fit the values and specific needs of your company.

For additional information on the NLRB's Social Media holdings and the guidance provided by the Acting General Counsel, please contact Lisa Amato laa@wysekadish.com.

DISCLAIMER *This summary provides general information and should not be construed as legal advice or a legal opinion on any specific facts or circumstances. If you have specific legal questions, please contact Lisa Amato at Wyse Kadish LLP, 503.228.8448, or laa@wysekadish.com*

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