NLRB Weighs In Again on Employer Social Media Policies

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The National Labor Relations Board (NLRB) continues to weigh in on social media. The Acting General Counsel of the NLRB has issued the third in a series of reports on the alleged negative effects of social media policies on employee organizing rights under Section 7 of the National Labor Relations Act. In the two prior reports, the Acting Counsel commented on fact situations and social media policies and whether they restricted Section 7 employee speech. This third report follows a similar outline, but at 24 pages, it is the most comprehensive to date. The Acting General Counsel has reprinted one policy found to be entirely lawful. Employers should take heed of this report, which impacts both unionized and non-unionized workplaces.

In the latest report, the Acting General Counsel discusses six unlawful social media policies. He focuses on policy language that is too broad or otherwise appears to restrict employee discussions of working conditions. The Acting General Counsel expressly rejected a company disclaimer that disavowed any intent to violate employee rights under the NLRA. In the Acting General Counsel's view, such disclaimers are not sufficient to safeguard employee rights under Section 7.

The Acting General Counsel targeted a large number of otherwise prudent employer directives as unlawful. Some examples:

- Ensure social media posts "are completely accurate and not misleading and that they do not reveal non-public company information on any public site."
- "Don't release confidential guest, team member or company information…"
- "Offensive, demeaning, abusive or inappropriate remarks are as out of place online as they are offline…"
- "Get permission before reusing others' content or images."

Under this broad interpretation of protected Section 7 speech, employers must review their social media policies and employee handbooks to determine whether the company's admonishments and cautions regarding communications could conceivably restrict an employee's attempts to organize or discuss working conditions.

As guidance, the Acting General Counsel suggests that employers use examples that no one would consider protected by Section 7. "[R]ules that clarify and restrict their scope by including examples of clearly illegal or unprotected conduct, such that they could not be reasonably construed to cover protected activity, are not unlawful." Proffered examples of acceptable policies include:

- "[A]void using statements....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. Examples of such conduct might include offensive posts meant to intentionally harm someone's reputation or posts that could contribute to a hostile work environment on the basis of race, sex, disability relation or any other status protected by law or a company policy."
- "Maintain the confidentiality of [Employer] trade secrets and private or confidential information. Trades (sic) secrets may include information regarding the development of systems, processes, products, know-how and technology. Do not post internal reports, policies, procedures or other internal business-related confidential communications."

In these examples, the language was not interpreted as prohibiting employees from criticizing the employer or its working conditions. In giving the seal of approval to the seventh and last policy discussed, the Acting General Counsel may prompt many employers to adopt it in whole as their own social media policy. Employers should consider the unique needs and aspects of their businesses and tailor social media policies and handbooks to fit the company.

If you have questions about the NLRB's recent opinion, please contact your Lathrop Gage attorney or the author listed above.