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Acting NLRB GC Issues Updated Report Concerning Social Media Cases

Article By:

Labor & Employment Practice

Report analyzes seven employer social media policies under the National Labor Relations Act, and provides an example of a policy that is considered to be lawful.

On May 30, Lafe Solomon, Acting General Counsel (AGC) of the National Labor Relations Board (NLRB or the Board), issued the third in a series of reports on social media cases. The reports, issued on August 18, 2011, January 24, 2012, and May 30, 2012, respectively, present the AGC's views on whether unfair labor practice charges arising in the context of social media should be prosecuted. It is important to note that these reports do not constitute binding NLRB precedent. They only reflect the AGC's position for purposes of determining whether an unfair labor practice charge should be prosecuted.

The most recent report analyzes seven employer social media policies under the National Labor Relations Act (NLRA or Act) and is notable in three respects: (1) for the first time, it sets forth a sample social media policy that the AGC deems lawful under the Act; (2) it reflects that the AGC has reversed course and now believes that an employer may require employees to include a disclaimer that views expressed on social media are the employee's own and not those of the company; and (3) it finds a social media policy to be unlawful insofar as it encourages employees to utilize internal procedures to resolve concerns instead of social media or online forums.

Background

An employer's social media policy or rule may violate Section 8(a)(1) of the Act if it "would reasonably tend to chill employees in the exercise of their Section 7 rights." *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), *enf'd*, 203 F. 3d 52 (D.C. Cir. 1999). The NLRB has found that a policy or rule is clearly unlawful if it explicitly restricts activity protected by Section 7 of the Act. If the policy or rule does not explicitly restrict protected activities, it will only violate Section 8(a)(1) upon a showing that (1) employees would reasonably construe the language to prohibit Section 7 activity, (2) the rule was promulgated in response to union activity, or (3) the rule has been applied to restrict the exercise of Section 7 rights.

Policies that are ambiguous as to their application to Section 7 activity may also be unlawful if they

contain no limiting language or context that would demonstrate to employees, in a manner in which they can understand, that the policy does not restrict Section 7 rights. *University Medical Center*, 335 NLRB 1318, 1320–1322 (2001), *enf. denied in pertinent part*, 335 F.3d 1079 (D.C. Cir. 2003). Notably, a social media policy may be deemed to be unlawfully overbroad under the NLRA even if it applies only to nonunion workers.

Lawful Social Media Policy Provided as Guidance

In the May 30 report, the AGC sets forth, in full, a social media policy that was found to be entirely lawful under the Act. In concluding that the policy is lawful, the AGC stated that the policy "provides sufficient examples of prohibited conduct so that, in context, employees would not read the rules to prohibit Section 7 activity." For example, the AGC noted the following:

- The "Be Respectful" portion of the social media policy could be overly broad because of its exhortation to be respectful and fair and courteous in the posting of comments, complaints, photographs, or videos. However, the policy counsels employees to avoid posts that could be viewed as "malicious, obscene, threatening or intimidating" and further explains that prohibited harassment and bullying would 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, religion or any other status protected by law or company policy." The AGC found that employers have a legitimate basis to prohibit such workplace communications, and the policy as written does so without burdening protected communications about terms and conditions of employment.
- A section of the policy that required employees to maintain the confidentiality of the employer's trade secrets and private and confidential information was not unlawful because the employer's rule provided sufficient examples of prohibited disclosures (i.e., products, know-how, technology, internal reports, procedures, or other internal business-related communications) for employees to understand that it does not reach protected communications about working conditions or wages.

A copy of the approved social media policy may be viewed in full here.

Position on Policies Requiring Employee Disclaimers Reversed

In his January 2012 report concerning social media cases, the AGC considered the lawfulness of a social networking policy that required employees to expressly state that their comments are their personal opinions and do not necessarily reflect the employer's opinions. At that time, the AGC found that requiring employees to expressly state in their posts that their comments are their personal opinions and not those of the employer "would significantly burden the exercise of employees' section 7 rights to discuss working conditions and criticize the Employer's labor policies in violation of Section 8(a)(1)." NLRB Office of the General Counsel, Memorandum OM 12-31, p. 15 (January 24, 2012).

However, in the May 30, 2012, report, the AGC appears to have reversed that position. He evaluated a policy that provided:

> Any comments directly or indirectly relating to [the employer] must include the following disclaimer: "[T]he postings on this site are my own and do not represent [the employer's] positions, strategies or opinions."

The AGC found that such a requirement is not unlawful because an employer "has a legitimate need for a disclaimer to protect itself from unauthorized postings made to promote its product or services" and that the requirement does not unduly burden employees in the exercise of their Section 7 right to discuss working conditions.

Provision Encouraging Use of Internal Procedures to Address Complaints Deemed Unlawful

In the new report, the AGC addressed the legality of a policy that stated the following:

> You are encouraged to resolve concerns about work by speaking with co-workers, supervisors, or managers. . . . [Employer] encourages employees and other contingent resources to consider using available internal resources, rather than social media or other online forums, to resolve these type[s] of concerns.

The AGC found this provision to be illegal because, while "an employer may reasonably suggest that employees try to work out concerns over working conditions through internal procedures," an employer may not tell employees that they should use internal resources rather than air their grievances online. This is despite the fact that the language did not require, but only "encouraged," employees to use an internal grievance procedure rather than social media for their grievances. The reasoning by the AGC was that such encouragement could preclude or inhibit employees from engaging in protected speech online.

Conclusion

Employers should thoroughly review policies concerning social media, use of email, confidentiality, privacy, codes of conduct, and any other policies that may be incorporated by reference in a social media policy. The AGC's reports, while they do not constitute binding NLRB precedent, do provide guidance on how these types of policies should be drafted in order to avoid charges that a policy violates the NLRA.

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