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NLRB Report Challenges Validity of Many Commonly Used Social Media Policies

By Philip Gordon

In its most recent effort to draw lines on the self-described "hot topic" of the "lawfulness of employers' social media policies and rules," the National Labor Relations Board's (NLRB) Office of General Counsel has taken the position that many policy provisions commonly seen in employers' social media policies violate the National Labor Relations Act (NLRA). This most recent shot across the bow came on January 24, 2012, in the form of a report, issued to senior regional staff, on 14 cases which, according to the General Counsel, "present emerging issues in the context of social media." This report follows a previous General Counsel report, dated August 18, 2011, which discussed 14 prior NLRB cases involving social media issues.

Each of the headings below reviews the General Counsel's current position on a particular type of commonly used policy provision. Employers should carefully review their existing social media policy and any new policy in light of the General Counsel's most recent report. With careful drafting and the use of examples and limiting language, employers should still be able to achieve their objectives of gaining reasonable control over the Wild West of social media content while staying within the parameters of the NLRA.

No Defamation/Non-Disparagement: No employer likes seeing its employees or organization trashed in social media, but, according to the General Counsel, a broad non-disparagement policy violates the NLRA on a per se basis because it could inhibit employees from making negative comments about the terms and conditions of their employment. For example, the General Counsel opined in the report that the following policy prohibition is illegal: "[m]aking disparaging comments about the company through any media, including online blogs, other electronic media or through the media." The General Counsel reached the same conclusion on a policy which prohibits "discriminatory, defamatory, or harassing web entries about specific employees, work environment, or work-related issues on social media sites."

While the General Counsel's opinion sounds frustrating, employers should not despair. The General Counsel explains that by including non-disparagement policy language within a list of other forms of unprotected conduct, an employer's non-disparagement policy will comply with the NLRA. To illustrate the point, the General Counsel pointed to the NLRB's holding that a policy prohibiting "statements which are slanderous or detrimental to the company" was lawful when it "appeared on a list of prohibited conduct including 'sexual or racial harassment' and 'sabotage.'" Following this authority, the General Counsel gave its stamp of approval in the report to a policy which

"prohibited the use of social media to post or display comments about coworkers or supervisors or the Employer that are vulgar, obscene, threatening, intimidating, harassing, or a violation of the Employer's workplace policies against discrimination, harassment, or hostility on account of age, race, religion, sex, ethnicity, nationality, disability, or other protected class, status, or characteristic."

Confidentiality: Protecting confidential information and trade secrets from competitors is critical to every organization. According to the General Counsel, however, a confidentiality policy is illegal if it would impinge on employees' ability to discuss their wages and working conditions with others inside or outside the organization. Consistent with that reasoning, the General Counsel's report rejected a provision in an employer's social media policy that prohibited employees from "disclosing or communicating . . . confidential, sensitive, or non-public information concerning the company on or through company property to anyone outside the company without prior approval of senior management or the law department." By contrast, the General Counsel approved a policy provision that "prohibited employees from using or disclosing confidential and/or proprietary information, including personal health information about customers or patients" as well as "'embargoed information,' such as launch and release dates and pending reorganizations." The General Counsel approved of this policy language based on the following reasoning: "Considering that the Employer sells pharmaceuticals and that the rule contains several references to customers, patients, and health information, employees would reasonably understand that this rule was intended to protect the privacy interests of the Employer's customers and not to restrict Section 7 protected communications."

The General Counsel's distinction between the two confidentiality provisions suggests a potential litmus test for confidentiality language in a social media policy: if the policy reasonably could be read to prevent employees from disclosing the amount of their compensation to family members, the General Counsel likely would find the policy to be overbroad. Employers should note that this same issue could apply to confidentiality agreements signed by hourly workers, and not just to confidentiality requirements in a social media policy.

Logos/Trademarks: Organizations understandably want to control use of their logo and trademarks. Nonetheless, a social media policy which prohibits "use of the company's name or service marks outside the course of business without prior approval of the law department" is, according to the General Counsel, unlawful. The General Counsel takes the position that employees have the right under the NLRA to use the company's name and logo "while engaging in protected concerted activity, such as in electronic or paper leaflets, cartoons, or picket signs in connection with a protest involving the terms and conditions of employment." The General Counsel reasoned that such protected use of a company's name and logo does not "remotely implicate[]" the company's interests protected by trademark law, "such as the trademark holder's interests in protecting the good reputation associated with the mark from the possibility of being tarnished by inferior merchandise sold by another entity using the trademark and in being able to enter a related commercial field and use its well-established trademark."

This reasoning is wrong. An employee easily could damage brand reputation and engender customer confusion by, for example, creating a Facebook page with the corporate name and logo. At a minimum, an employer should be able to prohibit employees from using the company name or logo when engaging or depicting in social media any conduct which violates the company's policies or is unlawful; such a policy would not encompass activity protected by Section 7 of the NLRA. Employers also should consider consulting intellectual property counsel about logo and trademark issues and not necessarily develop a marketing strategy based solely on NLRA issues. However, the General Counsel's analysis (which is not law, but rather the Office's view of the law) should not be fully ignored either.

Employee Disclaimers: Social media policies commonly mandate that employees must include a disclaimer in any social media content that relates to the employer. For example, in one of the cases discussed in the General Counsel's report, the employer's social media policy required that employees "expressly state that their comments are their personal opinions and do not necessarily reflect the Employer's opinions." The General Counsel opined that this policy requirement violates the NLRA because it "would significantly burden the exercise of employees' Section 7 rights to discuss working conditions and criticize the Employer's labor policies." Fortunately, employers can achieve a similar result with a policy that prohibits employees from representing in any way that they are speaking on the company's behalf without prior written authorization to do so.

It is worth noting that the General Counsel did approve an employee disclaimer requirement in the section of a social media policy addressing product promotions. The General Counsel explained that in context, this provision could not be read to interfere with Section 7 rights because the policy focused on product promotions and endorsements and was intended to avoid potential liability for unfair and deceptive trade practices under guidance issued by the Federal Trade Commission.

Discussions of Work-Related Concerns: The aphorism, "Don't hang out your dirty laundry," may seem antiquated but many employers still say just that in their social media policy. By way of illustration, one policy discussed in the General Counsel's report "required employees to first discuss with their supervisor or manager any work-related concerns, and it provided that failure to comply could result in corrective action, up to and including termination." The General Counsel concluded that this policy violated the NLRA because of the threat of discipline. Employers can avoid this potential pitfall by urging, but not mandating, that employees use internal channels, rather than social media, to resolve workplace concerns. In that regard, the General Counsel's opinion is nothing new, but rather is in line with traditional NLRA law on protected, concerted activity in general.

Communications With The Media: Social media policies often tell employees not to discuss with the media their social media content related to the company. The General Counsel's report finds such prohibitions illegal. ("An employer's rule that prohibits employee communications to the media or requires prior authorization for such communications is therefore unlawfully overbroad.") However, a similar report issued by the General Counsel on August 18, 2011, recognized that "a media policy that simply seeks to ensure a consistent, controlled company message and limits employee contact with the media only to the extent necessary to effect that result cannot be reasonably interpreted to restrict Section 7 communications." In light of that principle, the General Counsel blessed the media policy in question because the "policy repeatedly stated that the purpose of the policy was to ensure that only one person spoke for the company" and even though "employees were instructed to answer all media/reporter questions in a particular way." In other words, it appears that employers can still carefully craft a provision on media relations in a social media policy which complies with the NLRA.

"Unprofessional" Content: In several of the reported cases, the General Counsel took issue with policy terms that were undefined, vague, or subjective. These terms included prohibitions on "insubordination or other disrespectful conduct," "inappropriate conversation," "unprofessional communication that could negatively impact the Employer's reputation or interfere with the Employer's mission," and "nonprofessional/inappropriate communication regarding members of the Employer's community" as well as the requirement that social media activity occur in an "honest, professional, and appropriate manner." Employers can achieve the intended objectives of this disfavored language by using terms that are defined in the social media policy or other policies or by providing examples of prohibited conduct which do not include conduct protected by the NLRA.

Employee's Self-Identification: Some employers have tried to protect their organization by telling employees not to identify their affiliation with the organization when engaging in social media activity unless there is a legitimate business reason for doing so. In its report, the General Counsel took the position that this type of policy violates the NLRA "because personal profile pages serve an important function in enabling employees to use online social networks to find and communicate with their fellow employees at their own or other locations." Employers should not view the General Counsel's position here as a particular setback. Telling employees not to mention their employer by name in a personal profile is akin to telling them not to do the same at a cocktail party; the rule would be honored in the breach.

Securities Blackouts: Publicly traded companies are rightfully concerned that employees may let slip on social media highly sensitive information about a corporate transaction, new product launch, or non-public financial information. Among the few policy provisions with which the General Counsel did not take issue was one which stated that the employer might "request employees to confine their social networking to matters unrelated to the company if necessary to ensure compliance with securities regulations and other laws." The General Counsel reasoned that "employees reasonably would interpret the rule to address only those communications that could implicate security regulations," as opposed to the terms and conditions of their employment.

Employer Disclaimers: In the wake of the NLRB's aggressive position since the AMR case in late 2010 on social media policies and employee discipline based on social media conduct, many employment and labor law practitioners have recommended the inclusion of a disclaimer in social media policies. The disclaimer explains that the employer's policies are not intended to interfere with employees' rights under the NLRA. In its first public review of a disclaimer in a social media policy, the Board somewhat surprisingly took the position that such a disclaimer was ineffective. In that case, the disclaimer stated as follows:

> [T]he policy [will] not be interpreted or applied so as to interfere with employee rights to self- organize, form, join, or assist labor organizations, to bargain collectively through representatives of their choosing, or to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from engaging in such activities.

According to the General Counsel, this disclaimer could not "save" a policy provision prohibiting employees from posting "inappropriate" content because "an employee could not reasonably be expected to know that this language encompasses discussions the Employer deems 'inappropriate.'" Given the detailed nature of the disclaimer in question, this conclusion suggests the General Counsel, and possibly the Board itself, will view skeptically any effort by an employer to rely upon a disclaimer to protect an otherwise overbroad social media policy. That is an unfortunate result for employers, as a disclaimer seemed to be the answer to keeping a policy simple and uncluttered, without violating the NLRA. Now employers should consider instead replacing such a disclaimer with a list of specific limitations or examples, such as those discussed above which can transform an otherwise overbroad (at least in the eyes of the General Counsel) non-disparagement provision into one that complies fully with the NLRA.

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