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NLRB Issues New Social Media, Networking Report

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On May 30, National Labor Relations Board (NLRB) General Counsel Lafe E. Solomon issued his third report summarizing seven social media and networking cases, focusing solely on the social media policies governing employees.

In six of those cases, the General Counsel deemed certain stipulations of the employers' policies to be overbroad and, thus, unlawful under Section 7 of the National Labor Relations Act (NLRA). In one case, however, the entire policy was deemed lawful and the General Counsel attached that policy to the report. The cases and the social media policy provisions found to be either lawful or unlawful are briefly summarized below:

Case 1

Unlawful

— provisions prohibiting employees from discussing confidential information, which could include terms and conditions of employment, virtually everywhere, both with other employees and outsiders

— threats of discharge or criminal prosecution for failing to report unauthorized access to or misuse of confidential information, because the rules governing release of confidential information were themselves unlawful.

Lawful

— provision advising employees to "develop a healthy suspicion," does not prohibit any particular communication, and merely advises caution to prevent inadvertent or unwitting disclosures.

Case 2

Unlawful

— provision requiring posts to be "completely accurate and not misleading and [not revealing of] non-public information on any public site" was determined to be overbroad because it could apply to discussions of labor policies and employee treatment that were not maliciously false, and because no guidance or examples were provided to limit application to Section 7 activity

— provisions defining "non-public information" to specifically include personal information about another employee, including compensation or status

— provision requiring employees to secure permission before posting potentially prohibited information

— provision prohibiting posting of photos, music, videos and related works without the owner's permission and prohibiting use of the employer's logos and trademarks, since there was no further explanation or limitation that Section 7 activities (such as photos of picket signs with logos) were excluded from the provisions

— instruction that "offensive, demeaning, abusive or inappropriate remarks are as out of place online as they are offline" because it was unclear what might be deemed "inappropriate"

— provision instructing employees to “think carefully about ‘friending’ co-workers” as it discouraged communications among employees

— provision instructing employees to “report any unusual or inappropriate internal social media activity”

— “Savings Clause” insufficient to correct ambiguities where it failed to provide any description of Section 7 rights or other applicable laws and regulations.

Lawful

— provision prohibiting discussing information related to safety components for the employer’s automobile system cannot reasonably be construed to apply to workplace safety;

— provision addressing “Secrets, Confidential information, or Attorney-Client privileged information” is clearly aimed at protecting the employer’s proprietary and privileged information.

Case 3

Unlawful

— prohibition on disclosure of personal information about employees or contingent workers which, absent clarification, could be construed to include wages and working conditions

— prohibition on commenting on legal matters including pending litigation or disputes because it specifically restricts employees from discussing the protected subject of potential claims

— provision advising employees to use a “friendly tone” online and to communicate in a “professional tone” and to avoid topics that might be “objectionable or inflammatory” because there was no significant clarification of those terms and because working conditions and unionism could be controversial or inflammatory topics

– rule requiring permission from copyright holder before use could restrict employees’ right to take and post photos of picket lines or unsafe working conditions

— rule encouraging employees to resolve concerns about work internally, rather than online or in alternative forums, as it would preclude or inhibit protected activity

— “Savings Clause” insufficient because employees would not understand from its limited language that certain activities are protected.

Lawful

— prohibition on disclosing personal information only to those authorized to receive it, once the restriction on disclosure regarding employee and contingent worker personal information was removed

— advice to respect copyright and other intellectual property laws

— suggestion that employees use their best judgment, take personal responsibility and recognize both internal and external consequences that could come from engaging in social media activities.

Case 4

Unlawful

— provisions prohibiting the posting of “material non-public information,” or confidential or proprietary information” was overbroad and so vague that employees could perceive them to include work conditions

— provision warning employees to “avoid harming the image and integrity of the company” could be construed to prohibit criticism of labor policies or treatment of employees

— provision prohibiting expression of employees' personal opinions to the public regarding "the workplace, work satisfaction or dissatisfaction, wages hours or work conditions"

— "Savings Clause" insufficient because it does not explain to a layperson what the right to engage in "concerted activity" means, especially given the specific prohibitions in other provisions.

Lawful

— provision prohibiting online bullying, harassment, discrimination and retaliation that would be prohibited in the workplace.

Case 5

Unlawful

— provision requiring employees to report receiving "unsolicited or inappropriate electronic communications" because it could reasonably be interpreted to restrain communications with other employees and other third parties.

Lawful

— provision prohibiting "unauthorized postings" in the name of the employer because it merely requires an employee to receive authorization before posting content that could reasonably be attributed to the employer.

Case 6

Unlawful

— provision prohibiting "disparaging and defamatory" remarks, without any clarification, because it can reasonably be interpreted to apply to the employer's labor policies and treatment of employees

— rule against participation in social media activities on employer time because it restricts the right of employees to engage in Section 7 activities on employer's premises during non-work time and in non-work areas

— rule requiring authorization before reaching out to third parties, specifically the Internet and the media, because it infringes on the right to communicate information about labor disputes to third parties

— rule limiting communication with government agencies to the extent it restricts employees' rights to converse with the NLRB, respond to government inquiries or otherwise concertedly seek held regarding working conditions.

Lawful

— prohibition on the expression of opinions or statements as policy or view of employer, or otherwise on behalf of Employer, and rule requiring employees to expressly state that their postings are their own and do not represent employer's positions, strategies or opinions.

Case 7

The employer's **entire policy was found lawful**. Any potentially ambiguous terms were resolved with significant and direct clarification or examples, such that the rules were appropriately clarified or restricted in ways that prevented them from being construed to cover protected activity.

By this report, it is apparent that the NLRB is trying to firm up its guidance on social media policies. In fact, the inclusion of the Case 7 policy which was found to be entirely lawful offers a clear sense of what the NLRB is looking for, and provides good contrast with the provisions found unlawful in the other six cases. That policy may be a starting point for employers looking to create new policies or revise existing ones, but likely will need to be modified to meet specific employer needs and wants. As always, we strongly recommend consulting with counsel before implementing new or revised policies.

The May 30, 2012 report is available through the NLRB website at:

https://www.nlrb.gov/news/acting-general-counsel-releases-report-employer-social-media-policies

