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A Complete Overview Of The NLRB's Memorandum Regarding Social Media Policies In The Workplace

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A. Executive Summary

On May 30, 2012, the National Labor Relations Board's (NLRB) Acting General Counsel Lafe Solomon issued a memorandum regarding social media policies in the workplace, the third such memorandum in recent months. The memorandum provides numerous examples of employer policies that ran afoul of the National Labor Relations Act (NLRA), and a few examples where employers "got it right." While it remains to be seen whether the NLRB's interpretations are supported by the courts, employers should recognize that these policies are a top enforcement priority for the NLRB and proceed with great caution when drafting and enforcing social media policies against employees.

B. Background: How The National Labor Relations Act Is Implicated by Social Media Policies

Section 7 of the NLRA gives employees the right to form, join, or assist labor organizations. It also guarantees employees the right to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. Even in the absence of a labor union, an employee complaining about wages, hours or working conditions on behalf of himself or herself and other employees cannot be disciplined or discharged for such conduct under the NLRA. This can include communications via social media, even outside of work. Therefore, the General Counsel's memorandum is applicable to unionized and non-unionized workforces alike.

C. The General Counsel's Guidance

Where The Employers Got It Wrong

The General Counsel's memo addressed seven distinct social media policies from a variety of employers. Six of those policies contained numerous provisions he deemed unlawful. Employers will be surprised to see the variety of contexts in which even the most well-intentioned company might find itself in hot water.

Confidential Information

An employer's attempt to protect confidential information might inadvertently run afoul of the NLRA. For example, a policy prohibiting employees from online discussions regarding "confidential guest, team member or company information" was deemed impermissibly vague and overbroad. According to the General Counsel, the policy reasonably could be interpreted as prohibiting employees from discussing and disclosing information regarding

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their own terms and conditions of employment – a clearly protected activity.

Keeping the Peace

Social media policies designed to maintain harmony in the workplace might also present a pitfall for well-intentioned employers. For example, a policy's warning not to "pick fights" and to avoid "controversial topics" when engaging in online discussions failed to pass muster. According to the General Counsel, the purpose of the policy was to caution employees against online discussion regarding topics that could become heated or controversial. Since topics regarding working conditions or unionism have the potential to become heated and controversial, the policy could reasonably be construed as inhibiting Section 7 rights. Likewise, a provision encouraging employees to discuss concerns about work internally rather than airing grievances online was unlawful because it could inhibit workers from seeking redress through alternative forums.

Controlling the Dissemination of Information

An employer's attempt to protect its image could also have unintended consequences. For example, an instruction not to "comment on legal matters, including pending litigation or disputes" went too far. The General Counsel explained that an employee could reasonably construe the language as prohibiting him or her from discussing potential claims against the employer. Additionally, an employer found itself in trouble when it adopted a policy explaining that its communications department was solely responsible for discussing company information with media outlets. The policy also required employees to obtain authorization before speaking to the media regarding the employer (blogs and message boards were considered "media"). According to the General Counsel, "[e]mployees have a protected right to seek help from third parties regarding their working conditions," and employers can not restrict social media comments to non-public forums. This would include going to the press and blogging.

Miscellaneous Provisions

Even seemingly innocuous provisions within a social media policy may not escape heightened scrutiny. For example, an employer's admonition to "think carefully" about connecting with co-workers was unlawfully overbroad. The General Counsel explained that the policy could be construed as limiting communications among co-workers, and thus interfere with Section 7 activity. Likewise, an instruction to report "any unusual or inappropriate internal social media activity" could be construed as encouraging employees to report to management the union activities of other employees.

Where The Employer Got It Right

Even in the offending policies, the General Counsel did recognize certain provisions that were permissible. These were provisions that, according to the General Counsel, could not conceivably be construed as extending to terms and conditions of employment. For example, a provision barring online conduct amounting to "harassment, bullying, discrimination, or retaliation" was permissible because it was narrowly tailored to apply only to egregious conduct. Additionally, a confidentiality policy was lawful where it provided

specific examples of the information that the company sought to protect, such as “information regarding the development of systems, processes, products, know-how, technology, internal reports, procedures, or other internal business-related communications.” Perhaps most helpful, however, was the analysis of the seventh social media policy. Here, the General Counsel determined the entire policy was lawful (and helpfully attached it to the memorandum). In concluding the policy was lawful, the General Counsel explained that policies clarifying and restricting their scope by including examples of clearly illegal or unprotected conduct will likely be lawful. In contrast, policies that are ambiguous as to their application to Section 7 activity and that contain no limiting language or context to clarify their scope will likely be unlawful.

Takeaway

The sheer number of violations outlined in the memorandum suggests that a majority of employers in the United States maintain social media policies that the National Labor Relations Board would consider unlawful. It is important to note that a boiler-plate “saving clause” (e.g. “nothing in this policy is intended to infringe upon Section 7 rights”) likely will not insulate an employer from liability. The General Counsel repeatedly emphasized these provisions will ordinarily not cure an otherwise unlawful policy. Instead, individual provisions must be carefully worded so as to limit their scope to clearly illegal or unprotected conduct. So long as the NLRB continues its campaign to scrutinize social media policies word by word, employers are encouraged to consult legal counsel when determining whether to implement a social media policy and in what form. We know of no precedent for a government agency to be as focused on a single type of employee policy, and to scrutinize them in the manner the NLRB has been scrutinizing social media policies. While recognizing the need for employers to comply with the NLRA, it seems likely that federal courts will ultimately rein in the NLRB and restore some margin for error for employers. Until then, employers should proceed with great caution.

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