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JUST SOCIAL, OR MATERIAL?

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By Lois Yurow

Frank comes home from a long day operating machinery at Widgets Galore, a public company, and posts this update on Facebook:

"Never been so tired. We can't make the new widgets fast enough. My whole section is working overtime and the #&%* manager won't authorize the OT pay until next quarter! Me and some of the other guys are going to complain to payroll tomorrow."

Material? Maybe. Can Widgets Galore do anything about it? According to the National Labor Relations Board (NLRB), no.

What IROs Need to Know About the NLRB

The NLRB is the federal agency that interprets and enforces the National Labor Relations Act. The statute was enacted to facilitate union organizing, but Section 7 broadly grants employees (whether union or not) the right to "engage in . . . concerted activities for the purpose of . . . mutual aid or protection."

As the NLRB interprets Section 7, employees are entitled to talk about working conditions, wages and hours, and management. Section 8 of the statute makes it an "unfair labor practice" for an employer to interfere with those conversations.

Recent NLRB guidance emphasizes that an employee's right to complain is at least as compelling as an employer's right to prevent disclosure of business information. That means an employee can make unauthorized comments that may raise concerns under securities law but are protected under labor law. IROs should be prepared.

What the NRLB Considers Unlawful

Doesn't Widgets Galore have a social media policy that tells employees what to avoid online? Maybe they do, but it's a good bet that policy contains provisions that the NLRB believes are unlawful.

The NLRB has issued three memoranda regarding social media. (All three are found easily by searching "social media" at www.nlrb.gov.) The first two memoranda, from August 2011 and January 2012, summarize investigations against companies that disciplined employees for social media activities. The third, from May 2012, focuses on common provisions of social media policies and explains why the NLRB thinks many of them improperly infringe on employees' rights. This May 2012 memo reproduces one social media policy – Walmart's – that the NLRB approved in its entirety.

The NLRB's guiding principle for social media policies is: "Rules that are ambiguous as to their application to Section 7 activity and that contain no limiting language or context to clarify that the rules do not restrict Section 7 rights are unlawful. In contrast, rules that clarify and restrict their scope by including examples of clearly illegal or unprotected conduct, such that they could not reasonably be construed to cover protected activity, are not unlawful."

Looking at social media restrictions most likely to interest IROs, here is how the NLRB has applied this standard in its three memos:

Confidential, sensitive, and non-public information

CAN prohibit "discussing . . . 'embargoed information,' such as launch and release dates and pending reorganizations."

CAN advise employees to "[d]evelop a healthy suspicion" of third parties seeking confidential information.

CAN "request employees to confine their social networking to matters unrelated to the company if necessary to ensure compliance with securities regulations and other laws," because "employees reasonably would interpret the rule to address only those communications that could implicate security regulations."

CANNOT require employees to "suspend posted communications if the [e]mployer believed it necessary or advisable to ensure compliance with securities regulations, other laws, or in the best interests of the company." Obviously, this is inconsistent with the ruling above. The reason may be that this restriction was inexplicably coupled with an unlawful requirement that employees discuss work-related concerns with a supervisor before communicating about them online, but the NLRB did not clarify.

CANNOT prohibit employees from "disclosing or communicating information of a confidential, sensitive [nature], or non-public information concerning the company" unless accompanied by "context or examples of the types of information [the employer] deems confidential, sensitive, or non-public in order to clarify that the policy does not prohibit Section 7 activity."

Truthful, nondisparaging, professional, and appropriate

CAN prohibit "statements which are slanderous or detrimental to the company" if the context makes it obvious that protected discussions are not affected. (This particular policy included "a list of prohibited conduct including 'sexual or racial harassment' and 'sabotage.'")

CANNOT prohibit employees from making "statements that lack truthfulness or that might damage the reputation or goodwill of the [employer], its staff, or employees," because such a rule uses "broad terms that would commonly apply to protected criticism of the employer's labor policies or treatment of employees."

CANNOT require employees to communicate online in an "honest, professional, and appropriate manner" because "employees would reasonably construe broad terms, such as 'professional' and 'appropriate,'

to prohibit them from communicating . . . about protected concerns."

Identifying or speaking for employer

CAN require employees "to receive prior authorization before posting a message that is either in the [e]mployer's name or could reasonably be attributed to the [e]mployer."

CAN require employees to "expressly state that their comments are their personal opinions," but only when the comments are about the employer. A policy requiring such a disclaimer in all instances was deemed unlawful.

CAN advise employees to direct all media inquiries to an authorized spokesperson.

CANNOT "[prohibit] employee communications to the media or [require] prior authorization for such communications." (Another fine line.)

CANNOT prohibit employees from identifying their employer, because that would make it harder for people to "find and communicate with their co-workers."

Can These Rulings be Reconciled?

If you have thrown up your hands in frustration, that's understandable. However, Marcia Goodman, a partner in the Employment & Benefits practice group at the law firm Mayer Brown, insists it is possible to craft a social media policy that will satisfy the NLRB and also reduce the employer's securities law risk.

First, Goodman stresses that employers can prohibit social media activities that would violate state or federal law. That's helpful to a point, but securities law violations in particular can be difficult to identify, especially in advance.

Second, Goodman reiterates that the NLRB's primary complaint is with prohibitions it considers overbroad. She recommends that companies incorporate plenty of examples and explanations in their policies. However, examples need to be what Goodman calls "nuanced."

Consider Clearwater Paper's social media policy, which prohibited posting "material nonpublic information or any information that is considered confidential or proprietary." The NLRB objected to many of the company's examples: "[I]nformation about company performance, cost increases, and customer wins or losses has potential relevance in collective-bargaining negotiations regarding employees' wages and other benefits. Information about contracts . . . could include collective-bargaining agreements."

Similarly, General Motors' social media policy defined "non-public information" as:

- "Any topic related to the financial performance of the company;
- Information directly or indirectly related to the safety performance of [GM's] systems or components for vehicles;
- [GM] Secret, Confidential or Attorney-Client Privileged information;
- Information that has not already been disclosed by authorized persons in a public forum; and
- Personal information about another [GM] employee . . . ."

The NLRB found this restriction unlawful because the first, fourth, and fifth examples "[encompass] topics related to Section 7 activities."

How Does the Walmart Policy Differ?

"Nuanced" is the right word to describe the Walmart social media policy. It is not easy to distinguish some of the Walmart language from language the NLRB has criticized.

On the issues an IRO would worry about most, the Walmart policy appears spare. Employees are admonished to "[m]aintain the confidentiality of [Walmart's] trade secrets and private or confidential information," with some examples of what those terms mean, and also to "[r]espect financial disclosure laws," with a pointed reminder about the company's insider trading policy.

This might be brilliant. The undeniable purpose of an insider trading policy is to avoid a securities law problem. Even with its inclination toward liberal interpretations, the NLRB is unlikely to find an insider trading policy to be an unfair labor practice. Thus, an employer theoretically can incorporate by reference all of the examples of "material information" and the definition of "nonpublic" from its insider trading policy—many of which undoubtedly include language the NLRB wouldn't accept in the social media policy itself.

Compliance 101

Of course, like an insider trading policy, a social media policy is worthless unless it is formalized and employees understand it. In a recent survey of participants in a webinar about social media governance conducted by Thomson Reuters Accelus and KPMG, less than 45 percent of the respondents said their companies have social media policies, and only 28 percent said their companies mandate employee training on the specific issue of social media.

Mike Rost, global head of industry analysts at Thomson Reuters, thinks these survey results fairly approximate the status of companies generally. "Most highly regulated industries like banks and broker-dealers have social media policies," but many other companies do not.

He explains that social media is an emerging risk area; it may take a "trigger event" – such as a Netflix-type investigation involving a low-level employee – to spur most companies to act.

Rost urges companies to do three basic things: 1) Have a social media policy; 2) Make sure employees get social media training; and 3) Regularly update the policy to reflect new technologies and new regulatory developments. ▸

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Widgets Galore and Securities Law

Let's go back to Frank. His protected comments might alert the reader to the success of the new widget, and also might suggest that Widgets Galore is violating laws regulating overtime pay. If Frank's post is brought to management's attention, does the company need to react?

There is no specific guidance from the Securities and Exchange Commission on this growing concern. The 2008 Interpretive Release on company use of websites and the recent investigative report about Netflix do not address rogue online comments by ordinary employees. Of course, the most pressing concern is Regulation FD.

Frank's post was not by or on behalf of the company, and Frank is not a senior Widgets Galore official or a regular spokesperson. Eddie Best, co-leader of the Capital Markets and Financial Institutions groups at Mayer Brown, stresses that Reg FD does not cover "the guy on the factory floor." The adopting release for Reg FD reinforces that point: "An issuer is not responsible under Regulation FD when one of its employees improperly trades or tips."

Moreover, Reg FD only covers communications to securities professionals and company shareholders. Best assumes that Frank's Facebook friends are unlikely to include such individuals.

Does that mean Widgets Galore's IRO can rest easy? Probably, but Best suggests preparing a scaled response, just in case.

First, the company needs to consider whether the information Frank divulged is material. That is a very fact-specific determination that could change daily, but Best notes that "the kinds of information most employees have will generally not be material."

Next, Widgets Galore should assess how broadly Frank's post was distributed. How many people can read his comments? Are any of them likely to attach significance to this particular comment, and either redistribute it or trade company stock because of it?

Unless Widgets Galore decides the post was material *and* likely to be seen by someone Reg FD covers, the company does not need to distribute the information broadly. However, Best says a company spokesperson should be ready with a response – even if it's "no comment" – in the event of a media inquiry. Of course, if there are several media inquiries, Widgets Galore may need to reconsider its decision that no action is warranted.

Two Final Issues

There are two more points that make this discussion more interesting, but also more complicated.

First, in an informal survey of labor lawyers and securities lawyers (none of whom wish to be identified), all agreed that if a public company has to choose between violating labor law with an overbroad social media policy and risking a securities law violation, the labor law repercussions are less onerous.

Second, there is substantial uncertainty surrounding the NLRB's standing. For reasons beyond the scope of this article, the D.C. Circuit Court of Appeals recently declared that the appointment of the current NLRB members was unconstitutional, and that they have no authority to issue or enforce orders. That decision is under appeal, but until the matter is resolved, all NLRB orders since January 2012 are in question. If the current members are reappointed lawfully, they presumably would stay the course in their views of social media policies. There is no telling how new board members would rule.

IROs should determine whether their companies have up-to-date social media policies that comply with NLRB guidance at its strictest, and advocate regular employee training on the potential risks of social media. IRU

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SOCIAL MEDIA RESOURCES

The law governing company or executive use of social media is a bit more settled. NIRI's website (http://www.niri.org/) has a wide range of reports, memos, webinars, and other resources to help members fully understand the IR implications of "authorized" social media use.

Those resources include:

- *NIRI Executive Alert*, "SEC Permits Social Media Use for Corporate Disclosure," April 2013.
- An April 30, 2013 NIRI webinar, "Social Media and the SEC" (www.niri.org/archivedwebinars).
- NIRI's "Standards of Practice for Investor Relations: Disclosure," (www.niri.org/standards ofpractice) which discusses best practices on social media (see pages 46-47).
- NIRI's Social Media page (www.niri.org/socialmedia), which includes earlier *IR Update* magazine articles on social media issues.
- NIRI's Regulations page (www.niri.org/regulations), which includes links to the Security and Exchange Commission's regulations and guidance on social media, corporate websites, and Regulation FD.
- NIRI's Presentation and Report Library (www.niri.org/resourcelibrary), which has memos from law firms, IR consultants, and software providers on social media and other disclosure concerns.
- In addition, the results of NIRI's survey of social media practices will be presented at the 2013 NIRI Annual Conference in June.