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Lexis Practice Advisor Labor & Employment

Understanding the NLRB's Positions on Regulating Employees' Social Media Usage

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Section 7 of the National Labor Relations Act (NLRA) confers upon employees the right to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection. 29 U.S.C. § 157. NLRA section 8(a)(1) makes it an unfair labor practice for employers to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7. 29 U.S.C. § 158(a)(1). The National Labor Relations Board (NLRB) has vigorously policed both employers' social media policies and their disciplinary actions that relate to employees' social networking. An employer's social media policy that infringes upon employees' section 7 rights, or that could be interpreted by employees as infringing upon them, will be susceptible to charges of unfair labor practices. Likewise, employers that discipline employees for social media activity that constitutes protected concerted activity likely will be found to have violated the NLRA.

This practice note explains the NLRB's decisions to enable you to better counsel employers on lawfully regulating and responding to employees' use (or misuse) of social media. Specifically, we divide this practice note into two main sections:

- Crafting Social Media Policies that the NLRB Will Uphold
- Lawfully Disciplining Employees for Social Media Activity

For more information on the NLRA, see Navigating NLRA Section 8(a) Unfair Labor Practices by Employers.

Crafting Social Media Policies that the NLRB Will Uphold

Employers developing social media policies must ensure that the terms of those policies do not violate the NLRA, and should analyze whether any social media activity upon which they wish to base disciplinary decisions falls within the NLRB's definition of protected concerted activity. The NLRB will find social media policies unlawful if it determines the policies interfere with—or might be interpreted by employees as interfering with—employees' rights under the NLRA. To make this determination, the NLRB analyzes the policy to determine if it uses overbroad or ambiguous language that would reasonably tend to chill employees' exercise of their rights to engage in concerted activities. The following sections contain tips on drafting and implementing social medial policies to help ensure that they withstand the NLRB's scrutiny.

For a full annotated social media policy, see Social Media Policy. See also Developing Social Media Policies; Understanding Key Social Media Issues in Employment; and Checklist – Addressing Social Media in an Employee Handbook.

The Context for Social Media Restrictions Matters

When drafting and reviewing social media policies, note that the context for any particular restriction will play an important role in whether or not that restriction complies with the NLRA.

Example: Restricting Social Media Networking to Ensure Compliance with Securities Regulations

A national drugstore chain had a social media policy that directed employees to confine their social networking to matters unrelated to the company if necessary to ensure compliance with securities regulations and other laws. It further prohibited employees from using or disclosing confidential and/or proprietary information, including personal health information about customers or patients. The NLRB found these restrictions lawful.

Employees could construe a provision that limits social media activity to topics unrelated to the company as a rule restricting employees from communicating about the terms and conditions of employment. Nevertheless, in this context, the NLRB found that employees would reasonably interpret the drugstore chain's policy provision to address only those communications that could implicate securities regulations. And, considering that the employer sold pharmaceuticals and that the restriction on disclosing confidential information referred in several places to customers, patients, and health information, employees would reasonably understand that this rule intended to protect the privacy interests of the employer's customers and not to restrain section 7 protected rights. NLRB, Report of the Acting General Counsel Concerning Social Media Cases, 2012 NLRB OM Memo LEXIS 57, at 17 (Jan. 24, 2012).

Incorporate Language from Other Employment Policies

Using examples of activity that the employer seeks to restrict will often provide the necessary context for a rule that restricts social networking. You can accomplish this by incorporating language and illustrations from the employer's other policies into the social media policy. Detailing the prohibited conduct will better enable employees to understand that the restriction is not directed at any form of protected activity.

Example: Incorporating Non-discrimination or Harassment Policies

A social media policy can include language taken from a company's anti-discrimination or anti-harassment policy. Compare the following two restrictions:

- *Restriction 1*. Employees may not make discriminatory, defamatory, or harassing internet posts about specific employees, the work environment, or work-related issues on social media sites.
- *Restriction 2*. Employees may not use social media to make posts about coworkers, 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.

Restriction 1 contains broad terms such as "defamatory" that specifically apply to discussions about work-related issues and arguably would also apply to protected criticism of an employer's labor policies or treatment of employees. Restriction 2, on the other hand, would not reasonably be construed to apply to section 7 activity because it appears in the context of a list of plainly egregious conduct. Therefore, the NLRB will likely find it lawful. NLRB, Report of the Acting General Counsel Concerning Social Media Cases, 2012 NLRB OM Memo LEXIS 57, at 16-17 (Jan. 24, 2012). To further dispel possible ambiguities, an employer may wish to name the other policies that its social media policy incorporates.

Do Not Place Burdens on Employees' Ability to Engage in Protected Activity

Employers should avoid any social media rules that place undue burdens on employees or that would tend to chill employees' engagement in protected concerted activity.

Example: Invalid Overbroad Online Communications Policy

An employer's online communications policy dictated that employees who identify themselves as associates of the employer and publish any work-related information online must use the following disclaimer: "The postings on this site are my own and don't necessarily represent the position, strategies, or opinions of [the employer]."

An NLRB administrative law judge (ALJ) observed that the rule could reasonably be read to apply to any communication posted online, which could be quite burdensome. The ALJ further found the disclaimer rule was manifestly broader than the employer's legitimate interest in preventing employees from speaking or appearing to speak on its behalf. In this case, the employer had not demonstrated—and the ALJ found it "highly counterintuitive, and defie[d] common sense"—that employee discussions about the employer's "work-related information" —online, or in the line at the post office, would likely be misunderstood as "a statement of the employer." The Kroger Co. of Michigan v. Anita Granger, 2014 NLRB LEXIS 279, at *10 (Apr. 22, 2014).

Savings Clauses

You should include in a social media policy a clause indicating that the employer will not construe or apply the policy in a manner that interferes with or restricts employees' rights under the NLRA. Such a clause may help inform employees that the policy generally does not apply to protected concerted activities. Note, however, that the NLRB has repeatedly stated that savings clauses alone do not cure an otherwise unlawful policy provision. See, e.g., McKesson Corp., NLRB Case No. 06-CA-066504 (Office of Gen. Counsel Advice Mem. Mar. 1, 2012) (available at http://apps.nlrb.gov/link/document.aspx/09031d4580f79116); Giant Food LLC, 2012 NLRB LEXIS 896, at 8 (Associate General Counsel Division of Advice Mar. 21, 2012). The NLRB has reasoned that a savings clause paired with an unlawful policy provision does not give employees sufficient information to understand that protected activities are actually protected.

Policy Dos and Don'ts

The following sections list types of social media policy clauses that the NLRB will generally find lawful or unlawful.

Rules That the NLRB Will Likely Uphold

The NLRB will likely conclude that the social media provisions listed below do not infringe on employees' section 7 right to use social media to join forces with other employees to advocate for improvements to their working conditions. These provisions avoid overbroad and ambiguous language through references to other policies and legal requirements and examples to illuminate terms that may otherwise be considered vague. Because the rules are narrowly drawn, the associated obligations on the employees are reasonable and not overly burdensome.

Thus, the NLRB typically permits social media provisions that

- prohibit inappropriate postings that may include discriminatory remarks, harassment, and threats of violence or similar inappropriate or unlawful conduct;
- prohibit harassment or bullying, explicitly defined as 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;
- require employees to be respectful and professional to coworkers, clients, and competitors;
- require employees to maintain the confidentiality of the employer's trade secrets and private and confidential information, including information regarding the development of systems, processes, products, know-how, technology, internal reports, and procedures;
- request employees to respect the laws governing copyright, fair use of copyrighted material owned by others, trademarks, and other intellectual property, including the employer's own copyrights, trademarks, and brands;

- demand that employees not post anything on the Internet in the name of the employer or in a manner that could reasonably be attributed to the employer without prior written authorization from the employer;
- prohibit employees from pressuring their coworkers to connect or communicate with them via social media;
- request employees to confine their social networking to matters unrelated to the company if necessary to ensure compliance with securities regulations and other laws; and
- prohibit disclosure of information protected by the attorney-client privilege.

Rules That the NLRB Will Likely Invalidate

In contrast, the provisions listed in this section are broadly drafted and may conceivably be interpreted to infringe upon protected concerted activities. Although many of these examples appear at first glance to be reasonable, the NLRB scrutinizes policies for overbreadth and ambiguity. Rules that contain any language that may inhibit an employee from freely communicating about workplace issues—including criticizing the employer about terms and conditions of employment and labor policies and airing sensitive information about how the employer treats employees—are likely to be found to violate the NLRA. As discussed further below in the section on when concerted activity loses its protection, the NLRA protects even false statements so long as they were not made maliciously with knowledge of their falsity.

Accordingly, the NLRB typically finds unlawful social media provisions that

- prohibit depictions of the employer's logo or company uniform;
- prohibit employees from using the company name, address, or other information on their personal social media profiles;
- ban all disparaging comments regarding the workplace, the employer, supervisors, and coworkers;
- restrict employees from revealing—including through the use of photographs—personal information regarding coworkers, company clients, partners, or customers without their consent;
- prohibit conduct that is generally offensive, discourteous, or rude, or require respect in general terms;
- bar untrue statements or statements that might damage the reputation of the employer or its staff;
- prohibit employees from disclosing or communicating any information of a confidential, sensitive, or non-public nature concerning the company to anyone outside the company without prior approval of the employer;
- require that social networking site communications be made in an honest, professional, and appropriate manner, without defamatory or inflammatory comments regarding the employer and its subsidiaries, and their respective shareholders, officers, employees, customers, suppliers, contractors, and patients;
- instruct employees to think carefully about "friending" coworkers;
- prohibit anonymous posts online; and
- prohibit discussion of legal matters.

Lawfully Disciplining Employees for Social Media Activity

An employer analyzing whether it can lawfully discipline an employee for his or her social media activity should consider (1) whether the employee's activity is concerted and (2) whether it occurred under circumstances that fall within the scope of the NLRA's protection.

Is the Social Media Activity Concerted?

In general, for social media activity to qualify as concerted, the employee must take the action together with—or on the authority of—other employees and not solely by and on behalf of the individual employee. Activity can still rise to the level of concerted where coworkers are not involved if the activity continues a conversation or discussion among coworkers regarding working conditions. Personal griping over social media is usually not considered concerted activity because it is not done together with other employees.

Examples of Concerted Activity

An employer generally may not lawfully discipline employees for discussing with coworkers the terms and conditions of their employment, including compensation, staffing levels, discipline, and other important aspects of the employment relationship. Evidence that the employee(s) had brought, or intended to bring, these issues to management's attention or take other steps to advance their collective position will increase the likelihood that the NLRB will conclude that the employee(s) engaged in concerted activity. For example:

- In one case, an EMT posted on a former coworker's Facebook page that he should "think about getting a lawyer and taking the employer] to court" and "contact the labor board too." The EMT made these remarks in response to another employee's post about getting fired for commenting on the condition of the company's vehicles to a patient. The ALJ held that, viewed in its context, the EMT's posts were protected concerted activity because vehicle condition was a matter of mutual concern. The ALJ rejected the employer's argument that the employee's Facebook posts lost the NLRA's protection because they were accessible to customers or other third parties, noting the NLRB's long-standing position that concerted activity does not lose its protection just because it may have an adverse effect on a company's business. See Butler Medical Transp. LLC, 2013 NLRB LEXIS 584 (Sept. 4, 2013).
- In another case, an employee solicited opinions on Facebook about employee job performance and staffing levels in preparation for a meeting with a supervisor; in response, several coworkers commented about staffing levels and workload. The NLRB deemed the posts to constitute concerted activity because the employees were discussing working conditions with each other and their conversation related to a meeting with the employer about the terms and conditions of employment. See NLRB, Report of the Acting General Counsel Concerning Social Media Cases, Memorandum OM 11-74, at 3-5 (Aug. 18, 2011) (available at http://apps.nlrb.gov/link/document.aspx/09031d458056e743).
- The NLRB also found that concerted activity occurred when an employee posted pictures and commentary on Facebook of a controversial sales event held by the employer. Employees had previously complained among themselves and to management about the inexpensive food and beverages offered at the event, which they thought would adversely affect sales of the product and their commissions. The NLRB brushed aside the fact that no co-employees commented on the post and noted that the Facebook post continued the conversation that had occurred at a staff meeting and related to the employees' compensation, which is a term and condition of employment. See NLRB, Report of the Acting General Counsel Concerning Social Media Cases, Memorandum OM 11-74, at 6-9 (Aug. 18, 2011) (available at http://apps.nlrb.gov/link/document.aspx/09031d458056e743).
- Another example of concerted activity occurred when an employee made negative comments about a supervisor on Facebook. The employee—responding to coworkers' Facebook conversation about drama in the workplace and another coworker's discipline—posted that she hated the employer and couldn't wait to get out of there. She also blamed the operations manager for much of the drama as well as the poor work environment. These statements followed previous workplace conversations and employee complaints to management about the operations manager's negative attitude and supervision. Although the post was phrased in terms of the employee's own dissatisfaction with the operations manager and the employer's operation generally, the NLRB found that the employee's Facebook post amounted to concerted activity. The employee shared these views as part of an ongoing conversation with coworkers about section 7 subjects related to terms and conditions of employment, including the discipline of another employee, inadequate supplies, and work scheduling. See NLRB, Report of the Acting General Counsel Concerning Social Media Cases, 2012 NLRB OM Memo LEXIS 57, at 22-25 (Jan. 24, 2012).

Examples of Non-concerted Activity

By contrast, the NLRB will not consider social media activity to be concerted when it does not involve coworkers but merely reflects personal gripes. Thus, an employer can terminate or discipline an employee for such activity without violating the NLRA. For example:

- A bartender who engaged in a Facebook conversation with a relative, in which he complained about his employer's tipping policy, commented that the employer's customers were "rednecks," and wished that the bar's patrons choked on glass as they drove home drunk, did not engage in concerted activity. No coworkers participated in the conversation and the posts did not continue any conversation with coworkers about the terms and conditions of employment. See JT Porch Saloon & Eatery, Ltd., 2011 NLRB GCM LEXIS 24 (Aug. 18, 2011); see also NLRB, Report of the Acting General Counsel Concerning Social Media Cases, Memorandum OM 11-74, at 14-15 (Aug. 18, 2011) (available at http://apps.nlrb.gov/link/document.aspx/09031d458056e743).
- The NLRB also found no concerted activity when an employee posted on a public official's Facebook wall regarding paltry public funding for the employer's industry and complained about lack of vehicles and employees' ability to perform the job. The NLRB noted that no evidence indicated that the employee discussed her concerns with her coworkers or planned to bring the issues to management's attention. See NLRB, Report of the Acting General Counsel Concerning Social Media Cases, Memorandum OM 11-74, at 15-16 (Aug. 18, 2011) (available at http://apps.nlrb.gov/link/document.aspx/09031d458056e743).
- In another "personal gripe" case, the NLRB found that a retail employee's complaint on Facebook represented a personal gripe about a bad interaction with a manager about mispriced or misplaced items. His coworkers responded with comments of emotional support. The NLRB emphasized that the posting did not suggest that the employee sought to initiate group action with his coworkers. Rather, he merely expressed frustration over the interaction. His coworkers also appeared to interpret the employee's post as a personal gripe; their comments did not reveal any past or future group activity regarding the employees' terms and conditions of employment. See NLRB, Report of the Acting General Counsel Concerning Social Media Cases, Memorandum OM 11-74, at 17-18 (Aug. 18, 2011) (available at http://apps.nlrb.gov/link/document.aspx/09031d458056e743).

Is the Concerted Social Media Activity Protected?

Once an employer determines that an employee has engaged in concerted activity, it must also determine if the concerted activity is protected under the NLRA. Concerted activity can lose the NLRA's protection if it is (1) maliciously untrue and made with the knowledge of its falsity, or (2) so egregious that it loses protection of the NLRA.

Importantly, the NLRB stringently applies both of these exceptions. With respect to the first exception, the NLRA protects an employee's criticism of an employer even if the criticism is false or defamatory. See Office of the General Counsel, Report of the General Counsel Concerning Employer Rules, Memorandum GC 15-04, at 7 (Mar. 8, 2015) (available at http://apps.nlrb.gov/link/document.aspx/09031d4581b37135) (citing Copper River of Boiling Springs, LLC, 2014 NLRB LEXIS 154 (Feb. 28. 2014)). With respect to the second exception, the NLRB recognizes that "unionization and other protected concerted activity is often contentious and controversial" and therefore will not look askance at impassioned debates and provocative, discourteous, or offensive statements by employees engaged in concerted activity. See Office of the General Counsel, Report of the General Counsel Concerning Employer Rules, Memorandum GC 15-04, at 10 (Mar. 8, 2015) (available at http://apps.nlrb.gov/link/document.aspx/09031d4581b37135).

Example of Unprotected Maliciously Untrue Concerted Activity

In Butler Medical Transport LLC, 2013 NLRB LEXIS 584, at *14 (Sept. 4, 2013), also discussed above, a second employee, whom the ALJ concluded was lawfully terminated, posted on Facebook: "Hey everybody!!!!! Im f[****]n' broke down in the same s[**]t I was broke in last week because they don't wanta buy new s[**]t!!!! Cha-Chinnnggggggg chinnng-at Sheetz Convenience Store." After a review of the employee's maintenance records showed that the vehicle was not broken down when the employee made the posts and he testified at an unemployment insurance hearing that he was referring to his personal vehicle, the ALJ concluded that the posts were maliciously untrue and, therefore, not protected by the labor law.

Example of Unprotected Egregious Concerted Activity

Concerted activity can also be so egregious that it loses its protection under the NLRA. The NLRB applied this principle to Facebook activity in Richmond District Neighborhood Center, 2013 NLRB LEXIS 687 (Oct. 17, 2013). In *Richmond*, two employees engaged in a Facebook exchange shortly after the center offered to rehire them for the upcoming school year. In the exchange, the employees claimed that they would take students on "[f]ield trips all the time to wherever the f*** we want" and that the program could just "figure out the money." A supervisor at the center, who was Facebook friends with one of the employees, alerted the center to the posts. Subsequently, the center rescinded its rehire offers to the two employees. Although finding that the employees had engaged in protected activity, the ALJ nevertheless concluded that the center did not violate the NLRA. The NLRA did not protect the employees' activity because the center had a legitimate concern that the Facebook comments could "jeopardize the program's funding and the safety of the youth it serves." The *Richmond* case is the first to show how employees may exceed the protection of the NLRA on Facebook.