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SOCIAL MEDIA AND THE NLRB

If your company is using social media, it should adopt, implement and enforce a social media policy. The purpose of the social media policy is to set the rules for how a company's employees may use social media sites. Once you have adopted a social media policy, it is very important to train employees so that they understand the policy rules and to enforce the policy once it is implemented.

Compliance with Applicable Laws.

Companies often find themselves inadvertently violating laws when they allow their employees to use social media. Defamation laws, laws regarding unfair competition and deceptive acts (e.g., false advertising), laws regulating promotions, sweepstakes and contests, and securities laws are types of laws that can easily be violated if you are not careful. In particular many businesses unwittingly overlook the impact of the National Labor Relations Act to discussions via social media by or among employees regarding working conditions or other terms and conditions of their employment.

The NLRB has taken an aggressive approach where employers attempt to restrict or curtail discussions among employees. The National Labor Relations Act protects associational rights of "non-union" employees as well as "union" employees. In fact, it is possible to commit an unfair labor practice without a union presence in the workplace. Employees may engage in protected concerted activity in situations other than traditional union organizing and collective bargaining. Employers also must allow a coworker to be present during employee investigatory interviews under a recent NLRB interpretation of the Act.

Recently the NLRB has reviewed the social media policies of several employers and rejected them where there was potential interference with employees' rights under Section 7. Recently the NLRB review one such policy and found it to be lawful under the Act.

Social Media Policy Receives Approval From NLRB's Acting General Counsel

Attached is an employer's social media policy that, according to the acting general counsel of the National Labor Relations Board, is lawful in its entirety under the National Labor Relations Act. (Office of General Counsel, Division of Operations-Management, Memorandum OM 12-59, May 30, 2012, pp. 22-24).*

* Memorandum OM 12-59 can be viewed at: www.nlr.gov/news/acting-general-counsel-releases-report-employer-social-media-policies.

The acting general counsel's comments on this social media policy and his reasoning why the policy is lawful, are reproduced below from Memorandum OM 12-59, pp. 19-20. Although this information is intended to provide guidance, employers are well advised to consult with their own legal counsel for professional advice when adopting or revising employment policies and work rules.

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(Text from Memorandum OM 12-59, pp. 19-20, follows)

In this case, we concluded that the Employer's entire revised social media policy, as attached in full, is lawful. We thus found it unnecessary to rule on the Employer's social media policy that was initially alleged to be unlawful.

As explained above, 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.

Applying these principles, we concluded that the Employer's revised social media policy is not ambiguous because it provides sufficient examples of prohibited conduct so that, in context, employees would not reasonably read the rules to prohibit Section 7 activity. For instance, the Employer's rule prohibits "inappropriate postings that may include discriminatory remarks, harassment and threats of violence or similar inappropriate or unlawful conduct." We found this rule lawful since it prohibits plainly egregious conduct, such as discrimination and threats of violence, and there is no evidence that the Employer has used the rule to discipline Section 7 activity.

Similarly, we found lawful the portion of the Employer's social media policy entitled "Be Respectful." In certain contexts, the rule's exhortation to be respectful and "fair and courteous" in the posting of comments, complaints, photographs, or videos, could be overly broad. The rule, however, provides sufficient examples of plainly egregious conduct so that employees would not reasonably construe the rule to prohibit Section 7 conduct. For instance, the rule counsels employees to avoid posts that "could be viewed as malicious, obscene, threatening or intimidating." It further explains that prohibited "harassment or bullying" would include "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." The Employer has a legitimate basis to prohibit such workplace communications, and has done so without burdening protected communications about terms and conditions of employment.

We also found that the Employer's rule requiring employees to maintain the confidentiality of the Employer's trade secrets and private and confidential information is not unlawful. Employees have no protected right to disclose trade secrets. Moreover, the Employer's rule provides sufficient examples of prohibited disclosures (i.e., information regarding the development of

systems, processes, products, know-how, technology, internal reports, procedures, or other internal business-related communications) for employees to understand that it does not reach protected communications about working conditions. [Walmart, Case 11-CA-067171]

[End of text]

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Source: National Labor Relations Board, Office of General Counsel, Division of Operations-Management, Memorandum OM 12-59, May 30, 2012, pp. 22-24

Social Media Policy

Updated: May 4, 2012

At [Employer], we understand that social media can be a fun and rewarding way to share your life and opinions with family, friends and co-workers around the world. However, use of social media also presents certain risks and carries with it certain responsibilities. To assist you in making responsible decisions about your use of social media, we have established these guidelines for appropriate use of social media.

This policy applies to all associates who work for [Employer], or one of its subsidiary companies in the United States ([Employer]).

Managers and supervisors should use the supplemental Social Media Management Guidelines for additional guidance in administering the policy.

GUIDELINES

In the rapidly expanding world of electronic communication, social media can mean many things. Social media includes all means of communicating or posting information or content of any sort on the Internet, including to your own or someone else's web log or blog, journal or diary, personal web site, social networking or affinity web site, web bulletin board or a chat room, whether or not associated or affiliated with [Employer], as well as any other form of electronic communication.

The same principles and guidelines found in [Employer] policies and three basic beliefs apply to your activities online. Ultimately, you are solely responsible for what you post online. Before creating online content, consider some of the risks and rewards that are involved. Keep in mind that any of your conduct that adversely affects your job performance, the performance of fellow associates or otherwise adversely affects members, customers, suppliers, people who work on behalf of [Employer] or [Employer's] legitimate business interests may result in disciplinary action up to and including termination.

Know and follow the rules

Carefully read these guidelines, the [Employer] Statement of Ethics Policy, the [Employer] Information Policy and the Discrimination & Harassment Prevention Policy, and ensure your postings are consistent with these policies. Inappropriate postings that may include discriminatory remarks, harassment, and threats of violence or similar inappropriate or unlawful conduct will not be tolerated and may subject you to disciplinary action up to and including termination.

Be respectful

Always be fair and courteous to fellow associates, customers, members, suppliers or people who work on behalf of [Employer]. Also, keep in mind that you are more likely to resolve work-related complaints by speaking directly with your co-workers or by utilizing our Open Door Policy than by posting complaints to a social media outlet. Nevertheless, if you decide to post complaints or criticism, avoid using statements, photographs, video or audio that reasonably could be viewed as malicious, obscene, threatening or intimidating, that disparage customers, members, associates or suppliers, or that might constitute harassment or bullying. Examples of such conduct might include 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.

Be honest and accurate

Make sure you are always honest and accurate when posting information or news, and if you make a mistake, correct it quickly. Be open about any previous posts you have altered. Remember that the Internet archives almost everything; therefore, even deleted postings can be searched. Never post any information or rumors that you know to be false about [Employer], fellow associates, members, customers, suppliers, people working on behalf of [Employer] or competitors.

Post only appropriate and respectful content

- Maintain the confidentiality of [Employer] trade secrets and private or confidential information. Trade secrets may include information regarding the development of systems, processes, products, know-how and technology. Do not post internal reports, policies, procedures or other internal business-related confidential communications.
- Respect financial disclosure laws. It is illegal to communicate or give a "tip" on inside information to others so that they may buy or sell stocks or securities. Such online conduct may also violate the Insider Trading Policy.
- Do not create a link from your blog, website or other social networking site to a [Employer] website without identifying yourself as a [Employer] associate.
- Express only your personal opinions. Never represent yourself as a spokesperson for [Employer]. If [Employer] is a subject of the content you are creating, be clear and open about the fact that you are an associate and make it clear that your views do not represent those of [Employer], fellow associates, members, customers, suppliers or people working on behalf of [Employer]. If you do publish a blog or post online related to the work you do or subjects associated with [Employer], make it clear that you are not speaking on behalf of [Employer]. It is best to include a disclaimer such as "The postings on this site are my own and do not necessarily reflect the views of [Employer]."

Using social media at work

Refrain from using social media while on work time or on equipment we provide, unless it is work-related as authorized by your manager or consistent with the Company Equipment Policy.

Do not use [Employer] email addresses to register on social networks, blogs or other online tools utilized for personal use.

Retaliation is prohibited

[Employer] prohibits taking negative action against any associate for reporting a possible deviation from this policy or for cooperating in an investigation. Any associate who retaliates against another associate for reporting a possible deviation from this policy or for cooperating in an investigation will be subject to disciplinary action, up to and including termination.

Media contacts

Associates should not speak to the media on [Employer's] behalf without contacting the Corporate Affairs Department. All media inquiries should be directed to them.

For more information

If you have questions or need further guidance, please contact your HR representative.