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NLRB Cases Provide Guidance on Drafting Social Media Policies

By Matthew J. Feery, Esq.

In the past few years, we have seen an increase in the number of client inquiries regarding social media policies, and for good reason - employers want to update and implement policies to protect their interests and to address the increasing use of social media by their employees. In particular, there has been an uptick in interest in these policies as employers are noticing an increased number of legal cases and actions applying the National Labor Relations Act (NLRA) - a law enacted nearly 70 years before the launch of Facebook - both to companies' social media policies and to companies' disciplinary actions against employees for posts and comments made on social networking sites.

Last month, the Office of the General Counsel of the National Labor Relations Board ("Board") released its second report discussing social media, and it provides additional guidance on what social media policy provisions the Board considers to be overbroad, as well as some guidance on when employee actions on social networking sites become protected by the NLRA. The Board's decisions may require many employers to revisit their social media policies and update them accordingly.

As background, many, if not most, employers are familiar with the general principles of the NLRA. But what can be easy to forget is that certain provisions of the NLRA apply to all employers, regardless of the presence of a unionized workforce. In terms of social media policies, the key provisions of the NLRA are Sections 7 and 8(a)(1). Section 7 concerns the associational rights of all employees and provides that all employees have the right to engage

in certain "concerted activities," which the Board considers to include discussing wages and terms and conditions of employment. Section 8(a)(1) prohibits, in general, workplace rules that employees would reasonably construe to prohibit activities protected by Section 7.

Based on recent cases applying the NLRA to employer social media policies and employee social media activities, a couple general principles become evident. First, the airing of purely personal grievances not made in relation to group activity among employees generally is not protected by the NLRA. Unfortunately for employers, the Board appears to make the determination of whether a social media post, such as a blog, a Facebook update, or tweet on Twitter, is a personal airing of a grievance as opposed to a group activity based on whether, and in what manner, coworkers respond to that post. Thus, it appears that a social media post that, in and of itself, may be considered personal in nature can subsequently turn into concerted activity protected under the NLRA. This, of course, can complicate any action an employer seeks to take based on that initial post.

Next, although the decisions by the Board do not offer affirmative guidance on how employers can draft enforceable social media policies, the decisions do provide examples regarding what the Board seems to consider overly broad policy provisions that violate the NLRA. In general, broadly worded social media policies lacking in contextual examples will likely be considered overbroad and in violation of Section 7 and/or Section 8(a)(1). The Board has found the following social media policy provisions, on their own and without context, to be overbroad and in violation of the NLRA:

- General prohibition on "inappropriate conversations" or "inappropriately" sharing "confidential information" related to the employer's business, including personnel actions;
- Blanket prohibition on "unprofessional communications" that could "negatively impact" the "reputation" of the employer;
- General prohibition on disclosing or communicating information of a "confidential," "sensitive," or "non-public" nature concerning the employer;
- Prohibition on using or displaying the employer's name or symbol without prior permission;
- Requirement that employees state with each post that any opinions expressed are their own and not those of the employer;
- Requirement that employees discuss "work-related concerns" with management before expressing them online;
- Prohibition on making any disparaging remarks about coworkers and supervisors;
- Prohibition on "offensive conduct";

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- Prohibition on use of social media that may violate, compromise, or disregard the rights and reasonable privacy of any person or entity; and
- Prohibition on posts the employees would not want their supervisor to see.

The key problem with these general prohibitions, according to the Board, is that, without context, employees will reasonably construe them to prohibit otherwise protected activities. For example, "confidential" or "non-public" information could include wage information, and "inappropriate" comments or posts could include grievances about supervisors or company management.

It is for these reasons that those policies found permissible by the Board provided additional context or were more specifically tailored to the employer's business. Thus, while a general prohibition on "inappropriate" comments may not be permissible, a prohibition on posts or comments regarding coworkers or supervisors that are vulgar, obscene, threatening, intimidating, harassing, or a violation of workplace policies against discrimination or harassment based on protected classes is more likely to be permissible. Similarly, the Board has found permissible policies that allow employers to ask employees to remove posts or comments if the employer reasonably believes it necessary to ensure compliance with securities regulations or other laws. Likewise, the Board found permissible a policy that prevented employees from posting confidential medical information about customers or disclosing "embargoed" information, such as product launch dates or the date of an impending organization.

Unfortunately, the Board found in one case that a savings clause stating the employer's social media policy "would not be interpreted or applied so as to interfere with employee rights to self-organize, form, join, or assist labor organizations, to bargain collectively through representatives of their choosing, or to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from engaging in such activities" was not enough to cure the ambiguities otherwise present in the policy.

Where does this leave employers? As an initial matter, employers should revisit their social media policies and revise them if necessary. Employers should be wary of broad, sweeping prohibitions without some context or specificity related to the employer's business. While a savings clause may not save an otherwise overbroad policy, it may still be beneficial to include. Finally, employers should keep the NLRA in mind when deciding whether to take an employment action against an employee for his or her online comment. It may seem as though social media has been around a while, but as the Board's cases demonstrate, this is still a developing area of law, and employers should expect more changes in the future.

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