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Hot Off the Presses! Newest Social Media Update from the NLRB

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If you are anything like me, you have been eagerly awaiting another update from the NLRB on its social media decisions. Well, wait no longer. On May 30, the NLRB's Acting General Counsel issued a third report on recent social media cases. This complements the two previous reports from January 12, 2012, and August 18, 2011. For more information on the first two reports, see my recent post.

The new report does not offer any groundbreaking new principles for employers seeking to implement or enforce social media policies. This is good news, as it means that you don't need to rewrite your social media policy every time the NLRB issues a report. This report does elaborate on a few of the key principles, however, and it offers some new and interesting examples. It also includes as an example an entire social media policy that was found lawful.

First, and most importantly, the NLRB has remained consistent in its approach to broad restrictions on employee social media communications: it does not like them. If you are trying to stop employees from posting certain content online (for instance, angry tirades about managers or defamatory statements about the company), you must carefully word your restriction to ensure that a reasonable employee would not interpret it to prohibit speech that is protected under the National Labor Relations Act. Protected speech includes commentary to coworkers about working conditions, wages, schedules, and other terms and conditions of employment. Again, the NLRB has stricken policies that use broad, vague terms like "inappropriate" or "offensive" and instead required employers to either tie the restriction closely together with a lawful purpose (for example, "no offensive posts that violate our anti-harassment or discrimination policies") or include narrow descriptions of the type of postings prohibited (for example, "no postings that are malicious, obscene, threatening, or intimidating").

Second, the NLRB has increased its focus on provisions meant to protect privacy and confidential information. An employee could easily believe that hiring practices and wage information—both of which are fair game for employee postings under the NLRA—are the type of "confidential information" that many employers prohibit posting in their social media policies. The NLRB has counseled employers to tie confidentiality restrictions to a lawful purpose. Alternately, or in addition, employers can specifically exclude protected speech from the prohibition, with a phrase such as, "this provision is not intended to prevent employees from exercising their rights to engage in discussions of working conditions, wages, or other terms

and conditions of employment."

While we are on the subject of disclaimers, here is another important tip from this recent update: a blanket disclaimer is NOT enough to make your policy lawful. In order to avoid NLRA pitfalls, many employers have taken to including an umbrella disclaimer either at the beginning or end of the policy, saying something to the effect of "This policy is not intended to and will not be interpreted to restrict protected activity under the National Labor Relations Act." The NLRB has come back in this recent guidance with a resounding "no way" in response to this practice. While the previous report contained one example of such a policy being stricken, this report contains several. The message is clear that the NLRB does not allow employers to recite "magic words" to make a policy lawful: the actual provisions must also be narrowly focused and related to lawful purposes.

Those are the key themes of the recent guidance. The following issues were also touched upon and are worth mentioning:

- Preconditions are unlawful. An employer cannot require that employees check with the employer before making certain types of postings (with the exception of any posting that is actually *on behalf of* the employer).
- Restrictions on employees' ability to be Facebook friends with their peers are unlawful. Employers cannot restrict employees' ability to communicate with each other, as this directly impacts their ability to engage in collective action. Note that the NLRB has not yet discussed when employers can prevent employees from becoming Facebook friends with *supervisory* employees. This remains an open issue.
- Requiring employees to inform management if another employee has violated the policy *may be* unlawful. If your policy contains only lawful restrictions, then this provision is fine; however, if any of your other provisions themselves are overbroad or too vague, then this will be interpreted as requiring employees to rat out coworkers who engage in concerted activity.
- Requiring, or even strongly encouraging, employees to resolve conflicts internally rather than posting online about their gripes is not lawful. Employers cannot compel workers to go through management before complaining to each other online. If you want to include a provision like this one, you should specify that this specific provision is not intended to restrict employees' rights to discuss terms and conditions of employment online.
- Disclaimer requirements may be lawful. In a previous report, the NLRB struck down a provision requiring employees to include before every post language like "This posting represents solely my own personal opinions and not those of my employer," on the common-sense ground that this bulky disclaimer hampers employee speech. In this recent report, however, the NLRB upheld such a provision. This incongruity between the two reports makes me leery: I would wait for clearer guidance on this before including

such a provision.

Again, the overall theme of the newest NLRB report is that rules that are ambiguous, with no specific limiting language or context, are unlawful. Rules that clarify and restrict their scope by including examples of clearly illegal or unprotected conduct or that are closely tied to a lawful purpose are permitted. As these principles are applied to more and more social media policies, however, it becomes evident that this is still a developing area of the law, and employers still must be very careful about the restrictions they attempt to impose.

If you have questions or would like additional information about this recent report and its effect, please feel free to contact Greg.

Tags: National Labor Relations Act, NLRB, protected speech, Social Media