National Labor Relations Board General Counsel Issues Third Report on Employer Social Media Policies

On May 30, 2012, the National Labor Relations Board (“NLRB”) Acting General Counsel, Lafe Solomon, issued a report on the lawfulness of employer policies governing social media (Memorandum OM 12-59). This is the third report addressing social media that has been issued by the NLRB General Counsel; the first report was released in August 2011, and the most recent report was issued in January 2012.

The report analyzed seven social media policies from employers and determined whether the policies were lawful under the National Labor Relations Act (the “Act”). The NLRB found that provisions of the policies that could be interpreted as prohibiting protected activity under the Act, and which did not contain limiting language or clarifying examples, were unlawful. Policies that provided examples of prohibited conduct to ensure that employees would not reasonably believe protected activity was prohibited by the policies were generally found to be lawful.

In the first policy, the NLRB found that:

• A provision prohibiting employees from “releas[ing] confidential guest, team member or company information” was unlawful, because it would reasonably be interpreted as prohibiting employees from discussing information regarding the conditions of employment, which is protected under the Act.

• A provision instructing employees not to share confidential information with co-workers unless they “need to know” and prohibiting discussions regarding confidential information in the break room, at home or in open areas and public places was overbroad and unlawful, as employees would reasonably believe that discussion about protected topics was prohibited.

• A provision threatening employees with termination or criminal prosecution for failing to report a violation of the policy concerning confidential information was unlawful, as the policy concerning confidential information was unlawful.

• A provision advising employees to be cautious about being tricked into divulging confidential information was lawful, as it did not proscribe any particular communication.

In the second policy, the NLRB found that:

• A provision requiring that employees post only “completely accurate” and “not misleading” information on any public site was unlawful, because it would reasonably be interpreted to apply to discussions about the employer’s labor policies and treatment of employees, which is protected activity as long as not maliciously false.

• A provision telling employees to check with the employer before posting if in doubt about whether to post information was unlawful, because any rule requiring employees to receive permission from an employer before engaging in protected activity is unlawful.
• A provision prohibiting employees from using the employer’s logo and trademarks was unlawful, because it could be interpreted as prohibiting employee use of the employer’s logo while engaged in protected activity, such as using picket signs containing the employer’s logo.

• A provision prohibiting employees from discussing information related to the safety of the employer’s products and “secret, confidential or attorney-client privileged information” was lawful, as it would not reasonably be interpreted to prohibit protected activity.

• A provision prohibiting “offensive, demeaning, abusive or inappropriate remarks” was unlawful as it would include protected criticisms of the employer’s labor policies or treatment of employees.

• A provision encouraging employees to “think carefully about ‘friending’ co-workers” was unlawful, because it would discourage communication between co-workers.

• A provision requiring employees to report “any unusual or inappropriate internal social media activity” to the employer was unlawful, as the NLRB has held that a requirement encouraging employees to report the union activities of other employees to management violates the Act.

• The policy’s savings clause, stating that the policy will be administered in compliance with the Act, did not cure the overbroad and unlawful provisions.

In the third policy, the NLRB found that:

• A provision prohibiting disclosure of personal information about employees was unlawful, because it could be reasonably interpreted as prohibiting disclosure of employee wages and working conditions, which are protected under the Act.

• A provision prohibiting employees from commenting on any legal matters was unlawful, because discussing potential claims against an employer is a protected activity under the Act.

• A provision encouraging employees to “[a]dopt a friendly tone” in online discussions was unlawful, because discussions about working conditions or unions have the potential to become heated and controversial and employees could reasonably construe the rule as prohibiting robust discussions on protected topics.

• A provision encouraging employees to “resolve concerns about work by speaking with co-workers, supervisor, or managers” was unlawful, because it could preclude or inhibit employees from seeking redress outside of the company, which is protected activity under the Act.

In the fourth policy, the NLRB found that:

• A provision warning employees to “avoid harming the image and integrity of the company” was unlawful because it could reasonably be construed as prohibiting criticism of the employer’s labor policies or treatment of employees, which are protected topics.

• A provision prohibiting harassment, bullying, discrimination or retaliation was lawful because it included a list of clearly unprotected and egregious activities.

In the fifth policy, the NLRB found that:

• A provision requiring employees to report any “unsolicited or inappropriate electronic communications” was unlawful because employees would reasonably interpret the rule to prohibit communications with third parties, such as a union, about the terms and conditions of their employment.

• A provision prohibiting posts in the name of the employer or that could be reasonably attributed to the employer without prior written authorization was lawful, because it could not reasonably be construed to restrict protected activities.

In the sixth policy, the NLRB found that:

• A provision prohibiting employees from using social media with employer resources or on employer time was unlawful, because employees have the right to engage in protected activities on the employer’s premises during non-work time and in non-work areas.

• A provision prohibiting employees from speaking with the media regarding the employer or its business activities without prior authorization was unlawful, because employees have a protected right to seek help from third parties regarding their working conditions, including going to the press, blogging, speaking at a rally, etc.

• A provision requiring that employees notify the employer immediately about any communication involving federal, state or local agencies was unlawful, because it would restrict employees from engaging in the protected activity of
speaking with the NLRB or other agencies regarding working conditions.

In the seventh policy, the NLRB found that:

- The entire policy was lawful, as it provided sufficient examples of prohibited conduct so that employees would not reasonably interpret the provisions as prohibiting protected activity.

The Acting General Counsel attached the full policy determined to be lawful to his report. While the report, and in particular, the full policy, provide welcome guidance in drafting social media policies, all such policies should be reviewed by counsel, as in some instances the addition of clarifying language or examples of prohibited conduct may have resulted in different findings than those made in the report.

If you have any questions regarding any matters discussed in this briefing, please contact any of the Winston & Strawn attorneys listed below or your usual Winston & Strawn contact.

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