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NLRB Issues Third Report Concerning Social Media

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On May 30, 2012, the National Labor Relations Board (NLRB or the Board) Acting General Counsel issued a **press release** announcing publication of its **report on social media**, in which it examined seven cases involving policies governing the use of social media by employees. For information pertaining to the earlier two reports, click **here**.

Summarizing its approach to analyzing employer-issued social media policies, the NLRB stated that an employer violates the National Labor Relations Act (NLRA or the Act) through maintenance of a policy that would "reasonably tend to chill employees" in their exercise of rights under the Act, whether or not the employer's workforce is unionized. Using a two-step inquiry to determine whether the policy would have such an effect, the Board first looks at whether the policy explicitly restricts protected activities. If it does not, the policy is then reviewed to determine whether:

1. employees would reasonably construe the policy as prohibiting protected activities;
2. the policy was promulgated in response to union activity; or
3. the policy has been applied to restrict protected activity.

Of the seven policies the Board reviewed, it found six to contain unlawful provisions. For example, a provision that informed employees that "[o]ffensive, demeaning, abusive or inappropriate remarks are as out of place online as they are offline" was unlawful, according to the Board, because it "proscribes a broad spectrum of communications that would include protected criticisms of the Employer's labor policies or treatment of employees." Further, the Board stated, the provision does not specify which communications the employer would deem inappropriate at work and, thus, is ambiguous as to its application to [the NLRA].

Other examples of provisions the Board found to be overbroad and, therefore, unlawful include:

- a statement encouraging employees to resolve work-related concerns by speaking with co-workers, supervisors, or managers, rather than by posting complaints on-line;
- a provision prohibiting employees from posting information regarding the employer that could be deemed material, non-public, confidential or proprietary;
- a warning to employees to "avoid harming the image and integrity of the company;"
- prohibiting employees from making "disparaging or defamatory" comments; and
- a rule prohibiting communications to the media about the employer or its business operations.

At least some of these policies had a savings clause, which stated that the social media policy would be administered in compliance with applicable laws and regulations (including the NLRA). The Board took the position that these savings clauses do not cure otherwise overbroad policies.

Finally, the Board examined, and posted in its entirety, a social media policy it finds to be lawful. In large part, the Board based its determination on the fact that this policy included specific examples of prohibited conduct, rather than broad, undefined prohibitions, such that employees would not reasonably read the policy to prohibit protected activity.

In light of the Board's clear stance on social media policies, and its application to both unionized and non-unionized employers, we recommend that all employers review their social media policies and consider whether they would pass NLRB scrutiny.

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