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## National Labor Relations Board Weighs in on Social Media Policies

By Vito A. Gagliardi, Jr., Principal and Karén Gazaryan, Summer Associate

On May 30, the National Labor Relations Board ("NLRB") issued its third report regarding social media policies for employees. The report provides important guidance to employers because it clarifies what policies and rules the NLRB considers unlawful under Section 7 of the National Labor Relations Act ("NLRA") and what restrictions are deemed lawful. The report explains this important distinction by providing seven examples - six examples illustrating partially unlawful policies and one example providing employers with a model social media policy.

### What policies are unlawful?

Section 7 of the NLRA provides that employees have a protected right to "engage in ... concerted activities for the purpose of collective bargaining or other mutual aid or protection." Significantly, this protection applies to all workers eligible to organize a union, whether they actually have formed a union or not.

In general, provisions that explicitly limit Section 7 protections or create an ambiguity about the application of the provisions are considered overbroad. For example, an instruction to employees to post only "completely accurate and not misleading" information about an employer on any social media website is overbroad, because, without specific examples, this instruction can reasonably be interpreted by employees to prohibit criticism of the employees' working conditions. Such critical discussion is protected by Section 7 as long as it is not maliciously false.

In addition, a policy instructing employees not to "reveal non-public company information on any public site" does not pass muster because it can be reasonably construed to proscribe any discussion of the terms and conditions of employment. Moreover, a policy cautioning an employee to get permission when in doubt about whether sharing such information is prohibited is likewise overbroad since preconditions to engage in Section 7 activities violate the NLRA.

Furthermore, the NLRB's examples illustrate that it is unlawful to prohibit employees to post photos and videos with an employer's logo. While employers do have proprietary interests in their trademarks and logos, employees cannot be barred from using them for non-commercial purposes involving Section 7 activities and later sharing the photos and videos online.

Other overbroad, prohibited policies include: a warning not to engage in "[c]ommunications with co-workers ... that would be inappropriate in the

workplace; " a policy commanding to "[t]hink carefully about 'friending' co-workers"; a rule demanding employees to avoid objectionable and inflammatory topics online; and a policy prohibiting employees from commenting on any legal matters in which the employer is involved. The NLRB has ruled that these policies are unlawfully overbroad because they explicitly hamper the protected discussions under Section 7.

### What policies are lawful?

In general, policies that contain specific enough instructions are considered not to be in violation of the NLRA. For example, a policy prohibiting "inappropriate postings that may include discriminatory remarks, harassment and threats of violence or similar inappropriate or unlawful conduct" is lawful because it unambiguously bans egregious conduct without infringing on Section 7 protections.

Similarly, a policy asking employees to be respectful and courteous in their online postings could potentially be seen as overly broad; however, it can be cured by specific examples of prohibited behavior such as "harassments or bullying," "offensive posts meant to intentionally harm someone's reputation," or comments that may be construed as creating a potential "hostile work environment." As noted in the report, employers have legitimate reasons to restrict such workplace behavior and communications.

Moreover, a policy requiring employees to maintain employers' trade secret confidentiality is also lawful. Specific examples of prohibited disclosures that eliminate doubts concerning the integrity of employees' communications will make the policy appropriate according to the NLRB. The report sets forth that restrictions "addressing secret, confidential, or attorney-client privileged information" are usually lawful as long as they are intended to protect legitimate privileged and confidential information.

### Practical Tips

The examples in the report make it clear what social media policies are considered overbroad and unlawful. Therefore, we recommend the following tips to comply with the NLRB's guidance:

- **Confirm that social media policy rules are clear and unambiguous.** Do not generalize and make the rules as specific as possible.
- **Provide many examples to illustrate what practices are prohibited.** Again, it is crucial to demonstrate that the provisions of the rules cannot reasonably be interpreted to violate Section 7.
- **Prepare rules for employees that do not in any way inhibit the employees' protected communications about working conditions.** "Catch-all" clauses stating that the policies should not be construed to interfere with the rights under the NLRA will not suffice. Instead, the substance of the rules needs to comply with the NLRB's guidelines.

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