fyi®

For your information

Volume 35 | Issue 47 | July 13, 2012

The NLRB and Social Media

The NLRB's Acting General Counsel recently issued his third report in less than a year on social media policies in the workplace. The report focuses on seven recent cases challenging employers' social media policies, and discusses common policy provisions that may run afoul of the National Labor Relations Act.

Background

Section 7 of the National Labor Relations Act (NLRA) guarantees most private sector employees the right to organize, to bargain collectively, and "to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." Section 7 protects the rights of employees to discuss wages and working conditions. Section 8(a)(1) makes it an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of those rights.

Social media in the workplace has become an increasingly hot topic for employers and for the National Labor Relations Board (NLRB or Board), which is charged with enforcing the NLRA and remedying unfair labor practices. (See our March 8, 2011 For Your Information.) As employers deal with the intersection of technology and the workplace, they must be mindful that the NLRB is actively applying traditional labor law principles to regulate social media policies and practices in both unionized and nonunionized settings.

The Social Media Report

On May 30, 2012, the NLRB's Acting General Counsel Lafe Solomon (AGC) issued his third report on social media in the workplace. The report focuses on seven recent cases challenging the legality of employer policies, and illustrates common policy provisions that may run afoul of the NLRA. Although the AGC ultimately does not determine whether employers' policies are lawful, he does decide what enforcement position the NLRB will take when challenges to social media policies arise. Thus, the AGC's views on lawful and unlawful policy provisions should be of interest to employers as they address social media issues in the workplace.

According to the AGC, social media policies that prohibit or would reasonably be interpreted to prohibit employees from discussing wages and working conditions with co-workers or third parties infringe on employees' Section 7 rights. As the AGC explains, a policy clearly violates the NLRA when it explicitly restricts Section 7 protected activities and a policy without an explicit restriction also may be unlawful if

it would reasonably tend to chill the exercise of Section 7 rights. In assessing whether a policy has a chilling effect, the AGC will consider various factors, such as how employees construe the policy and how the policy is applied.

INSIGHT

On June 18, 2012, the NLRB launched an interactive Web page that describes the rights of employees to act together for their mutual aid and protection, whether or not they are in a union. Notably, the new site includes the story of a paramedic fired after posting work-related grievances on Facebook.

Social Media Policies That May Violate the NLRA

Generally, the AGC views as unlawful overbroad or ambiguous policy provisions that would discourage communications among co-workers. Thus, policy provisions that reasonably can be seen as prohibiting discussion of the terms and conditions of employment or set out preconditions for engaging in Section 7 activities will fail to pass muster.

Broad confidentiality policies are just one example of the type of provision that may chill the exercise of employees' Section 7 rights. Other policy provisions the AGC finds unlawfully overbroad include:

- Prohibiting the release of "confidential information" or "non-public company information" on any public site
- Requiring employees to obtain employer permission before communicating with the media
- Prohibiting "disparaging or defamatory" comments or "offensive, demeaning, abusive or inappropriate remarks"
- Instructing employees to "think carefully" before "'friending' co-workers"
- Prohibiting employees from posting and sharing online photos and videos with an employer's logo
- Prohibiting employees from commenting on legal matters involving the employer
- Requiring employees to report "unusual or inappropriate internal social media activity."

As the report explains, overly broad policies may be cured by providing limiting language, context, or sufficient examples of prohibited behavior. However, employers cannot cure ambiguities or other potential problems with their social media policies by including a savings clause. Because employees are not expected to know the full scope of their rights under the NLRA, language stating that an employer's social media policy will not be interpreted or enforced to interfere with protected concerted activity or other conduct protected by the NLRA generally will not save an otherwise problematic policy.

Not all social media comments are protected under the NLRA, and employers have legitimate business reasons to restrict certain workplace communications and behavior. The AGC concluded, for example, that a policy prohibiting "unauthorized" Internet postings in the employer's name or that reasonably

could be attributed to the employer is lawful. Similarly, the AGC did not find unlawful a prohibition on representing "any opinion or statement as the policy or view of the [Employer] or of any individual in their capacity as an employee or otherwise on behalf of [Employer]" unless specifically authorized to do so. The AGC also found a prohibition on online harassment and bullying lawful. As the report notes, restrictions "addressing secret, confidential, or attorney-client privileged information" usually are lawful provided they are unambiguous and are intended to protect such information.

A Lawful Social Media Policy

The sample policy, reportedly from Wal-Mart, is an example of a social media policy the AGC would view as lawful. In endorsing the policy, the report emphasizes that employees "would not reasonably read the rules to prohibit" concerted, protected activity because the policy provides sufficient examples of prohibited conduct. The policy prohibits, for example, "malicious, obscene, threatening, or intimidating" posts, which the NLRA would not protect.

Although the AGC did not tout this as a "model" social media policy, employer policies that mirror its key provisions likely will be safe from prosecution even if a charge is filed. However, the AGC will still examine how even a lawful policy is applied, and bring enforcement actions as it deems necessary to protect concerted employee activity.

Conclusion

The latest report provides potentially helpful insights into the types of social media policies the AGC would prosecute if challenged, and highlights policy language to avoid. Because the report reflects the NLRB's current enforcement position, unionized and non-unionized employers would be well advised to consider this guidance when crafting rules governing employees' use of social media.

Buck Can Help

- Keep you abreast of further developments
- Review social media and disciplinary policies
- Train and educate managers and supervisors on social media issues