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September 2012
THE DOLAN COMPANY

SPECIAL FEATURE

NLRB report highlights pitfalls of social media policies

By Brian D. Carlson

The Acting General Counsel ("AGC") of the National Labor Relations Board ("NLRB" or "Board") has released a new report on employment policies governing the use of social media, including Facebook, Twitter and other social-networking websites.

The report (which follows two similar reports issued by the AGC during the past year) discusses recent cases in which the AGC issued formal complaints against employers upon finding that their social media policies unlawfully chilled employees' rights to engage in protected "concerted activities" under Section 7 of the National Labor Relations Act ("NLRA").

While the AGC's report, unfortunately, does not establish any clear "safe harbor" guidelines for employers in drafting social media policies, it discusses several types of policy provisions that likely *will* be found to violate employees' Section 7 rights.

Thus, employers should carefully review the AGC's report and consider whether any of their social media or related policies need to be revised.

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Legal background

Under the NLRA, when employees act collectively for the purpose of bettering the terms and conditions of their employment, such actions generally constitute protected "concerted activity," for which employees may not be penalized.

Significantly, even actions taken by a single employee may be deemed protected concerted activity, if the employee undertakes them with the object of initiating or preparing for group action.

Further, the NLRA's protection of such concerted activities applies equally to unionized and non-unionized employees.

The NLRB has held that a work rule (such as a social media policy) violates the NLRA if it "would reasonably tend to chill employees in the exercise of their Section 7 rights." The determination as to whether a rule would have such an effect is made through a two-step inquiry.

First, if a work rule *explicitly* restricts protected concerted activities — for instance, by directing employees not to discuss work grievances with one another — the rule will be found unlawful on its face.

Second, if a rule does not explicitly limit protected concerted activities, it nonetheless will be deemed to violate the NLRA if (1) employees would reasonably construe its language as prohibiting protected concerted activity, (2) the rule was promulgated in response to protected concerted activity, or (3) the rule has been applied to restrict the exercise of Section 7 rights.

In general, if a rule is ambiguous as to whether it restricts protected concerted activity, it is likely to be found unlawful.

Social media policy provisions discussed in report

The AGC's report highlights a number of types of social media policy provisions that may raise pitfalls for employers, as summarized below.

Broad confidentiality provisions. In two of the cases discussed in the report, the employment policies, respectively, instructed employees not to "release confidential guest, team member or company information" and not to disclose "material non-public information" on social networking sites.

The AGC's report indicates that language of such a nature would reasonably be interpreted as unlawfully prohibiting employees from using social media to discuss their terms and conditions of employment.

By contrast, in another case discussed in the report, the AGC concluded that the confidentiality language in the employer's social media policy was lawful because it provided "sufficient examples of prohibited conduct so that, in context, employees would not read the rules to prohibit Section 7 activity."

That policy included numerous examples of the types of confidential information sought to be protected — such as trade secrets, product information, technology and know-how — and, according to the AGC, thus made clear to employees that the policy was not intended to encompass protected communications about terms and condition of employment.

Prohibitions on posting "false" or "misleading" information. One employer's social media policy cautioned employees to ensure that their social media posts were "completely accurate and not misleading." The AGC determined that the language was unlawful, as it could reasonably be interpreted as prohibiting employees from criticizing their employer's personnel policies.

Provisions aimed at discouraging employees from publicizing work issues externally. The AGC found unlawful a policy that encouraged employees to resolve "concerns about work by speaking with co-workers, supervisors, or managers" and which stated that the employer believed such outlets were more effective than "posting complaints on the Internet" or using "social media or other online forums."

The AGC explained that while an employer may legitimately suggest that employees attempt to resolve work issues internally, if the employer's policy affirmatively discourages employees from discussing such issues online, it will have the likely effect of chilling protected concerted activity, and thus will be found to violate the NLRA.

Instructions concerning the tone of online postings. The AGC found unlawful two social media policies that, respectively, stated that "[o]ffensive, demeaning, abusive or inappropriate remarks are as out of place online as they are offline" and that employees should "communicate in a professional tone" online, and not "pick fights."

In the AGC's view, provisions of this nature, without further clarification, would reasonably be construed by employees "to prohibit robust but protected discussions about working conditions or unionism."

Restrictions on materials that may be posted online. Another policy cautioned employees to "[g]et permission before posting photos, video, quotes or personal information of anyone other than you online," and not to "incorporate [the employer's] logos, trademarks or other assets in your posts."

The AGC determined that those provisions violated the NLRA because "employees would reasonably interpret [them] as proscribing the use of photos and videos of employees engaging in Section 7 activities, including photos of picket signs containing the Employer's logo."

"Savings" clauses. Significantly, the report indicates that the AGC will not uphold an overly broad social media policy simply because the policy includes a "savings" clause stating that the policy is meant to comply with the law.

In two cases, the AGC found social media policies unlawful despite the fact that one of the policies specified that it was intended to be "administered in compliance with applicable laws and regulations (including Section 7 of the [NLRA])," and the other policy stated that it was not to be "construed or applied in a manner that improperly interferes with employees' rights under the [NLRA]."

The report concludes that the inclusion of such a savings clause "does not cure the ambiguities in [a] policy's overbroad rules."

Recommendations for employers

In light of the AGC's report, and the NLRB's focus on social media cases, there are a number of steps that employers should consider taking.

First, employers should thoroughly review all existing personnel policies that potentially relate to protected concerted activities. In addition to social media policies, such policies may include email, confidentiality, privacy and business ethics policies, as well as codes of conduct.

Second, employers should consider, in consultation with labor counsel, whether existing social media or similar policies need to be revised to avoid running afoul of the NLRA. As the AGC's report underscores, it is crucial that such policies be worded with extreme care so that it is clear that they are not intended to restrict protected concerted activities.

Additionally, before terminating or otherwise disciplining an employee for violating a social media or similar policy, an employer should confer with counsel to consider whether the policy at issue is lawful. If the policy is overly broad, the proposed discipline could well spark an unfair labor practice charge.

Finally, employers should continue to monitor the Board's and the AGC's pronouncements on social media and related policies. In that regard, while the standards for determining whether such policies violate the NLRA remain less than clear, it seems likely that the Board will, at some point, issue a formal decision that will provide greater clarity on these matters. NEIH