

NLRB Issues Second Social Media Report

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By Joanne Deschenaux

National Labor Relations Board (NLRB) Acting General Counsel Lafe Solomon has issued a second report describing social media cases reviewed by his office. Released on Jan. 25, 2012, the memo is intended to provide further guidance to practitioners and human resource professionals in formulating social media policies that comply with federal labor laws and in legally disciplining employees for social media use.

The first report, released by the acting general counsel on Aug. 18, 2011, summarized 14 social media cases decided by the NLRB during the previous year. This second report also covers 14 cases reviewed by the general counsel's office since issuance of the first report. Seven of these cases involve questions about employer social media policies, while seven involve discharges of employees after they posted comments to Facebook.

A release issued along with the report notes that the new report underscores two main points made in the earlier report:

Employer policies should not be so sweeping that they prohibit the kinds of activity protected by federal labor law, such as the discussion of wages or working conditions among employees.

An employee's comments on social media are generally not protected if they are mere gripes not made in relation to group activity among employees.

The issuance of the report itself is an indication of several things, according to Ronald Meisburg, an attorney in Proskauer's Washington, D.C., office and a former NLRB general counsel and board member. "First of all, this shows how important this issue is to the general counsel," he told SHRM Online. It also shows how important this issue is to employers, he added.

As to the report's content, "it shows some evolution of the general counsel's thinking ... *maybe*," Meisburg said.

In the past, the general counsel has taken the position that social media postings are just like "water cooler conversations"—conversations between employees at work,

Meisburg said. Therefore, the conversations were governed by the old rules for such conversations.

“But this ignores an important aspect of social media. It is not in the workplace and the comments are not necessarily directed at fellow employees or the employer. They are directed at the world,” he explained.

In one of the cases, there was—for the first time he had seen, he said—recognition that although general “water cooler standards” continue to apply to social media postings, the NLRB may be adjusting its standards a little “because statements that go out on the Internet can cause greater harm to the workplace” than water cooler conversations.

Employer Policies

Of the seven cases that concerned employer social media policies, five of those policies were found to be unlawfully broad.

In one case, for example, the NLRB found that an employer rule forbidding employees from making “disparaging comments about the company through any media, including online blogs, other electronic media or through the media” was illegal because “it would reasonably be construed to restrict” the type of concerted action authorized by the National Labor Relations Act, “such as statements that the employer is, for example, not treating employees fairly or paying them sufficiently.”

In another case, the NLRB deemed unlawful a social media policy that provided that “employees should generally avoid identifying themselves as the employer’s employees unless discussing terms and conditions of employment in an appropriate manner.” That too would infringe on employees’ rights to discuss terms and conditions of employment—even if those discussions were “inappropriate.”

The NLRB further determined that an employer disclaimer in the social media policy that nothing in the policy should be construed to prohibit employee rights under the National Labor Relations Act was not enough to make the overall policy lawful.

Fortunately, the NLRB offered some guidance in this area, according to Eric B. Mayer, an attorney with law firm Dilworth Paxson in Philadelphia, particularly in the two cases where the policies were upheld—one only after it was revised.

In that case, the employer’s original social media policy prohibited “discriminatory, defamatory, or harassing web entries about specific employees, work environment, or work-related issues on social media sites.” The employer replaced that policy with one that prohibited the use of social media to “post or display comments about coworkers or supervisors or the employer that are vulgar, obscene, threatening, intimidating, harassing, or a violation of the employer’s workplace policies against discrimination, harassment, or hostility on account of age, race, religion, sex, ethnicity, nationality, disability, or other protected class, status, or characteristic.”

The NLRB deemed the original policy overly broad because employees had the right to engage in protected concerted activity to criticize employer policies and treatment of employees—even if that speech is “defamatory.”

The NLRB, however, found that the amended policy was lawful because “a rule’s context provides the key to the ‘reasonableness’ of a particular construction.” The rule, as rewritten “would not be reasonably understood to restrict” legal concerted activity, the report noted.

In another case, involving a national drugstore chain, the NLRB concluded that the following provision in a social media policy was not overly broad and, therefore, lawful:

“The employer’s social media policy provided that the employer could request employees to confine their social networking to matters unrelated to the company if necessary to ensure compliance with securities regulations and other laws. It prohibited employees from using or disclosing confidential and/or proprietary information, including personal health information about customers or patients, and it also prohibited employees from discussing in any form of social media ‘embargoed information,’ such as launch and release dates and pending reorganizations.”

Tips for Employers

Mayer suggested three tips for employers based on the report:

It’s OK to prohibit employees from sharing confidential and proprietary information online.

It’s OK to prohibit employees from using vulgar or obscene language online or posting intimidating or harassing material, but “make sure to use the NLRB-blessed language quoted above to pass muster.”

Don’t count on a disclaimer to rescue an overly broad social media policy.

In the release accompanying the report, the acting general counsel noted that “Given the new and evolving nature of social media cases, the acting general counsel has asked all regional offices to send cases which the regions believe to be meritorious to the agency’s Division of Advice in Washington D.C., in the interest of tracking them and devising a consistent approach. About 75 cases have been forwarded to the office to date.”

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