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Setting the Example: The NLRB's Third Report on Recent Social Media Cases Encourages the Use of Examples to Clarify Social Media Policies

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While the National Labor Relations Board's ("NLRB") first and second reports on recent social media cases highlight instances of employers having unlawful and overbroad social media policies, its third report offers greater guidance to employers on what should be included in a social media policy to avoid violating employees' rights to discuss the terms and conditions of their employment ("protected employee rights"), as guaranteed by Section 7 of the National Labor Relations Act. The NLRB's third report strongly encourages employers to include examples for context and clarification with any policy that could be read to discourage employees from exercising their protected employee rights.

In stark contrast to many policies that were found to be overbroad, policy provisions which provided specific examples of prohibited conduct were found to be lawful. In a case involving Wal-Mart, the company's entire social media policy, which included specific examples of prohibited conduct, was found to be lawful. Wal-Mart effectively drafted each provision of its social media policy, utilizing examples to: instruct employees to avoid postings that could be seen as malicious, obscene, threating or intimidating; clarify that harassment or bullying includes posts that are offensive or intended to harm one's reputation or contribute to a hostile work environment on an unlawful basis; and highlight specific prohibited confidential disclosures.

While providing examples and other clarification was found to improve social media policies and prevent them from being found unlawful, the inclusion of a general savings clause was not as successful. Savings clauses provide a blanket statement that any prohibited conduct shall not include the lawful exercise of employees' protected rights under Section 7 of the NLRA. While still recommended, three of the cases examined in the third report contained general savings clauses that, nevertheless, failed to cure an overbroad social media policy. Therefore, employers are advised to combine a savings clause with inclusion of specific examples of prohibited conduct to ensure that employees cannot reasonably construe such prohibitions to apply to protected employee rights.

Below are the Dos and Don'ts of clarifying prohibited activities in social media policies:

Employers Should Do the Following:

- Provide specific examples or limiting language to clarify that prohibited conduct does not include protected employee rights
- Include a savings clause stating that the policy should not be construed to limit the exercise of protected employee rights
- Give examples of egregious and clearly unlawful conduct
- Describe prohibited disclosures
- Prohibit harassment and unlawful discrimination
- Clarify any information that must not be shared, such as that which is covered by attorney-client privilege

Employers Should Not Do the Following:

- Prohibit conduct without explaining the scope of such policy or providing examples
- Rely solely on a savings clause without clarification to avoid prohibiting protected employee rights
- Include examples which can be construed to include prohibitions on protected employee rights

Of course, if you need assistance with the design or review of a social media policy, please contact Dena B. Calo, Esq., Partner and Director of the firm's Human Resource Practices Group. For guidance on issues pertaining to the National Labor Relations Act, please contact John R. Vreeland, Esq., Counsel in the firm's Labor Group.