The Only Thing More Difficult than Keeping up with Social Media Technology is Keeping up with Social Media Legal Developments

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On January 25, 2012, and on the heels of its initial social media report, the National Labor Relations Board (the "Board")'s Acting General Counsel, Lafe Solomon, issued a second report on recent cases involving social media policies. Citing recent examples of employers that disciplined employees under social media policies, and emphasizing pitfalls that can occur when the policies are far-reaching, the Board stressed the elements of a clear and effective social media policy.

Under the National Labor Relations Act (the "Act"), restrictions on the use of social media forums, including Facebook, cannot unlawfully restrain an employee's right to engage in concerted protected activity. Thus, one Board Regional Director has recently stated that an employer violates Section 7 rights under the Act if it takes actions that would reasonably chill employees in exercising their rights. For example, in a previous case, the court found that the Act protected an employee who clicked a Facebook "Like" button linked to an issue that dealt with employment terms and conditions. In general, the Board will consider four factors in making its determination: (1) the place of discussion, (2) the subject matter being discussed, (3) the nature of the employee's comment, and (4) whether the comment was provoked by the employer.

The Board's second report sheds more light on the scope of the Act's protection for employees in the social media context. The cases summarized in the report reaffirm the notion that employers cannot adopt blanket social media policies that might discourage protected concerted activity; yet, individual complaints and gripes posted on social media outlets are not protected under the Act. Specifically, the recent cases found many policies that were so broadly worded that they constituted unlawful restraints on employees. For example, a policy that instructed employees to avoid identifying themselves as employees of the organization unless terms and conditions of employment were discussed, violated the Act. A policy that universally prohibited inappropriate conversations and disrespectful conduct was also found to be overbroad and to unlawfully restrain employees' rights. As a final example, a prohibition on unprofessional communications that could damage the employer's reputation in a negative way or interfere with its mission similarly violated the Act.

To avoid having an overly broad social media policy, an employer should clearly describe the prohibited behavior in such a way that an employee cannot reasonably interpret the policy as limiting communications about employment terms and conditions. The following DOs and DON'Ts may help avoid overly broad policies that interfere with Section 7 rights:

Employer policies <u>should</u>:

- Explain that employees have no expectation of privacy in their social media communications and they act at their own peril.
- Explain that company policies (i.e. anti-harassment, anti-discrimination, ethics and standards of conduct) *do* apply to communications made on social media relating to the workplace and prohibit the use of such communications.
- Restrict the use of social media during working hours, unless for business purposes.
- Restrict the disclosure of confidential, financial and/or proprietary information online.
- Allow for discipline of an employee for comments made on social media that reflect a neglect of duty.
- Restrict employees' use of comments about coworkers or supervisors that are vulgar, obscene or slanderous.

- Confine posts to matters unrelated to the Company if necessary to ensure compliance with federal, state and local laws and regulations.
- Explain each restriction clearly and in a way that employees could not reasonably interpret the policy as limiting their communications about employment terms and conditions.

Employer policies should not:

- Restrict vague behavior regarding an employer or a fellow coworker, such as making "disparaging remarks," engaging in "inappropriate discussions," or requiring communications to be made in a "professional and appropriate manner."
- Restrict communication with the media, when this could be construed to prevent discussions related to an ongoing labor dispute.
- Restrict the kinds of activity protected by federal labor law, such as the discussion of wages or working conditions among employees.
- Restrict the use or display of an employer's image or logo in social media posts where it is being used in conjunction with protected concerted activity.
- Require prior authorization for all employee postings.

Finally, some employers have attempted to include savings clauses to avoid violating the Act. Such clauses declare that the employer will not interpret or apply its social media policy in a way that would interfere with the Section 7 rights of employees. However, recent developments caution employers that savings clauses will not save broad social media policies that are otherwise unlawful. Although it is good practice to include a savings clause in the policy, its mere inclusion does not automatically convert an overly broad or restrictive social media policy into a permissible one.

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. If you need guidance on issues pertaining to the National Labor Relations Act, please contact John Vreeland, Counsel in the firm's Labor Group.