



HOSPITALITY ALERT

NLRB CLARIFIES ITS POSITION ON EMPLOYERS' SOCIAL MEDIA POLICIES

On August 18, 2011, in response to a growing number of disputes between employers and employees concerning employees' use of Facebook, Twitter, YouTube, and other social media, the NLRB clarified its rules for determining (1) when employees are engaging in protected activity, and (2) when employers are using illegal social media policies. These latest clarifications give helpful, concrete guidance to employers.

A Review of NLRB Cases

On August 18, 2011, the Acting General Counsel of the National Labor Relations Board ("NLRB") issued his report on 14 different cases pending before the NLRB that involved employees' use of social media.¹ This report followed a more exhaustive analysis of pending NLRB cases involving social media that was completed by the U.S. Chamber of Commerce on August 5, 2011.²

The majority of cases reviewed by the NLRB fall into two broad categories: cases where the employer's social media policy (1) *specifically prohibited* employees from discussing, either among themselves or with other interested third parties, the terms and conditions of their employment; or (2) *implicitly prohibited* such discussion by using overbroad, vague, and/or undefined terms which created a "chilling effect" on employees' rights under the National Labor Relations Act ("NLRA").

¹ See Memorandum OM 11-74, which is available at <http://mynlrb.nlr.gov>

² See "A Survey of Social Media Issues Before the NLRB," U.S. Chamber of Commerce, 2011" which is available at <http://uschamber.com/reports>

With regard to the first category of cases - those that contain *specific prohibitions* - the NLRB focuses on what activities are ultimately restricted by the policy. If the employer's policy at issue restricts employees from engaging in activities that are protected by the NLRA - such as attempting to organize other employees, advancing group complaints, and/or commenting on the terms and conditions of employment with, among, or on behalf of other employees - the policy is likely illegal.

With regard to the second category of cases - those that may contain *implicit restrictions* - the NLRB will focus on the restrictive language used in the policy. If the language is so vague or overbroad that an employee could "reasonably construe" that policy to prevent him/her from engaging in activities that are protected by the NLRA, that policy is likely illegal. Examples of such illegally vague policies, according to the NLRB, are those that prohibit "offensive," "inappropriate," "rude," and/or "discourteous" conduct or comments. Another likely illegal example, according to the NLRB, is a policy that prevents employees from engaging in comments or conduct that could "damage the reputation or goodwill of the company." And, finally, another likely illegal policy is one that prohibits employees from using the employer's logo in social media posts. Such a policy is illegally overbroad, according to the NLRB, because it could be "reasonably construed" by employees to prohibit them from posting pictures of picket signs or other collective action.

Finally, the NLRB clarified that employees can lose the protection of the NLRA when their conduct and/or statements are defamatory or "opprobrious" - that is, "so disloyal, reckless, or maliciously untrue." In these cases, the employee's wrongful actions cause a loss of NLRA protection, regardless of the language used in the employer's policy.



Impact on California Employers

Taken together, these two reports begin to give employers some guidance on how to draft defensible social media policies and how to respond to employees' increasing use of social media in the workplace.

Based on the NLRB's latest comments, employers should consider reviewing their existing social media policies to:

- (1) Ensure that they contain no explicit prohibitions on employees discussing the terms and conditions of their employment;
- (2) Confirm that they do not include overbroad or vague restrictions on employees' use of social media that could reasonably be construed by an employee to chill his/her NLRA rights; and
- (3) Given the likelihood that the NLRB will further refine its analysis in the future, include a broad disclaimer stating that the employer's social media policy is not intended to restrict any rights guaranteed by state or federal law.

In addition, if an employer is faced with the decision of whether to discipline or terminate an employee based on his/her comments or conduct in a social media post, the employer should consult with competent counsel. The employer and counsel should carefully review whether, in light of the NLRB's latest comments, the employee's comments or conduct may constitute protected activity under the NLRA.

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