NLRB Continues Aggressive Crackdown on Social Media Policies

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In the past few years the National Labor Relations Board ("NLRB") has taken an increased interest in whether workplace policies prohibiting employees from discussing the terms and conditions of their employment on social media such as Facebook and Twitter violate the National Labor Relations Act ("NLRA") by interfering with workers' rights to engage in concerted activity. Federal law prohibits an employer from interfering with employees who come together to discuss work-related issues for the purpose of collective bargaining or other mutual aid or protection, and the NLRB has (correctly) noted that social media has become one of the primary avenues through which employees engage in such activity. A spate of recent decisions makes clear that the NLRB has intensified (and will likely continue to intensify) its scrutiny of employer social media policies and this scrutiny extends no less to non-unionized employers.

Recent decisions provide examples of the specific policy language that the NLRB has found unlawful, illustrating the various hazards employers face when drafting their social media policies. Just before Labor Day, the Board, in Triple Play Sports Bar and Grille, Nos. 34-CA-012915, 34-CA-012926 (N.L.R.B. Aug. 22, 2014), held that an employer violated the NLRA when it terminated two employees for participating in a Facebook discussion criticizing the employer's failure to withhold the proper amount of state income tax from their paychecks. The employer did not contest that the employees engaged in protected, concerted activity by discussing its tax withholding calculations on Facebook, but argued that the employees' conduct, including using profane language to criticize one of the owners, was so disloyal that they forfeited the NLRA's protections. The Board disagreed that the employees' comments were maliciously untrue and concluded that the communications were protected because the purpose of the conversation was to "seek and provide mutual support looking toward group action to encourage the employer to address problems in terms and conditions of employment, not to disparage its product or services or undermine its reputation."

In addition, the Board held that the company's "Internet/Blogging" policy discouraging online communications involving "confidential or proprietary information about the Company, or ... inappropriate discussions about the company, management, and/or co-workers" violated the NLRA. The fact that the policy included language stating that it had "no force or effect" to the extent it was precluded by state or federal law made no difference in the Board's view. While acknowledging that the policy did not "explicitly restrict protected activity," the Board nevertheless determined that it violated the NLRA because employees could reasonably interpret it as "proscribing any discussions about their terms and conditions of employment [that the employer] deemed 'inappropriate.'"

In Durham School Servs., L.P., 360 N.L.R.B. 85 (2014), the Board held that a school bus operator's social networking policy that threatened employees with discipline for, among other things, publicly sharing information "related to the company or any of its employees or customers" was unreasonably broad and vague under the NLRA. The NLRB concluded that employees "could reasonably interpret this policy language as restraining them..."
in their . . . right to communicate freely with fellow employees and others regarding work issues and for their mutual aid and protection.”

In another case, Prof'l Elec. Contractors of Conn., Inc., No. 34-CA-071532 (N.L.R.B. A.L.J. June 4, 2014), an administrative law judge rejected a handbook rule prohibiting the “[i]nitiating or participating in distribution of chain letters, sending communications or posting information, on or off duty, or using personal computers in any manner that may adversely affect company business interests or reputation.” The ALJ had little difficulty concluding that the rule “insofar as it prohibits employees from using their own computers to communicate with others ‘in any manner that may adversely affect the company business or reputation’ is invalid” under the NLRA.

Similarly, another ALJ recently determined that a company that provided restaurant management services violated the NLRA when it terminated a server for posting disparaging comments about coworkers and managers on social media in violation of an “insubordination rule” contained in the company’s handbook. In Hoot Winc, LLC, No. 31-CA-104872 (N.L.R.B. A.L.J. May 19, 2014), the ALJ concluded that the rule was subjective because it did not define terms such as “insubordination,” “lack of respect,” or “cooperation” and that construing those terms broadly could have a chilling effect on employees engaged in the exercise of NLRA rights. The ALJ observed that a prior ruling had upheld a similar policy because the restriction applied only to conduct that did not support the employer’s “goals and objectives,” but found the absence of any such limiting terms in Hoot Winc fatal to the policy.

Moreover, in Lily Transp. Corp., No. 01-CA-108618 (N.L.R.B. A.L.J. Apr. 22, 2014), the ALJ held that an “information posting” rule in an employee handbook that was intended to protect the employer’s public image was unlawful because it was “not restricted to confidential or even company information.” In the ALJ’s view, because the rule did not distinguish between disclosing information about customers and company business, which the employer may have been legally authorized to prohibit, and disclosing other information that employees should have been free to share, it violated the NLRA. Notably, in each of these cases, the employer’s policy failed not because the goals it sought to promote were inconsistent with the NLRA per se, but because the employers did not draft the restrictions clearly enough to ensure that the policy would not interfere with conduct specifically protected under the NLRA.

Despite these cases, at least one ALJ recently determined that an employer could enforce its social media policy without violating the NLRA. In Landry’s Inc., No. 32-CA-118213 (N.L.R.B. A.L.J. June 26, 2014), the ALJ had no issue with a policy stating that “the Company urges all employees not to post information regarding the Company, their jobs, or other employees which could lead to morale issues in the workplace or detrimentally affect the Company’s business.” This policy, according to the ALJ, did not explicitly prohibit employees from posting information regarding their jobs or those of their coworkers, but rather, urged them not to do so only if the postings were likely to create morale problems. Without more, the ALJ reasoned, “it would be unreasonable for employees reading this language to conclude that the [employer] generally frowns upon all job-related postings of any type.”

While the Board’s decision in Landry’s offers some useful guidance regarding efforts an employer can take to survive challenges to its social media policies, the NLRB’s recent rulings suggest it will continue to aggressively pursue policies it perceives as too restrictive. Employers should be aware that boilerplate disclaimers will not prevent violations, as demonstrated by the Board’s decision in Triple Play Sports Bar and Grille that the employer did not eliminate the chilling effect of its internet/blogging policy on NLRA rights by stating that the policy would have “no force or effect” if it conflicted with state or federal law.

One obvious step employers may wish to take is including a clause in their social media policy describing activities that the NLRA protects and affirming that they do not intend for their policy to interfere in any way with those rights. As a corollary, employers should consider identifying precisely the kinds of unprotected social media activities that will subject employees to discipline. These may include:

- Disclosure of proprietary, financial, marketing, strategic or other confidential business information belonging to the employer that is clearly defined and does not relate to terms and conditions of employment.
- Threats of violence or remarks that are obscene, malicious or bullying.
- Comments that are racist, sexist or otherwise discriminatory and create a hostile work environment.
- Rumors or other disparaging statements about the employer that the employee knows to be false.

Regardless of the unique goals of an individual employer’s social media policy, the key to an effective, enforceable policy is identifying with clarity the specific activities that will not be tolerated and carving out with equal precision those that the NLRB has made clear cannot be infringed. As evidenced by the Landry’s ruling,
limiting language is crucial, and as with many other types of workplace policies, drafting restrictions narrowly can often make the difference in whether subsequent challenges succeed or fail.

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