Lead Report

Social Media

Attorneys Advise Reconsidering Social Media Policies Based on NLRB Counsel's Report

Employers concerned about employees discussing workplace matters on social media should update their policies to conform with the latest advice from the National Labor Relations Board's acting general counsel, management attorneys told Bloomberg BNA.

In the 35-page memorandum, released Jan. 24, Lafe Solomon outlined 14 legal cases that highlight emerging social media challenges employers have faced (30 HRR 91, 1/30/12). The memorandum concluded that employees using social media to engage in protected concerted complaints about their employment are protected by the National Labor Relations Act, while employees who merely air individual gripes lack statutory protection.

''This issue generally demonstrates just one of the many new challenges that changing technologies present to the HR professional,'' Nelson Cary, a partner at Vorys, Sater, Seymour and Pease in Columbus, Ohio, told Bloomberg BNA Feb. 2. ''It is, therefore, definitely a challenge that they will have to confront, if not right away, then some time in the future.''

Philip Gordon, a shareholder in Littler Mendelson's Denver office and chair of the firm's Privacy and Data Protection Practice Group, told Bloomberg BNA Feb. 3, ''The biggest challenge right now is there are a lot of social media policies on the web that are publicly available and easy to download, but as a company you need to be very careful now when you're relying on something published before the [acting] general counsel's memo on Jan. 24, 2012, and also before [a similar] memo on Aug. 18, 2011.''

Many Employers Behind the Social Media Curve. Fewer than half of employers have a social media policy, the Society for Human Resource Management noted in a survey report released in January. The survey of randomly selected HR professionals showed that 40 percent of 470 employers have a formal social media policy. The SHRM report noted that where employers do have such a policy, HR is responsible for creating and enforcing it.

''Many organizations are still grappling with how to use [social media] as a strategic tool rather than as just another tactic,'' Mark Schmit, SHRM's vice president of research, told Bloomberg BNA Feb. 6.

''Also, many organizations are not out in front with their social media policies,'' he added.

The SHRM survey, conducted from Dec. 17, 2010, to Feb. 1, 2011, also revealed that among organizations that have a social media policy, 33 percent said they have taken disciplinary action against employees who violated the policy within the past 12 months.

Dealing with social media can involve various employer policies, Curtis Midkiff, SHRM's director of social engagement, said Feb. 6. ''There are a lot of aspects of social media policies that are considered to be part of other established policies in the company,'' he said.

For example, Midkiff said, employers might incorporate rules about social media in workplace policies that address employee conduct, harassment, or the use of technology and other types of company property.

''A lot of employers believe they can address anything that occurs with social media through the vast array of policies they already have on the books,'' Brian Hall, a partner at Porter, Wright, Morris & Arthur's office in Columbus, Ohio, told Bloomberg BNA Feb. 3. ''I don't disagree that that's possible, but it's important to have a single place where people can go and understand what they can and cannot do.''

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Hall added that as companies develop social media policies, the goal should be to make sure they are consistent with other work rules they enforce. ''Make sure those work rules are also compliant with what the [NLRB] considers to be 'protected activity' under Section 7'' of the NLRA, he said.

NLRA Pertains to All Employers. Mark Brossman, a partner at Schulte Roth & Zabel in New York City and co-chair of the firm's Employment and Employee Benefits Group, noted in a recent client alert he co-authored with colleagues about Solomon's memo that ''Section 7 of the NLRA applies to *both* unionized and non-unionized employees.'' The alert went on to explain that Section 7 ''protects employees' rights to engage in protected concerted activities, including those in which employees seek mutual aid or protection; seek to initiate, induce or prepare for group action; bring group complaints to management's attention regarding the terms and conditions of their employment; or address a workplace issue of concern to employees.''

The alert also points out that Solomon concluded that workers' postings to social media sites that discuss or seek advice from other employees about the terms and

conditions of their employment are likely protected, concerted activity.

''When employees discuss job performance, supervisory actions, or concerns about workplace responsibilities or policies, employers should be wary of disciplining the employees or terminating their employment, even if the postings contain insulting or offensive language,'' the law firm's alert stated.

For example, in one case cited in the acting general counsel's report, Solomon in part concluded that an employee's discharge for making profane Facebook comments that criticized her employer was unlawful.

Policy Dos and Don'ts. Cary at Vorys, Sater, Seymour and Peace and co-worker Ashley Manfull noted in a recent client alert that legal cases Solomon said contained employer rules or policies that were overly broad, and therefore unlawful, included language that:

■ prohibits ''making disparaging comments about the company through any media, including online blogs'';

■ stipulates employee discussions of terms and conditions must be in an ''appropriate'' manner, without defining ''appropriate'';

■ bars ''insubordination or other disrespectful conduct'' and ''inappropriate conversation''; and

■ prohibits disclosure of confidential, sensitive or non-public information concerning the company, without further definition.

Cary said there were two cases highlighted, however, in which Solomon said employers' social media policies were lawful and ''would not reasonably be construed to apply to Section 7 activity.''

Those cases pertained to employer social media policies that specifically mentioned ''plainly egregious conduct that was prohibited'' such as vulgar, obscene, threatening, intimidating, harassing, and/or unlawful discriminatory comments, Cary said. Social media policies that limited employee disclosure of confidential information to matters protected by federal law, such as securities or health information laws, also are considered lawful, he added.

Moreover, the acting general counsel's memorandum said, ''An employer will not be held liable for discipline imposed pursuant to an overbroad rule if it can establish that the employee's conduct actually interfered with the employee's own work or that of other employees or otherwise actually interfered with the employer's operations, and that the interference was the reason for the discipline.''

Best Practices for Employers. Based on the acting general counsel's report, attorneys told Bloomberg BNA employers should:

■ **Determine whether you need a social media policy.** ''Decide whether this is a significant enough issue or could it become one to the business to justify drafting, implementing, enforcing, and potentially defending a policy,'' Cary said.

■ **Make sure policy language is not too broad.** Policies restricting employee posts should avoid ambiguous words and undefined terms, Cary said. ''It should be apparent to all that the Board's interpretation of what is a lawful or unlawful policy is very nuanced,'' Hall said. ''Where possible, examples or context should be provided for any specific policies that arguably can be interpreted as infringing on employees' Section 7 rights.''

■ **Encourage other options for resolving conflicts.** Gordon at Littler Mendelson said employers should urge, but not mandate, that employees use internal channels, rather than social media, to resolve workplaces concerns.

■ **Tailor your policy to the company's particular business.** For example, Gordon said, a company in the health care sector would have provisions prohibiting the posting on social media of patient photographs, diagnoses, treatment, or other private information.

■ **Include a disclaimer.** Gordon said employers should clearly note that the policy is not designed to limit employees' rights under the NLRA or applicable law. ''Until we have more clarification and a decision from at least an administrative law judge or the NLRB or a federal circuit court, it makes sense to keep disclaimers in,'' though it is unclear whether they will be found effective, he said.

■ **Include attorneys in policy discussions.** ''Employers should seek legal counsel in drafting or reviewing their social media policies and before taking disciplinary action against employees for their social media activity,'' Hall said. Deciding whether an employee is engaged in protected, concerted activity is not a bright-line test, Cary said, ''so there is the need to parse through the facts of each specific case that might come before an HR manager or director to determine whether a termination is appropriate under the policy and under the law.''

■ **Try to make the policy appealing.** ''Find a balance between a policy people will actually read and one that is encyclopedic and boring,'' Gordon said.

BY RHONDA SMITH

Text of the NLRB acting general counsel's memorandum on social media may be accessed at http://op.bna.com/dlrcases.nsf/r?Open=ldue-8qunub.

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