

Publications

Labor and Employment Alert: A Moment of Clarity: Third Report on Social Media Provides Employers with a Policy Deemed Entirely Lawful

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In an extremely significant report concerning social media cases, issued on May 30, 2012, the NLRB's Acting General Counsel (AGC) has provided more guidance to employers with social media policies.

Perhaps the most helpful information for labor professionals comes at the end of the 22 page [report](#) (pdf). In concluding its summary of seven recent cases addressing the lawfulness of employer social media policies, AGC Lafe Solomon includes an entire social media policy which he has determined to be in full compliance with Section 7. The AGC found that the employer's revised social media policy was lawful, in its entirety, because the policy provided sufficient examples of prohibited conduct which, *in context*, could not reasonably be interpreted to prohibit employees' Section 7 protected activities.

Throughout its analysis of the recent cases, the AGC continually emphasizes the following rule of thumb for social media policies: If a rule is ambiguous as to its application to Section 7 activity and fails to contain limiting language or context that would make it clear to employees that the rule does not interfere with their Section 7 activities, the rule is unlawful. This is a rule the NLRB has applied to employer policies for many years, even before the widespread attention given to social media. To ensure compliance with Section 7, employer policies should clarify and restrict their scope by including examples of clearly illegal or unprotected conduct.

Applying this rule of thumb, some of the statements contained in employer policies that the AGC found unlawful include:

- Watch what you say. Don't have conversations regarding confidential information in the Breakroom or in any other open area. Never discuss confidential information at home or in public areas.
- Think carefully about 'friending' coworkers...on external social media sites.
- Offensive, demeaning, abusive or inappropriate remarks are as out of place offline as they are online, even if they are unintentional.

- Don't comment on any legal matters, including pending lawsuits or disputes.
- Adopt a friendly tone when engaging online. Don't pick fights...avoid topics that may be considered objectionable or inflammatory—such as politics and religion.
- Employees should avoid harming the image and integrity of the company...

In comparison, the AGC determined that the following types of rules in social media policies are lawful:

- Use your best judgment and exercise personal responsibility. Take your responsibility as stewards of personal information to heart. Integrity, Accountability, and Respect are core [Employer] values...Remember that there can be consequences to your actions in the social media world-both internally, if your comments violate policies, and with outside individuals and/or entities...
- Any harassment, bullying, discrimination, or retaliation that would not be permissible in the workplace is not permissible between co-workers online, even if it is done after hours, from home and on home computers...
- Users may not post anything on the Internet in the name of [Employer] or in a manner that could reasonably be attributed to [Employer] without prior written authorization from the President or the President's designated agent.

Finally, it is worth noting that in several of the summarized cases, the AGC determined that the inclusion of a "savings clause" in the policy (*i.e.*, that the policy will be administered in compliance with Section 7 of the NLRA) was not sufficient to cure the ambiguities in the unlawful provisions.

In light of this new guidance, labor professionals may want to:

- Refer to the prior posts on this blog for information about the AGC's [August 2011](#) and [January 2012](#) reports on social media issues.
- Consider revisiting existing or draft social media policies to incorporate some or all of the AGC's guidance.
- Exercise caution in using the policy attached to the AGC's report. Keep in mind the importance of context in determining whether the policy is lawful. Particular passages or sentences standing on their own may not be lawful.
- Remember that this report, like the others, is only the opinion of the AGC, who is responsible for prosecuting alleged violations of the NLRA. Thus, it is possible that the NLRB itself will come to a different conclusion about whether particular language violates the NLRA.
- Before implementing a social media policy, and indeed with respect to all of your employment policies, it is advisable to consult with qualified labor counsel. A few words may mean the difference between a policy that is lawful and one that is not.

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