

# Managing Social Media in the Workplace



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## I. Introduction

In today's fast-paced digital society, we place a premium on "staying connected." Our social and professional lives are intertwined with such social media outlets as Facebook and Twitter. In its first quarterly earnings report to the Securities and Exchange Commission, Facebook reported that as of June 30, 2012, it had 955 million total users.<sup>1</sup> Twitter reported that it had 140 million users in March of 2012.<sup>2</sup> These social media outlets provide efficient avenues for communications and can become effective business tools for advertising and other promotional activities. While the benefits of social media are unquestionable, employers are now facing difficult policy decisions as they balance employee rights with business interests. Many of these policy decisions impact workforce morale and can lead to significant employer liability if handled improperly.

Recent case law is illustrative of employer pitfalls now arising in regulating employee social media access. Consider the following hypothetical—you, the employer, have an employee who is frustrated over a position transfer and protests the move to her supervisor. After the supervisor fails to transfer the employee back to her previous position, the employee logs onto Facebook and describes her feelings towards her supervisor using several expletives and also criticizes the employer in the process. Question—is the employer justified in terminating this employee for her Facebook comments? Answer—no, according to the National Labor Relations Board (NLRB).<sup>3</sup> According to the NLRB, the employer's policy against disparagement of the company through any media outlet was unlawful because it could reasonably be construed to restrict Section 7 activity.<sup>4</sup> The NLRB further found that the employee engaged in protected concerted activity because her Facebook status generated a discussion about working conditions amongst fellow employees.<sup>5</sup> Therefore, the employee's termination was considered unlawful.

Realizing the potential liability presented by operating without a social media policy, employers have responded by crafting policies to regulate their employees' social media behavior. However, many

of these social media policies are overly broad and infringe upon employees' Section 7 rights under the National Labor Relations Act (NLRA).<sup>6</sup> Balancing legitimate employer interests with employee rights is essential in the development of an effective and legal social media policy.

## II. General Confidentiality and Privacy Issues

When considering employment policies, confidentiality and privacy interests are of general concern for employees and employers alike. Employees like to know that their personal information in the possession of the employer will remain confidential. This employee interest continues to evolve as federal laws such as Family Medical Leave Act and Americans with Disabilities Act further regulate employers' handling of employee personal information. Likewise, employers want to ensure that employees preserve the confidentiality of certain company information and that employees will not use company property in a manner that would subject confidential company information to public disclosure. These confidentiality and privacy interests have evolved over decades of employer/employee relations and continue to remain highly relevant today.

For employers, technology has created further need to protect and restrict disclosure of proprietary electronic information, inasmuch as with one email transmission, a disgruntled employee can reveal to the world the employer's inner workings including client data, customer lists and financial information.

In preserving confidentiality of company records, employers may create policies to ensure that company property is used properly and not abused by employees. Employers often institute internet site restrictions and routinely review employee emails to confirm that company property is being used for its intended purpose.<sup>7</sup> While employees often believe that they possess a reasonable expectation of privacy in their activities while on the employer's network,<sup>8</sup> this belief is often misplaced, as employees' privacy rights are generally limited to only those instances where the matter intruded upon is "intensely private."<sup>9</sup> Employers can reinforce their right to monitor employee communications on the employer's network by placing the employees on notice that their emails and Internet activities will be monitored.<sup>10</sup> With notice of an employer's policy of monitoring network activity, it is difficult for employees to claim that they have a reasonable expectation of privacy. Courts will typically balance a company's interest in preventing unprofessional conduct or illegal activity over its network against any privacy interest an employee can claim in those activities, and this analysis typically favors employers.<sup>11</sup>

Regulating social media presents similar challenges for employers. Social media can be misused by employees and, thus, subject employers to liability, create confidentiality issues, and result in significant public embarrassment.<sup>12</sup> Other more specific employer concerns regarding employee use of social media may include: (1) the use of offensive language or posting of inappropriate materials; (2) the disparagement of the company and its directors, officers and employees; (3) the harassment of co-workers; (4) the transmission of computer viruses; (5) or the general lack of employee performance due to their use of social media outlets.<sup>13</sup> Properly crafted social media policies better protect employers against this type of misuse and may further help mitigate damages flowing therefrom.

### III. Drafting an Effective and Legal Social Media Policy

When crafting a social media policy, employers must remain mindful of employee rights protected by the NLRA. The NLRA protects employees' rights to "engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection" (referred to herein as "Section 7 rights").<sup>14</sup> For an activity to be "concerted activity," an employee must act "with or on the authority of other employees and not solely by and on behalf of the employee himself."<sup>15</sup> The NLRB is the administrative body charged with investigating and preventing any person or company from engaging in violations of the NLRA.<sup>16</sup> If an unfair labor practice is determined, the NLRB can issue cease and desist orders and take other action warranted under the circumstances.

Employers and lawyers alike frequently operate under the mistaken belief that the NLRA does not apply to non-union employers. However, the NLRA only excludes from its definition of "employer" state and federal government employers and any employer subject to the Railway Labor Act. Most other employers are prohibited from interfering with rights provided to employees under the NLRA.<sup>17</sup> Employers will violate section 8(a)(1) of the NLRA when a work rule

is enforced that "reasonably tends to chill employees in the exercise of their Section 7 rights."<sup>18</sup> If an employer's social media policy is overly broad in nature so that it encompasses certain Section 7 activities, it may violate the NLRA and an action by a disgruntled employee could be brought to the NLRB.

The NLRB, through its acting general counsel, has recently provided examples of acceptable and unacceptable social media policies in a series of memoranda.<sup>19</sup> These memoranda address such topics as materials employees are prohibited from posting online, overly broad policies that infringe upon employee rights, and general do's and don'ts for employers in regulating employee social media usage. These memoranda provide employers with an excellent resource to rely on in the creation of social media policies and the administration of such policies in the employer/employee setting.

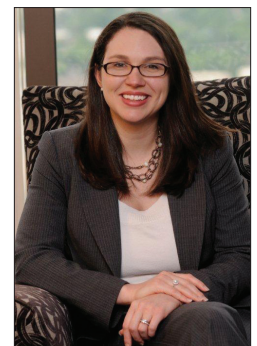
#### A. Specific Examples of Unlawful Social Media Policies

One of the common themes presented through the NLRB memoranda is the potential illegality of overly broad, vague or ambiguous social media policies that infringe upon employees' Section 7 rights. A social media policy that is vague or ambiguous in its application to Section 7 rights or provides no limitations or examples that would signal to employees that the policy does not restrict Section 7 rights is unlawful.<sup>20</sup> On the other hand, a social media policy that sets clear boundaries that restrict its scope by including examples of conduct that is clearly illegal or unprotected to the point where the policy could not be read to cover Section 7 rights is lawful.<sup>21</sup> In Memorandum OM 11-74, the acting general counsel of the NLRB described an employer's internet/bloggging policy that prohibited employees from engaging in "inappropriate discussions." This language was considered overly broad and could reasonably be construed to restrict Section 7 activity.<sup>22</sup> The policy did not attempt to explain the meaning of "inappropriate discussions" or limit its scope through specific examples to exclude Section 7 activity and was, therefore, considered unlawful in its application.<sup>23</sup>

Other specific examples offered by the NLRB of inappropriate social media policies include a policy that prohibited employees from using social media to engage in "unprofessional communication that could negatively impact the Employer's reputation or interfere



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with the Employer's mission or unprofessional/inappropriate communication regarding members of the Employer's community."<sup>24</sup> According to the NLRB, this type of restriction violates Section 8(a)(1) "because it would reasonably be construed to chill employees in the exercise of their Section 7 rights" and could also encompass protected statements about employment practices.<sup>25</sup> Further, according to the NLRB, such policy contains no limitations or examples that would indicate to an employee that Section 7 rights were excluded from the prohibition.<sup>26</sup>

Further, a policy requiring employees to seek approval from their employer to identify themselves as the employer's employees on a social media site and to expressly state that their comments are their personal opinions and do not necessarily reflect their employer's opinions likely violates the NLRA.<sup>27</sup> A provision of this type is considered overly broad and also damaging to the employee's Section 7 right to engage in concerted activity.<sup>28</sup> Further, requiring employees to explicitly state that their comments are their own and not those of their employer after each comment posted places an unreasonable burden upon employees who seek to exercise their Section 7 rights.<sup>29</sup> Another social media policy that required employees generally to "avoid identifying themselves as the [e]mployer's employees unless discussing terms and conditions of employment in an appropriate manner" was also found to be unlawful.<sup>30</sup> Aside from the overly broad nature of the term "appropriate" in this policy, the NLRB views this requirement as restricting protected activities such as criticizing terms and conditions of employment and the employer's labor policies.<sup>31</sup>

The NLRB has also found that policy provisions prohibiting the use of a company's name or service marks outside the course of business without prior approval of the company violate the NLRA.<sup>32</sup> The NLRB concluded that employees have a Section 7 right to use their employer's name or logo in conjunction with protected concerted activity, such as to communicate with fellow employees or the public about a labor dispute. The NLRB further concluded that because this provision could reasonably be construed to restrict employees' Section 7 rights, it violated the NLRA.<sup>33</sup>

Finally, a policy prohibiting employees from publishing any representation about their employer without prior approval by

senior management was determined to be overbroad by the NLRB and in violation of the NLRA because it interfered with employees' Section 7 rights.

As the preceding examples demonstrate, it is imperative that employers carefully construct social media policies that provide specific limitations and examples that make it clear to employees that their individual Section 7 rights are protected; otherwise, these policies will be considered overbroad.

## **B. Specific Examples of Acceptable Social Media Policies**

While employees have a wide range of rights and liberties in this area, employers do have a protectable interest in regulating social media. The NLRB has upheld as lawful social media policies that contain rules prohibiting employees from engaging in certain behaviors via social media. Such policies typically list prohibited actions such as breaching confidentiality, harassment or disparagement of other employees or disparagement of the company. With the necessary specificity, such policies have been consistently upheld as lawful. Specific examples of acceptable social media policies include:

- a policy that "precluded employees from pressuring their coworkers to connect or communicate with them via social media."<sup>34</sup>

This policy did not restrict Section 7 activities because it was "sufficiently specific in its prohibition against pressuring coworkers and clearly applied only to harassing conduct;"<sup>35</sup>

- a policy that prohibited the use of social media to "post or display comments about coworkers or supervisors or the employer that are vulgar, obscene, threatening, intimidating, harassing, or a violation of the employer's workplace policies against discrimination, harassment, or hostility on account of age, race, religion, sex, ethnicity, nationality, disability, or other protected class, status, or characteristic." Once again, this policy was upheld as lawful as the policy clearly identified egregious misconduct and was not utilized to discipline Section 7 activities<sup>36</sup>;

- a policy containing a rule prohibiting "verbal or other statements which are slanderous or detrimental to the company or any of the company's employees."<sup>37</sup> This rule was found on a list of 19 rules prohibiting such egregious conduct as sabotage and sexual or racial harassment.<sup>38</sup> The NLRB found that the rule could not reasonably be read to encompass Section 7 activity because "slan-

derous" and "detrimental" activities were egregious activities that did not involve concerted activity and could be lawfully prohibited. The NLRB also upheld a policy prohibiting conduct "that tends to bring discredit to, or reflects adversely ... on the Company" and prohibiting "conducting oneself unprofessionally or unethically, with the potential of damaging the reputation of a department of the Company."<sup>39</sup> While the NLRB agreed that the policy was a bit overbroad and vague and would have preferred to see explicit Section 7 right exclusions, it found the policy to be lawful because the totality of the evidence led to a conclusion that the rule was not aimed at conduct related to Section 7 activities, but was related to crimes and other misconduct, such as giving proprietary information to competitors.

From a review of these "acceptable" social media policies it is apparent that the NLRB favors specificity over generalities. As such, significant interest should be placed on tailoring a policy specific to the needs of the underlying company as one size may not fit all as related to an enforceable policy.

## **IV. Closing**

Practitioners, prior to drafting a social media policy, should first consider the nature of the client's business and the protectable interests involved. Once they are determined, significant interest should be placed upon the specific employee activities subject to regulation. A cookie-cutter form policy found through a Google search may not address the specific needs of the Practitioner's client's business or comply with NLRB standards. There is no one-size-fits-all social media policy; companies will need to carefully craft their policies to incorporate industry-specific concerns while maintaining necessary employee rights. In this digital age, social media will continue to thrive and employees will continue to connect with others and voice their opinions (and, oftentimes, their displeasure) with their working environments. Inevitably litigation will further shape the landscape of employer/employee relations as related to social media usage and policies derived therefrom. Proper planning and careful assessment will further insulate employers from this imminent wave of litigation.

## **Endnotes:**

1. See <http://www.sec.gov/Archives/edgar/>

- data/1326801/000119312512325997/d371464d10q.htm (last visited August 15, 2012).
2. See <http://blog.twitter.com/2012/03/twitter-turns-six.html> (last visited August 15, 2012).
3. Memorandum OM 12-31 Report on Soc. Media Cases from the Assoc. Gen. Counsel of the Nat'l Labor Relations Bd. (NLRB) to All Reg'l Officers-in-Charge and Resident Officers (Jan. 24, 2012) (on file with NLRB) [hereinafter Memo 1].
4. *Id.*
5. *Id.*
6. 29 U.S.C. §§ 151-169 (LexisNexis 2012).
7. See John Soma et al., *Bit-Wise but Privacy Foolish: Smarter E-Messaging Technologies Call for a Return to Core Privacy Principles*, 20 ALB. L.J. SCI. & TECH. 487, 507-510 (2010); Christopher Pearson Fazekas, *1984 Is Still Fiction: Electronic Monitoring in the Workplace and U.S. Privacy Law*, 2004 DUKE & TECH REV. 15 (2004).
8. Fazekas, *supra* note 9, at 15.
9. *Id.*
10. *Id.*
11. *Id.*; see also *Smyth v. Pillsbury Co.*, 914 F. Supp. 97, 100-101 (E.D. Pa. 1996).
12. See Soma et al., *supra* note 9 at 507-510.
13. *Id.* at 515-516.
14. 29 U.S.C. § 157 (2012).
15. *Meyers Industries, Inc. v. NLRB*, 268 NLRB 493, 497 (1984), *aff'd sub nom. Prill v. NLRB*, 835 F.2d 1481 (1987).
16. 29 U.S.C. § 160 (2012).
17. 29 U.S.C. § 157 (2012); 29 U.S.C. § 158(a)(1).
18. *Lafayette Park Hotel v. NLRB*, 326 NLRB 824, 825 (1998).
19. See Memo 1, *supra* note 1; Memorandum OM 11-74 Report on Soc. Media Cases from the Assoc. Gen. Counsel of the Nat'l Labor Relations Bd. (NLRB) to All Reg'l Officers-in-Charge and Resident Officers (Aug. 18, 2011) (on file with NLRB) [hereinafter Memo 2]; Memorandum OM 12-59 Report on Soc. Media Cases from the Assoc. Gen. Counsel of the Nat'l Labor Relations Bd. (NLRB) to All Reg'l Officers-in-Charge and Resident Officers (May, 30 2012) (on file with NLRB) [hereinafter Memo 3].
20. *University Medical Center v. National Labor Relations Board*, 335 N.L.R.B. 1318, 1320-1322 (2001), *abrogated in part by Caesar's Entm't v. NLRB*, No. 28-CA-60841, 2012 NLRB Lexis 134 (NLRB Mar. 20, 2012).
21. *Tradesman International v. NLRB*, 338 NLRB 460, 460-462 (2002).
22. Memo 2, *supra* note 19.
23. *Id.*
24. *Id.*
25. *Id.*
26. *Id.*
27. Memo 1, *supra* note 1.
28. *Id.*
29. *Id.*
30. *Id.*
31. *Id.*
32. Memo 1, *supra* note 1.
33. *Id.*
34. Memo 2, *supra* note 18.
35. *Id.*
36. *Id.*
37. *Tradesman International v. NLRB*, 338 NLRB 460, 462 (2002).
38. *Id.*
39. *Ark Las Vegas Restaurant Corporation v. AFL-CIO*, 335 NLRB 1284, 1291(2001). ■