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# PEOPLE MAY TALK

## Does the National Labor Relations Board "like" your social media policies?

BY ANN MARIE PAINTER

**ALTHOUGH UNIONS REPRESENT LESS THAN** 7 percent of all private-sector workers today, President Barack Obama's National Labor Relations Board (NLRB) has aggressively pursued multiple initiatives to expand the reach of the NLRB to all private-sector corporations—without regard to the presence or absence of unions. Section 7 of the National Labor Relations Act (NLRA) grants employees broad rights to discuss wages, hours, and other terms and conditions of employment not only with each other but also with the public at large. The rights apply even if no union is organizing or representing employees.

One current NLRB initiative piggybacks on the massive expansion in the use of online "social media" by employees, including the growth of Facebook, Twitter, and other online venues allowing employees to communicate both at work and outside the workplace. Less than six months after publishing his first report on social media issues in August 2011, the NLRB's acting general counsel issued his second report on January 24, 2012, outlining 14 cases in which he interprets both the language of social media policies and specific disciplinary situations. He finds many statutory violations that might surprise even labor lawyers who have practiced for decades.

Against this backdrop of heightened NLRB attention to social media, employers understandably remain concerned about employees' online activities that criticize management or fellow employees, expose confidential or trade secret information, or otherwise attack the company's products or services. But social media policies, even those drafted with the best intentions, run a serious risk of violating the rights of employees as defined by section 7 of the NLRA. And perhaps most surprising, an employer may violate the NLRA simply by instituting a policy or procedure that could be "reasonably construed" to restrict or prohibit section 7–protected activity even if the policy has never been enforced in a way that actually restricts protected activities.

Here are some major categories of social media and code-of-conduct policies that often trigger NLRA concerns, and our recommendations for reducing or eliminating the risk of a violation:

**Social media policies, even those drafted with the best intentions, run a risk of violating the rights of employees under section 7 of the NLRA.**

### Restrictions on disparaging, confrontational, harsh, or even inappropriate communications regarding the company or its employees.

Section 7 of the NLRA has been interpreted as allowing employees the right to say some pretty extreme things about their company, supervisors, and coworkers without being subject to discipline or termination, as long as the communications relate to wages, hours, or terms and conditions of employment. This standard has long been applied to employee conversations that occur around the watercooler. However, the NLRB has signaled that it will give employees even more leeway to criticize their company and its supervisors and managers on social media, as many posts do not "disrupt" the workplace.

Lawful antidisparagement provisions in corporate policies should be limited to communications regarding company products or services and/or linked to antiharassment guidelines, to prevent racial, sexual, or other like forms of harassment between employees. Employers do not have to tolerate harassment between employees that would otherwise violate Title VII and similar equal rights laws, but they need to be careful to ensure that any policy makes it clear and unambiguous that it is this type of harassment that is prohibited, by explicitly limiting the policy to "unlawful harassment."

### Restrictions on the distribution of "confidential" information.

Companies have the right to require employees to keep confidential a good deal of information on business secrets, intellectual property, and other similar information. But "personnel" information that addresses wages, hours, or terms and conditions of employment cannot be kept secret as part of a general ban on the dissemination of "confidential information." Confidential information in corporate policies, especially social media policies, should be expressly defined

to exclude general information on wages, hours, and terms and conditions of employment.

**Restrictions on employees' presenting false, dishonest, or misleading, but not "maliciously false," information.**

Again, section 7 rights extend broadly and include the right of employees to present objectively false or misleading information if the communications relate to wages, hours, or terms and conditions of employment. Employers may still consider whether to ban "maliciously false" communications, where the employee knows that the information is false and purposefully intends to harm the company or coworkers with the information. The line between "false" and "maliciously false" is not always black-and-white, however, so you need to tread lightly with policy restrictions on presenting false or inaccurate information through social media.

**Restrictions on employee use of company logos and trademarks.**

The current acting general counsel of the NLRB has explained on multiple occasions that regardless of intellectual property rights in company logos and trademarks, employees have the right to use company logos and trademarks in connection with discussions or protests over wages, hours, or terms and conditions of employment. Examples provided to the employer community include the right to make protest T-shirts with company logos, or alternatively to take pictures of company stores or sites and use those pictures in posts related to section 7 "activities." Thus, social media restrictions on the use of company logos or trademarks should expressly indicate that the restriction does not apply to activities that could fall under section 7.

**Inclusion of general disclaimer language in policies to indicate that section 7 rights are not infringed.**

Logically, it makes sense that if a policy specifically states that it should not be read to restrict section 7 rights, an employer should not be found in violation of the NLRA. But the current acting GC of the NLRB has essentially disregarded general disclaimer language in social media and related policies. Thus, employers should not assume that if they include a disclaimer somewhere in their policy, any other language in the policy that could be "reasonably construed" to restrict section 7 activity then becomes acceptable. Including disclaimer language is helpful, nonetheless, and including specific and multiple disclaimers throughout the policy—in connection with each provision that might arguably limit section 7 activities—should go a long way in protecting employers that seek to have broad social media restrictions.

**Requirement that employees obtain "approval" from the company before identifying or referencing their employment.**

Any requirements that employees get permission to use personal social media if their employer's name is mentioned should be carefully screened as potentially violative of the NLRA. Likewise, requirements that employees include their own disclaimer on social media sites, such as "the views expressed on this Web site are mine alone and don't necessarily reflect the views of my employer" are "trip wire" language for the current NLRB to find a statutory violation. We recommend that any approval or disclaimer language be limited to social media use relating to company products and services, rather than barring or restricting any mention of the company or its operations in general.

Clearly, there are many seemingly innocuous aspects of social media policies that could be interpreted as restricting section 7 activity, even if the employer has absolutely no motivation or desire to violate employee rights. Social media policies must be crafted with care, always with an eye toward what language could reasonably be read to limit employees from joining with their fellow employees to discuss or protest wages, hours, or terms and conditions of employment.

Most importantly, these section 7 rights apply regardless of whether a union is organizing or actively represents employees. The NLRA's guarantee of an employee's right to engage in protected concerted activity has been the law for over 75 years, but the workplace has changed enormously during that time. The application of NLRA policies in the modern corporate workplace is likely to produce some unexpected twists and turns for employers' counsel in the years ahead, with social media use by employees presenting some previously unforeseen challenges. You'll need to stay logged on and keep watching those tweets. People will talk, and not just around the watercooler.

**"Confidential information" in corporate policies, especially social media policies, should be defined to exclude general information on wages, hours, and terms and conditions of employment.**

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