Client Alert
LABOR, EMPLOYMENT AND BENEFITS PRACTICE GROUP | FEBRUARY 2012

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NLRB's Office of the General Counsel Issues a Follow-up Memorandum Summarizing its Rulings in Social Media Cases

On January 24, 2012, the National Labor Relations Board's Office of the General Counsel, Division of Operations Management issued its second Memorandum describing the facts presented and rulings issued in several recent social media cases. The Memorandum is intended to further clarify the NLRB's position regarding this evolving area of law involving the use of social media in the workplace. This Memorandum is a follow-up to a case compilation that the NLRB issued on August 18, 2011. Both of these Memorandum can be accessed in the Client Alert on our website at www.wiggin.com/showClientAlert.aspx?Show=13602.

The Memorandum covers a total of fourteen cases, seven of which directly address the legality of workplace social media policies. Of the policies reviewed, five were deemed to be overly broad, one lawful, and the seventh found to be lawful after prescribed revisions. The remaining cases involved unfair labor practice charges citing employers for discharging employees in response to the content of their Facebook postings. Most of the terminations were ruled unlawful because they were effectuated pursuant to overly broad policies. In one case, however, the discharge was upheld despite an unlawful policy because the employee's posting was not "work-related". [1]

The primary principles derived from the Memorandum are as follows:

- Social media policies or provisions in such policies that restrict employees' online speech or activities will be ruled unlawful where, for example, they broadly and/or vaguely provide that employees:
  - "may not disparage the employer in any media;"
  - may discuss terms and conditions of employment "in an appropriate manner only," where the term "appropriate" is not narrowly defined;
  - "may not use social media to engage in unprofessional communication that could negatively impact the employer's reputation," where the term "unprofessional" is not defined; and
  - "may not disclose non-public information concerning the employer to anyone outside the company without prior consent."
- Policies deemed lawful included provisions that prohibited statements that were specifically "slanderous", "discriminatory", or "harassing." Similarly, a policy that prohibited online disclosure of personal health information or securities-related data was deemed lawful.
- An employee's posting disparaging the employer's product was held not to be protected.
- In general, the determination as to whether a work rule or policy is lawful depends on whether an employee would reasonably conclude that the rule restricts protected activity, such as discussions regarding terms and conditions of employment. If so, the rule is likely to be deemed overly broad. As such, a social media policy or work rule should include limiting language that makes it clear to employees that their protected activities are not restricted. This could be done by means of an explicit statement or

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by including examples of postings that would violate the policy.

- An employer does not commit an unfair labor practice by disciplining an employee for violating an overly broad rule or policy if the employer can establish that the employee's conduct actually interfered with the employee's own work, other employees' work, or the employer's operations, and that this interference was the reason for the discipline.
- To be considered "protected activity," the posting must:
  - Be directed to a particular audience;
  - Contain language suggesting the employee seeks to initiate or induce co-workers to engage in group action;
  - Arise out of a prior discussion about terms and conditions of employment with co-workers; or
  - Involve the sharing of common concerns and not be made solely on the employee's behalf. An employee's venting or expression of a purely individual gripe is not protected.
- Employees are allowed to use the employer's name or logo in connection with protected online activity, such as communicating with fellow employees or the public about a labor dispute. The employer's proprietary interest in service marks, trademarks, or copyrighted name is not infringed by the employee's non-commercial use. The General Counsel indicated that commercial use would entail, for example, another entity selling inferior merchandise using the employer's trademark or any other use that would mislead the public as to the source of the product. Note that employees may not use the employer's logos or trademarks in otherwise prohibited contexts, such as disparaging the employer's product online.

Based on its Memorandum, the NLRB appears to be expanding its protection of employees who are disciplined for their online activities and more closely scrutinizing social media policies and work rules. At the same time, the NLRB's ultimate ruling in a particular case will depend on the specific facts and circumstances of that case. Therefore, a one-size-fits-all approach regarding employee discipline or work rules is not advisable.

The Memorandum reflects the NLRB's ongoing effort to develop legal standards that it believes are in step with the rapidly developing area of social media law. To facilitate that effort, the NLRB's Acting General Counsel, Lafe Solomon, requested that all regional offices forward relevant cases to the NLRB's Division of Advice in Washington, D.C. so that the agency can track them and develop a consistent approach.

It is anticipated that the NLRB will provide further guidance as novel social media issues arise. For example, the agency is yet to directly address the interplay between restrictions on employer surveillance and employees' rights to express themselves through social media. There are also lingering questions about just how specific a social media policy needs to be in order to be lawful. Pending and future cases will undoubtedly further clarify the NLRB's position, so we will be sure to provide substantive updates as they become available.

If you have any questions about the Memorandum, would like guidance regarding proposed disciplinary action arising out of an employee's social media activities, wish to develop a social media policy, or are concerned about whether your current policy is lawful, please do not hesitate to contact us.