Employment Law Advisor: Social Media Policies

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The use of social networking websites, blogs, and other online communications media ("Social Media") in the workplace is now commonplace. Whereas Social Media once was used by individuals for personal communications and networking, many businesses now maintain an official presence on popular social media sites, such as Facebook and LinkedIn, to attract employees and promote their goods and services to the broadest possible audience. Employees also now regularly stay connected with their friends and families throughout the workday by accessing Social Media on their work computers and smart phones — often freely expressing their opinions about their jobs, employers and managers.

The widespread use of Social Media in the workplace has created challenges and legal risk for employers, and has prompted them to adopt Social Media policies. In turn, the government has taken issue with some employers' attempts to regulate employee use of Social Media, citing privacy rights and federal labor law protections under the National Labor Relations Act (NLRA). This edition of the Employment Law Advisor discusses these developments and provides guidance to employers concerning best practices in this evolving area of employment law.

Why Have a Social Media Policy?

Employers face a variety of risks and claims from employee use of Social Media. Some examples include:

- loss of productivity from excessive personal use;
- increased exposure to claims for defamation, discrimination, sexual and other harassment, and hostile work environment arising from employee online posts;
- damage to the employer's business reputation, e.g., false statements about the employer's products, services, and business practices, or other inappropriate or unprofessional behavior that harms the company's reputation;
- unauthorized disclosure of trade secrets or confidential information;
- disclosure of information that violates federal or state regulations, such as Securities and Exchange Commission regulations;
- claims of improper advertising from product endorsements and testimonials by employees who do not disclose their relationship; and
- unofficial online recommendations of former employees by managers, whose postings may conflict with those of the company.

Employers also may face increased risks and claims from their employees' use of Social Media for business purposes. For example, employers who use social media to screen job applicants may expose themselves to claims of discriminatory hiring on the grounds that they based hiring decisions on information from an applicant's online profile that revealed membership in a protected class.

A carefully drafted Social Media policy can help guide employee online behavior by reminding them that their online activity should be consistent with their obligations under company policies. The single greatest benefit of a Social Media policy may be to remind employees that what they post online may be immediately and permanently available to millions of people and may negatively affect their employment. Employers should consider having a separate set of Social Media Management Guidelines that addresses use of Social Media for business purposes, such are recruiting.

What Should a Social Media Policy Include?

A well-written Social Media policy will recognize that employees' use of social media is a fact of life, and be advisory rather than heavy-handed in tone. Typically, Social Media policies advise employees:

- that Social Media includes all means of communicating or posting information or content of any sort on the Internet, whether or not associated or affiliated with the employer;
- that they are subject to the same principles and guidelines found in other employer policies;
- that they are responsible for their online conduct, and that any conduct that adversely affects their job performance, the performance of co-workers, or the employer's legitimate business interests may result in disciplinary action;
- that discriminatory remarks, harassment, threats of violence or similar inappropriate or unlawful conduct will not be tolerated and they are not to post material that is malicious, obscene, threatening or intimidating, or bullying, such as offensive posts meant to intentionally harm someone's reputation;
- to be honest and accurate when posting information or news, to correct mistakes quickly, and never to post any information or rumors the employee knows to be false;
- to respect financial disclosure and copyright laws;
- to maintain the confidentiality of employer trade secrets and appropriately defined confidential information; and
- not to represent themselves as a spokesperson for the company and to make clear that their personal opinions are their own.

Specific examples of behavior that violates the policy should be included for each prohibition so that the policy does not conflict with current guidance from the National Labor Relations Board's acting general counsel (NLRB), which apply to both union and non-union employees alike.

What Are the Current Limits On Social Media Policies?

An employer's Social Media policy may subject the employer to a charge that it violates the NLRA unless it is drafted carefully and narrowly. In the past year, the NLRB has issued three reports concerning the legality of language contained in employers' social media policies. It is important to note that the reports have been issued by the NLRB's acting general counsel and are not binding on the NLRB or any court. But the reports have provided employers with guidance as to what provisions may violate the NLRA. The most recent NLRB report, which can be found at:
http://www.nlrb.gov/news/acting-general-counsel-releases-report-employer-social-media-policies, includes an entire social media policy the NLRB has found to be lawful.

Broad Policies May Result in NLRB Charges

The acting general counsel of the NLRB has opined that if an employer's social media policy is not

narrowly and clearly drafted, it could "tend to chill employees" in the exercise of "concerted activities for the purpose of collective bargaining or other mutual aid or protection…" Generally, policies that may be read to prohibit discussion of wages or working conditions among employees likely will be found to violate the NLRB's current guidance. Examples of such policies include general prohibitions against making disparaging comments about the company or criticizing compensation and benefits. An overbroad policy will not be found lawful if it includes a "savings clause" stating that nothing in the policy is meant to interfere with any NLRA rights.

Narrow Policies are Preferable

The latest NLRB report makes clear that narrowly-drafted policies are lawful. For example, prohibitions against the use of social media to make obscene, threatening, intimidating, harassing statements are not overbroad, since they still permit an employee to discuss working conditions in a non-obscene and non-harassing manner. Similarly, requiring employees to maintain the confidentiality of the employer's trade secrets and private and confidential information is not unlawful if the policy provides examples of such information so that employees understand that it does not reach protected communications about working conditions.

Given the potential risks to employers from unfettered Social Media use in the workplace on the one hand, and from charges that an overly restrictive Social Media policy violates the NLRA on the other, employers should carefully consider their social media policies. For assistance in doing so, and for any questions relating to these issues, please contact a member of our Employment Law Group.