



Best Practices in Social Media for Employers Part 2 – Monitoring Employees’ Social Media Use

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The National Labor Relations Board (NLRB or the “Board”) is the government agency charged with enforcement of the NLRA. A common misperception is that the Board can only exercise jurisdiction over employers with unionized workforces. However, the Board actually has jurisdiction over most private employers, regardless of whether a union presence exists at their worksite.

Following a decline in private sector union membership over the past few decades, the NLRB in recent years has capitalized on the exponential increase in social media use as grounds to inject itself into nonunionized workplaces. Social media receives extensive media attention, and thus provides a platform to capture the attention of nonunionized private sector employees. In accordance with this initiative, the Board has opined on employers’ social media (and other standard workplace) policies where it believes those policies infringe on employees’ rights to engage in concerted activities for mutual aid or protection.

The NLRB has held that various standard prohibitions in employers’ social media policies and employee handbooks violate the NLRA, including:

- overbroad definitions of what constitutes “confidential information,” which may not be disseminated by employees on social media platforms
- prohibiting employees from contacting or commenting to the media, or commenting on social media, about their employer or co-workers
- discouraging employees from posting “inappropriate,” “disparaging,” or “negative” comments about their employer or co-workers

- requiring employees to only post “respectful” comments
- blanket prohibitions against employees using the company’s logo
- requiring employees to include disclaimers stating that their comments or posts do not reflect the views of their employer.

The above prohibitions are generally found to violate the NLRA because, in the NLRB’s view, they can reasonably be interpreted by employees as prohibiting them from discussing their terms and conditions of employment. For example, if an employer’s definition of “confidential information” includes personnel information, and the employer’s policy prohibits employees from sharing confidential information on social media, employees could construe this as prohibiting them from discussing their wages with colleagues, which is permissible activity under the NLRA. Additionally, prohibiting employees from posting “inappropriate,” “disparaging,” or “negative” comments, or otherwise requiring employees to post “respectful” comments, could be viewed by employees as prohibiting them from discussing a conflict with a supervisor or complaining about a workplace policy, which is conduct protected by the NLRA.

If an employer’s social media policy violates any of the above broad prohibitions, broad disclaimers, such as, e.g., “in the event state or federal law precludes this policy, then it is of no force or effect,” will not cure the violation, and the policy will be deemed unlawful by the NLRB.

In light of the above, we recommend employers carefully consider business needs and required compliance with other laws and regulatory schemes when drafting a social media policy. In some situations, it may be best to refrain from implementing a policy specific to social media, as the issues covered can be best addressed in other policies or in a compliance manual. If the decision is made to put a social media policy in place, we suggest the following best practices:

- Avoid blanket prohibitions on the types of information employees may post, and kinds of conduct in which employees may engage, on social media.
- Use specific and targeted examples to demonstrate the types of information and kinds of conduct that are prohibited when using social media.
- Clarify otherwise ambiguous language that may be construed by employees as infringing on their rights to engage in concerted activity.

Review other handbook policies, such as confidential information, information technology, and code of conduct policies, to ensure that definitions used in those sections, which may be referenced in a social media policy, are not overbroad in violation of the NLRA.

Categories

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