Social Media Policies Can Run Afoul of the National Labor Relations Act

The General Counsel of the National Labor Relations Board recently issued a report concerning social media cases. The General Counsel is the head of the prosecutorial arm of the Board. General Counsel decisions are followed by unfair labor practice complaints which either result in settlements or hearings before administrative law judges and, ultimately, Board decisions. In the report, the General Counsel details a number of cases in which he concluded, as an initial matter, that an employer's social media policies violated the National Labor Relations Act.

These cases included social media policies which contained the following language:

- Prohibitions against employees posting pictures of themselves in the media, including the internet, which depict the company in any way, including a company uniform, logo, product, brand, or store;
- Prohibitions against employees making disparaging comments when discussing the company or employees' supervisors, co-workers, and/or competitors;
- Prohibitions against use of language or action that is inappropriate or of a generally offensive nature and rude or discourteous behavior to clients or co-workers;
- Prohibitions against revealing confidential or proprietary information about the company or engaging in inappropriate discussions about the company, management and/or co-workers;
- Prohibitions against use of any social media that may violate, compromise or disregard the rights and reasonable expectations as to privacy or confidentiality of any person or entity;
- Prohibitions against any communication or post that constitutes embarrassment, harassment or defamation of company, or any company employee, officer, board member, representative or staff member;
- Prohibitions against statements that lack truthfulness or that might damage the reputation or goodwill of the company, its staff or employees;
- Prohibitions against talking about company business on personal accounts;
- Prohibitions against posting anything that employee would not want his manager or supervisor to see or that would put the employee's job in jeopardy;
- Prohibitions against the disclosure of inappropriate or sensitive information about the company;
- Prohibitions against the posting of any pictures or comments involving the company or its employees that could be construed as inappropriate;
- Prohibitions against employees revealing personal information about co-workers, clients, partners, or customers without their consent.

Generally, the General Counsel concluded that these above-stated policies were overbroad and could reasonably be interpreted as restraining activity protected by Section 7 of the National Labor Relations Act. Section 7 protected activities normally include discussions among co-workers about a company's labor policies, how a company treats its employees, and about the employees' wages, benefits and other terms and conditions of employment. The General Counsel concluded that these social media policies failed to include sufficient limiting language from which an employee could conclude that they did not apply to Section 7 protected activity. With regard to the posting of pictures depicting the company or its logo, the General Counsel noted that pursuant to such a policy, an employee could not post a picture of an employee carrying a picket sign depicting the company name or could not wear a t-shirt portraying a company logo while protesting terms and conditions of employment.

These cases, as summarized in the General Counsel report, demonstrate how careful an employer, even a non-union employer, must be when drafting social media and other policies. It is always important to have these policies reviewed by labor and employment counsel before putting them into

effect.

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