

LEGISLATIVE BRIEF

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NLRB Guidelines for Acceptable Social Media Policies

The adoption of social media as a communication forum has greatly enabled organizations to reach end users and establish an online presence in our communities. However, maintaining a reputable presence is not an easy task in cyber space, especially due to employee participation in social media, which has attracted the attention of employers and governmental organizations.

On one hand, employers are concerned about how their employees' comments may affect their reputation and morale at the workplace. On the other hand, governmental organizations—such as the National Labor Relations Board (NLRB) and the Federal Communications Commission (FCC)—as well as state legislatures have been paying close attention to identify possible violations of employee privacy and protected activity rights.

CURRENT SOCIAL MEDIA LAWS

For some time now, employers have been screening applicants' social media involvement to assess their character and fitness for employment. However, recent news coverage has alerted the public of employers that have gone as far as requesting an applicant's username and password to logon to a social media profile. This practice has been condemned by many, and has even led companies like Facebook and Google to threaten lawsuits against those who request username and password disclosures. State legislatures have also reacted to this phenomenon by passing and proposing legislation to prohibit this practice.

Despite the recent attention, there are still not that many laws or court decisions that address employers' attempts to monitor and manage its employees' participation in social media forums. However, the NLRB has recently published a [set of guidelines](#) to help employers develop policies that protect employee rights under the National Labor Relations Act (NLRA). These guidelines are the result of an analysis of specific social media employer policies reviewed by the NLRB.

PROTECTED CONCERTED ACTIVITIES

Employee participation in social media may be protected under section seven of the NLRA, even for non-unionized employees. Section seven of the NLRA gives employees the right to form unions and to engage in protected concerted activities. Employees engage in protected concerted activities when they act for their mutual aid and protection regarding their terms and conditions of employment.

The key to determine whether an employee has engaged in protected concerted activity is whether the employee was acting for the benefit, or on behalf, of others and not solely for his or her personal interest. Employees do not need to formally agree to act as a group or designate a representative to participate in concerted activities. Concerted activities can include spontaneous, non-eventful actions such as a discussion of working conditions and wages or questioning a supervisor on a company policy. In that sense, the NLRA protects any employee who:

- Addresses group concerns with an employer;
- Forms, joins or helps a labor organization;
- Initiates, induces or prepares for group action; or
- Speaks on behalf of or represents other employees.



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PROTECTED CONCERTED ACTIVITY IN SOCIAL MEDIA

The line between personal interest and acting on behalf of others is blurry, and social media participation has only made the distinction more difficult. It is still unclear whether “friending” a co-worker is enough to establish a group or whether commenting on or “liking” a teammate’s post is sufficient to establish a group discussion. Instead of wrestling with these particular issues, the NLRB has taken the position that if an employer’s social media policy can be reasonably interpreted to include concerted activity, the policy violates the NLRA.

The NLRB’s position is that broad, vague and ambiguous employer policies can violate an employee’s right to protected concerted activity because employees may believe that they are prohibited from participating in protected activities. In addition, the NLRB disapproves of policies that inhibit or intimidate employees from participating in protected concerted activities by expressly discouraging a protected practice, or threatening sanctions or disciplinary actions against those who participate in these activities. The NLRB also states that policies should not be adopted in response to previous concerted activities.

However, the NLRA does not protect activities that are outrageously disgraceful or shameful conduct or reckless or maliciously untrue communications.

UNLAWFUL SOCIAL MEDIA POLICIES

In its analysis, the NLRB condemns any policy that is too vague or ambiguous. These policies, in the NLRB’s opinion, do not provide sufficient context, do not limit their scope and, as a result, overreach into areas protected by law. The NLRB also concluded that including a “savings” clause—stating that the policies must be interpreted in harmony with the NLRA—is not sufficient to limit a policy’s reach into protected activity. Some examples of vague and overreaching policies include policies that:

- Discourage employee participation in social media by threatening sanctions and policies against those that post disparaging or defamatory remarks regarding the employer;
- Encourage employees to not “friend” or reach out to one another using social media because they would stifle employee communications or possible efforts to initiate concerted activity;
- Prevent employees from releasing confidential information because they can be interpreted to restrict the discussion of conditions and terms of employment, unless the employer provides a narrow definition for what constitutes confidential information. This includes policies restricting the release of corporate financial information because such information can include data employees could use to negotiate improved terms and conditions of employment;
- Prohibit employees from contacting or answering to the media or governmental organizations because this could interfere with a legitimate investigation of employment terms and conditions;
- Require employees to obtain authorization before discussing employer information in social media because they can inhibit employee discussion of conditions and terms of employment. These provisions also extend to a discussion of legal matters because this could be reasonably interpreted to include the discussion of potential claims employees may have against their employers;
- Require employees to obtain permission before quoting other employees or posting their image in social media outlets because it could be interpreted to include a restriction of posting the image of an individual working in substandard conditions to raise public awareness;
- Require employees to report on another employee’s social media activity because they would inhibit employee discussion of employment terms and conditions. This aspect is particularly troublesome in cases where the employer is asking employees to either disclose their logon information to social media applications or to monitor social media forums in behalf of the employer; and

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- Require employees to report or ignore unsolicited communications because they can be reasonably interpreted to include an employee's unsolicited request to other employees to participate in protected activity.

ACCEPTABLE SOCIAL MEDIA POLICIES

The NLRB's analysis also provided several suggestions to employers that are looking to adopt or update their social media policies. The NLRB recommends that employers should limit the scope of their policies and include clear definitions of their policy terms to avoid ambiguity and misinterpretation. The NLRB also suggests that when employers include examples of both prohibited and acceptable practices, they can create a context for the reasonable interpretation of the policy and show how the employer's policy harmonizes with labor practices and regulations.

For example, the NLRB found that adopting a no-retaliation policy for employees that choose to report inappropriate social media activities is lawful because it does not impose a duty on employees to report social media activities but encourages employees to speak up, and this could improve employee discussion of working conditions because employees would feel that they could start a grievance procedure in safety.

In another instance, the NLRB found acceptable a policy stating that discriminatory remarks, harassment, bullying, threats of violence and similar inappropriate behavior that is not tolerated in the workplace is not acceptable in social media. The NLRB considered that this type of policy was a natural extension of compliance with acceptable labor practices, provided sufficient context and was sufficiently defined so that an employee would not reasonable interpret the policy to overreach into protected concerted activity.

Other acceptable social media policies include statements that:

- Forbid employees from impersonating the employer, making statements in behalf of the employer without authorization, or making statements that can be construed as establishing the employer's official position or policy is on any particular issue;
- Encourage employees to resolve workplace grievances internally with an invitation to refrain from posting comments and materials that could be viewed as malicious, obscene, threatening , intimidating or that could create a hostile environment on the basis of race, sex, disability, religion or any other status protected by law if they choose to address their grievance using social media;
- Request that employees do not disclose trade secrets, publish internal reports, provide tips based on inside information or participate in other activities that may be considered insider trading; and
- Restrict employees from accessing or using social media for personal purposes during company time with company equipment, unless they have secured prior authorization to do so.

REACTIONS TO NLRB GUIDELINES

Although the NLRB has issued some guidelines on acceptable social media policies, the reaction to this initiative has been mixed. While employers are grateful to have a list of "do's and don'ts", many question whether in its zeal to categorize employer policies as overreaching, the NLRB has issued an analysis of what could be reasonably interpreted as including protected concerted activity. Indeed, some believe that the NLRB may be trying to create relevance in a labor market where the power of unions is waning.

Yet, employers would do well to understand the reasoning behind the NLRB's analysis and may want to review their social media policies to avoid coming into conflict with the NLRB.