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Lawful Social Media Policy: NLRB Finally Provides an Example

In July 2011, a Walmart greeter, who listed Walmart as his employer on his Facebook page, made the following posts on his Facebook wall:

> The government needs to step in and set a limit on how many kids people are allowed to have based on their income. If you can't afford to feed them you shouldn't be allowed to have them. ... Our population needs to be controlled! In my neck of the woods when the whitetail deer get to be too numerous we thin them out! ... Just go to your nearest big box store and start picking them off. ... We cater too much to the handicapped nowadays! Hell, if you can't walk, why don't you stay the f**k home!!!!

Shortly thereafter, a customer read the posts and contacted Walmart to complain that she found the comments so frightening that she did not think she could return to the store. The customer also characterized the comments as "beyond disturbing," considering a fatal shooting that occurred approximately a year before in the same store.

Walmart promptly investigated the incident and terminated the greeter's employment. The greeter then challenged his termination under the National Labor Relations Act (NLRA), alleging that his Facebook posts were protected "concerted activity."

Protected Activity?

Upon review, the National Labor Relations Board (NLRB) concluded that, because the greeter's comments did not address his working conditions or arise out of a concern about his working conditions, his Facebook posts were not protected concerted activity; rather the greeter was "just running off at the mouth," which did not implicate the NLRA.

The story, however, did not end there. Despite the fact that Walmart engaged in no wrongdoing in terminating an employee who made disturbing posts about its customers on his Facebook page, the NLRB used the greeter's challenge to his termination as an opportunity to closely scrutinize Walmart's social media use policy. Walmart Advice Memorandum, Case 11-CA-067171 (May 30, 2012).

While the board spent many years primarily applying the NLRA to union campaigns and union workplaces, likely because of the significant decline in union membership nationwide, the board has a renewed focus on the application of the NLRA against nonunion employers generally. This renewed focus is illustrated both by a brand-new website warning nonunion employers that the NLRA does indeed apply to them and their employees and the board's continued interest in employer social media policies.

In fact, the board's acting general counsel (AGC) just released its third report in the past year addressing employer social media polices. The first two reports both provided guidance on whether employee social media use constituted protected "concerted activity" or unprotected "individual griping," and examples of unlawfully overbroad employer policies. The new report provides the board's most detailed guidance to date on crafting lawful social media policies. Of particular note is a new directive that an employer must include specific examples of illegal or unprotected conduct in its policy to prevent the policy from being unlawfully overbroad under the NLRA. Report of Acting Gen. Counsel Concerning Social Media Cases, OM 12- 59 (May 30, 2012).

Statutory Background

As background, Section 7 of the NLRA provides all employees a right to engage in concerted activity for mutual aid and protection, which may—but does not necessarily—include collective bargaining. Section 8(a)(1) of the NLRA provides that it is an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed under Section 7 of the act. An employer violates Section 8(a)(1) by imposing a work rule that "would unreasonably tend to chill employees in the exercise of their Section 7 rights."

Employer social media policies may violate the NLRA if they either explicitly restrict Section 7 activities, such as discussing wages, benefits, or working conditions, or if they are so broad that an employee would reasonably interpret the policy as prohibiting the discussion of such issues. The AGC, in its new report, now clarifies its prior guidance on social media policies and warns employers to avoid policies containing broad language that could be interpreted as prohibiting protected activity. In doing so, the AGC summarizes seven recent NLRB decisions, six of which involved policy language that was "unlawfully broad" under the NLRA. Perhaps more importantly, however, it also includes an example of a lawful policy.

The Walmart decision is significant, not only because it upheld Walmart's termination of an employee who made inappropriate Facebook com-

ments, but also because it is the only case addressed in the AGC Report in which the Board found an employer's social media policy entirely lawful under the NLRA.

Unlawful Policy Language

The third AGC Report provides new tips for crafting and revising social media policies, and establishes that the primary distinguishing factor between lawful and unlawful policies is the extent to which employers use examples or context to assure that employees will not "reasonably construe" policies to limit the exercise of their Section 7 rights.

For example, unlawfully broad policies include language that:

- Encourages employees "to resolve concerns about work by speaking with coworkers, supervisors, or managers" because such a rule would have the likely effect of inhibiting or precluding employees from the protected activity of seeking redress through alternative means;
- Directs employees to not communicate and/or release confidential customer, employee, or company information because such a rule would reasonably be interpreted as to prohibit employees from sharing information regarding their own working conditions and the working conditions of their co-workers;
- Prohibits employees from making "disparaging or defamatory comments" about the company, its customers, or its employees because such a rule would be reasonably construed to prohibit protected criticism of the employer's treatment of employees and labor policies;
- Warns employees to post only completely accurate and not misleading information because such a rule would be reasonably construed to apply to criticism of policies or working conditions that would be protected so long as the criticism is not maliciously false;
- Prohibits employees from disclosing personal information about co-workers, including performance, compensation, or status in the company, because such a rule specifically includes topics related to Section 7 activities and, as a result, employees would reasonably construe the policy as precluding the discussion between themselves and with nonemployees of terms and conditions of their employment;
- Tells employees to communicate in a professional tone and avoid inflammatory or objectionable topics, like politics or religion, because such a rule warns employees against engaging in heated or controversial discussions and discussions about working conditions or unionism could be as heated or controversial as discussions about politics or religion; or
- Instructs employees "to think carefully about 'friending' co-workers" because such a rule plainly discourages communication among coworkers and would necessarily interfere with Section 7 activity.

Lawful Policy Language

Although Walmart's social media policy was closely scrutinized as a result of its former employee's threatening Facebook posts and subsequent challenge to his termination, the NLRB ultimately approved Walmart's policy language and the AGC attached the policy to its new report for the benefit of other employers. For example, following the Walmart decision, employers can prohibit "inappropriate postings," so long the policy provides clear descriptions of what constitutes "inappropriate postings," such as harassing or discriminatory comments, threats of violence, and similar inappropriate or unlawful conduct.

Employers may also direct employees to be respectful, fair, and courteous in online posts, but only if they explain in detail that obscene, malicious, threatening, or intimidating communications are disrespectful, unfair, or not courteous. Prohibited posts may include "bullying and harassment" if the employer explains that such posts are meant to harm a person's reputation or create a hostile work environment.

Moreover, employers may require employees to maintain the confidentiality of the employer's trade secrets and other private and confidential information, if the rule provides sufficient examples of the prohibited disclosures, such as listing out protected information like information related to the development of confidential processes, systems, products, or technologies, or internal procedures or reports.

An employer may also bar employees from representing that any online opinion or statement is the policy or view of the employer (without specific authorization to do so) because, although an employee has a protected right to express his or her opinion regarding working conditions, an employer has a legitimate need to protect itself from false and unauthorized postings.

In the end, the AGC's third report provides new guidance to employers in drafting social media policies. Policy prohibitions that contain no limiting language or context to clarify that they do not impede employee Section 7 rights are unlawful. In contrast, policies that include specific examples of clearly illegal or unprotected conduct are lawful because they could not be reasonably construed to prohibit concerted activity. **TFL**

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