

# Questions—And Answers

## ***Crafting a Social-Media Policy You Can “Like”***

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As social media changes and develops, so must employers' responses to it. Each new platform provides unique ways for users to communicate with one another and the outside world. However, employees may also use social media to communicate negative statements about their jobs, leaving employers to strike a difficult balance between an employee's right to free speech and the potential for damage to the business. Employers attempting to protect their interests from employee social-media activity through employer policies must be mindful of employee protections enforced by the National Labor Relations Board (NLRB) and afforded under Section 7 of the National Labor Relations Act. Recent decisions by the NLRB concerning appropriate social-media policies have left many employers unsure of how to draft or implement workplace social-media policies that are both lawful and effective. This Q&A addresses recent developments in the law concerning social-media policies, discusses possible actions that employers can take to improve those policies, and cautions against including social-media-policy provisions that might run afoul of Section 7.

### **WHY IS SECTION 7 IMPORTANT TO EMPLOYER SOCIAL-MEDIA POLICIES?**

Section 7 had historically been applied in the traditional labor-law context, but the NLRB has also recently and frequently applied it to the propriety of social-media policies used by employers without unionized employees. Section 7 states that “employees shall have the right ... to engage in ... concerted activities for the purpose of collective bargaining or other mutual aid or protection.”<sup>1</sup> Interfering with, restraining, or coercing

employees in the exercise of their rights under Section 7 is characterized as an “unfair labor practice,” which is punishable by fine or mandatory workplace postings stating that an employer has violated Section 7.<sup>2</sup>

Section 7 has become highly relevant to employer social-media policies, whether or not employees are organized, as a result of the NLRB’s increased willingness to construe online work-related speech as “concerted activity.” When employees communicate online about working conditions, their communications will often be protected. The NLRB has successfully used Section 7 to protect a wide variety of employee social-media speech, even where the speech is objectively offensive, disparaging, or profane. Recent employee social-media activity that the NLRB has protected as “concerted activity” under Section 7 includes:

- ❑ “Liking” a Facebook comment that called the employer a “shady little man” and accusing him of “pocket[ing] money from employee paychecks.”<sup>3</sup>
- ❑ Commenting on Facebook that an employer had improperly misclassified employees on tax returns and calling the owner an expletive.<sup>4</sup>
- ❑ Posting on Facebook during a union election that “Bob [supervisor] is such a NASTY M--- F--- don’t know how to talk to people!!!! F--- his mother and his entire f--- family!!!! What a LOSER!!!! Vote YES for the UNION!!!!”<sup>5</sup>

The reach of Section 7 is not unlimited, however. Employee speech will lose Section 7 protection where it is “disloyal or defamatory,” where it is made “with knowledge of [the statement’s] falsity, or with reckless disregard of whether [the statement is] true or false,” or if it “amounts to criticisms disconnected from any ongoing labor dispute.”<sup>6</sup> In the following instances, the NLRB has determined that the employee’s social-media activity was unprotected, and validated the employer’s decision to discipline or terminate the employee:

- ❑ A car salesman criticizing on Facebook a sales event thrown by his employer during the course of the event<sup>7</sup>;
- ❑ A Wal-Mart greeter who posted on his Facebook wall the following comments: “Our population needs to be controlled! In my neck of the woods when the whitetail deer get to be numerous we thin them out! ... Just go to your nearest big box store and start picking them off.”<sup>8</sup>

A clear understanding of Section 7 is critical for employers seeking to implement an enforceable social-media policy that will not infringe

on employee's "concerted activity." A social-media policy is "unlawfully overbroad when employees would reasonably interpret it to encompass protected activities."<sup>9</sup> Each time the NLRB interprets an employer's social-media policy, the contours of what constitute "overbroad" and "protected activity" shift. However, some general lessons can be learned from the board's recent decisions on the topic.

### **CAN AN EMPLOYER PROHIBIT ITS EMPLOYEES FROM POSTING NEGATIVE THINGS ABOUT THE EMPLOYER'S BUSINESS ON SOCIAL MEDIA?**

Probably not. The NLRB has held that policies generally banning disparaging comments about an employer are unlawfully overbroad.<sup>10</sup> In addition, antidisparagement clauses that are ambiguous are more likely to be rejected by the NLRB as unlawful. However, employers are not left without recourse when an employee's social-media activity threatens brand or reputational damage. The keys to an effective antidisparagement clause in a social-media policy are its clarity, specificity, and lay terms, so as to avoid even the hint of infringement on Section 7 rights.

Indeed, at least one social-media policy with a carefully circumscribed antidisparagement policy has been upheld by the NLRB. In *Landry's, Inc.*, the board approved a policy that "urge[d] all employees not to post information regarding the Company, their jobs, or other employees which could lead to morale issues in the workplace or detrimentally affect the Company's business," specifically advising employees to "always think before you post, [be] civil to others and their opinions, and not post personal information about others unless you have received their permission."<sup>11</sup> The NLRB's approval of the clause resulted from the policy's focus on the specific goal of avoiding "morale issues" and provided examples that made it clear that the employer was not trying to prohibit employee posts on job-related matters.

### **CAN AN EMPLOYER TERMINATE AN EMPLOYEE IF A CUSTOMER CAN SEE THE EMPLOYEE'S DAMAGING SOCIAL-MEDIA POSTS?**

No. Whether customers can see a disparaging post on social media does not affect whether employee speech is protected under Section 7, particularly if the post is made while the employee is off duty.<sup>12</sup> For instance, in *Three D, LLC* (which was recently upheld by the United States Court of Appeals for the Second Circuit), the NLRB deemed protected an employee's disparaging comments about her employer on Facebook, even though the employer's customers saw – and even responded to—the post.<sup>13</sup>

## **CAN AN EMPLOYER PROHIBIT EMPLOYEES FROM USING ITS LOGO IN SOCIAL-MEDIA POSTS?**

Yes. Employers can prohibit employees from using an employer's logo or trademark if the use would infringe on the employer's intellectual property rights, but that prohibition must be clearly stated, with a lay definition of the types of logo uses that are not permitted.<sup>14</sup> Noncommercial use of an employer's logo or trademarks while engaging in Section 7 activities is permitted if it does not infringe on an employer's property interest.<sup>15</sup> In *Giant Food, LLC*, for example, the employer maintained a social-media policy prohibiting the use of the employer's logo online. A union representing employees protested this provision, as it would have prevented them from posting photographs of picket signs and leaflets featuring the logo on social-media accounts. The NLRB determined that the employer's policy was overbroad, because it would have prevented the union from using the logo on materials linked to the lawful exercise of Section 7 rights.<sup>16</sup>

## **CAN AN EMPLOYER ASK ITS EMPLOYEES FOR SOCIAL-MEDIA-ACCOUNT PASSWORDS?**

It depends, but the general trend is to prohibit employer "social-media snooping." No current federal laws prohibit employers from accessing employee social-media accounts, but more than 20 states do, and bills on the issue are pending in several more.<sup>17</sup> In states where such "snooping" is prohibited, employers cannot request access to the personal social-media accounts of current or prospective employees.<sup>18</sup>

## **WHAT SHOULD AN EMPLOYER AVOID WHEN CRAFTING A SOCIAL-MEDIA POLICY?**

Much of the NLRB's guidance regarding social-media policies comes by way of rejected, rather than approved, policies. Social-media policies, or portions thereof, that the board has found unlawful include:

- ❑ Broad antidisparagement clauses without limitations or accompanying context, such as: "employees would be well advised to refrain from posting information or comments about the company, the company's clients, the company's employees, or employees' work that have not been approved"<sup>19</sup>; "You may not make disparaging or defamatory comments about [the company], its employees, officers, directors, vendors, customers, partners, or affiliates"<sup>20</sup>; or a prohibition against "engaging in inappropriate discussions about the company, management, and/or co-workers"<sup>21</sup>;

- ❑ A mandate that social-media posts be “completely accurate and not misleading”;
- ❑ Rules requiring employees to secure employer permission before engaging in protected activities on social media;
- ❑ A policy prohibiting all use of an employer’s logo or trademarks;
- ❑ Requirements that employees report the inappropriate social-media activities of others;
- ❑ A prohibition against using social media to contact traditional media or government agencies<sup>22</sup>;
- ❑ Rules prohibiting commenting on legal matters (but, prohibitions on divulging privileged information are acceptable);
- ❑ Language cautioning against “friending” coworkers;
- ❑ Broadly worded bans on the use of “improper tone” on social media.<sup>23</sup>

### **WHAT SHOULD AN EMPLOYER’S SOCIAL-MEDIA POLICY INCLUDE?**

An employer’s social-media policy should include clear descriptions of prohibited online behavior that avoids ambiguity and makes it clear to employees that they can discuss online working conditions. Employers should thus take steps to delineate the specific goals the policy is designed to achieve, or otherwise limit or provide context to broad restrictions. Even where prohibiting specifically described types of behavior is impractical, setting out the policy’s objectives makes it clear to employees that their Section 7 rights are not at risk. For example, the NLRB has upheld the following provisions contained in social media policies:

- ❑ Specific, carefully worded prohibitions against discussing secret, confidential, or privileged information;
- ❑ Language urging employees to respect copyright and other intellectual property laws;
- ❑ A prohibition against online harassment, bullying, discrimination, and retaliation;
- ❑ Restrictions on employees representing themselves as an employer’s spokesperson.<sup>24</sup>

These provisions are not exhaustive, and employers should examine the NLRB’s guidance on social-media policies to determine whether any additional clauses would be useful for a particular workforce. An employer would be well-advised to include in its social-media policy a statement that employee communications protected by Section 7 are excluded from any rules contained within the policy. The NLRB has specifically stated, however, that a clause to this effect will not “save” a policy that is otherwise

unlawful under Section 7, so all employers should, therefore, review existing policies without simply relying on a disclaimer.<sup>25</sup>

By carefully describing and clearly communicating social-media policies, employers can avoid many of the problematic policies that have plagued others in the past. All employers should be sure to closely monitor any and all developments in this field to ensure compliance in this critically important and rapidly developing area of the law.

## NOTES

1. National Labor Relations Act, 29 U.S.C. §§ 151-169 (2016).
2. *Id.*
3. *Three D, LLC*, 361 NLRB No. 31 (2014).
4. *Id.*
5. *Pier Sixty LLC*, 362 NLRB No. 59 (2015).
6. *Three D, LLC*, 361 NLRB No. 31 (2014).
7. *Karl Knauz Motors, Inc.*, 358 NLRB No. 164 (2012).
8. National Labor Relations Board, Advice Memorandum Case No. 11-CA-067171 (2012).
9. *Three D, LLC*, 361 NLRB No. 31 (2014).
10. See, e.g., *Chipotle Services LLC v. Pennsylvania Workers Organizing Committee*, Nos. 04-CA-147314 and 04-CA-149551 (March 14, 2016); *Hoot Winc, LLC and Ontario Wings, LLC d/b/a Hooters of Ontario Mills*, 363 NLRB No. 2 (2014) (NLRB held as overbroad and unenforceable under Section 7 policy prohibiting any social-media post that "negatively affects, or would tend to negatively affect, the employee's ability to perform his or her job, the company's reputation, or the smooth operation, goodwill or profitability of the Company's business"); *Professional Elec. Contrs. of Connecticut, Inc.*, Case No. 34-CA-071532 (June 4, 2014) (held as overbroad and unenforceable a policy prohibiting "using personal computers in any manner that may adversely affect company business interests or reputation"); *Laurus Tech. Inst.*, 360 NLRB No. 133 (2014) (held as overbroad a social-media policy prohibiting "negative or untrue or disparaging comments").
11. Case No. 32-CA-118213 (June 26, 2014).
12. *Three D, LLC*, 361 NLRB No. 31 (2014).
13. *Id.*
14. *Landry's, Inc.*, Case No. 32-CA-118213 (June 26, 2014).
15. National Labor Relations Board Office of the General Counsel, Report of the Acting General Counsel Concerning Social Media Cases (May 30, 2012), available at <https://www.nlr.gov/news-outreach/news-story/acting-general-counsel-releases-report-employer-social-media-policies>
16. NLRB Office of the General Counsel Advice Memorandum, Case Nos. 05-CA-064793, Case Nos. 05-CA-064794, Case Nos. 05-CA-064795 (Mar. 21, 2012).
17. Marina Riker, Hawaii bill would ban bosses from workers' personal accounts. *Washington Times* (Feb. 25, 2016), available at <http://www.washingtontimes.com/news/2016/feb/25/hawaii-bill-would-ban-bosses-from-workers-personal/>

18. *Id.*
19. *Lily Transp. Corp.*, Case CA-108618 (April 22, 2014).
20. *Dish Network Corp.*, 359 NLRB No. 108 (2012).
21. *Three D, LLC*, 361 NLRB No. 31 (2014).
22. *DirecTV U.S. DirecTV Holdings LLC*, 359 NLRB No. 54 (2013).
23. National Labor Relations Board Office of the General Counsel, Report of the Acting General Counsel Concerning Social Media Cases (May 30, 2012), available at <https://www.nlr.gov/news-outreach/news-story/acting-general-counsel-releases-report-employer-social-media-policies>
24. National Labor Relations Board Office of the General Counsel, Report of the Acting General Counsel Concerning Social Media Cases (May 30, 2012), available at <https://www.nlr.gov/news-outreach/news-story/acting-general-counsel-releases-report-employer-social-media-policies>
25. National Labor Relations Board Office of the General Counsel, Report of the Acting General Counsel Concerning Social Media Cases (May 30, 2012), available at <https://www.nlr.gov/news-outreach/news-story/acting-general-counsel-releases-report-employer-social-media-policies>

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