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Social Media Policies and the National Labor Relations Board: Partying Like It's 1939

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On May 30, 2012, the Acting General Counsel ("G.C.") for the National Labor Relations Board ("NLRB" or "Board") issued a new Operational Memorandum purporting to issue guidance on social media policies that it believes violate the Act. Memorandum OM 12-59, May 30, 2012. Unfortunately, most of the policies discussed in the Memorandum violated the Act. Indeed, the G.C.'s interpretation of the kinds of policies that violate the law is breathtaking in its scope. Key concerns like confidentiality, private, non-public data, defamation, disparagement, and employee-employer cooperation are all swept aside by a G.C. that assumes: (i) almost all policies are designed to hinder employees' Section 7 rights, and (ii) employees are too stupid to understand the reasonable intentions of the employer. The upshot, of course, is that employees are free to disparage customers and co-workers and disclose confidential, non-public information with relative impunity.

For example, the G.C. understands that a confidentiality policy prohibiting employees from releasing confidential guest, team member and company information on social websites violates the law. According to the G.C., this phrase "would reasonably be interpreted as prohibiting employees from discussing and disclosing information regarding their own conditions of employment, as well as the conditions of employment of employees other than themselves—activities that are clearly protected by Section 7." It found unlawful provisions that threaten employees with discharge or criminal prosecution for failing to report unauthorized access to or misuse of confidential information. According to the G.C., "those provisions would be construed as requiring employees to report a breach of the rules governing the communication of confidential information set forth above. Since we found those rules unlawful, the reporting requirement is likely unlawful." Thus has the G.C. instituted what appears to be a new "anti-snitch" doctrine.

In another case, the G.C. interpreted as illegal a social media policy that recommended that employees, among other things, "make sure that your posts are completely accurate and not misleading and that they do not reveal non-public company information on any public site." This recommendation for accuracy was deemed a violation of the law by the G.C. because it was "overbroad," and could reasonably be construed as prohibiting discussions about, or criticisms of, the employer's labor policies or its treatment of employees. For the same reason, the G.C. found the prohibition of offensive, demeaning, abusive or inappropriate remarks unlawful. Shockingly, he even decided that it was unlawful to prohibit employees from revealing non-public company information on public sites, such as, for example, private financial information.

Even policies asking employees not to pick fights is deemed objectionable by the Board. The policy in question stated, among other things:

. . . given the logic employed by the Board in these cases, it was hardly a leap to find illegal a clause that asked employees to resolve concerns by speaking directly with co-workers and supervisors.

> Adopt a friendly tone when engaging online. Don't pick fights. Social media is about conversations. When engaging with others online, adopt a warm and friendly tone that will encourage others to respond to your postings and join your conversation. Remember to communicate in a professional tone. ... This includes not only the obvious (no ethnic slurs, personal insults, obscenity, etc.) but also proper consideration of privacy and topics that may be considered objectionable or inflammatory—such as politics and religion. Don't make any comments about employer's customers, suppliers, or competitors that might be considered defamatory.

Somehow, the G.C. found even this innocuous provision to be a violation:

> First, in warning employees not to 'pick fights' and to avoid topics that might be considered objectionable or inflammatory—such as politics and religion, and reminding employees to communicate in a 'professional tone,' the overall thrust of this rule is to caution employees against online discussions that could become heated or controversial. Discussions about working conditions or unionism have the potential to become just as heated or controversial as discussions about politics and religion. Without further clarification of what is 'objectionable or inflammatory,' employees would reasonably construe this rule to prohibit robust but protected discussions about working conditions or unionism.

Of course, given the logic employed by the G.C. in these cases, it was hardly a leap to find illegal a clause that asked employees to resolve concerns by speaking directly with co-workers and supervisors. The clause in question was as follows:

> You are encouraged to resolve concerns about work by speaking with co-workers, supervisors, or managers. [Employer] believes that individuals are more likely to resolve concerns about work by speaking directly with co-workers, supervisors or other management-level personnel than by posting complaints on the Internet. [Employer] encourages employees and other contingent resources to consider using available internal resources, rather than social media or other online forums, to resolve these types of concerns.

This clause was deemed illegal because employees might read that clause and be discouraged from filing charges with the NLRB.

> We found that this rule encouraging employees 'to resolve concerns about work by speaking with co-workers, supervisors, or managers' is unlawful. An employer may reasonably suggest that employees try to work out concerns over working conditions through internal procedures. However, by telling employees that they should

> use internal resources rather than airing their grievances online, we found that this rule would have the probable effect of precluding or inhibiting employees from the protected activity of seeking redress through alternative forums.

Based on the Memorandum, an employer could reasonably assume that there is very little that it can or should say in a social media policy. That's not entirely true, however. There are some things that can and should be included in a policy. For example, an employer may prohibit employees from posting anything on the internet in the employer's name. As for confidentiality, the G.C. approved a statement that employees "maintain the confidentiality of employer trade secrets and private or confidential information. Trade secrets may include information regarding the development of systems, processes, products, know-how and technology. Do not post internal reports, policies, procedures or other internal business-related confidential communications." The employer may also require employees to respect financial disclosure laws when online and to not create a link from their blog or social networking site to an employer website without identifying himself or herself as an employer associate.

I can't decide whether the G.C.'s approach to social media policies betray a certain naiveté about the intelligence of employees and their motivations or a crass cynicism about employers, their intentions and the state of the modern workplace. In my opinion, the G.C.'s Memorandum reflects a desperate attempt to remain relevant among unrepresented, educated workers totally comfortable with the new virtual environment, trying to impose an early 20th century template onto a 21st century world. But in case no one in Washington has noticed, this isn't Jimmy Hoffa's workplace anymore. ■

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