FUNKHOUSER VEGOSEN LIEBMAN & DUNN LTD.

Legal Update

September 2012

NLRB Releases Controversial Report Critical of Common Employer Social Media Policies

By Jonathan Vegosen

The National Labor Relations Board (NLRB), through its Acting General Counsel Lafe Solomon, recently released its third Report on social media policies in the last year. The Report, which is not a binding regulation but states the NLRB's current enforcement policy, analyzes seven employer social media policies and concludes that parts of six of these policies violate the National Labor Relations Act (NLRA). The Report also includes the full text of the one social media policy that the NLRB found lawful in its entirety. As discussed below, many employers may find disturbing some of the Report's conclusions regarding common social media policy provisions, including those aimed at protecting intellectual property and confidential information. Nonetheless, the NLRB has already issued at least one Decision finding against an employer for reasons consistent with the positions taken in the Report.

The NLRB, which has initiated enforcement proceedings against various employers in recent years regarding their social media policies, uses a two-step inquiry to determine whether an employer's policies and rules regarding employees' use of social media would chill the exercise of rights protected by the NLRA, such as rights to discuss their terms of employment and working conditions with coworkers under Section 7 of the NLRA. First, if the rule explicitly restricts protected activities, then it is clearly unlawful. Second, if the rule does not explicitly restrict protected activities, then it may violate the NLRA if: (1) employees would reasonably construe the language to prohibit protected activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict protected activity.

The NLRB Report found unlawful ambiguous or overbroad social media policies that lack limiting language or clarification about their applicability to protected activities. Some of the provisions that the NLRB Report flagged as unlawful include:

- A prohibition against sharing confidential information with coworkers unless they need the information to do their jobs.
- A policy instructing employees to be sure that online posts are "completely accurate and not misleading" and do not reveal non-public company information.
- A rule requiring employees to secure permission from an employer if in doubt about whether disclosure of information falls into a prohibited category.
- A prohibition against using the employer's logos and trademarks.
- A rule requiring employees to get permission before reusing others' content or images.
- A policy stating that "offensive, demeaning, abusive or inappropriate remarks are as out of place online as they are offline."
- A warning to "think carefully" about friending co-workers on social media sites.

FVLD®

- A policy to report any unusual or inappropriate internal social media activity.
- A prohibition on employees commenting on any legal matters.
- A warning not to pick fights online and to avoid objectionable or inflammatory topics.
- A policy directing employees to use internal resources rather than airing grievances online.

Some of the NLRB positions are surprising and disturbing. For example, many employers have trade secrets and other confidential and proprietary information. Often such information is restricted to a small group of employees, and for good reason. Yet, the NLRB has flagged as unlawful a social media policy prohibiting the sharing of confidential or proprietary information with coworkers unless they need the information to do their jobs. Likewise, doctors and lawyers owe confidentiality obligations to their patients and clients. Moreover, employers have confidentiality obligations concerning their employees when it comes to laws like the Americans with Disabilities Act. Nevertheless, these important obligations are threatened by the breadth of the NLRB's pronouncements. Federal law gives companies rights to limit the use of logos and trademarks by third parties. Yet, the NLRB would deny a company this right when a company employee uses his employer's logo or trademark for "non-commercial use" in connection with protected activities. These issues will inevitably be litigated if the NLRB persists in its sweeping restriction of social media policies. It will be interesting to see how the courts deal with these issues.

Many employers also have well-meaning policies encouraging employees to conduct themselves civilly in online interactions with the employer and with each other. In a recent decision, however, the NLRB found that Costco Wholesale Corp.'s social media policy violated the NLRA. The policy provided that employees who posted statements "electronically (such as [to] online message boards or discussion groups) that damage the Company, defame any individual or damage any person's reputation, or violate the policies outlined in the Costco Employee Agreement may be subject to discipline, up to and including termination of employment." The NLRB determined that the provision was unlawful because it could be reasonably construed to prohibit "protected concerted activities protesting the [employer's] treatment of its employees." The NLRB noted that there "is nothing in the rule that even arguably suggests that protected communications are excluded from the broad parameters of the rule."

The NLRB allows employers to require employees to expressly state that their social media postings are their own and do not represent the views of their employers. The Report states that disclaimer requirements may legitimately protect an employer's right to protect its products and services without chilling employees' ability to exercise their Section 7 rights. According to the Report, employers may not rely on a savings clause stating that their social media policy is not designed to interfere with activity protected by the NLRB, and the Report cautions that these types of savings clause do not cure overbroad or ambiguous policies. Specific language explaining the employers' intentions, rather than generic savings clauses, will be necessary to ensure that provisions similar to those regarding which the NLRB raised concerns do not run afoul of the NLRA.

In related news, Illinois has recently enacted a statute prohibiting employers from asking employees or job candidates for their social network account information to gain access to their accounts or profiles. The law will go into effect on January 1, 2013, and makes Illinois the second state, after Maryland, with such legislation. The law does not prevent employers from accessing information in the public domain.

FVLD®

It is important to note that the NLRB Report represents only the opinion of the NLRB Acting General Counsel and is not legally binding on employers. Courts (or the NLRB itself) may scale back the NLRB's restrictions in the future, although the aforementioned *Costco* case indicates that the agency is likely to act in accordance with the positions taken by its Acting General Counsel.

The NLRB disapproves many common policies that employers may have good basis to implement for reasons having nothing to do with any desire to restrict protected discussion. Given the NLRB's continued focus on social media as well as recent legislation protecting employees, however, employers should carefully review their social media policies and consult with counsel regarding policy language that accomplishes employers' legitimate goals while minimizing the risk of NLRB action. Furthermore, employers should consult counsel before disciplining employees pursuant to social media policies for conduct that the NLRA may protect.

Next month's Legal Update will cover additional important decisions from the NLRB affecting employers, including regarding employment-at-will disclaimers. Stay tuned.

FVLD publishes updates on legal issues and summaries of legal topics for its clients and friends. They are merely informational and do not constitute legal advice. We welcome comments or questions. If we can be of assistance, please call or write Jonathan Vegosen 312.701.6860 jvegosen@fvldlaw.com or your regular FVLD contact.

FVLD®