NLRB Taking Close Look At Photography Policies

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In February of 2009, a Wisconsin medical center fired several nurses after they electronically posted patient x-rays to their Facebook page, revealing the presence of a potentially embarrassing foreign object. As a result, the local sheriff's office investigated the medical center and ultimately referred the case to the FBI to determine whether any federal laws, such as the Health Insurance Portability and Accountability Act (HIPAA), had been violated.

This story illustrates just one of many dangers that the combination of workplace photography and social media can create for employers. Other employees have even posted videos and pictures of proprietary information, such as highly confidential business plans, as well as photos depicting unsafe working conditions on social networking sites.

It's no wonder employers want to implement policies to control this problem.

How The NLRB Views The Situation

In response, the NLRB has shown an increased tendency to scrutinize, and in many cases strike down, policies designed to restrict employee use of social media. The Board's reasoning is that employees would reasonably construe them as chilling their rights under Section 7 of the National Labor Relations Act (NLRA), which gives employees the right to band together for mutual aid and protection.

The NLRB has indicated that social-media policies prohibiting the taking of photos or video footage in the workplace will face similar scrutiny. A recent Advice Memorandum released by the agency addresses complaints filed by several unions against Giant Food LLC in late 2011 and early 2012. The unions asserted that the company's recently-implemented Social Media Guidelines policy was impermissibly vague and overbroad to the extent that it could be construed to chill the exercise of Section 7 rights in violation of the NLRA. The NLRB's Office of the General Counsel concluded that the policy, which prohibited taking pictures or video footage of the company's premises or products, did indeed, run afoul of Section 7.

The relevant portion of the policy prohibited employees from using any photographs or video of the company's premises, processes, operations, or products, which included confidential information owned by the company, unless the employee had received the company's prior written approval. The policy contained a savings clause advising employees that the Company would not apply it in a

manner that "improperly interferes with or limits employees' rights under any state or federal laws, including the National Labor Relations Act."

But even with that, the Office of the General Counsel believed that employees would reasonably interpret this prohibition as preventing them "from using social media to communicate and share information regarding Section 7 activities through pictures or videos, such as of employees engaged in picketing or other concerted activities." The Memorandum further indicated that, without limiting language, the term "confidential information" could be construed as encompassing information concerning terms and conditions of employment. Finally, the Memorandum confirmed that the savings clause alone did not cure the otherwise unlawful policy provisions.

Unfortunately, the Office of the General Counsel offered little guidance regarding those policies prohibiting workplace pictures and videos that pass muster, other than to note that, "rules that clarify and restrict their scope by including examples of clearly illegal or unprotected conduct, such that they could not reasonably be construed to cover protected activity are not unlawful." Giant Food ultimately settled the cases and withdrew the policy at issue.

While the position expressed in the Memorandum may seem surprising at first glance, it is consistent with other NLRB memorandums and opinions regarding social-media policies. If nothing else, it reinforces the Board's apparent objective to scrutinize written employment policies that purport to limit employee communications through social media and other means, particularly to the extent they contain blanket prohibitions with no limiting language or examples of prohibited conduct encompassed by the policy.

Tips For Drafting Lawful Policies

Despite the scarcity of case law in this area, many employers will understandably choose to implement and maintain policies limiting the taking of workplace photos and video footage in an effort to safeguard confidential or proprietary information, and to protect privacy interests. If your organization falls into that camp, there are several measures you can take to help ensure that your policy withstands scrutiny.

As an initial matter, you should include a savings clause making clear that the policy is not intended to prohibit or restrict Section 7 activity. As the Advice Memorandum makes clear, however, that alone will not cure otherwise vague and overbroad policies.

Consequently, you should also make every attempt to narrowly tailor policies prohibiting workplace photos and videos, for example, by limiting application to specified areas or subjects that may help to counter any allegations of vagueness or over breadth. Providing specific examples of conduct encompassed by the policy may also help combat any argument that employees are left to guess at what is prohibited, and whether the policy is designed to curtail Section 7 activity. While such steps don't guarantee the legality of such policies, they do provide a good starting point while awaiting further guidance from the NLRB as cases advance through the agency.

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