Insights, News & Events

EMPLOYERS BEWARE: THE NLRB IS EXPANDING EMPLOYEE RIGHTS BY DECLARING MANY TYPICAL WORKPLACE RULES UNLAWFUL

Publication
Oct 26, 2012

Ever since the National Labor Relations Act ("Act") was passed in 1935, employees have had the right to engage in "protected concerted activity" ("PCA") for their mutual aid and protection. These rights apply to employees regardless of whether they are represented by a union in their workplace. The scope of activities covered by these terms has been defined and evolved through many decisions of the National Labor Relations Board ("NLRB"), the Supreme Court of the United States and other federal courts.

Under President Obama, the NLRB has been very aggressive in further expanding employee rights to engage in PCA. This conclusion is supported by the NLRB's rulings or official guidelines with regard to social media, employment-at-will and off-duty access policies.

SOCIAL MEDIA AND RELATED POLICIES

No other policy area has received more attention by the NLRB than social media. The attention has arisen because social media is a relatively new technology, at least when compared to the history of the Act. Social media policies also cover a broad range of topics, such as confidential information, harassment, workplace violence, contact with third parties, the media or government agencies, and therefore may involve many different employee rights.

The NLRB's General Counsel issued three different papers setting forth guidelines concerning what employers may and may not say in social media policies. The length and scope

Related People

D. Albert Brannen
Partner
404.240.4235

of these guidelines gives a lot of insight into the current NLRB's view of employee rights.

POLICIES OR RULES DECLARED *UNLAWFUL*

By way of example, the last of the General Counsel's guidelines on social media, issued on May 30, 2012, declared the following rules or polices to be *unlawful*:

- Employees should not release confidential guest, team member or company information
- Employees should not share confidential information with coworkers unless they need the information to do their job
- Employees should not have discussions regarding confidential information in the break room, at home, or in open public places
- Employees should not "reveal non-public company information on any public sites"
- Employees should not post photos, music, videos and personal information of others without obtaining the owner's permission and must ensure that the content can be legally shared
- Employees should not use the employer's logos and trademarks for non-commercial purposes
- Employees should not make "offensive, demeaning, abusive or inappropriate remarks online"
- Employees should not make "disparaging or defamatory" comments
- Employees should not participate in activities that disparage or defame the company on company time.
- Employees should not disclose personal information about the employer, employees and contingent workers
- Employees should not post information regarding the employer that can be deemed "material, non-public information" or "confidential or proprietary"
- Employees should not comment on legal matters

- Employees should not “pick fights” and should avoid conflicts that might be considered objectionable or inflammatory, such as politics and religion
- Employees may not express their personal opinions to the public regarding “the workplace, work satisfaction, dissatisfaction, wages, hours or working conditions”
- Employees must report unauthorized access on issues of confidential information
- Employees must make sure that their postings are “completely accurate and not misleading and that they do not reveal non-public information on any public site”
- Employees must communicate in a “professional tone”
- Employees must “get permission for reusing others’ content or images”
- Employees should “resolve concerns about work by speaking with coworkers, supervisors or managers”
- Employees should “avoid harming the image and integrity of the company”
- Employees should report “unsolicited or inappropriate electronic communications”
- Employees should “report any unusual or inappropriate internal social media activities”
- Employees should “think carefully about friending coworkers”

POLICIES OR RULES DECLARED *LAWFUL*

In those same guidelines, the NLRB’s General Counsel ruled the following rules to be *lawful*:

- Employees should not post “any opinion or statement as the policy or view of the employer or any individual in that capacity as an employer otherwise on behalf of the employer.”
- Employees should not post “inappropriate postings that may include discriminatory remarks, harassment and threats of violence or similar inappropriate or unlawful conduct.”

- Develop a healthy suspicion. Don't let anyone trick you into disclosing confidential information. Be suspicious if asked to ignore identification procedures.
- Employees should not discuss information related to the "safety performance of the employer's systems or components or vehicles" and "secret, confidential or attorney-client privileged information."
- "Respect all copyright and all other intellectual property laws. For the employer's protection as well as your own, it is critical to show proper respect for the laws governing copyright, fair use of copyright material owned by others, trademarks and other intellectual property, including the employer's own copyrights, trademarks and brands."
- Employees should try to work out concerns over working conditions through internal procedures.
- Use your best judgment and exercise personal responsibility. Take responsibility as stewards of personal information to heart. Display integrity, accountability and respect of core employer values. As a company, we trust – and expect – you to exercise personal responsibility when you participate in social media or other online activities. Remember that there can be consequences for your actions in the social media world – both internally, if your comments violate our policies – and with outside individuals or entities. [It would be unlawful to state: if you are about to publish, respond or engage in something that makes you even the slightest bit uncomfortable, don't do it].
- "Harassment, bullying, discrimination or retaliation that is not permissible in the workplace is not permissible between coworkers online, even if it's done after hours, from home and on home computers."
- No unauthorized postings: Users may not post anything on the Internet or in the name of the employer or in a manner that can reasonably be attributed to the employer without prior written authorization from the president or the president's designated agent.
- Employees should expressly state that postings are "my own and do not represent my employer's positions, strategies, or opinions."

- Be “respectful and fair and courteous in the posting of comments, complaints, photographs, or videos”...[along with sufficient examples of plainly egregious conduct]... For example, do not post things that “could be viewed as malicious, obscene, threatening, or intimidating” or “harassment or bullying” and avoid “offensive posts meant to intentionally harm someone’s reputation” or posts that can contribute to a hostile work environment on the basis of “race, sex, disability, religion or any other status protected by law or company policy.”

- Employees should “maintain the confidentiality of the employer’s trade secrets;”

- Employees are prohibited from disclosing information regarding the development of systems, processes, products, know-how, technology, internal reports, procedures or other internal business-related communications. [The rule does need to communicate to employees that it does not reach protected communications about working conditions].

EMPLOYMENT AT-WILL POLICIES

Officials of the NLRB also declared key phrases in traditional employment-at-will policies to be unlawful in two cases filed in the Phoenix Region of the NLRB earlier this year. In one of those cases, the one that did not settle before trial, an Administrative Law Judge (“ALJ”) held that an employer’s requirement that an employee sign an acknowledgment that the employee’s at-will status “could not be amended, modified or altered in any way” was unlawful because “[c]learly such a clause would reasonably chill employees who were interested in exercising their Section 7 rights [to engage in PCA].”

Although untested, it is possible that the following language would address the language cited by the ALJ as unlawful and cure any defects: “The at-will nature of employment with [Employer Name] may be modified only if in writing, signed by you or your representative and an authorized Center representative.” This language leaves open the possibility that an employee could have a representative, including a union, “negotiate” for a better deal than simply at-will employment and should be held to be lawful.

OFF-DUTY ACCESS POLICIES

The NLRB also held a hotel chain's "no off-duty access" rule to be unlawful because the rule reserved the right to the employer to exercise its discretion to grant exceptions to its general rule that employees were not allowed to enter onto its property when they were not working." Under the rule of law applied by the NLRB, a no access rule is valid only if three conditions are met. The rule must (1) limit access solely with respect to the interior of the employer's premises and other working areas; (2) be clearly disseminated to all employees; and (3) apply to off-duty employees seeking access to the facility for any purpose and not just to those engaging in union activity.

Employers who want to ban employees from coming onto their property when they are not working will have to meet all three of these criteria. As result, lawful no-access rules will be harsher and cannot include any exceptions.

CONCLUSION

By its nature, the NLRB is prone to "policy oscillations" where its interpretations of the law may change with the political party in power at any given time. To some degree these fluctuations can be expected. However, the current NLRB seems to have taken a dramatic turn in the expansive way it views employee rights. Employers should be aware of these recent developments and should review their work rules and policies to make sure that they still comply with the law as viewed by the current NLRB. Specifically, employers should revise their social media, employment-at-will and no-access polices as soon as possible.

For more information on this subject, please contact the author via e-mail at dabrannen@fisherphillips.com or by phone at 404.240.4235.