Drafting Workplace Social Media Policies:
Protecting Employer Interests, Avoiding
NLRB Enforcement Action

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OVERVIEW OF THE NATIONAL LABOR RELATIONS ACT (NLRA)

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A wider lens on workplace law
Are You Ready To Navigate This Landscape?
The Law

A wider lens on workplace law
The NLRA

- §7 – “Employees shall have the right. . . to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection”

- §8(a)(1) – “It shall be an unfair labor practice for an employer to interfere with, restrain or coerce employees in the exercise of rights guaranteed in §7 of this act”
The NLRA

- Applies to almost all private sector employees
- Applies to ALL employees regardless of union membership status
- An activity is “concerted” if it is undertaken by two or more employees, or by one employee on behalf of others
  - This means that even if one employee is acting alone and the action could encourage others, that employee receives the protection of the act
- These protected communications between workers used to be face-to-face or over the phone
  - Think of two employees discussing working conditions around the water coolers
Big Concerns

- Thanks to the internet and social media, it is much easier for employees to complain “in concert.”
- Anti-employer rants on Facebook, Twitter, and personal blogs are not uncommon.
- “Why in the world can’t I fire an employee who calls me a ‘scumbag’ or an ‘as**ole’ on the internet?”
- BECAUSE it may be “protected concerted activity,” that’s why.
What Are Considered a Protected Topics?

- i.e. discussions of workload, wages, staffing issues, or treatment of employees by his/her supervisors.
- NOT Company’s trade secret or other proprietary information, client’s confidential information, or purely personal rants or individual gripes (i.e. an employee posted on Facebook while at work that “it was creepy being in a mental institution at night.”)
The Jefferson Standard applies where an employee has made allegedly disparaging comments about an employer or its products/services to public or third parties.

- the statement will be found to be protected where the communication is related to an ongoing labor dispute and it is not so disloyal, reckless, or maliciously untrue.

The Atlantic Steel applies to communications between employees and supervisors, and specifically focuses on whether the communications would disrupt or undermine discipline. In determining whether employee conduct is so “opprobrious” as to forfeit protections under the Act, consider the following:

- place of the discussion
- the subject matter of the discussion
- the nature of the outburst
- whether the outburst was provoked by employer’s unfair labor practice.
THE NLRB

RENAME
No
Longer
Reasonable
Board

TIME FOR FEEDBACK
NLRB

A wider lens on workplace law
What is the NLRB Looking For?
How Much Have You Learned?

- **Employee 1** writes: “Need a new job. I’m physically and mentally sickened.”

- **Employee 2** writes: “I’m unbelievably stressed out and I can’t believe NO ONE is doing anything about it! The way she treats us is NOT okay but no one cares because every time we try to solve conflicts NOTHING GETS DONE!!!”

- **Employee 1** then posts “Tomorrow I’m bringing a Florida Worker’s Rights book to work.”
How Much Have You Learned?

• In a private Facebook message among 9 employees to plan a party, Employee 1 implied that her supervisor should “back the freak off”, “I don’t bite my [tongue] anymore. . .FIRE ME. . .Make my day. . .”

• Two hours later, Employee 2 writes that the workplace was “annoying as hell” and “there’s always some dumb s*** going on”.

• No other comments were made
How Much Have You Learned?

“Offensive, demeaning, abusive or inappropriate remarks are as out of place online as they are offline, even if they are unintentional. We expect you to abide by the same standards of behavior both in the workplace and in your social media communications”
“Make sure someone needs to know. You should never share confidential information with another team member unless they have a need to know the information to do their job. Don’t have conversations regarding confidential information in the Breakroom or in any other open area. Never discuss confidential information at home or in public areas.”
“Respect all copyright and other intellectual property laws. For [Employer’s] protection as well as your own, it is critical that you show proper respect for the laws governing copyright, fair use of copyrighted material owned by others, trademarks, and other intellectual property, including [Employer’s] own copyrights, trademarks, and brands.”
Drafting Workplace Social Media Policies: Protecting Company Interests, Avoiding NLRB Enforcement Action

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NLRB and Social Media Policies

• Cannot “chill” employees exercising their Section 7 rights
NLRB Actions cont.

• **NLRB’s 1/6/14 Advice Memorandum**
  - KMOV-TV (a Belo Corp. company) had implemented a social media policy that included a section entitled “Personal Activity”:
  - “Adhere to Belo’s company harassment and retaliation policies. It is the responsibility of employees to notify management and/or Human Resources immediately of possible sexual or other unlawful harassment without the concern of reprisal or retaliation. *Do not post insulting, embarrassing, hurtful or abusive comments about other company employees online.* Do not share pictures of other Belo Employees unless the other employee is comfortable with it. Belo expects its employees to treat their co-workers with respect and courtesy at all times.”
  - Found unlawful the ban on posting "insulting, embarrassing, hurtful or abusive comments about other company employees online."
    - **Rationale:** Deemed overbroad because did not contain sufficiently specific definitions or examples of prohibited behavior such that it would be clear to employees that the provision did not encompass protected Section 7 behavior.
NLRB Actions cont.

• **NLRB’s 1/6/14 Advice Memorandum cont.**
  
  – “Adhere to Belo’s company harassment and retaliation policies. It is the responsibility of employees to notify management and/or Human Resources immediately of possible sexual or other unlawful harassment without the concern of reprisal or retaliation. Do not post insulting, embarrassing, hurtful or abusive comments about other company employees online. *Do not share pictures of other Belo Employees unless the other employee is comfortable with it.* Belo expects its employees to treat their co-workers with respect and courtesy at all times.”

  • Found unlawful the prohibition against “shar[ing] pictures of other Belo Employees unless the other employee is comfortable with it.”
    
    – **Rationale:** Employees reasonably could interpret that instruction to preclude them from using social media to post pictures of fellow employees engaged in protected activities like strikes or working in unsafe conditions.
NLRB Actions cont.

• *NLRB’s 1/6/14 Advice Memorandum cont.*
  – “Do not defame Belo companies, their employees, clients, customers, audience, business partners or competitors. Indeed you should avoid making defamatory or libelous comments and postings in general as others may attempt to impute these comments to your employer or you as an employee.”

• Found unlawful the prohibition against employees “defam[ing] Belo companies [or] their employees” or “making defamatory or libelous comments and postings in general”.
  – **Rationale:** Deemed overbroad because provision did not have sufficient limiting language and reasonably could be construed by employees to prohibit protected activities like criticizing the employer’s policies.
NLRB Actions

• **NLRB’s 1/16/14 Advice Memorandum cont.**
  – “Do not disclose confidential financial data, or other non-public proprietary company information. Do not share confidential information regarding business partners, vendors, or customers.”

  • Found lawful provision prohibiting disclosure of confidential financial data and non-public proprietary company information.
    – **Rationale**: This language reasonably would be interpreted by employees to apply only to the employer's confidential business information, and not to discussion of wages or working conditions.
NLRB Actions

• **NLRB’s 10/7/15 Advice Memorandum**
  – Addressed 24 Hour Fitness’ Handbook policies
  – Found unlawful the provision requiring that employees who identify themselves as 24 Hour Fitness employees in a social media post also include a disclaimer in any post stating that the views expressed are the employee’s only, and do “not necessarily reflect the view of the company.”

• **Rationale:** While employer has a legitimate interest in limiting who can make official statements for it, requiring a disclaimer every time employee speaks through social media is overly burdensome, especially for platforms where participants communicate quickly and repeatedly or have character limits or are premised on visual communications. Also burdensome if employee was posting on Facebook by “liking” a comment or post.
**NLRB Actions cont.**

- **NLRB’s 10/7/15 Advice Memorandum cont.**
  - Found unlawfully overbroad the provision prohibiting employees from sharing information that is “confidential and proprietary, such as financial information, company strategy, business performance, organizational structure, personal information (i.e., confidential team member, gym member or guest data) or any other information that has not been publicly released by [the Employer]. . . . (Note: this guideline does not include information related to a Team Member’s wages, hours or working conditions).”

- **Rationale:** The “personal information” clause is unlawfully overbroad because employees would reasonably construe “confidential team member . . . data” to cover terms and conditions of employment and employee contact information, which is impermissible. While the savings clause clarifies that the provision does not prohibit employees from divulging working conditions, it fails to address the sharing of employee contact information.
NLRB Actions cont.

• *NLRB’s 10/7/15 Advice Memorandum cont.*
  – Found ineffective savings clause stating that: “This Policy will not be construed or applied in a manner that interferes with your rights under Section 7 of the National Labor Relations Act.”

• **Rationale:** While an employer’s express notice to employees advising them of their rights under the Act may, in certain circumstances, clarify the scope of an otherwise ambiguous and unlawful rule, an employer may not prohibit employee activity protected by the Act and shield itself from liability by a general reference to protected rights via a savings clause. With regard to overbroad prohibitions that reasonably would be interpreted to prohibit protected activities, a general disclaimer is insufficient where employees would not understand from the disclaimer that protected activities are in fact permitted. The savings clause contains only a general reference to “rights under Section 7 of the . . . Act,” and employees, who are laypersons, would not reasonably understand that this refers to their right to communicate with their fellow employees and others about their terms and conditions of employment or contact information.
NLRB Actions

• *NLRB v. Pier Sixty, LLC, 855 F.3d 115 (2d Cir. 2017)*
  
  – Pier Sixty operated catering company in NY. Two days before union election, supervisor gave directions to server in a “harsh tone,” including “Turn your head that way [towards the guests] and stop chitchatting,” and “Spread out, move, move.” About an hour later, the employee posted to his Facebook page: “Bob [supervisor] is such a NASTY MOTHER F***ER don't know how to talk to people!!!!!! F**k his mother and his entire f***ing family!!!! What a LOSER!!!! Vote YES for the UNION!!!!!!!” When Pier Sixty’s management learned of post, it terminated his employment.

  – The NLRB affirmed the ALJ’s ruling that the employee’s Facebook post was not “opprobrious enough” to lose protection under the NLRA and justify the employee’s termination.
NLRB Actions

• **NLRB/Pier Sixy cont.**
  - The Second Circuit agreed with the NLRB, focusing on three primary reasons:
    • Although employee’s post included vulgar attack on supervisor’s family, the subject matter of the message included workplace concerns—*i.e.*, management's allegedly disrespectful treatment of employees and the upcoming union election.
    • Pier Sixty consistently tolerated profanity among its workers because evidence showed it did not consistently discipline employees for use of profanity.
    • The employee’s post was on an online forum, which is a key medium of communication among coworkers and a tool or organization in the modern era. And although Facebook can be a public forum, which may be visible to potential customers, there was no evidence the post was made in the presence of customers or disrupted the event.
What the Courts Are Saying About Social Media Policies
Rodriguez v. Wal-Mart Stores, Inc.
5th Circuit Court of Appeals
Appeal of Lower Court Summary Judgment

• Violation of Social Media Policy = Legitimate non-discriminatory reason for termination of manager in an age and national origin discrimination case under Texas Labor Code.

• 9 months after final warning for reducing cost of item she wished to purchase Rodriguez posted on Facebook about 2 cashiers who called in sick on day of party hosted by co-worker

• Post said – “I hear that Caleb didn’t show up for work on this day what’s up with that??? He is partying with you guys??? WOW. . .you guys are amazing and bold enough to post these. . .”

• Wal-Mart policy approved earlier by NLRB prohibited posting anything “Unprofessional, insulting, embarrassing, untrue, or harmful.”
Sullivan v. Brookville CTR for Children’s Services, Inc.
New York State Appellate Court

• Unemployment Compensation case
• One time violation of Social Media Policy did not constitute disqualifying conduct under New York law
• Policy prohibited posting on social media “during work hours, unless for specific and approved business purposes.”
• Employee had prior clean disciplinary record and one time violation “Reflective of momentary lapse in judgment, did not rise to the level of disqualifying misconduct.”
• Could be different result depending on jurisdiction.
Smith v. Hillshire Brands
Kansas Federal Court

• Scope of discovery in Title VII and FMLA case to recover for emotional distress
• Court AGREED request for “Documentation of ALL of the plaintiff’s activity on the named social networks since January 1, 2013 . . .” Overly broad.
• Court took intermediate approach not allowing discovery of plaintiff’s entire social media activity but only content that reveals plaintiff’s emotions or mental state and references to potential causes for that emotional state.
Buker v. Howard County, et al.
USDC – Maryland May 27, 2015
Defendant Motion for Summary Judgment Denied

- Unpaid volunteer EMT posted on Facebook regarding a news story concerning gun control debate
- Post had racial overtones and attacked “Liberals”
- Employee terminated
- Alleged violation of First Amendment right of free speech
- Three prong test – Questions of law
  - Public concern v. Personal Interest – Here public concern – gun control
  - Free Speech v. Fire Department Interests in effective service – Here no disruption or interference
  - Speech a substantial factor in termination – Here statement on social medial was a substantial factor
• Romero claimed sex discrimination on the basis of her pregnancy
• A customer service employee, Romero posted on Facebook that she “hated” working at Weiss Rohlig.
• CEO declared decision to terminate Romero based solely on Facebook posting that she “hated” working at Weiss Rohlig
• Troubling that a customer service employee posted in a forum where it could be seen outside the company
• Summary Judgment for company granted – Business interests potentially harmed by such behavior legitimizes the punishment of termination. Company offered legitimate non-retaliatory reasons for termination
Brown v. Tyson Foods, Inc.
USDC W.D. Arkansas  July 29, 2014

• Brown sues alleging race discrimination, retaliation, and hostile work environment
• October 2101 Facebook post on Brown’s Facebook page regarding a co-worker

@This Bitch name Candie Im not your Murthafuckin friend an I think I said sumthing to an at your Ass earlier. About looking on my page u dnt no anthing about me nor my husband. An first of ALL I can put whatever I want on my Damn page if u dnt like it when Delete your ass from my page. An first of All your Bitch ass keep looking in my Damn mouth every Lyme im talking if im not talking to you what the fuck u getting a mouth full of nothing. Just to let u know hater are my motivate. So since you think I talk to guys an calling it adultery. Bitch u dnt know anything about me but my first Name so u need to Think B4 u Speak. An go find your Babies Daddy an stop-fuckin your friend Man. With your bad bult ass with your back pocket touchin your knees as get u a Booty Pad so your pants stop falling. Now go tell the Bitch, So u will be Delete. An stop having one night stand with all your riders Suckin they Dick. U Brought this on your own.
• Court found no prima facie Title VII race discrimination – employer’s reason for termination was not pre-textual and no hostile environment
Moncel v. Sullivan’s of Indiana, Inc.
USDC S.D. Indiana May 13, 2014

- Moncel sues alleging sexual harassment and hostile work environment
- Employees at Sullivan created a Facebook page entitled “Shift Swap” for scheduling conflicts
- Facebook page quickly turned into a venting page about negative and hostile environment at Sullivans
- Moncel posts negative comments about management

I agree . . . But maybe we can make the hostess double swear not to say anything . . . Shit . . . Who care if they do . . . It will be funny . . . OO a crew that can’t be bullied around anymore. I love it!!! I actually hope they do find out they have been kicked out of the house, and know one wants them on here . . . What will they say! Really, look at OSHA and EOC peeps, we have rights :))))
Moncel v. Sullivan’s of Indiana, Inc.
USDC S.D. Indiana  May 13, 2014 (continued)

• Terminated for creating a negative work environment
• Query whether better off filing an Unfair Labor Practice claiming protected activity
Use of Social Media in Hiring

• According to some surveys, as many as 75% of hiring managers/recruiters check an applicant’s social media profiles.

• Availability of information on social media regarding applicants creates conundrum for employers:
  – Reviewing information on applicants’ social media profiles increases risk of discrimination claim.
    • Applicants’ social media profiles may contain information regarding applicant’s protected characteristics, which cannot be considered.
    • EEOC and NLRB paying attention to this issue. EEOC has been very active in recent years filing class actions against employers relating to hiring practices.
  – Ignoring available information on social media regarding applicants also could have negative consequences, however.
    • Potentially increases risk of other claims, such as negligent hiring (e.g., failing to conduct reasonable background check).
    • Hampers opportunity to weed out poor candidates (e.g., candidates whose social media profiles reflect illegal drug use, poor writing or inappropriate behavior).
Use of Social Media in Hiring cont.

- Potential solutions/compromise to minimize risk if incorporating some review of social media into hiring process:
  - Develop and implement consistent protocols regarding:
    - Who may engage in review of applicants’ social media profiles
      - Create wall between decisionmakers and those conducting online profile search
      - Have non-decisionmakers filter out information that should not be considered
    - The scope of such review
      - For example, review only certain social media sites like LinkedIn
    - What stage of hiring process such review can occur
      - For example, only review at initial screening stage (by recruiter)
  - Keep detailed records that can facilitate verification in case of potential litigation

Alex Nestor, Esq.
Monitoring Employees on Social Media

• On employer-owned social media, minimal risk:
  – With appropriate notice to employees, little risk of monitoring employee posts on employer-owned social media

• On employees’ personal social media accounts, increased risk:
  – Many states have laws prohibiting employers from taking adverse action against employee for off-duty conduct
  – Over 25 states now have passed some type of legislation limiting employers’ access to employees’ social media accounts
    • However, many of these statutes include an exception where employer is conducting a good-faith investigation (e.g., alleged harassment)
  – NLRA protects employees exercising their Section 7 rights while posting on personal social media accounts
Specific Considerations

• Does your organization need a specific social media policy or will revisions to existing policies be sufficient?

• Should your organization permit only certain types of employees to access social media networks through employer-provided devices?
Specific Considerations

- Publish and distribute your policy to all employees

- Obtain written acknowledgement from employees indicating that they have received the policy and understand it

- Regularly evaluate your policies to see if they are addressing new trends
Training Considerations

• Include Social Media training with orientation, harassment/discrimination training, and management training

• Train employees, especially management, on the do’s and don’ts of interacting with subordinates on social media sites

• Since the NLRA does not apply to management, there can be more stringent restrictions on their “social” regulation
Social Media Policy Tips

- Provisions regulating employee conduct
  - Limit to regulating conduct towards coworkers, clients or competitors, not employer/management (e.g., “disrespectful” conduct or language that “damages” company’s reputation or image)
  - NLRB has found latter type of provision unlawful because it potentially encompasses Section 7 activity
  - Include specific examples of inappropriate conduct so it is clear that employer is not attempting to restrict Section 7 rights
    - Do not discourage “friending” or sending unsolicited messages as it may violate Section 7 of NLRA
  - Include savings clause with specific and clear statement of various rights protected by Section 7
    - May not save otherwise unlawful policy, but helps create context within which employees should construe policy
Social Media Policy Tips cont.

• Provisions restricting disclosure of confidential information
  – Specifically define confidential/non-public information that is prohibited from disclosure to avoid including employee information, complaints, etc.
    • For example, trade secrets, financial or business information, customer’s information
• Provisions addressing employee use of company logos
  – Require employees to respect copyright and trademark laws, don’t just ban use of company logos, copyrights and trademarks
• Provisions regarding company information
  – Clarify and put employees on notice that company has rights to business-related concepts and developments produced by employees, including on personal and third party websites
• Disclaimers
  – Employees must identify themselves and include disclaimer that their views do not necessarily reflect company’s views, but reasonably limit scope
• Provisions regarding investigating harassment
  – Confirm that employees are not immune from discipline because they post material or content that may violate company’s anti-harassment policies on personal social media
SAMPLE SOCIAL MEDIA POLICY

This policy applies to all employees of XYZ Company who participate in what are known as social media or social networking technologies, whether for purely personal or business-related reasons. These technologies include, but are not limited to, blogs; wikis; RSS feeds; social networking sites such as Facebook, LinkedIn or MySpace; microblogs such as Twitter; photo sharing sites such as Flickr; content sharing or bookmarking sites such as Digg and Delicious; customer feedback sites such as Yelp; and video sharing sites such as YouTube.

Social media creates new opportunities for communications and collaboration, it also creates new responsibilities for individuals. Posted material can, when matched with an identity or photograph, reflect not only on the individual, but also on that individual’s employer, associates and profession. This policy is not meant to infringe on your personal interaction or commentary online, inasmuch as it does not pertain to XYZ Company or create a negative image for the Company, its employees, (patients), vendors and other such parties. In fact, the Company encourages and supports positive and knowledgeable use of social media.

In general, the Company views social networking sites, personal web sites, podcasts, wikis, and blogs (collectively “social media”) positively and respects the right of employees to use them as a medium of self-expression. However, XYZ Company requires that employees observe the following guidelines:

1) You are personally responsible for what you post. Be mindful that what you publish will be public forever.

2) For non-business participation on social media sites, you must use a personal e-mail address and must not attribute to or imply that personal opinions or statements are endorsed or supported by the Company.

3) [Optional depending on whether the job requires it] When participating in social networking sites in a professional context and when writing personal blogs, make an explicit statement that the views expressed by the author represent the author’s alone and do not represent the views of the Company.

4) Employees must not use social media to maliciously defame co-workers, its competitors or vendors. Employees should comply with any applicable state and federal, trademark, trade secret, copyright and other intellectual property laws.
5) Employees must not use social media to harass, bully or intimidate other employees or otherwise engage in conduct that is prohibited by Company policies, including, but not limited to, the improper or illegal use of alcohol and drugs, sexual behavior, and sexual harassment in violation of Title VII and other state or federal workplace laws and regulations.

6) Employees must not use social media to discriminate or harass any individual based on race, sex, color, gender, sex, religion, national origin, disability, age, veteran status, genetic information or any other characteristic protected by state or federal law.

7) Employees must not use social media to maliciously defame the Company or any management official or make grossly disloyal, reckless or maliciously false statements about the Company.

8) Employees must not use social media to disclose any confidential or proprietary information of the Company, its clients, or its vendors, including financial information, trade secrets, protected health information, social security number, date of birth, and employee banking information. Do not post anything you could not present in any public forum.

9) Employees must not post pictures of or comments made by employees or customers on a website without obtaining permission from the individual and the customer.

10) If a member of the news media contacts you about an Internet posting created by the Company that concerns the Company’s crisis situation, clients or vendors, please refer that person to _________. The designated spokesperson will respond to the news media in a timely and professional manner.

11) [Optional depending on whether the job requires it] Employees must not post any information concerning patients or any other information considered protected health information under HIPAA.

12) Violation of this policy may result in disciplinary action up to and including termination.

13) No sections of this policy will be interpreted or applied in a way that interferes with the right of employees to engage in protected concerted activity concerning terms and conditions of employment.