Tips for Creating Policies

By Joseph C. DeBlasio and Kelly D. Gunther

Untangling the Web of Social Media

Social media use permeates the workplace now more than ever. Regulating employees' active presence on social media platforms such as Facebook, Twitter, LinkedIn, and even You Tube is a hot topic for debate due to the many questions and few easy answers. Recently, the National Labor Relations Board (NLRB) thrust the use of social media into the public spotlight. On August 18, 2011, the NLRB Acting General Counsel Lafe E. Solomon issued a memorandum concerning recent social media cases purportedly to provide guidance to employers when addressing and responding to social media activity by employees. Office of the General Counsel, Nat'l Labor Relations Bd., Mem. OM 11-74, Report of the Acting General Counsel Concerning Social Media Cases (Aug. 18, 2011), *available at* https://www.nlrb.gov/news/acting-general-counsel-releases-report-social-media-cases (last visited Dec. 2, 2011). To keep pace, employers must revisit their social media policies to attempt to walk the fine line between controlling inappropriate employee conduct and unlawfully restricting employees' rights.

Many employers, especially nonunion employers, fail to appreciate that certain employee rights set forth in the National Labor Relations Act (NLRA) apply to all private sector employees, irrespective of union membership. Significantly, section 7 of the NLRA protects the right of all employees to communicate with one another regarding the terms and conditions of their employment without fear of retribution. 29 U.S.C. §157 (section 7). Gen-

■ Joseph C. DeBlasio is co-chairperson and Kelly D. Gunther is a senior associate in the Labor and Employment Law Practice Group at Giordano, Halleran & Ciesla, P.C. in Red Bank, New Jersey. They represent management in all aspects of labor and employment-related matters with a particular emphasis in federal and state court litigation, agency proceedings and litigation avoidance. Mr. DeBlasio is a member of DRI's Employment Law Committee.

erally speaking, this protected "concerted activity" means all activity by individual employees who are united in pursuit of a common goal. In other words, the activity must be engaged in with, or on the authority of, other employees. *Meyers Industries*, 281 N.L.R.B. 882 (1986). If an employee's communication qualifies as protected, concerted activity, an employer cannot discipline the employee because of it. 29 U.S.C. §158(a)(1) (section 8(a)(1)). These traditional labor law principles are well established. However, the application of these tenets to employees' use of social media presents new and ever-challenging issues.

Social media became a hot-button issue with the case known simply as the "Facebook firing case." In October 2010, the NLRB issued a complaint against an ambulance company alleging that the company unlawfully discharged an employee who made negative statements on Facebook about her supervisor on the basis that the remarks constituted concerted activity protected under section 7. *American Medical Response of Connecticut, Inc.*, Case No. 34-CA-12576 (N.L.R.B. Div. of Advice Oct. 27, 2010). Ultimately, the company agreed to pay an undisclosed amount to the employee and revise the workplace policies that had constrained workers so that the policies acknowledged that employees could discuss wages, hours, and working conditions with coworkers outside of work. After the company settled the complaint, employers wondered just how deeply into the social media universe the NLRA and the NLRB would reach.

Without something tangible to take away from the Facebook firing case, employers began to question whether the NLRA inherently prohibited social media work-related policies. Many employers did not know that the NLRB previously had declared a position in an advice memorandum that narrowly tailored social media policies did not interfere with the rights provided to workers by the NLRA. *Sears Holdings (Roebucks)*, Case No. 18-CA-19081 (N.L.R.B. Div. of Advice Dec. 4, 2009). The Sears policy contained an introductory paragraph explaining that its purpose "was not to restrict the flow of useful and appropriate information, but to minimize the risk to the Company and its associates." The Sears policy then listed several "prohibited subjects" that employees could not discuss online including "disparagement of company's or competitors' products, services, executive leadership, employees, strategy, and business prospects." The advice memorandum in response to the Sears complaint "explained that, when reviewing an employer's policy, including social media policies, a review of the complained-of policy requires that the policy is evaluated as a whole, instead of parsing it out in small pieces, to ensure that the context of the language is not ignored." Molly DiBianca, Employers, Don't Despair, Social-Media Policies Are Not Prohibited by the NLRA, The Delaware Employment Law Blog (Nov. 15, 2010), http://www.delawareemploymentlawblog.com/2010/11/employers-dont-despair-socialm.html. The NLRB found that when read in isolation, the rule against the "'[d]isparagement of company's… executive leadership, employees, [or] strategy…' could chill the exercise of Section 7 rights," but that "the Policy as a whole provides sufficient context to preclude a reasonable employee from construing the rule as a limit on Section 7 conduct." *Sears Holdings*, *supra*, at 6 (quoting with punctuation as in the mem.).

> Many employers… fail to appreciate that certain employee rights set forth in the National Labor Relations Act apply to all private sector employees, irrespective of union membership.

After settling the Facebook firing complaint, the NLRB's interest in social media intensified. In April 2011, the NLRB acting general counsel issued a memorandum requiring all regions to submit cases to the Division of Advice if they involved "employer's rules prohibiting, or discipline of employees for engaging in, protected concerted activity using social media, such as Facebook or Twitter." Shortly after a string of advice memoranda tackled these issues head-on. Unfortunately, the cases appear arbitrary and do not offer bright-line rules or workable standards.

Use of Social Media as a Lawful Basis for an Adverse Employment Action

In *Lee Enterprises, Inc. d/b/a Arizona Daily Star*, Case No. 28-CA-23267 (N.L.R.B. Div. of Advice Apr. 21, 2011), a case involving Twitter, a newspaper reporter opened a Twitter account after his employer, a newspaper, encouraged him to do so. The biography section of the employee's account identified him as a reporter for the newspaper and included a link to the newspaper's website. The employee subsequently posted a "tweet" that criticized the paper's copy editors, specifically how they handled sports department headlines. The evidence didn't establish that the employee had discussed having concerns about the headlines with any coworkers.

In response to his post, the newspaper told the employee that he could not air his grievances with the newspaper in a public forum. The employee refrained from making public comments about the newspaper, but he continued to "tweet" about other matters including his public safety beat and homicides in the city. On one occasion, he criticized a local television station in a tweet, which drew the ire of the station's producer. Ultimately, the newspaper discharged the employee for disregarding the directive that he should refrain from using social media in a manner that could damage the goodwill of the company.

The NLRB determined that the newspaper discharged the employee for writing inappropriate and offensive tweets that did not involve protected, concerted activity. The tweets did not relate to the terms and conditions of employment, nor did they seek to involve other employees in issues related to employment. As a result, the newspaper discharged the employee for conduct that the NLRA did not protect. The NLRB memorandum observed that someone could interpret some of the employer's statements to the employee as prohibiting

activities protected by section 7. However, because the statements did not constitute overbroad "rules," the newspaper directed them to the employee solely in the context of discipline, and the newspaper did not make the statements to other employees or identify them as new "rules," the statements did not violate section 7. In summary, this analysis was intensely fact sensitive and failed to announce specific standards.

In *Rural Metro*, Case No. 25-CA-31802 (N.L.R.B. Div. of Advice June 29, 2011), the employer, a provider of medical transportation and fire protection services, discharged a dispatcher for posting messages on the Facebook page of a U.S. senator. The senator announced on Facebook that four fire departments in the state had received federal grants. In response, the employee commented on the senator's Facebook page that her employer had contracts with several fire departments to provide service because her employer was cheap and paid employees less than the national average. She also complained that the company in her view had too few trucks to provide the services necessary under the contracts and described an incident in which one of the employer's crew did not know how to perform CPR.

The employee did not discuss her Facebook comments with coworkers. Although the employee previously discussed wages with other employees after the employer announced a wage cap, evidence did not indicate that the employees met or organized group action to raise concerns over wages with the employer. The employer discharged the employee for publicly posting disparaging remarks about the employer and for posting confidential information about its response to a service call. Further, the employer deemed her comments as violating the employer's code of ethics and the business conduct policy. Finding that the employee had merely tried to make a public official aware of the condition of emergency medical services in her state, the NLRB determined that the employee did not engage in protected, concerted activity. But the NLRB seemingly could have just as easily concluded that the employee had broadcast the workers' collective concerns over low wages or other terms and conditions of employment, which they had previously discussed among themselves.

Subsequently, in *JT's Porch Saloon & Eatery, Ltd.*, Case No. 13-CA-46689 (N.L.R.B. Div. of Advice July 7, 2011), a restaurant-bar discharged a bartender after the bartender posted comments in a Facebook conversation with a nonemployee complaining about the employer's tipping policy and called customers "rednecks," among other things. The employee did not discuss his Facebook posting with other employees and none of his coworkers participated in the Facebook conversation or responded to it. The employer learned about the Facebook posting and discharged the employee in a message to the employee on Facebook. The next day, the employer explained in a voice message to the employee that the employer had discharged him because of the negative Facebook posting about the employer's customers.

> The NLRA does not call for a blanket prohibition against disciplining employees for Facebook or other social media posts that they make during work time.

The NLRB did not view the employee's conduct as protected, concerted activity. The bartender did not discuss the posting with co workers nor did any coworkers respond to it. Importantly, the employee had discussions with coworkers in the past about the employer's tipping policy, but the Facebook posting did not grow out of these previous conversations. This implies that if the NLRB had viewed the Facebook posting as connected to the earlier conversations about tipping, the outcome could have been different. Unfortunately, we can't predict how the NLRB would have viewed the exact same Facebook conversation if it had continued a previous discussion between this employee and his coworkers about the employer's tipping policy.

In *Wal-Mart*, Case No. 17-CA-25030 (N.L.R.B, Div. of Advice July 19, 2011), a Wal-Mart store discharged an employee after he posted on his Facebook page certain frustrations that he had with management and referred to the store as a "tyranny." The employee's Facebook "friends," mostly coworkers, could view the post. Two coworkers commented on the employee's post. The employee then followed with another post insulting the assistant store manager, who apparently had discussed specific performance matters with the employee. The employee stated in his post that he intended to speak to the store manager about these issues. Two coworkers posted additional comments to support the employee. After the store manager learned of the Facebook postings, that manager disciplined the employee.

The NLRB did not find that this conduct constituted protected, concerted activity. The NLRB viewed the Facebook postings as nothing more than grumbling by the employee about his own individual dispute with the assistant store manager. The NLRB didn't find anything in the postings that it could construe as inducing group action, nor did it find that any of the coworkers' Facebook responses indicated that they interpreted the postings as intended to bring about group action.

The same day that the NLRB issued the *Wal-Mart* advice memorandum, it issued a similar memorandum. *Martin House*, Case No. 34-CA-12950 (N.L.R.B. Div. of Advice July 19, 2011). In *Martin House*, a residential facility for the homeless discharged an employee, a recovery specialist, for posting inappropriate comments to her Facebook page about residents, many of whom suffered from mental illness and substance abuse problems. While working the overnight shift, the employee engaged in a "conversation" through her Facebook account in which she posted comments about the workplace and the residents. Two of the employee's Facebook "friends" participated in the conversation. The employee was not a Facebook friend of any of her coworkers, but she was a Facebook friend of one of the employer's former clients who told the employer about the postings. The employer discharged the employee and in the discharge letter quoted the Facebook conversation.

Again, the NLRB found that the employee's activities did not qualify as concerted and protected. The employee did not direct her Facebook postings to nor discuss them with her coworkers, nor did the postings "even mention any terms or conditions of employment." *Id.* at 3. The NLRB construed the posts as nothing more than communications between friends during the employee's working time.

At best, employers can garner assurance from the August 18, 2011, NLRB report concerning social media cases that the NLRA does not call for a blanket prohibition against disciplining employees for Facebook or other social media posts that they make during work time. *See* Nat'l Labor Relations Bd. Report Concerning Social Media Cases, *supra*. On their face, the report and NLRB advice memoranda suggest that employers lawfully can discipline employees for comments that involve (1) complaints solely by and on behalf an individual employee; (2) derogatory or insensitive comments about an employer's customers; and (3) complaints made to other coworkers about the employee's personal relationship with a superior. However, other cases bring these conclusions back into murky waters.

Use of Social Media for Protected, Concerted Activity

Not all of the recent NLRB guidance has favored employers. In *Hispanics United of Buffalo, Inc.*, 2011 WL-3894520 (N.L.R.B. Div. of Judges) (Sept. 2, 2011), a nonprofit social services provider discharged five employees who posted comments on Facebook relating to allegations of their poor job performance by one of their coworkers. The administrative law judge ruled that these employees were engaged in protected, concerted activity. A complex chain of events began when one employee complained to a coworker that clients did not want to seek services from the employer. She also had discussions with other coworkers in which she criticized the work done by other employees, and she sent text messages to coworkers with similar complaints. In one particular text message she complained to a coworker that, in her view, the coworker had failed to assist a client properly. During the final exchange of text messages, the employee asserted that the executive director would settle their differences.

In preparation for the anticipated meeting with the executive director, one of the employees engaged in these exchanges posted on Facebook that the complaining employee, who didn't work in the office every day, felt that the other employees did not do enough to assist their clients. She solicited comments from other coworkers about this. Four of them responded posting their own views. The complaining employee reported the Facebook conversation to the executive director and stated that she considered the comments "cyberbullying" and harassment. The next day, the employee who solicited the comments characterized as cyberbullying and harassing tried to meet with the executive director without success. A few hours later, the executive director discharged this employee. The same day, the executive director discharged the other four workers who posted Facebook comments about the employee who told the executive director about the Facebook exchanges.

The administrative law judge found the Facebook discussion a "textbook example" of concerted activity. One employee initiated the discussion in an appeal to other coworkers seeking their input. She used Facebook as a means to survey her coworkers on the issue of job performance in preparation for an anticipated meeting with the executive director. Thus, the administrative law judge viewed the resulting Facebook discussion among these coworkers about job performance and related issues as concerted activity protected by section 7 of the NLRA.

Similarly, in the Facebook firing case, discussed above, the employer discharged an employee for posting negative remarks on Facebook about a supervisor's actions, specifically actions prohibiting union representation. *American Medical Response of Connecticut, Inc.*, Case No. 34-CA-12576 (N.L.R.B. Div. of Advice Oct. 27, 2010). The NLRB viewed the employee's discharge as unlawful, which led the NLRB to file a formal complaint against the company. In this case the employee's supervisor had asked the employee to prepare an incident report concerning a customer complaint about the employee's work. The employee requested that a union representative oversee the report preparation. The supervisor denied the request. Later that day from home, the employee posted a negative remark about her supervisor on her Facebook page, which prompted supportive responses from coworkers, which in turn led the employee to post additional comments about her supervisor. The employer discharged the employee for these Facebook postings.

While the employer ultimately settled the complaint, the NLRB based its allegations in the complaint on the fact that the employee had a right to union representation in preparing the incident report. In exercising her right to union representation and discussing supervisory actions with coworkers in her Facebook post, the NLRB alleged that the employee had engaged in protected activity. According to the NLRB, the employee's reference to her supervisor as a "d-ck" and "scumbag" did not push the post beyond the protective scope of the NLRA. Further, the postings did not interrupt the work of any employees because they occurred outside the workplace during off-work hours. The key argument that supported the NLRB allegations was that the employer provoked the employee's Facebook postings by unlawfully refusing to permit union representation. Nevertheless, it appears that the employee's Facebook posts in *American Medical Response of Connecticut* simply personally attacked the employee's supervisor, making the case difficult to reconcile with the *Wal-Mart* advice memorandum reasoning, as well as with other NLRB advice memoranda and administrative judge decisions.

Likewise, in *Karl Knauz Motors, Inc. d/b/a Knauz MNW*, 2011 WL4499437 (N.L.R.B. Div. of Judges) (Sept. 28, 2011), an administrative law judge ruled that a sales person's posting on his Facebook page of photographs and commentary that criticized a sales event by the car dealership for which he worked constituted protected conduct relevant to all sales employees' concerns over commissions. But the employee also posted photos and comments about something else that happened the same week at the same time. First, the employee and other coworkers witnessed someone accidentally drive a vehicle owned

by the employer into a pond. The employee photographed the incident. Second, during the same week, the employer hosted a promotional event to introduce a new luxury car model. In a meeting before the upcoming launch event, managers explained to the salespersons that the employer would serve hot dogs, cookies, snacks, and water at the event. At least one employee asked why the employer would not serve more refined, substantial refreshments. Following the meeting, the salespersons discussed the poor manner in which they believed the employer had chosen to handle the event, specifically that such inexpensive refreshments would send the wrong message to clients and negatively affect sales and commissions. During the sales event, the Facebook-posting employee took photographs of the food and beverages served at the event, his co-workers, and the banner advertising the new car model.

After the event, the employee posted on his Facebook page the photographs of the vehicle in the pond and also the various photographs of the sales event. The employee sarcastically commented that he was happy to see the employer go "all out" for "the important car launch." He included comments with each of the pictures criticizing the inexpensive food and beverages that the employer provided.

The employer learned about the employee's postings from another auto dealer and another employee who was a Facebook friend of the employee. The employer directed the employee to remove the photographs and comments from his Facebook page, which he did. On returning to work another day, he was told that his actions had embarrassed the employer, and the employer discharged him.

The administrative judge ruled that the employee's Facebook activity pertaining to the sales event was a direct outgrowth of the earlier discussion among the salespersons that followed the meeting that they had with management about the sales event. Thus, when the employee posted the comments and photographs on his Facebook page about the event food and beverage choices, the employee engaged in concerted, protected activity. It didn't matter that the employee's coworkers hadn't commented on the photographs because the judge viewed the employee as vocalizing the sentiments of his coworkers. Although the employee had engaged in some protected, concerted activity, the Facebook activity about the sales event, the administrative law Judge found that the employer nevertheless had lawfully discharged the employee based on persuasive testimony that the employee's unprotected comments about the car in the pond had triggered the discharge decision. Importantly, the administrative law judge characterized the employee's Facebook activity about the sales events as protected, concerted activity even though the employee's coworkers hadn't responded to it on Facebook.

> Employers should tailor social media policies narrowly so that they do not prohibit "concerted activity" via social media.

In *Triple Play Sports Bar*, Case No. 34-CA-12926 (filed Feb. 24, 2011) (open), the employees participated in a Facebook conversation initiated by a former coworker about the employer's tax-withholding practices. The NLRB viewed the employer's decision to discharge the employees as unlawful because the postings were protected concerted activity. After several former and current employees discovered that they owed state income taxes for 2010, at least one of them raised the issue with the employer and requested that the agenda for an upcoming management meeting with employees include the issue. A former employee then posted on her Facebook page a statement in which she complained that she now owed money and claimed that the employer's owners could not even do paperwork correctly. Another employee responded to the posting simply by clicking the "like" button, which showed approval of the former employee's comment. Two other employees commented that they had never owed money before. Another employee indicated the employer would discuss this at the upcoming meeting. Two customers also made comments. Another employee referred negatively to one of the employer's owners. The employer discharged both the employee who clicked "like" and the employee who made the negative comment about an owner when the employees returned to work.

The NLRB determined that the Facebook conversation related to the employees' shared concerns about a term and condition of employment, namely the employer's administration of income tax withholdings. Nat'l Labor Relations Bd. Report Concerning Social Media Cases, *supra*. Notably, before the online conversation, this shared concern had been brought to the employer's attention, which was subsequently noted in the Facebook discussion. According to the NLRB, the Facebook conversation embodied "truly group complaints" that contemplated future group activity. *Id.*

It is difficult to reconcile the NLRB advice memoranda, administrative law judge decisions, and cases discussed in the August 18, 2011, NLRB report on social media cases. For instance, it seems that if coworkers engage in online conversation about another coworker's social media posting or respond with comments online, the NLRA may protect the initial posting activity. But what will the NLRB think if an employee intends coworkers to see a post, they actually view it, but they do not post responses? What if an employer cannot determine whether an employee's coworkers viewed a particular post or if the employee intended them to see it? What if an employer doesn't know that an employee has posted a remark in continuation of a previous workplace discussion among employees? How far must an employer go to investigate and determine whether an employee intended to or participated in "concerted" conduct? Many questions linger despite the August 18, 2011, report released by the NLRB on social media cases.

We plainly do not have hard and fast rules to help us to oversee employees' use of social media. To date, the federal courts have not addressed these issues.

Fortunately for employers, the August 18, 2011, NLRB report on social media cases does address the substantive elements of certain social media policies that the NLRB has evaluated. In five of the cases

described in the report the NLRB found at least some provisions of the employers' social media policies unlawfully overbroad. While the report does not announce new or specific rules for drafting social media policies, it implies that to avoid running afoul of section 8(a)(1), employers should tailor social media policies narrowly so that they do not prohibit "concerted activity" via social media, meaning, for instance, discussion among coworkers regarding terms and conditions of employment. This is an obvious starting point. Whether revising a preexisting social media policy or drafting a new policy, an employer needs to tailor each provision narrowly so that each provision carefully addresses the employer's legitimate policy objectives.

Social Media Policy Provisions Deemed Overbroad

The August 18, 2011, NLRB report on social media cases identifies specific examples of social media policy provisions that violate section 8(a)(1) of the NLRA. Nat'l Labor Relations Bd. Report Concerning Social Media Cases, *supra*. Taken together, the string of "what not to do" examples offers employers a basic understanding of which policies, viewed in isolation, the NLRB could deem to violate the NLRA. Specifically, the following could violate the NLRA: (1) a blogging and internet posting policy prohibiting employees from posting pictures of themselves in any media depicting the company in any way; (2) a blogging and internet posting policy prohibiting employees from "making disparaging comments when discussing the company or the employee's superiors, coworkers, and/or competitors"; (3) an internet posting and blogging policy subjecting employees to discipline for engaging in "inappropriate discussion" about the company, management, or coworkers; (4) a social media policy provision prohibiting employees "from using any social media that may violate, compromise, or disregard the rights and reasonable expectations as to privacy or confidentiality of any person or entity"; (5) a social media policy provision prohibiting communications or posts that "constitutes embarrassment, harassment or defamation of the [employer] or any… employee, officer, board member, representative, or staff member"; (6) a social media policy provision prohibiting communications or posts that "lacks truthfulness or that might damage the reputation or goodwill of the [employer], its staff, or employees"; (7) an online social networking policy barring employees from using social media to "talk about company business," post "anything that they would not want their manager or supervisor to see or that would put their job in jeopardy," disclose "inappropriate or sensitive information" about the employer, or post "pictures or comments involving the company or its employees that could be construed as inappropriate"; (8) a policy provision prohibiting employees from using the company's name, address, or other information in their personal online profiles; and, (9) a social media and electronic communication policy that includes guidelines precluding employees from revealing company clients, partners, or customers without management's consent and precluding the use of the employer's logos and photographs of the employer's store, brand, or product, without written authorization. *See* Nat'l Labor Relations Bd. Report Concerning Social Media Cases, *supra*.

Tips for Social Media Policies

If an employer has not yet implemented workplace policies to address employees' use of social media, there is no time like the present. In light of the barrage of mainstream media attention, continuing NLRB scrutiny, and the anticipated rise in judicial decisions on the topic, every employer should draft and implement such policies. Employers already having some form of workplace policy addressing employees' use of social media may need to revisit their policies in light of recent NLRB developments.

As with any other employment policy provision, an employer needs a clear and easy to understand social media policy. Ambiguities could lead to the inference that policies chill employees' exercise of section 7 rights, even if unintentionally. Additionally, an employer should take care to tailor every policy provision narrowly so the NLRB or a reviewing judge will not interpret them as overbroad. Policy provisions should address the employer's legitimate policy objectives specifically. The policy objectives likely will vary from industry to industry and from employer to employer.

Once an employer has prepared precise and narrowly tailored objectives, the employer needs to include limiting language to make it clear that the policy provisions do not prohibit section 7 activities and cannot be construed as prohibiting such protected activities. Employers must also understand that even if a policy provision does not expressly restrict protected activities, a policy provision nonetheless will violate the NLRA in the following three circumstances: (1) Employees reasonably construe the policy's language to prohibit section 7 activity; (2) The employer promulgated the policy or rule in response to union activity; or (3) The employer applied the policy or rule in a manner that restricted the exercise of section 7 rights.

Importantly, after an employer circulates an appropriate policy, the employer must monitor and implement it with consistency. Employers with unionized workforces may want to consider negotiating for collective bargaining agreements that expressly address and restrict the use of social media by bargaining unit members. Either way, employers should continually review their social media policies to keep ahead of the ostensibly moving line delineating lawful policies from unlawful restrictions on protected activity.