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Six Recent NLRB Cases Provide Further Insight on Structuring Employers' Social Media Policies

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Employers, struggling to regulate employees' work-related social media postings, recently suffered a string of defeats in National Labor Relations Board (NLRB) cases challenging their social media and related communications policies. The six cases, decided in the past three months, which resulted in five losses¹ and only one victory for employers,² demonstrate that the NLRB continues to use social media and other common communications policies as a vehicle to aggressively inject itself into the *non-union* workplace as the number of unionized workers continues to diminish. Four of these decisions were issued by administrative law judges,³ and two were issued by the Board.⁴ These cases also highlight the need for all employers to scrutinize their social media policies in an effort to determine whether employees reasonably would read them to prohibit discussion about the terms and conditions of employment for the mutual aid and benefit of the workforce, the applicable standard under Section 7 of the National Labor Relations Act (NLRA or "the Act") for protected concerted activity.

While reading social media policies through the eyes of the proverbial "reasonable employee" can be a challenge for any employer, the six recently decided cases discussed below help to establish certain parameters for policy drafting. In addition, these cases highlight common social media policy provisions that will raise a red flag for the NLRB and the steps employers can take in drafting these policies to avoid or survive an NLRB challenge.

1. Protection of Confidential Information

Like most employers, the employers in *Hoot Winc, LLC* and *Ontario Wings, LLC d/b/a/ Hooters of Ontario Mills ("Hooters")* and in *Lily Transportation Corporation* promulgated policies to protect their company's confidential information. For example, in *Hooters*, the employer's policy provided as follows:

"[t]he unauthorized dispersal of sensitive Company operating materials or information to any unauthorized person or party [might result in discipline

1 *Hoot Winc, LLC*, Case No. 31-CA-104872 (May 19, 2014); *Lily Transp. Corp.*, Case CA-108618 (April 22, 2014); *Durham School Servs., L.P.*, 360 NLRB No. 85 (April 25, 2014); *Professional Elec. Contrs. of Connecticut, Inc.*, Case No. 34-CA-071532 (June 4, 2014); *Laurus Tech. Inst.*, 360 NLRB No. 133 (June 13, 2014).

2 *Landry's Inc.*, Case No. 32-CA-118213 (June 26, 2014).

3 Case No. 31-CA-104872; Case CA-108618; Case No. 34-CA-071532; Case No. 32-CA-118213.

4 360 NLRB No. 85; 360 NLRB No. 133.

up to, and including immediate termination.] This includes, but is not limited to, recipes, policies, procedures, financial information, manuals or any other information in part or in whole as contained in any Company records.”⁵

And in *Lily Transportation*, the employer’s policy provided under the “Inappropriate Conduct” section of its handbook that “[d]isclosure of confidential information, including Company, customer information and employee information maintained in confidential personnel files,” could result in termination.⁶ Employers frequently reiterate policy provisions like these, often in abbreviated form, in their social media policy.

In both of these NLRB cases, the administrative law judge determined these rules were unlawfully overbroad for two reasons. First, employees reasonably would believe the policies prohibited them from discussing wages or other terms and conditions of employment with nonemployees, such as union representatives, which is an activity protected by Section 7 of the Act. Second, nothing about the rules limited their scope, for example, by including qualifying language that excepted protected activities. The judge in *Lily Transportation*, for example, rejected the prohibition against discussing “employee information maintained in confidential personnel files” because employees would reasonably understand that phrase to bar them from discussing their wages.

For many employers, social media policy provisions that address confidentiality are intended to be substantially abbreviated versions of more detailed confidentiality policies found elsewhere in the employee handbook. However, *Lily Transportation* demonstrates that a more detailed confidentiality policy that complies fully with the NLRA generally will not save an overly broad summary in the social media policy. In that case, the employer asserted the short confidentiality rule did not violate the Act because when read in the context of its more detailed confidentiality policy, employees would understand that the policy applied only to proprietary business information and not to wages, or the terms and conditions of employment. The judge rejected this argument, reasoning that the short policy statement did not reference the more detailed confidentiality policy and that the more detailed policy was located in a different section of the handbook which employees had no reason to connect with the shorter and overly broad policy statement.

2. Broad Restrictions on Social Media Posts

The recent NLRB decisions also address social media policies that broadly restrict employees’ posting about their employer in social media and other Internet venues. For example, in *Lily Transportation*, the employer’s policy stated the following:

[E]mployees would be well advised to refrain from posting information or comments about [the company], the [company’s] clients, [the company’s] employees or employees’ work that have not been approved by [the company] on the internet [The company] will use every means available under the law to hold persons accountable for disparaging, negative, false or misleading information or comments involving [the company] or [the company’s] employees and associates on the internet⁷

In *Durham School Services*, an employer who operates a fleet of school buses, maintained a social networking policy that urged employees who use social media to “limit contact with parents or school officials, and keep all contact appropriate” and required employees to keep “communication with coworkers. . . professional and respectful, even outside of work hours.”⁸ The policy also threatened discipline for “[e]mployees who publicly share unfavorable written, audio or video information related to the company or any of its employees or customers.”⁹

The NLRB rejected these policies as impermissibly overbroad, emphasizing that these policies:

- Failed to adequately specify the types of information employees were prohibited from posting;
- Failed to adequately distinguish between information employees could not post and protected speech; and/or
- Failed to provide examples of social media content the employer would consider “appropriate,” “professional,” respectful,” or “unfavorable.”

5 Case No. 31-CA-104872, slip op. at 34.

6 Case No. 01-CA-108618, slip op. at 5.

7 Case CA-108618, slip op. at 7.

8 360 NLRB No. 85, slip op. at 11.

9 *Id.*

These decisions demonstrate that employers cannot ban all negative comments about their organization or establish subjective standards that give employers complete discretion to decide which negative comments will result in discipline. Instead, employers must draft narrowly tailored policies that employees would not reasonably read to prohibit discussion about wages, hours and other terms and conditions of employment, however negative.

3. Additional Rules Pertaining to Communications

A. Requiring “Respectful” Posts

In *Hooters*, the NLRB judge concluded the employer violated the Act when it terminated a server for, among other things, “posting disparaging comments about coworkers and managers on social media” in violation of the company’s insubordination rule. That rule prohibited “insubordination to a manager or lack of respect and cooperation with fellow employees or guest.”¹⁰ The judge found the rule impermissible because it did not adequately define “insubordination,” “lack of respect” or “cooperation” and thus was subjective. The judge further reasoned that the rule did not include any limiting language, such as describing what would constitute uncooperative conduct. The judge suggested that the policy might have survived scrutiny if it had been limited to conduct not supporting the company’s “goals and objectives.”¹¹

B. Prohibiting Posts that “Negatively Affect” the Employer

Employers may hope that employees will not use social media in ways that damage the company’s goodwill or seed internal dissension, but three of the recent cases demonstrate that broad rules seeking to achieve those objectives likely will violate Section 7 of the NLRA. However, the one recent employer victory demonstrates how narrowing language can help a social media policy survive scrutiny.

In *Hooters*, for example, the employer’s policy prohibited any social media post that “negatively affects, or would tend to negatively affect, the employee’s ability to perform his or her job, the company’s reputation, or the smooth operation, goodwill or profitability of the Company’s business.”¹² The judge determined that this policy failed to provide sufficient guidance on the rule’s application and, thus, employees reasonably would conclude it precluded protected activities.¹³

The “No Gossip Policy” in *Laurus Technical Institute* faced a similar fate. There, the employer’s policy prohibited “gossip about the company, an employee, or customer.” The policy broadly defined “gossip” to include, among other things, (a) “[n]egative or untrue or disparaging comments” about others, (b) “repeating information that can injure a person,” and (c) “repeating a rumor about another person.” The NLRB in *Laurus* found this language to be “overly broad” and “ambiguous” and that it “severely restrict[ed] employees from discussing or complaining about any terms and conditions of employment.” The NLRB concluded that “[the employer] ha[d] not sufficiently narrowed, clarified, or defined the scope of its broad no gossip rule.”¹⁴

Likewise, in *Professional Electrical Contractors*, the employer maintained a rule that prohibited “using personal computers in any manner that may adversely affect company business interests or reputation.”¹⁵ The NLRB judge determined the rule was overbroad because it did not include accompanying language that would restrict or limit its application to exclude protected activities.

In contrast to the policies in these cases, the challenged policy in *Landry’s, Inc.* contained limiting language. The policy “urge[d] all employees not to post information regarding the Company, their jobs, or other employees *which could lead to morale issues in the workplace or detrimentally affect the Company’s business.* (emphasis supplied). The following sentence provided examples of how this objective could be met, including “always thinking before you post, being civil to others and their opinions, and not posting personal information about others unless you have received their permission.” The NLRB judge reasoned that (a) the italicized language adequately narrowed the preceding

¹⁰ Case No. 31-CA-104872, slip op. at 36.

¹¹ *Id.*

¹² *Id.* at 34.

¹³ *Id.* at 38.

¹⁴ 360 NLRB No. 133, slip op. at 5, 9.

¹⁵ Case No. 34-CA-071532, slip op. at 6.

restriction on posting by focusing the policy on the avoidance of “morale issues,” and (b) the ensuing examples established that the employer was not trying to prohibit posting on job-related subject matters “but rather the manner in which the subject matter is articulated and debated among the employees.”¹⁶

C. Restrictions on Profanity

With the letter “F” now a common staple of social media posts, employers have become sensitive about profanity-laced social media posts that can tarnish their image. However, the *Professional Electrical Contractors* case demonstrates the challenge of drafting a social media policy that broadly prohibits profanity.

Although the policy at issue in that case prohibited “[b]oisterous or disruptive activity in the workplace” as opposed to profanity *per se*, the judge, in striking down the policy, relied on cases that addressed policies that required employees to work harmoniously and to forego profanity. In those cases, the NLRB explained that rules that do not define prohibited abusive or profane language are patently ambiguous and would reasonably be interpreted as barring employees’ lawful protected activities. In contrast, rules that more clearly are directed at prohibiting unprotected conduct are lawful.

As an example, the judge discussed a 2014 case, involving a transportation company, in which the NLRB examined two rules. The first prohibited “[d]iscourteous or inappropriate attitude or behavior to passengers, other employees, or members of the public” and “disorderly conduct during working hours.” The second prohibited “[p]ropane or abusive language where the language used is uncivil, insulting, contemptuous, vicious, or malicious.” The NLRB determined that the first rule was invalid because it was ambiguous and not sufficiently defined, but the second rule was found to be lawful because it included defining language such that the “clear thrust” of the rule was to prohibit only “profane or abusive” language and not protected activity.¹⁷

D. Protecting the Company Logo

The complaint in *Landry’s* alleged that the company’s social media policy violated the NLRA by restricting use of the corporate logo. More specifically, the policy prohibited employees from posting, without prior approval, “any words, logo or other marks that would infringe upon the trademark, service mark, certification mark or other intellectual property rights of the Company or its business partners.” According to the NLRB’s General Counsel, employees would reasonably read this policy to prohibit protected, non-commercial uses of the company’s logo and could not be expected to understand that the word “infringes” applies only to non-protected, commercial uses of the logo that would create confusion in the marketplace. The NLRB judge rejected this argument, reasoning as follows: “As infringement is not defined, the employee is placed in the position of having to exercise his or her best judgment in determining whether postings that include particular ‘words, logos, or other marks’ may run afoul of the provision.”¹⁸

Key Takeaways for Employers

These six recent cases provide the following useful guidance for employers insofar as their social media policies are concerned:

1. The law in this area remains very fluid. Employers should follow developments regularly or submit their social media policy for review by counsel on a more frequent basis, perhaps semi-annually, than other policies addressing issues where the law is well settled.
2. Social media policies should establish specific rules that employees will easily understand. Employers should avoid subjective terms and standards that leave to the workforce the task of discerning permissible from impermissible social media conduct.
3. When analyzing policy provisions for compliance with the NLRA, employers should consider whether employees would reasonably understand the policy to prohibit them from discussing with co-workers subject matters, such as wages, performance evaluations, workplace safety, discipline, or other legally protected terms and conditions of employment.

¹⁶ Case No. 32-CA-118213, slip op. at 5-6.

¹⁷ Case No. 34-CA-071532, slip op, at 5-6.

¹⁸ Case No. 32-CA-118213, slip op. at 5, 7.

4. Especially when establishing high-level principles for social media conduct, such as the need to “be respectful,” employers should use examples and limiting language to narrow rules that otherwise would serve as a red flag for the NLRB because they are so overly broad that employees could understand them to prohibit protected activity.
5. When a social media policy addresses in abbreviated form matters, such as non-disclosure of confidential information, that are addressed in more detail elsewhere in the employee handbook, employers should consider inserting a specific reference to the more detailed policy.

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