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UPDATE
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National Labor Relations Board General Counsel Issues Guidance on Social Media Policies

With the increasing prevalence of social media in the workplace, numerous employers have responded by introducing social networking policies to provide guidance to employees regarding the proper use of social media. It is no surprise that the National Labor Relations Board (NLRB) has been scrutinizing these policies to ensure that they do not interfere with the rights of both union and nonunion employees to engage in protected concerted activity under the National Labor Relations Act (NLRA). The NLRB's acting general counsel recently released a third social media memo summarizing recent cases that his office reviewed regarding social networking policies. See Office of the General Counsel, Division of Operations-Management, Memorandum OM 12-59 (May 30, 2012). The memo includes a sample policy from a major retailer that the acting general counsel found in compliance with the NLRB's current interpretation of the law as it relates to social media practices.

The NLRB has determined that social networking policies can chill the exercise of employee rights under the NLRA if employees would reasonably construe the policy language to prohibit protected activity. These protected activities include the right to form, attempt to form or join a union, and to discuss wages, hours, or other terms or conditions of employment with co-workers. The acting general counsel has found unlawful rules that are ambiguous as to their application to protected activity, that do not contain limiting language, or that lack a context making it clear the rules do not restrict protected activity. For example, rules prohibiting the disclosure of confidential information or nonpublic information were overbroad because they could be interpreted to prohibit employees' rights to discuss and disclose their wages and conditions of employment. Similarly, rules that prohibited offensive, demeaning, abusive, or inappropriate remarks improperly interfered with the employees' rights to criticize an employer's labor policies or treatment of employees.

On the other hand, the acting general counsel found that a rule that prohibits "inappropriate postings that may include discriminatory remarks, harassment and threats of violence or similar inappropriate or unlawful conduct" was lawful because the rule prohibits plainly egregious conduct and no evidence existed that the employer used the policy to discipline employees for engaging in protected activity. Similarly, a rule that required employees to be respectful, fair, and courteous in their social media postings was lawful because it set forth examples of plainly egregious conduct, making it clear that the policy could not be interpreted

to interfere with protected activity. As further guidance for employers, the acting general counsel has even published a sample social media policy that it has determined does not violate the NLRA.

The acting general counsel's summary of cases and sample policy provide some guidance to employers on how the general counsel's office will review such policies, although the acting general counsel's decisions have not been subject to judicial review. Employers may wish to review their existing policies to ensure that their policies do not interfere with the protected rights of their employees under the NLRA.

To receive additional information regarding social networking policies or how to respond to an allegation that a social networking policy violates the law, please contact one of the following labor relations attorneys:

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