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EMPLOYER ALERT

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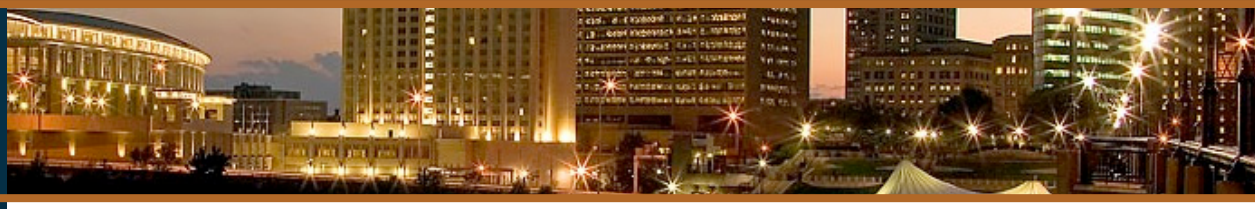

Social Media and the National Labor Relations Board: What You Need to Know

Social media has become a ubiquitous part of our lives. Everywhere we go someone is sending and receiving messages or checking for information. Social media is providing the means for people to stay connected with family and friends, voice opinions, and discuss any number of issues ranging from politics to celebrity break-ups.

In the context of the workplace, however, social media also provides a potential instrument for employees to threaten, harass and intimidate co-workers, clients and customers. Employers therefore have legitimate reasons to maintain social media policies aimed at preventing such behaviors. (By the way, if your company does not have a social media policy yet, it is time to develop and implement one). If not drafted properly, however, such policies have the potential to run afoul of labor and employment laws.

Both the language contained in social media policies and its application in practice are being scrutinized by the National Labor Relations Board to determine whether employees are being "chilled" from doing something which may be protected by the National Labor Relations Act. In a recent case, the company's policy prohibited employees from posting statements online that damaged the company, defamed an individual or damaged a person's reputation. The Labor Board found the prohibition would tend to deter employees from engaging in concerted activity for their mutual aid and protection.

The Labor Board ruled that the policy was unlawful because it contained nothing to suggest that its restrictions would not apply to employees' concerted activity protected by the Act. Because an employee reasonably could believe the prohibition would restrict his or her ability to post statements critical of the company's treatment of employees, payment of wages, or working conditions, the Labor Board found the restriction unlawful. The Labor Board reached this conclusion even though there was no evidence that the company actually did use its policy in that fashion.

The Labor Board offered a few clues as to what language might pass its scrutiny. It suggested that a policy prohibiting employees from making lewd or disparaging comments about customers, coworkers or the company include specific examples of plainly egregious conduct. For example, stating that making such comments in a manner that is threatening, obscene, intimidating, harassing or discriminatory would insulate the policy from being found

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unlawful. An employer's policy that restricted its scope by including examples of clearly illegal or unprotected conduct was found lawful as employees could not reasonably construe it as covering protected activity.

Like social media itself, the Labor Board's position continues to evolve in this area. It is critically important to remember that the Labor Board's position is not dependent on the union or non-union status of your employees. Virtually all private sector employees have the right to engage in concerted protected activity. Further, Connecticut's law concerning free speech in the workplace protects employees who speak out on matters of public concern, which adds an additional element to any analysis of social media policies. Accordingly, if your company has not reviewed its social media policy recently, it would be well advised to do so.

Questions or Assistance?

If you have questions about social media policies, please contact Gary S. Starr at (860) 251-5501 or gstarr@goodwin.com or Jarad M. Lucan at (860) 251-5785 or jlucan@goodwin.com.

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