Bloomberg BNA

Social Media Law & Policy Report™

LABOR & EMPLOYMENT

As corporate social media policies have been created, maintained, and thereafter relied upon to justify discipline or termination of employees violating them, challenges have followed, the authors write. They review recent actions by the National Labor Relations Board in both unionized and nonunionized settings to determine whether social media policies infringed upon employee rights.

Social Media Policies and the NLRB—The Growth of Social Media and the Need for Well-Drafted Social Media Policies

BY SHERRI A. AFFRUNTI AND CHRISTINE E. NIELSEN

Social media is broadly defined as ''. . . activities, practices and behaviors among communities of people who gather online to share information, knowledge, and opinions using conversational media.'' The explosion of social media has left many businesses grappling with the ways to use such tools to their advantage.

''[O]ver the last several years, social media has evolved beyond the fleeting concept of self-promotion and friend-collection to a highly-advanced and necessary tool to disseminate and manipulate information and gain market share.''[1] By way of example, the most well-known social network, Facebook, continues to grow exponentially. The social networking giant reported 665 million daily active users worldwide through March 31, 2013.[2] This is up from roughly 525 million in March 2012.[3]

A 2009 Deloitte study revealed that 23 percent of employees visit social networking sites one to four times per week while at work; 10 percent admit that some access is for personal reasons.[4] In the study, 74 percent of employees agreed it is easy to damage a company's reputation on social media; 23 percent of employees said they do not consider the ethical consequences of posting comments, photos, or videos online; and 72 percent of executives revealed the absence of formal policies governing social networking use. Businesses reluctant to wade into the social media waters, or to participate in the monitoring of employee, client, and

Sherri Affrunti, a partner in Reed Smith's Princeton, N.J., office, routinely provides counsel to clients on an array of human resources and employment law matters. She can be reached at saffruntti@reedsmith.com. Christine Nielsen is an associate in the Global Regulatory Enforcement Group in Reed Smith's Chicago office, focusing on privacy and data security, and can be reached at cnielsen@reedsmith.com.

[1] Michael J. Zussman and Glen R. McMurry, *44 Million Reasons Why You Should Use Social Media in Your Law Practice*, 60 Federal Lawyer 16 (June 2013).
[2] Facebook Inc., 10-Q, March 31, 2013.
[3] *Id.*
[4] Deloitte LLP, 2009 Ethics & Workplace Survey Results, Social Networking and Reputational Risk in the Workplace.

customer activity on social media platforms, do so at their peril.

Businesses have always understood the value of their trade secret, trademarked, copyrighted, and otherwise important confidential data and sought the most appropriate means to protect that intellectual property and proprietary information. Businesses have also understood the value in keeping client data private. More recently, businesses have learned to better protect the consumer personal information in their possession from unauthorized access or misuse. At the recommendation of the Federal Trade Commission, businesses have begun to engage in privacy-by-design, which involves taking privacy into consideration from the beginning phases of a project through the end of its life cycle.[5] Privacy-by-design is meant to better protect consumer personal information—including employee information—and requires businesses to create and maintain information security and privacy policies.

Employers have long instituted policies to monitor, control, and manage workplace safety, security, and ethical obligations. This focus on protecting the confidentiality and privacy of all corporate data has naturally led businesses to place restrictions on the ways their employees can use social media. In a 2012 survey, the Society for Human Resource Management found that 40 percent of organizations reported having a formal social media policy—leaving 60 percent of companies without one.[6] Among organizations with a social media policy, 33 percent indicated taking disciplinary action against employees who violated their policy within the prior 12 months.[7]

As social media policies have been created, maintained, and thereafter relied upon to justify discipline or termination of employees violating them, challenges have followed. The National Labor Relations Board (NLRB or Board) has been called upon in both unionized and nonunionized settings to determine whether the policies themselves infringe upon employee rights.

The NLRB's Authority

The National Labor Relations Act (NLRA or Act), passed in 1935, established the NLRB. It provides employees the right to organize and collectively bargain and prohibits unfair labor practices.[8]

Section 7 of the NLRA specifically states:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).[9]

Under Section 8(a)(1), it is an unfair labor practice for any employer to interfere with an employee's exercise of rights guaranteed under Section 7.[10]

The NLRB is authorized to investigate complaints of unfair labor practices, conduct hearings, and issue findings and orders.[11] The Board analyzes work rules to determine their validity. Rules that explicitly restrict activity protected by Section 7 are unlawful. For rules without such explicit restrictions, ''whether the Act has been violated depends on a showing of whether: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to Section 7 activity; or (3) the rule has been applied to restrict the exercise of such activity.''[12]

The Board also investigates whether the discharge or discipline of an employee violates Section 8(a)(1). The Board looks to a framework established by the *Meyers Industries* cases, *Meyers I* and *Meyers II*.[13] *Meyers I* set forth four factors to determine if an employee discharge violates Section 8(a)(1): ''(1) the activity engaged in by the employee was ''concerted'' within the meaning of Section 7; (2) the employer knew of the concerted nature of the employee's activity; (3) the concerted activity was protected by the Act; and (4) the discipline or discharge was motivated by the employee's protected, concerted activity.''[14]

Concerted activity is defined as that which is ''engaged in with or on behalf of the other employees, and not solely by and on behalf of the employee himself.''[15] *Meyers II*clarified the definition of ''concerted activity'' by also including ''circumstances where individual employees seek to initiate or to induce or to prepare for group action, as well as individual employees bringing truly group complaints to the attention of management.''[16]

NLRB Guidance on Unlawful Social Media Policies and Resultant Terminations

In August 2011, the NLRB's general counsel issued a report addressing social media concerns as they related to the Act and to employee's Section 7 rights.[17] The introduction to the report noted the ''emerging issues concerning the protected and/or concerted nature of employees' Facebook and Twitter postings, the coercive

---

[5] FTC, *Protecting Consumer Privacy in an Era of Rapid Change: Recommendations for Businesses and Policy Makers* 18 (March 2012), available at http://ftc.gov/os/2012/03/120326privacyreport.pdf.

[6] 2012 Survey of the Society for Human Resource Management (SHRM). A sample of HR professionals was randomly selected from SHRM's membership database, which included approximately 250,000 individual members at the time the survey was conducted. The sample was composed of members with the job function of recruiting/staffing. 532 responses were used, yielding a response rate of 19 percent. Data were collected Dec. 17, 2010, through Feb. 1, 2011. The margin of error for this poll is +/- 4 percent. © January 2012, Society for Human Resource Management.

[7] *Id*.

[8] *See* 29 U.S.C. §§ 151 *et seq*.

[9] 29 U.S.C. § 157.

[10] 29 U.S.C. § 158.

[11] 26 U.S.C. § 160.

[12] *Target Corp*., 359 N.L.R.B. No. 103, slip op. at 2 (2013) (citing to *Lutheran Heritage Village-Livonia*, 343 N.L.R.B. 646, 646-647 (2004)).

[13] *See Meyers Industries*, 268 N.L.R.B. 493 (1983) (*Meyers I*), *remanded sub nom. Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), *cert. denied* 474 U.S. 948 (1985), *supplemented* 281 N.L.R.B. 882 (1986) (*Meyers II*), *aff'd. sub nom. Prill v. NLRB* , 835 F.2d 1481 (D.C. Cir. 1987) , *cert. denied* 487 U.S. 1205 (1988).

[14] *Meyers I*, 268 N.L.R.B. at 497.

[15] *Id*.

[16] *Meyers II*, 281 N.L.R.B. at 887.

[17] NLRB Report of the Acting General Counsel Concerning Social Media Cases, Memorandum OM 11-74 (Aug. 18, 2011) (hereinafter August 2011 Report).

  ISSN

impact of a union's Facebook and YouTube postings, and the lawfulness of employers' social media policies and rules.''[18]

The first report summarized its findings from 14 then-recent cases involving employee terminations for violations of social media policies after employees turned to social media to complain about work problems. The NLRB focused its review on overbroad or restrictive social media policies; discipline or discharge for social media use; and unionization through social media.

The NLRB followed the August 2011 report up with two additional memoranda on 2012; the first released in January and the second in May.[19] These reports, as well as a review of Board decisions since May 2012, provide guidance for companies seeking to implement or amend their social media policies, whether or not their workforce is unionized.

Unlawful Terminations for Social Media Posts

The Board conducts fact-intensive inquiries to determine whether a discharge of an employee for making comments on or posting to social media sites is unlawful. Although the internet now replaces the break room and water cooler as the forum for discussing employment-related issues, the Board continues to rely on *Meyers I* and *Meyers II* for the framework in assessing the engagement of concerted activity.

In one sample case summarized in the January 2012 Report, the Board used the *Meyers I* factors to determine that an employee termination for posts made to Facebook was unlawful. The employee in the case posted to Facebook following an assignment transfer and, using an expletive to disparage her supervisor, complained about the reassignment seeking support and comments from co-workers.[20] Of importance to the NLRB, some co-workers commented and provided support for the employee's position, and at least one suggested taking concerted action by filing a class action lawsuit. The facts demonstrated that the employer knew about the employee's Facebook posts and terminated her employment as a direct result of them. The Board also found that the employer discharged the employee ''specifically as a result of the protected nature of her posts, i.e., because they were fomenting additional discussion among employees about workplace problems.'' This assessment of the *Meyers I* factors led to the Board's conclusion that the employment termination at issue was unlawful.

Where one employee acting alone vocalizes collective concerns previously discussed among several employees, the behavior has been found to be concerted. In one case, an employee posted pictures to his Facebook page, inserting descriptive captions to those pictures.[21] The NLRB analyzed the context of the postings, concluding the photographs depicted concerns raised by several employees in an informational meeting held before the photos were taken or captioned. The photos were deemed to be manifestations of employee concerns about the way their employer, an automobile dealer, had conducted a customer sale. Such concerted activity was protected.[22]

However, if a lone employee is vocalizing collective sentiment, discharge may be upheld. In one case, an employee's open letter to a U.S. senator about deficiencies in her employer's ability to provide emergency services in the state, where the letter was not discussed among co-workers, was not ''concerted activity''; her termination was thus not overturned.[23] In another, where the employee himself characterized his conduct as ''just venting'' and did not seek group action to address concerns about employment terms and conditions, he was found to have not engaged in concerted activity.[24] Where co-workers commented on a Facebook post and did not indicate that the post was of group concern, the post was not protected, and the termination was upheld as lawful.[25]

Unlawful Social Media Policies

The NLRB's assessment of social media policies demonstrates its view that blanket, general policies are unlawful when they chill protected concerted activity whether in the unionized or nonunionized setting. Specifically, the Board has found that the rule prohibiting ''making disparaging comments about the company through any media, including online blogs, other electronic media or through the media'' was unlawful because it restricted Section 7 rights.[26] A statement to employees not to release confidential information about the company, its employees, or its clients also was deemed by the Board to be too vague. The Board found that employees would construe vague provisions prohibiting the release of all confidential information as ''prohibiting them from discussing information regarding their terms and conditions of employment.''[27]

In another case, the social media policy initially reviewed by the Board prohibited ''discriminatory, defamatory, or harassing web entries about specific employees, work environment, or work-related issues on social media sites.'' The list arguably applied to protected criticism of labor policies, terms and conditions of employment, and treatment of employees. The revised policy forbade only ''statements which are slanderous or detrimental to the company'' on a list that included prohibitions on plainly egregious conduct such as discrimination or harassment on account of legally protected classifications. Adding specificity to the policy was deemed by the Board to have cured its previous defects.[28]

The Board generally finds that a broad statement requiring accuracy in all communications is not permissible. For example, one policy reviewed by the NLRB stated: ''You must also be sure that your posts are completely accurate and not misleading and that they do not reveal non-public company information on any public site.'' The Board found that the phrase ''[c]ompletely

[18] *Id*.
[19] *See* NLRB Report of the Acting General Counsel Concerning Social Media Cases, Memorandum OM 12-31 (Jan. 24, 2012) (hereinafter January 2012 Report); NLRB Report of the Acting General Counsel Concerning Social Media Cases, Memorandum OM 12-59 (May 30, 2012) (hereinafter May 2012 Report).
[20] *See* January 2012 Report 3-4.
[21] *See* August 2011 Report.
[22] *Id.*
[23] *See* August 2011 Report.
[24] *See* January 2012 Report 35.
[25] *See id* at 12.
[26] *See id.* at 4.
[27] *See* May 2012 Report 4.
[28] *See* January 2012 Report 16.

accurate and not misleading'' was not appropriately defined and ''would reasonably be interpreted to apply to discussions about, or criticisms of, the Employer's labor policies and its treatment of employees that would be protected by the Act so as long as they are not maliciously false.''[29]

A statement that requires employees to obtain permission or seek guidance from the employer prior to posting will not survive a challenge.[30] Additionally, requiring employees to seek permission from their coworkers before posting photos or other personal information is also too broad and generally impermissible.[31]

Social media policies sometimes contain statements or phrases that discourage communications or require reporting of communications. Examples of such statements are: ''Be careful when 'friending' coworkers;'' ''Address concerns by speaking directly to coworkers, supervisors, or management rather than posting on the Internet;'' and ''Report any inappropriate social media activity.'' These statements have been found to be unlawful.[32]

Social media policies can contain or be coupled with media policies, which restrict employee communications with government officials or media. Again, general prohibitions, such as ''notify the company if you are contacted by the media or a government agency;'' or ''never speak publicly about the company's business without prior authorization,'' may be struck down as violative of Section 8. Alternatively, those policies that specifically require the official company message to go out from one designated individual are usually acceptable as are policies prohibiting social media discussions about ''embargoed information,'' such as launch and release dates of new products or services and pending corporate reorganizations.[33]

The August 2011 report additionally articulated a persisting theme—a policy's ''savings'' clause will not save it from being deemed unlawful. Although savings clauses are advisable for otherwise reasonably tailored policies, including a savings clause does not adequately make up for a policy's consequence of chilling protected activity.

Recent NLRB Decisions

Since the May 2012 Report, the Board continues to analyze social media policies and, in some cases, the termination of employees for policy violations.

In a 2013 *Target* decision, the information security policy at issue prohibited employees from disclosing confidential information relating to the company or other employees on social media, in the break room, at home, or in open areas and public places.[34] The term ''confidential information'' was broadly defined as ''non-public company information'' including ''team member personnel records.''[35] The administrative law judge found the policy violated employees' Section 7 right to discuss their wages, hours, and working conditions because it was overly broad.[36] Target was ordered to cease and desist from maintaining an information security policy prohibiting employee discussions on wages, benefits, and other terms and conditions of employment.[37] The Board upheld the ALJ's decision and order.

A case against UPMC challenged three company polices: a solicitation policy, an electronic mail and messaging policy, and an acceptable use of information technology resources policy.[38] The information technology resources policy prohibited employees from, without prior permission, establishing social networks that disparaged or made false or misleading statements about UPMC.[39] In assessing the lawfulness of the policies, the ALJ found ''these overly broad and vague restrictions on employee use of technology resources, which employees can avoid if they seek and receive permission from the employer, violate the Act.''[40] The ALJ went on to say that the policy did not adequately describe what conduct was permitted, and what was not, so employees were left to decide for themselves if protected activity was prohibited. [41]

In addition, the prohibition on transferring ''sensitive, confidential, and highly confidential information'' over the internet was also found to be unlawful.[42] The ALJ found this general prohibition would chill employee discussions about wages, personnel matters, benefits, and other terms and conditions of employment.

In *DirectTV*, the challenged employee handbook policies addressed communication with the media, communication with NLRB agents, confidentiality of company business, and use of social media to discuss ''company business.''[43] DirectTV's social media policy stated, ''[e]mployees may not blog, enter chat rooms, post public website messages, or otherwise disclose company information . . . not already disclosed in a public record.''[44] ''Company information'' included ''employee records'' and was not further defined in the policy.[45] The Board determined that the definition left employees to decipher what information was subject to the prohibition from blogging and posting and what was permissible. The Board found employees could reasonably understand the policy to prohibit disclosure of employee wages, discipline, and performance ratings and found the policy unlawful.[46]

Supreme Court Review of Board Appointments

On Jan. 4, 2012, after the first session of the 112th Congress had adjourned, but before the second session had commenced, President Obama made three recess appointments to the NLRB. The D.C. Circuit has held those recess appoints unconstitutional. The Supreme Court will review whether recess appointments within a session are valid and whether recess appointments to

[29] *See* May 2012 Report 6.
[30] *See* January 2012 Report 13.
[31] *See* August 2011 Report.
[32] *See* May 2012 Report 8-9, 11.
[33] *See* January 2012 Report 17.
[34] *Target*, 359 N.L.R.B. No. 103 (Apr. 26, 2013).
[35] *Id*. at 14.
[36] *Id*. at 19.
[37] *Id*. at 4.
[38] *UPMC*, No. 06-CA-081896 (N.L.R.B. A.L.J. Apr. 19, 2013).
[39] *Id*. at 6.
[40] *Id*. at 19.
[41] *Id*.
[42] *Id*. at 20.
[43] *DirectTV*, 359 NLRB No. 54 (Jan. 25, 2013).
[44] *Id*. at 3.
[45] *Id*.
[46] *Id*.

  ISSN

fill vacancies that did not occur during an intersession recess are valid.[47]

In *Noel Canning v. NLRB*, the petitioner argued that the ''Board lacked authority to act for want of a quorum, as three members of the five-member Board were never validly appointed because they took office under putative recess appointments which were made when the Senate was not in recess.''[48] In addition, the vacancies that were being filled during the recess did not occur during the recess, but occurred prior to the Senate's adjournment.[49] In contrast, the Board contended that the president's appointments under the ''Recess Appointments Clause'' Session were valid.[50]

The D.C. Circuit held the recess appointment power was limited to intersession recesses and the NLRB appointments had not been made during an intersession recess. The Board's decision was therefore vacated.[51] In addition, a two-member majority held the appointments also were invalid because the vacancies themselves had not occurred during the intersession recess.

For now, *Noel Canning* is binding precedent only in the D.C. Circuit. The decision vacated a Board order aimed only at Noel Canning and relating to the approval of a collective bargaining agreement.

Since *Noel Canning*, the Third Circuit has issued a decision in *NLRB v. New Vista Nursing & Rehabilitation*, No. 11-3440 (3d Cir. May 16, 2013), holding the recess appointments invalid and finding the NLRB was thus legally unauthorized to act. These rulings conflict, however, with other Circuit opinions finding to the contrary—including the Second, Ninth and Eleventh Circuits.[52]

The constitutional issues yet to be addressed by the Supreme Court have far-reaching consequences on all of the NLRB's decisions after the recess appointments were made. ''The court's determination that the Board Members were invalidly appointed may be widely applicable to legal challenges of other actions undertaken by the Board in which the appointees participated. For example, more than 200 disputes on which the Board reportedly has ruled since the January 4, 2012 appointments likely would be called into question if the reasoning of *Noel Canning* is applied in future cases.''[53]

Creating Permissible Social Media Policies

Although the recent NLRB actions and decisions may be challenged if the Supreme Court upholds *Noel Canning*, those challenges are too prospective to provide guidance now. In the meantime, businesses would do well to apply the lessons learned in previous NLRB social media policy cases in establishing—or, if necessary, revising—social media policies.

First, it is important to clearly communicate that computer systems are owned by the company, to be used for company business. Employees should be reminded that they have no reasonable expectation of privacy when using company equipment, including desktop computers, laptops, mobile phones, and PDAs. The same is true for company information systems, such as email and the internet.

The nature and extent of employee monitoring on these devices and systems should also be part of the policy. Employees should be reminded that all information sent, received or viewed on the internet (including personal emails), web-based communications, instant messages, text messages, and other forms of communication can be stored on the computer's hard drive or the company's servers and can be reviewed and retrieved by the company at any time.

In the social media policy, prudent employers should clearly and specifically define prohibited activities and refrain from using vague or overbroad language that might chill concerted employee activity.

Provisions related to the prohibition of disseminating confidential information should include specific examples defining ''confidential information'' that is specific to the business and not generalizing in a manner that can be construed to prohibit discussions of wages or working conditions.

Employees can blog on their own time, but remind them to exercise decorum, comply with all terms of use for sites, and refrain from presenting their own personal opinions in a manner that can be viewed as the company's opinion. Employees should also be reminded that they must disclose their employment relationship with the company when endorsing company products or services. The focus of such policy provisions should be upon clearly improper conduct, such as sexual harassment and defamation, and not be overly generalized to prohibit ''complaints.''

Well-drafted policies also include employee acknowledgments; are reissued periodically; and warn employees that their violations of the policy—as with other policies— are grounds for disciplinary action, up to and including termination of employment.

Finally, although attorney review is strongly encouraged before implementation of any social media policies in this ever-changing environment to ensure legal compliance, it is wise to nonetheless include a disclaimer making clear the policy does not prohibit, and is not intended to prohibit, employees from engaging in protected concerted activity or discussing wages, hours, and working conditions. This ''savings clause'' will not cure otherwise deficient policies, so should be used only where the rest of the social media policy is lawful.

---

[47] *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013), *cert. granted*, No. 12-1281 (June 24, 2013).

[48] *Noel Canning*, 705 F.3d at 493.

[49] *Id.*

[50] U.S. Constitution, Art. II, § 2, cl. 3.

[51] *Id.* at 506-507.

[52] *See United States v. Allocco*, 305 F.2d 704 (2nd Cir. 1962); *United States v. Woodley*, 751 F.2d 1008 (9th Cir. 1985); *Evans v. Stephens*, 387 F.3d 1220 (11th Cir. 2004).

[53] David H. Carpenter and Todd Garvey, *Practical Implications of Noel Canning on the NLRB and CFPB* (CRS Apr. 1, 2013), available at http://www.cfpbmonitor.com/files/2013/04/Practical-Implications.pdf