



Social Media Policies: Do's and Don'ts by Jeffery A. James and Laura L. Edwards

In the past few years, social media technologies have emerged as double-edged swords in the workplace. In the right hands, such technologies can provide unprecedented marketing and growth opportunities. In the wrong hands, they can create embarrassment and liability for an employer. To protect their interests, employers have implemented policies addressing, and sometimes restricting, employee use of social media.

Recently, the National Labor Relations Board ("NLRB") has targeted social media policies in its enforcement of Section 7 of the National Labor Relations Act ("NLRA"). Section 7 prohibits employers from restraining employee engagement in "protected concerted activity." The NLRB has interpreted "protected concerted activity" to include Facebook, Twitter and blog posts. In August 2011 and January 2012, the NLRB's Acting General Counsel, Lafe Solomon, issued two reports addressing unfair labor practice cases involving social media issues. The reports show that employer social media policies can violate the NLRA in two primary ways. First, in a unionized workplace, an employer may have a duty to bargain with a union before implementing a social media policy. Second, broadly-worded social media policies (in both union and non-union settings) may improperly chill or restrict an employee's ability to engage in protected concerted activity.

The NLRB's test for whether an activity is "protected concerted activity" under Section 7 is whether it is "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." *Rural Metro*, 25-CA-31802 (June 29, 2011). However, individual activities that are the "logical outgrowth" of concerns expressed by a group of employees are protected. Concerted activities also include individual actions that aim to initiate group action. Individual activities that do not induce group action constitute unprotected "griping."

For example, in *Hispanics United of Buffalo, Inc. & Carlos Ortiz*, No. 3-CA-27872 (2011), an employee posted a comment on her Facebook page complaining that a co-worker made comments critical of other employees. The employee solicited opinions from other co-workers in her post. Four co-workers responded, some with profanity and one suggesting a meeting with the employer's business manager. After the complained-of employee told her employer about the postings, the employer discharged all commenting employees for violation of its harassment policy. An NLRB administrative law judge ("ALJ") found that the employees' postings were protected because they collectively discussed matters affecting their employment. The employees did not lose protection of the NLRA even though some of the postings were profane and sarcastic. The ALJ ordered the company to reinstate the employees with full back pay and benefits. Conversely, in *Rural Metro*, the NLRB advised that an employee's disparaging Facebook post was not protected concerted activity where the employee did not discuss the post with others and made no attempt to initiate group action.

Further, federal and state lawmakers are attempting to restrict employers from requesting access to employee social media accounts. The Social Networking Online Protection Act, introduced in the House of Representatives on April 27, would ban employers from requiring access to password-protected online content if passed. Washington Senate Bill 6637, introduced on April 6, seeks to prohibit an employer from requiring an employee (or prospective employee) to submit social media password and account information or otherwise demanding access to the individual's account on a social networking site. Maryland passed a bill banning such practices on May 2. Eight other states, including California, Illinois, Massachusetts, Michigan, Minnesota, Missouri, New York, and South Carolina, have proposed similar legislation.

Social Media Policy Guidelines. When drafting a social media policy, employers should keep the following guidelines in mind:

- **DON'T** adopt a social media policy that vaguely prohibits "distasteful" or "vulgar" postings.
- **DO** adopt a social media policy prohibiting unprotected activity, such as harassment. For example, a policy prohibiting the use of social media to post threatening, intimidating, or harassing comments about co-workers (but *not* about terms and conditions of employment) would probably not restrict employees' Section 7 rights.
- **DON'T** *broadly* prohibit disclosure of "confidential information or trade secrets" online, as such a policy could be construed to prohibit wage information discussions, which are protected by Section 7.
- **DO** prohibit online disclosure of confidential information specific to an employer's business, as well as HIPAA-protected information. For example, a tech firm could restrict discussion of proprietary designs and products under development; a hospital could prohibit employees from posting confidential medical information about customers.
- **DON'T** assume that a general "savings" (*e.g.*, that the employer will not use the policy to interfere with employee rights) will fix a broadly-worded social media policy. A savings clause cannot replace a carefully-crafted, employer-specific policy.
- **DO** inform employees that the employer will reasonably monitor employee use of social media.
- **DON'T** interfere with or discipline employees for simply engaging in social media conversations concerning conditions of employment. Be aware that an employee post that seems to air an unprotected personal grievance could "morph" into protected activity if co-workers comment and use it as a platform to discuss working conditions. Don't insist on access to employee passwords.
- **DO** enforce your social media policy consistently and without discrimination.
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Please note that this list is not comprehensive and that you should aim to create a policy that is as specific to the needs of your organization as possible. If you would like additional assistance in reviewing or drafting a social media policy, please contact Jeff James or Laura Edwards at (425) 454-4233.

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