The National Labor Relations Board's Crackdown on Social Media Policies

Edward P. Cadagin

If your company has a social media policy in its handbook, that policy is in the crosshairs of the National Labor Relations Board (NLRB). The NLRB is the agency that enforces the National Labor Relations Act (NLRA), which, despite common misconceptions, applies equally to unionized and ***non***-unionized workforces and to businesses big and small. Specifically, Section 7 of the NLRA protects all employees' rights to participate in "concerted activity" regarding the terms and conditions of their work without interference from the employer. Employees engage in concerted activity when they discuss workplace conditions, including, for example, wages, hours, benefits, or safety issues.

Like so many things, "concerted activity" has made its appearance on social media, but not always in a light that is flattering to the employer. In response, many employers have implemented social media policies that purport to restrict what employees can say about the company on social media. While having a social media policy in place is generally a good idea, the NLRB, ever vigilant against infringement on employees' rights to participate in concerted activity, is cracking down on social media policies that "chill" employees' protected speech.

Lessons From the NLRB's Review of Social Media Policies

The NLRB's recent focus on social media policies is causing heartburn for employers, especially given that its decisions focus primarily on what employers *cannot* say in a social media, leaving many scratching their heads as to what they *can* say. For those left staring at a social media policy with more red ink than black, please consider the following types of social media provisions that the NLRB is likely to approve:

- Prohibitions on employees pressuring coworkers to connect, link, or communicate via social media;
- Requirements that employees honor and respect copyright, trademark, and other intellectual property laws;
- Prohibitions on posting anything on social media in the name of the employer, or in such a way that it could be reasonably attributed to the employer, without prior written authorization;
- Prohibitions on the posting of discriminatory, harassing, or threatening remarks or similar unlawful/inappropriate conduct;
- Requirements that employees be professional and respectful in their interactions with coworkers, clients, and competitors;
- Prohibitions on cyber-bullying or posts that contribute to a hostile work environment;
- Requirements that employees maintain the confidentiality of company trade secrets and confidential information (as long as trade secrets and confidential information are well-defined); and
- Prohibitions on disclosure of information protected by attorney-client privilege.

Social media policies should also include a "savings clause," in the form a statement that the employer will not interpret or apply any of its policies in a manner that would restrict employees' rights under the Act. When paired with well-crafted provisions, a savings clause (while not a failsafe) serves as a signal to the NLRB that your company is serious about protecting employees' rights.

The Chipotle Case

The NLRB is showing no signs of slowing its crackdown on social media policies, as evidenced by a decision rendered in August 2016 against Chipotle. The case arose after an hourly employee fired off a series of tweets as follows:

- Regarding a news article about Chipotle employees forced to work on snow days, he tweeted to the company's communication director, "Snow day for 'top performers'...?".
- In response to a customer who tweeted about free Chipotle food, he tweeted, "nothing is free, only cheap #labor. Crew members only make $8.50hr how much is that steak bowl really?"

Chipotle requested that the employee remove the tweets, showing him a version of its social media policy which prohibited employees from sharing "confidential information" online or anywhere else, and from making "disparaging, false, misleading, harassing, or discriminatory statements" about Chipotle or its employees on social media.

The NLRB found that the policy's prohibition on disclosing "confidential information" violated the NLRA because the word "confidential" was not adequately defined, and the policy could therefore "easily lead employees to construe it as restricting their rights." Additionally, the NLRB found that the policy's prohibition against making disparaging, false, or misleading statements about Chipotle also violated the NLRA because, among other reasons, disparaging language "could easily encompass statements protected by [the NLRA]. . . ." The NLRB further found that Chipotle could not prohibit employees from making false or misleading statements unless the employee also had a malicious motive.

Interestingly, however, the NLRB found that Chipotle's social media policy did *not* violate the NLRA to the extent it prohibited employees from posting harassing or discriminatory statements, and from using Chipotle's trademarks or other intellectual property.

The Chipotle case highlights the NLRB's aggressive approach towards social media policies. Rulings like this, along with the growing prevalence of social media in the workplace, should prompt employers with pre-existing policies to revisit their policy and those without such policies a reason to implement them immediately.

Authors and Contributors

Edward P. Cadagin
Associate, Atlanta Office
404.873.8582
edward.cadagin@agg.com

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171 17th Street, NW
Suite 2100
Atlanta, GA 30363

Washington, DC Office
1775 Pennsylvania Avenue, NW
Suite 1000
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