JONES DAY

JUNE 2012

NLRB ACTING GENERAL COUNSEL ISSUES ENFORCEMENT GUIDANCE ON SOCIAL MEDIA POLICIES

For the third time in less than a year, the Acting General Counsel ("AGC") of the National Labor Relations Board ("NLRB") has issued an Operations-Management Memorandum providing enforcement guidance on employees' use of social media and employers' social media policies. In the latest report issued on May 30, 2012, the AGC offered the clearest glimpse so far of what constitutes a lawful social media policy under the National Labor Relations Act ("NLRA")—attaching in full one policy that the AGC deems lawful and, at the same time, finding six other policies unlawful. *See* NLRB, Operations Memorandum 12-59 (May 30, 2012) ("OM 12-59"), *available at* http://www.nlrb.gov/publications/operations-management-memos. This latest Operations-Management Memorandum underscores the importance of having properly drafted social media policies in both unionized and non-union workplaces, since the same rules apply to all employers subject to the NLRA whether they are unionized or not.

OM 12-59, together with the AGC's two prior reports and recent Administrative Law Judge ("ALJ") decisions on social media policies, makes several themes clear:

- The AGC continues to consider social media issues an enforcement priority, having acted on numerous cases since his April 2011 directive requiring that all "[c]ases involving employer rules prohibiting, or discipline of employees for engaging in, protected concerted activity using social media, such as Facebook or Twitter" be submitted to the NLRB's Division of Advice. NLRB General Counsel Memorandum 11-11 (Apr. 12, 2011) at 2.
- The AGC continues to find most employer social media policies overbroad and unlawful under the NLRA on the basis that employees could "reasonably construe" them as restricting employees' Section 7 rights to communicate with each other or third parties regarding wages, hours, and working conditions. In fact, of the 20 policies reviewed in his three reports, the AGC has found only four to be lawful.

- The AGC's numerous challenges to social media policies have met mixed success in litigation before ALJs of the NLRB, with one ALJ rejecting, just last week, some of the AGC's challenges to an employer's social media policy while finding other parts of the policy unlawful.
- Based upon the AGC's enforcement guidance, employers must carefully draft their social media policies to avoid broad language that employees could reasonably construe to prohibit protected activities, and employers must incorporate specific examples of prohibited conduct to make clear that the policies do not cover Section 7 activities. Including a disclaimer in the policy—simply stating that the policy does not apply to or prohibit Section 7 activities—is clearly not enough, in the AGC's view, to cure a defectively overbroad social media policy.

Although OM 12-59 does not constitute binding precedent, it provides useful guidance for employers that have implemented or are considering implementation of rules governing employee use of social media. To date, the NLRB has yet to provide any significant guidance on social media issues, as the handful of Board decisions that discuss social media have not established any guidelines on employee rights with respect to social media activity. However, the AGC has pursued several social media cases that have been or will be appealed to the Board, and employers can expect these cases to be decided in the near future.

OM 12-59

In an effort to "provide additional guidance" regarding social media issues, the AGC's latest Operations-Management Memorandum focuses exclusively on the lawfulness of social media policies. The AGC breaks no new ground on the basic legal standards, continuing to apply the Board's decision in *Lutheran Heritage Village-Livonia*, 343 N.L.R.B. 646 (2004). In *Lutheran*, the Board reaffirmed that a rule is unlawful if it "reasonably tends to chill employees in the exercise of their Section 7 rights." *Id*. at 646. To make that determination, the Board follows a two-step inquiry. First, a rule is unlawful if it explicitly restricts activities that Section 7 of the NLRA protects. Second, "[i]f the rule does not explicitly restrict activity protected by Section 7," it is still unlawful if "(1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights." *Id*. at 647. In conducting this analysis, the Board "must refrain from reading particular phrases in isolation, and it must not presume improper interference with employee rights." *Id*. at 646.

In his two prior Operations-Management Memoranda, the AGC reviewed 13 social media policies, finding 10 of those policies unlawfully overbroad. In OM 12-59, the AGC reviewed seven more policies and found six of them unlawful in part. In the AGC's view, employees could reasonably construe the following provisions, among others, to prohibit Section 7 activities:

- Restrictions on releasing "confidential information" about coworkers and "company information," as well as restrictions on sharing confidential information with coworkers. OM 12-59, at 3-5.
- Instructions to ensure that posts are "completely accurate and not misleading and that they do not reveal non-public company information on any public site." *Id*. at 6-7.
- Prohibitions on posting photos, music, videos, quotes, and personal information without the owner's permission, and using the company's logo, in the absence of any explanation of the scope of those restrictions. *Id*. at 7.
- Instructions that "offensive, demeaning, abusive or inappropriate remarks are as out of place online as they are offline," without examples eliminating ambiguity. *Id*. at 8-9.
- Prohibitions against posting personal information about other employees and contingent workers, commenting on "legal matters," picking fights, engaging in controversial discussions, and airing complaints online. *Id*. at 9-12.

In addition, OM 12-59 makes clear that the AGC does not consider general disclaimers in social media policies—stating, for example, that they "will not be construed or applied in a manner that improperly interferes with employees' rights under the [NLRA]," *id*. at 12—to be effective in curing the

defects in overbroad policies. In the AGC's views, employees "would not understand from this disclaimer that protected activities are in fact permitted." *Id*.

While finding the above-listed provisions unlawful in context, the AGC found that similar restrictions in another policy were lawful, citing the employer's use of examples to provide context for the prohibited communications. To underscore the point, the AGC published this lawful policy, in its entirety, and highlighted the importance of "provid[ing] sufficient examples of prohibited conduct so that, in context, employees would not reasonably read the rules to prohibit Section 7 activity." *Id*. at 20. On that basis, the AGC found the following provisions in this particular policy to be lawful:

- Prohibition against "inappropriate postings that may include discriminatory remarks, harassment and threats of violence or similar inappropriate or unlawful conduct." *Id*.
- Requirement that employees be "'fair and courteous' in the posting of comments, complaints, photographs or videos" where the policy lists, as examples, posts that could be "viewed as malicious, obscene, threatening or intimidating," that could amount to "harassment or bullying," or that could create a hostile or discriminatory work environment. *Id*.
- Requirement that employees maintain the confidentiality of the employer's trade secrets and confidential information, where the employer provided examples of prohibited disclosures that did not include protected communications. *Id*.

THE EARLY ALJ DECISIONS, WITH MORE TO COME

While the AGC has considered most social media policies to be unlawful, the views of the AGC have met with mixed success in litigation before NLRB ALJs. Just last week—on the same day that the AGC issued his third social media report—an ALJ issued a decision rejecting some, but not all, of the AGC's challenges to one of the policies discussed in the report. *See General Motors, LLC*, Case No. 07-CA-53570 (N.L.R.B. Div. of Judges, May 30, 2012) (Sandron, ALJ). Other ALJs in 2012 have rejected some of the AGC's positions on the lawfulness of social media policies. *See Triple Play Sports Bar & Grille*, Case Nos. 34-CA-12915 & 12926 (N.L.R.B. Div. of Judges, Jan. 3, 2012) (Esposito, ALJ) (rejecting argument that social media policy prohibiting "inappropriate" communications was unlawful); *G4S Secure Soluctions (USA) Inc*., Case No. 28-CA-23380 (N.L.R.B. Div. of Judges, Mar. 29, 2012) (Laws, ALJ) (finding parts of social media policy unlawful but upholding restriction on posting photos of uniformed employees based on employer privacy concerns).

In *General Motors*, ALJ Ira Sandron applied *Lutheran* in concluding that a number of prohibitions in the employer's social media policy did not violate the NLRA. In particular, the ALJ held that restrictions on the use of the employer's logo were lawful, finding that the employer had articulated a legitimate business reason for limiting use of its logo online, namely to prevent confusion about official communications, and had not adopted the rule to ban its use during protected union activities. The ALJ also upheld a provision stating that "offensive, demeaning, abusive or inappropriate remarks are as out of place online as they are offline," finding that these "descriptive adjectives" rendered the restriction permissible. *General Motors, LLC*, Case No. 07-CA-53570, at 7-8.

On the other hand, the ALJ agreed with the AGC that employees could "reasonably construe" certain other provisions as restricting their Section 7 rights, including provisions prohibiting disclosure of "nonpublic company information" and "personal information" about coworkers relating to "performance, compensation, or status in the company"; requiring posts to be "completely accurate" and "not misleading"; requiring employees to ask permission before posting information if they were "in doubt"; and prohibiting employees from posting photos, music, videos, quotes, or personal information without the owner's permission. *Id*. at 5-6. The ALJ found that these provisions could be construed to restrict communications about wages, require permission to engage in protected activities, and restrict protected activities like handbilling. *Id*.

While the policy contained a disclaimer stating that the employer would administer the policy in compliance with Section 7, the ALJ agreed with the AGC that this savings

clause did not cure the policy's defects. He concluded that "employees cannot be expected to know what conduct is protected under the Act." *Id*. at 9.

DRAFTING SOCIAL MEDIA POLICIES

The AGC's latest report certainly provides employers with the clearest guidance yet for drafting and revising their social media policies. While challenged policies continue to work their way through the Board's adjudicative processes, employers should take appropriate steps to update their policies to reflect OM 12-59's guidance, especially heeding its emphasis on providing examples and context. Employers should consult with counsel to draft social media policies that, among other things:

- Clearly articulate the employer's business purposes for the policy and the employer's business interests in imposing appropriate restrictions on social media postings;
- Explain that employees are free to express their views in social media but are responsible for what they post and thus should use good judgment and common sense;
- Define, with specific examples, the types of communications that the policy restricts and explain the business reasons for the restrictions (e.g., personal health information, competitor or client information);
- Define, with specific examples, the types of confidential information that cannot be disclosed for business or legal reasons (e.g., trade secrets, FDA information, FTC restrictions, attorney-client privileged information), but do not restrict communications on wages or working conditions;
- Define, with specific examples, restrictions on "offensive" communications and link them to policies against, e.g., harassment, discrimination, and bullying; and
- Include a carve-out explicitly stating, in understandable terms, that the policy should not be construed, and will not be applied, to restrict employees' rights to engage in protected activities.

Stay tuned as more ALJs decide social media cases and as these cases move to the Board—and eventually the courts—for decision. If the recent ALJ decisions are any indication, employers can expect continued litigation over social media policies, with success for employers tied to how carefully they draft their policies and how clearly they define, with explicit examples, impermissible communications that do not implicate employees' Section 7 rights.

LAWYER CONTACTS

For further information, please contact your principal Firm representative or one of the lawyers listed below. General email messages may be sent using our "Contact Us" form, which can be found at www.jonesday.com.

Lawrence C. DiNardo
Chicago
+1.312.269.4306
lcdinardo@jonesday.com

Brian W. Easley
Chicago
+1.312.269.4230
beasley@jonesday.com

Patricia A. Dunn
Washington
+1.202.879.5425
pdunn@jonesday.com

George S. Howard, Jr.
San Diego
+1.858.314.1166
gshoward@jonesday.com

Willis J. Goldsmith
New York
+1.212.326.3649
wgoldsmith@jonesday.com

G. Roger King
Columbus
+1.614.281.3874
rking@jonesday.com

F. Curt Kirschner, Jr.
San Francisco
+1.415.875.5769
ckirschner@jonesday.com

E. Michael Rossman
Columbus
+1.614.281.3866
emrossman@jonesday.com

Stanley Weiner
Cleveland
+1.216.586.7763
sweiner@jonesday.com

James S. Urban
Pittsburgh
+1.412.394.7906
jsurban@jonesday.com