A Timely Analysis of Legal Developments

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Three's a Charm: NLRB's Acting General Counsel Issues Third Guidance Document on Social Media and Approves One Policy

By Philip L. Gordon

On May 30, 2012, the National Labor Relations Board's Acting General Counsel issued his third guidance document on social media since August 2011. In that report, he took the opportunity to approve one employer's social media policy, a move that finally provides employers clear guidance in connection with the regulation of this rapidly evolving area of the law. The Acting GC's guidance, which was published in the form of an Operations Management Memorandum, was accompanied by an Advice Memorandum in *Walmart*, Case No. 11-CA-067171.[1] It is in this case that the agency articulated its reasoning and found, for the first time, a social media policy that was acceptable in its entirety.

This guidance is especially useful for employers because the Acting GC's two previous Advice Memoranda focused almost exclusively on social media policy provisions which, according to the Acting GC, violated the NLRA. The previous guidance left open whether any social media policy could ever be found lawful in the eyes of the Acting GC.

It is important to note, however, that the guidance document and Advice Memo that accompanied it only reflect the Acting GC's opinions with respect to the application of the NLRA to social media. While promulgating a policy similar to the approved policy would significantly reduce the risk that the Acting General Counsel would pursue an unfair labor practice charge, it is important to recognize that the Acting GC's opinions and Advice Memoranda are not binding on the NLRB or any court.

In addition to the approved policy, the guidance document highlighted six other social media policies and identified specific provisions the Acting GC found to be lawful or unlawful. Although many of the conclusions repeat positions taken in the earlier materials issued by the NLRB, several are new and provide additional useful guidance. After analyzing these developments in detail, this ASAP provides practical recommendations for employers seeking to reduce the risk that their social media policy will be the subject of an unfair labor practices charge before the NLRB.

What Is Different About the Approved Policy?

In his earlier guidance materials, the Acting GC disfavored policy provisions where "employees would reasonably construe the language to prohibit Section 7 activity," *i.e.*, communications

1 Stefan Marculewicz, a Shareholder in Littler Mendelson's Washington, D.C. office, was counsel of record for Walmart in this case.

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among co-workers concerning wages, hours and other terms and conditions of employment. In other words, the Acting GC considered policies to be unlawful where they "reasonably tend to chill employees in the exercise of their Section 7 rights." By contrast, the Acting GC found the approved policy would not have an unlawful chilling effect because it contains examples of clearly illegal or unprotected conduct that serve to dispel any ambiguity and prevent employees from reasonably construing the policy to prohibit Section 7 activity.

Which Commonly Used Social Media Policy Provisions Did the Acting GC Approve and Why?

- **Protect Confidentiality:** In his prior guidance, the Acting GC repeatedly indicated that policies that require employees to maintain confidentiality were unlawfully overbroad because they could be read to prohibit employees from collectively discussing compensation or unsafe working conditions. By contrast, the approved policy limits the scope of confidentiality to "the Employer's trade secrets and private and confidential information," and then provides the following examples:

  > Trades secrets may include information regarding the development of systems, processes, products, know-how and technology. Do not post internal reports, policies, procedures or other internal business-related confidential communications.

- **Inappropriate Postings:** In prior guidance, the Acting GC concluded that an employer's prohibition of "inappropriate postings" by itself was unlawful because it was too vague and could be misconstrued. The approved policy also prohibits "inappropriate postings" but passed muster because it included qualifying language that eliminates the potential for confusion and reads as follows: "that may include discriminatory remarks, harassment and threats of violence or similar inappropriate or unlawful conduct."
- **"Be Respectful," "Fair And Courteous:"** According to the Acting GC, the quoted exhortations for politeness, in isolation, could serve to chill Section 7 activity, which often involves impolite content. However, the approved policy avoids that potential pitfall by explaining that being respectful, fair and courteous means not posting social media content that is: (a) "malicious, obscene, threatening or intimidating;" (b) "harassing or bullying;" (c) "meant to intentionally harm someone's reputation;" or (d) "could contribute to a hostile work environment on the basis of race, sex, disability, religion or any other status protected by law or company policy."
- **Other Policy Provisions:** The Acting GC did not specifically comment on other provisions in the approved policy, suggesting that such policy language raises no issues under the NLRA. Some of the approved policy language, which is common in employers' social media policies, includes the following:
  - "Carefully read these guidelines, the [Employer] Statement of Ethics Policy, the [Employer] Information Policy and the Discrimination & Harassment Prevention Policy, and ensure your postings are consistent with these policies."
  - "Make sure you are always honest and accurate when posting information or news, and if you make a mistake, correct it quickly…. Never post any information or rumors that you know to be false about [Employer], fellow associates, members, customers, suppliers, people working on behalf of [Employer] or competitors."
  - "Never represent yourself as a spokesperson for [Employer]. If [Employer] is a subject of the content you are creating, be clear and open about the fact that you are an associate and make it clear that your views do not represent those of [Employer,] fellow associates, members, customers, suppliers or people working on behalf of [Employer]. If you do publish a blog or post online related to the work you do or subjects associated with [Employer], make it clear that you are not speaking on behalf of [Employer]. It is best to include a disclaimer such as "The postings on this site are my own and do not necessarily reflect the views of [Employer]."
- **Absence of a Savings Clause:** Finally, it is important to note that nowhere in the approved policy is there any savings clause, which is language included in such policies to affirmatively state that nothing in the policy is intended to infringe upon employees' exercise of their rights under the NLRA. Many social media policies contain such language, and the Acting GC's guidance makes it clear that a policy can be lawful without it.

What Are the Other Important Considerations Expressed in the May 2012 Guidance?

While the approved policy, without doubt, is the highlight of the May guidance materials, the materials contain other pronouncements on social media policies that provide additional insight into how employers can reduce the risk of an unfair labor practice charge as a result of

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their social media policy. Many of the Acting GC's considerations relate to matters discussed in the materials previously published by him and analyzed in the Littler ASAPs on those publications. Consequently, we focus here on policy provisions that the Acting GC addresses for the first time in the May 2012 guidance.

Policy Provisions Found to Be Unlawful

- **Friending Co-Workers:** The Acting GC states that it is unlawful to instruct employees in a social media policy to "[t]hink carefully about 'friending' co-workers … on external social media sites" because "it would discourage communications among co-workers." Notably, the Acting GC did not comment on whether it would be unlawful to prohibit friending between managers and their subordinates. Such a prohibition likely would not implicate Section 7 of the NLRA because it focuses principally on the conduct of management.

- **Alternative Complaint Mechanisms:** The Acting GC indicated that a policy that encourages employees to "consider using available internal resources, rather than social media or other online forums, to resolve [workplace] concerns" is overbroad because, under the Acting GC's reading, the quoted language tells employees that "they should use internal resources rather than airing their grievances online" (emphasis added). The Acting GC conceded, however, that "an employer may reasonably suggest that employees try to work out concerns over working conditions through internal procedures."

  The approved policy addresses this point appropriately using the following language:

  > [K]eep in mind that you are more likely to resolve work-related complaints by speaking directly with your co-workers or by utilizing our Open Door Policy than by posting complaints to a social media outlet. Nevertheless, if you decide to post complaints or criticism, avoid using statements, photographs, video or audio that reasonably could be viewed as malicious, obscene, threatening or intimidating, that disparage customers, members, associates or suppliers, or that might constitute harassment or bullying.

- **Employer Disclaimers:** As noted above, employers commonly seek to "save" potentially overbroad provisions in a social media policy from a finding of overbreadth by including in the policy a provision that disclaims any intent on the employer's part to restrict employees' Section 7 activities. In prior guidance, the Acting GC stated that a relatively simple disclaimer along these lines would be ineffective. In the May 2012 materials, he rejected an even more robust disclaimer:

  > This policy will not be interpreted or applied in a way that would interfere with the rights of employees to self organize, form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, or to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection or to refrain from engaging in such activities.

  As indicated by the approved policy, the presence of a disclaimer or savings language is not necessary for the policy to be deemed lawful. Conversely, as indicated by the Acting GC in this most recent guidance material, the presence of such language may not cure a policy that is otherwise overbroad. Neither the Board nor any court has yet addressed this issue.

- **Not on Company Time:** The Acting GC disapproved a policy that prohibits employees from "[p]articipat[ing] in [social media] activities with [Employer's] resources and/or on Company time." As justification, the Acting GC asserted that "employees have the right to engage in Section 7 activities on the Employer's premises during non-work time and in non-work areas." As with similar limitations on employee activities at work that do not involve social media, the Acting GC's position does not mean that employees have carte blanche to engage in social media activity at work. Employers can prohibit employees from engaging in social media activity using corporate resources and/or when their employees are supposed to be working. Consistent with this principle, the approved policy contains the following restriction on workplace social media activity:

  > Refrain from using social media while on work time or on equipment we provide, unless it is work-related as authorized by your manager or consistent with the Company Equipment Policy.

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Other Policy Provisions Found to Be Lawful

In addition to the approved policy, the Acting GC found several other provisions contained in social media policies to be lawful.

- **Safety Information:** The Acting GC found that prohibiting employees from posting "information directly or indirectly related to the safety performance of [Employer] systems or components for vehicles" was lawful because it applied to the safety of the employer's own products and could not be read to apply to workplace safety.
- **Attorney-Client Privileged Communications:** While the Acting GC indicated it would be unlawful to prohibit employees from discussing "legal matters" through social media in a general way, he recognized that an employer can lawfully prohibit employees from posting content that is subject to the employer's attorney-client privilege.
- **Copyrighted Information:** The Acting GC found it to be lawful for an employer to instruct employees to "show proper respect for the laws governing copyright, fair use of copyrighted material owned by others, trademarks and other intellectual property, including [Employer's] own copyrights, trademarks and brands." The Acting GC reasoned that this language "does not prohibit employees from using copyrighted material in their online communications, but merely urges employees to respect copyright and other intellectual property laws."

Conclusion

The May guidance from the NLRB, and in particular the approved social media policy, provides useful guidance for employers struggling to develop a social media policy that will withstand a challenge under Section 7 of the NLRA. Employers should keep in mind, however, that any social media policy should be tailored to the employer's business needs and corporate culture. In addition, the approved policy does not cover all issues an employer may wish to address in a social media policy, such as the use of social media for business purposes or the proper handling of requests for online references, such as a LinkedIn recommendation. Consequently, while employers will benefit from the guidance that the approved policy and the remainder of the May 2012 guidance provides, they should focus their efforts on developing a lawful social media policy that addresses their business' own unique needs.

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