OSB Corporate Counsel Section

Corporate COUNSELOR

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Letter From The Chair

Welcome to the Spring/Summer 2012 edition of the Corporate Counselor, the official newsletter of the Corporate Counsel Section of the Oregon State Bar. The Corporate Counselor is just one of the benefits we offer, in our efforts to serve and provide value to all Corporate Counsel Section members. We currently have over 480 members.

Other benefits, in the form of resources and activities, include the Section's website, roundtable discussions with expert panel members and moderators, CLEs on topics of interest to Section members, and a schedule of social and networking events. Many of these events are free to section members.

Please join us for the following events we have planned this year. Please refer to our website for current dates and topics for these events at www.osbcorporatecounsel.com.

- The Summer Networking luncheon at Oswego Lake Country Club
- Breakfast Roundtable discussions held throughout the year.
- Our Summer/Fall CLE program
- The Annual Meeting in the Fall
- Free Ethics CLE in December

Please check out our website, which contains our Corporate Counsel Section calendar, list of Corporate Counsel Section Executive Committee members, previous issues of the Corporate Counselor, and other useful information.

Every member of the Section is invited to participate in the planning, preparation, and implementation of Section functions. If you have suggestions, comments, questions, or concerns about the Section, what we do, or how you can become involved, please contact me at gary@laullp.com, or feel free to contact any of the other Corporate Counsel Section Executive Committee members.

Thank you for joining our Section and I am honored to serve as your Chair for 2012.

Best Regards,

Gary Lau

Virtual Friends in the Workplace: Liability Traps of Social Media Policies

*By Caroline Guest and Philip Gordon**

Social media policies may be the latest liability trap for the unwary employer in light of a report issued by the National Labor Relations Board's Office of General Counsel on January 24, 2012. The report relates to 14 cases that "present emerging issues in the context of social media" and contains the General Counsel's opinion on whether the employer in each case violated the National Labor Relations Act by imposing employee discipline based on social media conduct. The General Counsel's report sets forth the NLRB's enforcement position only, and although its decisions apply to union and *non-union* workforces in the private sector, there is currently little case law addressing these issues.

No Defamation/Non-Disparagement: A broad non-disparagement policy (*e.g.*, "making disparaging comments about the company through any media, including online blogs, other electronic media or through the media") violates the NLRA because it could inhibit employees from making negative comments about the terms and conditions of their employment. However, by including non-disparagement policy language within a list of other forms of unprotected conduct, an employer's non-disparagement policy may comply with the NLRA. For example, the NLRA isn't violated by a policy prohibiting the use of social media to post comments that violate the employer's policies against discrimination or harassment based on an employee's protected class.

Confidentiality: A confidentiality policy protecting confidential information and trade secrets is illegal if it would impinge on employees' ability to discuss their wages and working conditions with others inside or outside the organization. Therefore, the NLRA is violated by a provision prohibiting employees from disclosing confidential, sensitive, or non-public information outside the company without prior management approval. However, the NLRA isn't violated by a provision prohibiting employees from using or disclosing confidential and/or proprietary information, including personal health information about customers or patients, as well as embargoed information, such as launch and release dates and pending reorganizations.

Discussions of Work-Related Concerns: A policy requiring employees to first discuss work-related concerns internally with management or risk discipline violates the NLRA. Employers can avoid this problem by urging, but not mandating, that employees use internal channels, rather than social media, to resolve workplace concerns.

Employee Disclaimers: A social media policy violates the NLRA if it requires that employees "expressly state that their comments are their personal opinions and do not necessarily reflect the Employer's opinions" because it "would significantly burden the exercise of employees' rights to discuss working conditions and criticize the Employer's labor policies." However, employers may lawfully enforce a policy that prohibits employees from representing in any way that they are speaking on the company's behalf without prior written authorization.

Employee's Self-Identification: Some employers have policies prohibiting employees from identifying their affiliation with the organization when engaging in social media activity unless there is a legitimate business reason for doing so. The General Counsel opined that this type of policy violates the NLRA "because personal profile pages serve an important function in enabling employees to use online social networks to find and communicate with their fellow employees at their own or other locations."

Communications with the Media: An employer's rule that prohibits employee communications to the media or requires prior authorization for such communications is unlawfully overbroad. However, a media policy that simply seeks to ensure a consistent, controlled company message and limits employee contact with the media only to the extent necessary to effect that result is legal.

"Unprofessional" Content: The General Counsel took issue with policy terms that were undefined, vague, or subjective. These terms included prohibitions on "insubordination or other disrespectful conduct," "inappropriate conversation," "unprofessional communication that could negatively impact the Employer's reputation or interfere with the Employer's mission," as well as the

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requirement that social media activity occur in an "honest, professional, and appropriate manner."

Logos/Trademarks: A social media policy prohibiting "use of the company's name or service marks outside the course of business without prior approval of the law department" is unlawful. The General Counsel takes the position that employees have the right under the NLRA to use the company's name and logo "while engaging in protected concerted activity, such as in electronic or paper leaflets, cartoons, or picket signs in connection with a protest involving the terms and conditions of employment."

Securities Blackouts: The General Counsel did not take issue with a policy stating that the employer might "request employees to confine their social networking to matters unrelated to the company if necessary to ensure compliance with securities regulations and other laws," reasoning that "employees reasonably would interpret the rule to address only those communications that could implicate security regulations," as opposed to the terms and conditions of their employment.

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The Virtual Water Cooler Revisited

By Robert Barsocchini, General Counsel Goodwill Industries

In a previous article, we reviewed a case before the National Labor Relations Board (NLRB) involving social media and workplace complaints.[1] The case involved negative postings by a worker about her supervisor on her personal Facebook page. Although the case was settled, it demonstrated that the NLRB may consider such postings "protected, concerted activity" under the National Labor Relations Act. As we know, the NLRB has jurisdiction over most employers in the private sector whether unionized or not.

Since then, a number of other cases regarding social media postings have emerged. The NLRB has issued a report summarizing fourteen recent cases involving social media and employer's social media policies. That report is available at www.nlrb.gov/publications/operations-management-memos. Social media offers an easy way for employees to "gather around the water cooler" and talk about work, not only with other employees, but with an audience beyond the workplace. What do your policies say about that? What happens when you discipline or fire an employee for statements made in this virtual world?

Social media encompasses text, audio, video, images, podcasts and other multimedia communications. In general, the NLRB takes the position that an employer violates Section 8(a)(1) of the NLRA, (involving Employer interference, restraint, or coercion directed against union or collective activity), where an employer has a rule or policy that restricts Section 7 protected activity (i.e. grievances, protests, union or collective activity), or where employees would reasonably construe the language of the rule or policy to prohibit such activity.

The cases cited in the Acting General Counsel's report, mentioned above, turn on the language of employer's policies. A typical situation is a policy prohibiting employees from, for example, "making disparaging comments about the company through any media." Such a policy, according to the NLRB, is unlawful because it would reasonably be construed to restrict Section 7 activity, such as statements that the Employer is, for example, not treating employees fairly or paying them sufficiently.

If an Employer terminates an employee for violating such a policy, the NLRB determines whether the activity of the employee was concerted: Action by the employee "with or on the authority of other employees and not solely by and on behalf of the employee himself". In one such case where the employee posted disparaging remarks on her Facebook page about her company and her wage reduction, she was shown a copy of her Facebook page and then terminated. The policy prohibited employees from "making disparaging comments about the company through any media, including online blogs, other electronic media, or through the media." The NLRB found that the Employer discharged the employee pursuant to its unlawfully overbroad rule. It applied the Meyers test[2] and found that the employee initiated the

1 *In re American Medical Response of Connecticut, Inc.,* Case No. 34-CA-12576 (October 27, 2010)

2 Concerted activity "encompasses those circumstances where individual employees seek to initiate or to induce or to prepare for group action."

Facebook discussion because she was transferred to a less lucrative position. Thus her complaints were within the definition of concerted activity and she was fired specifically because of the protected nature of her posts. The Board also concluded that the policy was unlawfully overbroad as to the non-disparagement provision.

Note, however, that an employer will not be liable for discipline imposed pursuant to an overbroad rule if it can establish that the employee's conduct actually interfered with the employee's own work or that of other employees otherwise actually interfered with the employer's operations, and that the interference was the reason for the discipline.[3]

In another case, the NLRB found that a social media policy that provided employees should generally avoid identifying themselves as the Employer's employees unless discussing terms and conditions of employment in an appropriate manner to be unlawful because it implicitly prohibited "inappropriate" discussions of terms and conditions of employment and did not define what an "appropriate" or "inappropriate" discussion would be either through specific examples of what is covered or through limiting language that would exclude Section 7 activity. The NLRB concluded that the policy in question would be reasonably interpreted to prohibit protected activity, including criticism of the Employer's labor policies, treatment of employees, and terms and conditions of employment.

The report discusses a number of cases discussed where the NLRB found the social media policy to be unlawful, but nevertheless found in favor of the Employer regarding the discharge for violating the policy because the conduct for which the employee was terminated did not constitute protected activity. What is clear is that these cases are quite fact specific. The added twist of postings on social media such as Facebook only complicates matters when the postings are viewed by non-employee members of the general public. In such situations, consideration of the impact on the employer's reputation and business becomes important. Where statements are defamatory or otherwise highly disparaging, they may lose protection of the Act.

In deciding whether an Employer's social media policies violate the Act, the NLRB applies tests to determine whether the policy can withstand scrutiny. The report cited above sets forth the approaches taken by the NLRB. It also cites some cases where an Employer's policy was not found to violate the Act. In one of those cases, the Board found that the policy's context provided the key to the "reasonableness" of a particular construction. There, the Board found that a policy forbidding "statements which are slanderous or detrimental to the company" that appeared on a list of prohibited conduct including "sexual or racial harassment" and "sabotage" would not be reasonably understood to restrict Section 7 activity. In addition, there was no evidence that the policy had been utilized to discipline Section 7 activity.

In one more case where the Board found the Employer's social media policy not to be unlawful, and did not prohibit Section 7 activity. There, the policy provided that the Employer could request employees to confine their social networking to matters unrelated to the company if necessary to ensure compliance with security regulations and other laws. It also prohibited employees from using or disclosing confidential and/or proprietary information, including personal health information about customers and patients, and prohibited employees from discussing in any form of social media "embargoed information" such as launch and release dates and pending information. The Board noted that although the policy's requirement to confine social networking communications to matters unrelated to the company could be construed to restrict employees from communicating their terms and conditions of employment, in its context, employees reasonably would interpret the policy to address only those communications that could implicate security regulations.

It also concluded that the prohibition on disclosing confidential and/or proprietary information acquired in the course of employment was not overbroad.

Conclusion

Your employees are probably talking about your company and about other employees around the virtual water cooler via social media right now. Before you take any adverse employment actions based on such behavior, take a close look at your social media policies. Are they overly broad? Do they arguably apply to protected criticism of your labor policies or treatment of employees? The NLRB report provides excellent guidance on the current approach the NLRB takes to these cases.

Brief Note: The NLRB has adopted a rule requiring most private sector employers to post a notice advising employees of their rights under the National Labor Relations Act. The rule was to take effect on April 30, 2012. However, the DC Circuit Court of Appeals has temporarily enjoined implementation. The matter is currently working its way through the appellate courts. You can follow its progress by checking the NLRB website: www.nlrb.gov/poster.

3 The Continental Group, Inc., 357 NLRB No. 39, slip op. (2011).

Sample Social Networking Policy

Below is a Social Networking Policy provided by the Editor as a sample for your review. Consider whether it complies with the NLRB opinion analyzed in the two previous articles. For those of you with time and inclination, please send your thoughts to the Editor, ed.gerdes@cafeyumm.com, for possible publication in the next Corporate Counselor. As always, submissions for publication are much appreciated by all section members. Please express your desire to publish to the Editor. We will publish our next issue in October/November.

Social Networking Policy. This policy applies to electronic social networking of any kind. Examples include Twitter, Facebook, MySpace, LinkedIn, YouTube, blogs, wikis, or any other service that allows user-generated electronic content. It is important for you to understand that inappropriate use of such services can negatively impact your employment.

Employer supports the responsible use of online business networking through business-oriented sites such as LinkedIn. Participation on such sites is entirely voluntary, however, with the exception of selected job positions (e.g., certain jobs involving recruiting, sales or marketing) that will be specifically identified and communicated to individual employees who are expected to use approved networking sites as part of their jobs.

Federal guidelines require that if you comment about one of our products or services, you must identify yourself as our employee. Also, unless you have been specifically designated as an official spokesperson as part of your job duties, you must make it clear that your comment is your own opinion and you are not a Company spokesperson. You cannot use Company logos and trademarks without the express written consent of an officer of the company.

Information that you share must comply with our policies (e.g., confidentiality, nonharassment, nondiscrimination, etc). When posting information online, we ask that you be respectful to employer, coworkers, guests, partners, and competitors. Do not discuss current or former clients, partners, or guests without their express consent, as well as the approval of your manager.

Do *not* post recommendations on LinkedIn or similar networking sites for vendors or other business associates that you know as a result of your employment with employer, unless you first obtain written permission from an officer of the Company. Also, posting recommendations regarding current or former employees is prohibited.

Information from your personal social networking sites that is protected under federal, state, or local employment law will not be used in making employment decisions. If, however, you post or display anything online that is inappropriate under our normal policies or that we believe hinders your ability to satisfactorily perform your job, we may take disciplinary action, up to and including termination.

We recognize that work relationships may develop into personal friendships. During your own personal time outside of work we understand you may choose to participate in online social networks that are primarily personal in nature (e.g., Facebook or MySpace). As a general rule, we discourage managers and supervisors from following or connecting with individuals they supervise on these personal online social networks. You should not feel obligated to respond or connect with co-workers on personal online social networks.

Social media activities must not interfere with your work commitments or violate approved use of Company electronic resources.