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Question of the Day: Social Media Policies

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Question

To what extent may a company regulate employees' use of social media?

Answer

In the modern world of technology, employees frequently use electronic communications and various types of social media to discuss work-related matters. This is truer than ever during the COVID-19 pandemic due to the significant increase in remote or work-from-home arrangements. These communications may range from generalized criticism to specific grievances about co-workers, supervisors or working conditions. But given the often-changing agency guidance and little to no legislation to rely on, employers have had a difficult time understanding how they may lawfully regulate their employees' social media use.

Whether a workplace is unionized or not, employers must be mindful about social media (and other) policies that infringe on employees' rights to engage in "concerted protected activity" under the National Labor Relations Act (NLRA), which is enforced by the National Labor Relations Board (NLRB). Previously, the NLRB prohibited company policies that could be "reasonably construed" by workers to limit their right to engage in protected concerted activity. In December 2017, the NLRB replaced the "reasonably construed" standard with a new balancing test. Now, a company can impose facially neutral policies (i.e., policies that do not intentionally interfere with employees' NLRA rights) if the employer's legitimate justifications associated with the rule outweigh the nature and extent of the potential impact on employees' NLRA rights.

Over the last year, the NLRB has issued several advice memoranda and case decisions further clarifying types of social media policies that are lawful and unlawful. These decisions and guidance generally instruct as follows:

- Rules restricting employees from disclosing work information should be carefully and narrowly defined. Employers can prohibit posting of employee or customer "personal information," including social security numbers or account information, or other company-provided "internal" communications, but cannot prohibit disclosure of "employee information" in general.

- Employers can require employees to provide disclaimers about the personal nature of work-related posts and prohibit employees from speaking on behalf of the company without authorization.
- Employers can also prohibit employees from posting anything discriminatory, harassing, bullying, threatening, defamatory or unlawful, or posting any content, images, or photos that they don't have rights to use.

Takeaways:

The NLRB has provided employers with much more flexibility to restrict employees' social media activity that relates to company-related issues, but that latitude is not unlimited. Employers' social media policies must be carefully crafted to set forth the employer's expectations without infringing on employee rights. Among other things, such policies should cover employee use of the employer's IT resources; protection of narrowly-tailored confidential, proprietary and privileged information; prohibition of discrimination, harassment and retaliation against other employees; prohibition of defamation and disparagement of the company's reputation to customers or the general public; and appropriate disclosure of employees' connections to or authority with the company. Finally, providing training to employees and management about appropriate use of social media and enforcement of the company's policies goes a long way towards prevention and understanding.

If you need help drafting, reviewing or implementing a social media policy for your business, contact your Fredrikson Employment attorney.

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