

# New Report Issued on Employee use of Social Media and the National Labor Relations Act

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On May 30, 2012, the National Labor Relations Board's General Counsel issued a Report Concerning Social Media Cases. In it, the General Counsel's Office reviewed seven cases concerning employers' social media policies regarding. In its review, the General Counsel found several aspects of these policies to be overbroad while affirming others.

Overall, the General Counsel's office reiterated its general policy that an employer may not threaten an employee's ability to discuss or disclose information regarding their own conditions of employment or the conditions of employment of other employees. It advised that electronic use policies need to be specific as to the way in which they limit employee conduct and that such policies also need to be consistent with the provisions of the National Labor Relations Act (NLRA).

For example, an employer cannot require an employee to make statements that are "completely accurate and not misleading" because the NLRA protects statements so long as they are not maliciously false. In the same way, an employer cannot require an employee to check with a supervisor before posting certain information, because "[t]he Board has long held that any rule that requires employees to secure permission from an employer as a precondition to engaging in Section 7 activities violates the Act."

In accord with its general policy protecting employee communications, the General Counsel has been especially critical of social media policies that broadly limit employees from making statements online. The General Counsel found policies were too broad and may violate the NLRA where the policy:

1. Prohibits employees from releasing confidential or personal guest, team member, or company information online.
2. Prohibits employees from sharing confidential information with coworkers who did not need the information to do their job, or from having discussions regarding confidential information in the break room, at home, or in open areas and public places.

3. Threatens employees with discharge for failing to report unauthorized access or misuse of confidential information.
4. Prohibits employees from posting photos, music, videos, and the quotes and personal information of others without obtaining the owner's permission and from using the Employer's logos and trademarks.
5. Instructs that "[o]ffensive, demeaning, abusive or inappropriate remarks are as out of place online as they are offline" or advises not to "pick fights" and to use a "professional tone" in their on-line communications.
6. Directs employees that they should use internal resources rather than airing their grievances online or instructs employees not to use social media on company time.
7. Discourages employees from "friending" co-workers on Facebook.
8. Prohibited employees from commenting on legal matters, including pending litigation or disputes or instructs employees to "avoid harming the image and integrity of the company."

In reviewing the General Counsel's Report, employers should note that not all of the conduct prohibited by these policies is protected by the NLRA. Rules that clarify and restrict their scope by including examples of clearly illegal or unprotected conduct such that they could not reasonably be construed to cover protected activity, are not unlawful. For example, the General Counsel found lawful a provision that "harassment, bullying, discrimination, or retaliation that would not be permissible in the workplace is not permissible between co-workers online, even if it is done after hours, from home and on home computers."

As such, the key to drafting an effective social media policy is to use language that is specific and does not proscribe a broad spectrum of communications that could include protected criticisms of the employer's labor policies or treatment of employees. That being said, the General Counsel specifically noted that this distinction cannot be made by including a "savings clause" or disclaimer generally stating that the "Employer's Social Media Policy will be administered in compliance the National Labor Relations Act." Rather, the rules themselves must be specifically drafted.

In light of these new guidelines, it is especially important that employers drafting social media policies utilize counsel to ensure compliance with the National Labor Relations Act.

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## Topics

National Labor Relations Act (NLRA), National Labor Relations Board (NLRB), Social Media

