

USE AND REGULATION OF SOCIAL MEDIA IN THE PUBLIC WORKPLACE

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I. Introduction

The dramatic increase in the use of technology, both on and off the job, has created new issues for employers, for employees, and for the unions that represent them. In the last five years, the National Labor Relations Board has issued a number of decisions regarding the use of social media by employees. Many of these cases involve the interpretation and application of employer policies which regulate the use of social media by employees. The Office of the General Counsel of the NLRB has responded to the emergence of these issues and the need for guidance to both employers and employees by releasing three separate memoranda.. This paper will provide a brief summary of these memoranda, but I encourage readers to review the memoranda in detail.

II. Memorandum OM 11-74

This is the first of the three memoranda issued by the Office of the General Counsel of the NLRB and it was released to the public on August 18, 2011. It discusses several decisions of the NLRB involving employees' use of Facebook and Twitter, a union's use of YouTube, and a review of employer policies regulating social media. This is a summary of the cases included in Memorandum OM 11-74.

The Board found that a non-profit social services organization violated Section 7 of the NLRA when it discharged five employees who engaged in protected concerted activity. One of the employees posted on Facebook and asked her fellow employees for input regarding a meeting that she was scheduled to have with the employer. Four employees responded on Facebook. The General Counsel described the Facebook discussion as both "a textbook example of concerted activity" and clearly protected activity: a discussion among coworkers concerning job performance and staffing level issues. The swearing and sarcasm in several of the posts did not cause the activity to lose its protected status because the comments were "quite innocuous" and not "opprobrious".

In an internet and blogging policy case which also involved the termination of an employee, an employee was involved in an incident with a customer and was directed by her supervisor to prepare a report. She did so but also posted negative comments regarding her supervisor on her Facebook page. Several employees responded on Facebook and made more negative comments. The employee was discharged for

violating the ambulance company's internet policy. The Board found that the employee had engaged in protected activity by exercising her Weingarten rights and by discussing supervisory conduct with her coworkers, and the Board found her termination to be a violation of the Act. The Board also reviewed the company's internet policy and found the following provisions violated the Act: a prohibition against posting any picture of the employees that depict the company in any way, a prohibition against making disparaging comments about supervisors or coworkers, and a broadly worded standards of conduct provision barring "offensive conduct".

The Board ruled that a luxury car dealer violated the Act when it terminated a salesperson for posting photographs and negative comments on his Facebook page. The employee posted photographs of a car that had been driven into a pond and of food and beverages served by the employer at a company event. He included statements in his post regarding the inexpensive food and beverages, and other employees had a similar reaction. The posts were an expression of the sentiment of the group of employees. When they came to the employer's attention, the employee was fired. The Board found that the photos and comments, although personal, vocalized the sentiments of the coworkers and were, therefore, concerted and that they were protected because they pertained to working conditions.

A sports bar and restaurant violated the Act by discharging employees, by threatening them with legal action, and by maintaining an unlawful internet policy. The employees were advised that they owed additional state income taxes due to employer withholding errors, exchanged posts on Facebook, and made derogatory comments about the employer. The employer's attorney sent a letter to one of the employees threatening legal action if the "defamatory" Facebook posts were not removed. The Board found the Facebook postings to be both concerted (multiple postings and comments) and protected (administration of tax withholding was a term or condition of employment). The company's internet policy violated the Act by prohibiting "inappropriate discussions" about the company, management, and coworkers because it contained no specific examples or limitations which would exclude Section 7 activity from the prohibition.

A newspaper reporter who posted offensive tweets was not engaged in protected concerted activity. The reporter opened a Twitter account, identified himself in the biography section as a reporter for the newspaper, and provided a link to the paper's website. He posted tweets regarding his concerns about sports headlines, but there was no evidence that he discussed his concerns with his coworkers. The company told the employee that he was prohibited from airing his grievances or commenting about the newspaper in any public forum. He continued to tweet but not about the company. The Board found that his termination for writing inappropriate and offensive tweets did not involve protected concerted activity.

The Board found that a bartender who posted Facebook messages about the employer's tipping policy was not engaged in protected concerted activity. The bartender disliked

the restaurant's tip-sharing policy and posted his views on Facebook. He called the customers "rednecks" and stated that he hoped that they would choke on glass as they drove home drunk. The bartender did not discuss his posting with any of his coworkers, and none of them responded to it. Although the posting was protected because it pertained to working conditions, it was not concerted since no coworkers responded to the post or otherwise engaged in conversation about the matter.

An employee who posted comments of the Facebook wall of her U. S. Senator was not engaged in concerted activity. The employee's posts were a response to the Senator's own post regarding federal grants for fire departments. Her posts pertained to how emergency services were handled in her state and how her company failed to help the situation. She was terminated for making disparaging remarks about the company, but her action was not concerted because she did not discuss her posts with any other employees.

A nonprofit facility for homeless people did not violate the Act when it discharged an employee who made inappropriate posts on Facebook concerning the employer's mentally disabled clients. The posts commented on the clients in the mental health facility, but the only persons with whom the employee interacted were Facebook "friends" who were not coworkers. The posts did not mention terms or conditions of employment. Thus, the Board concluded that the posts were neither protected nor concerted activity.

The Board found that the Facebook postings of a customer service employee of a retail store were individual gripes and not concerted activity. The employee had been criticized for mispriced and misplaced merchandise, and his posts were a response to this criticism. Several coworkers responded to the post, but there was no indication in the responses that the coworkers thought that the employee was initiating any group activity on their behalf. The Board concluded that the employee's posts were personal in nature, not protected or concerted, and it ruled that the one-day suspension of the employee did not violate the Act.

A union that videotaped employees at a non-union jobsite and then uploaded an edited version of the videotape on YouTube and the union's Facebook page violated Section 8(b)(1)(a) of the Act. In this case, union representatives appeared at a jobsite and questioned employees about their immigration status, asked whether they had identification, and asked other job-related questions. One of the representatives videotaped the encounter and later uploaded an edited version of it on YouTube. The Board found the conduct of the union representatives to be coercive and, by extension, found that the documentation of the conduct which was uploaded to YouTube and posted on Facebook to be coercive.

A hospital adopted a social media policy which contained three rules that the Board found to be violative of the Act: a rule regarding disclosure of private or confidential

information, a rule prohibiting communication that might embarrass, harass or defame the hospital or its employees, and a rule prohibiting untruthful statements or statements that might damage the reputation of the hospital. The hospital terminated a nurse who posted a Facebook comment about another nurse who had called in sick. The nurse was fired for talking badly about the hospital. The Board found that the termination violated the Act and that the social media policy was unlawful because it was overboard and prohibited communication by employees on wages and other terms and conditions of employment.

The Board found that the social media policy of another company was likewise overboard and violative of the Act. This policy prohibited employees from micro-blogging about company business on their personal accounts, from disclosing inappropriate or sensitive information about the company, from posting pictures or information about the company that could be inappropriate, and from identifying themselves as employees of the company on their personal profiles. The policy contained no definitions or guidance as to what communication might be prohibited.

A supermarket chain implemented a social media policy which the Board found contained two unlawful guidelines: one guideline precluded employees from revealing personal information concerning coworkers, clients, or customers without their consent, and the other guideline precluded employees from using the company's logos and photographs of the store, brand, and products without written authorization. Both guidelines were found to be too broad because they could include Section 7 activity.

Another grocery chain violated the Act when it established a social media policy that prohibited employees from speaking on their own behalf with reporters. Although the company had the right to limit individuals who could make official statements on behalf of the company, the rule in this case went too far because it could reasonably be interpreted by employees as from prohibiting them from speaking to reporters about their working conditions.

III. Memorandum OM 12-31

This is the second of the three memoranda issued by the Office of the General Counsel of the NLRB, and it was released to the public on January 24, 2012. It discusses fourteen decisions of the NLRB involving employees' use of social media. The Board found that the social media policies adopted by the companies in several of these cases violated the Act because they prohibited communication or conduct that was protected by Section 7.

The General Counsel explained the analysis used by the Board in its review of the social media policies. The General Counsel advised that:

“An employer violates Section 8(a)(1) through the maintenance of a work rule if that rule ‘would reasonably tend to chill employees in the exercise of their Section 7 rights.’

Lafayette Park Hotel, 326 NLRB 824, 825 (1998), *enfd.* 203 F.3d 52 (D.C. Cir. 1999). The Board uses a two-step inquiry to determine if a work rule would have such an effect. Lutheran Heritage Village–Livonia, 343 NLRB 646, 647 (2004). First, a rule is clearly unlawful if it explicitly restricts Section 7 protected activities. If the rule does not explicitly restrict protected activities, it will only violate Section 8(a)(1) upon a showing that: (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.”

Applying these principles, the Board found policies to be unlawful when they contained the following limitations or prohibitions and when they did not contain any limiting language or context that would clarify to employees that the policy did not restrict Section 7 rights:

- making disparaging comments about the company through any media, including online blogs, other electronic media or through the media
- employees identifying themselves as the employer’s employees, unless there was a legitimate business need to do so or when discussing terms and conditions of employment in an appropriate manner
- engaging in insubordinate or other disrespectful conduct and participating in inappropriate conversations,
- using social media to engage in unprofessional communication that could negatively impact the employer’s reputation or interfere with the employer’s mission or unprofessional/inappropriate communication regarding members of the employer’s community,
- disclosing or communicating information of a confidential, sensitive, or non-public information concerning the company on or through company property to anyone outside the company without prior approval of senior management or the law department,
- using the company’s name or service marks outside the course of business without prior approval of the law department,
- requiring that social networking site communications be made in an honest, professional, and appropriate manner, without defamatory or inflammatory comments regarding the employer and its subsidiaries, and their shareholders, officers, employees, customers, suppliers, contractors, and patients,
- requiring employees to obtain approval to identify themselves as the employer’s employees and requiring those employees who had identified themselves as such on

social media sites to expressly state that their comments were their personal opinions and did not necessarily reflect the employer's opinions,

- requiring employees to first discuss with their supervisor or manager any work-related concerns, and providing that failure to comply could result in corrective action, up to and including termination,
- prohibiting discriminatory, defamatory, or harassing web entries about specific employees, work environment, or work-related issues on social media sites. When amended as follows, the Board said that the policy was lawful: prohibiting the use of social media to post or display comments about coworkers or supervisors or the employer that are vulgar, obscene, threatening, intimidating, harassing, or a violation of the employer's workplace policies against discrimination, harassment, or hostility on account of age, race, religion, sex, ethnicity, nationality, disability, or other protected class, status, or characteristic.

Several other cases did not address the legality of an employer's social media policy but instead focused on the social media conduct of employees. In four cases, the Board found that the employer violated the Act when it terminated employees who posted job-related comments on Facebook:

- an employee at a manufacturing plant posted comments on Facebook regarding sexist statements made by a supervisor, several coworkers were her Facebook friends, the employees exchanged posts on Facebook, and the employer fired her because of her involvement in her coworkers' job-related problems and her discussion of those problems on Facebook,
- an employee at a veterinary hospital who was passed over for a promotion posted on Facebook her comments about the employee who was selected for the position and about management, several Facebook friends who were coworkers responded on Facebook and agreed with the employee in their own posts, and the employee and three other coworkers were disciplined because of their posts on Facebook,
- three employees of a popcorn packaging facility exchanged comments on Facebook regarding the negative attitude and supervisory style of one of their managers and the charging party was fired for her Facebook posting regarding the employer and one its managers,
- a nurse at a hospital engaged in a series of online communications regarding his employer over a seven-month period, posting comments concerning the bullying of employees by the employer and the management style of the hospital in its response to the murder of a hospital employee by a coworker, writing letters to the editor of the local newspaper, making a presentation to the borough assembly, and posting the text

of his remarks to the assembly on his Facebook page; he was discharged for posting his remarks on his Facebook page.

In three cases, the Board found that the employer did not violate the Act when it disciplined employees who posted job-related comments on Facebook:

- comments posted on Facebook by a respiratory therapist at a hospital regarding a coworker who sucked his teeth, who was driving her nuts, and who she said she was about ready to beat with a ventilator were personal comments and were not protected and concerted
- a truck driver posted comments on Facebook regarding his frustration with the employer's response to work-related issues during a snow storm, but since no coworkers joined in his Facebook conversation and he was not seeking to induce or prepare his coworkers for action, his communications were not concerted,
- a warehouse worker posted comments about the employer's treatment of his while he was feeling ill at work, and, although six of his coworkers were his Facebook friends, none of them responded to his posts and thus his activity was not concerted.

Since employees tend to express themselves freely on social media sites and to use colorful or inflammatory language in doing so, the Board has also provided guidance on the limits of those expressions. The General Counsel explained that the Board uses two standards (NLRB v. IBEW, Local No. 1229 (the Jefferson Standard), 346 U.S. 464, 472 (1953) and Atlantic Steel Co., 245 NLRB 814, 816-817 (1979) (the Atlantic standard) for determining whether otherwise protected communication or conduct of a charging party loses the protection of the Act:

The Jefferson Standard test was established by the Supreme Court to analyze handbills that were part of an intentional appeal to the general public. The Board has applied this test to employee communications that are intended to appeal directly to third parties, with an eye toward whether those communications reference a labor dispute and are so disparaging of the employer or its product as to lose the protection of the Act.

Atlantic Steel is generally used to analyze communications between employees and supervisors, and specifically focuses on whether the communications would disrupt or undermine shop discipline. In determining whether employee conduct is so "opprobrious" as to forfeit protection under the Act, the Board looks at the place of the discussion, the subject matter of the discussion, the nature of the outburst, and whether the outburst was provoked by the employer's unfair labor practices.

As the General Counsel noted, these standards were developed without consideration of the internet and social media platforms for communication, and, so, they do not apply as neatly to social media communication cases. Therefore, the General Counsel stated that the Board had modified its approach:

Considering the focus and traditional application of Jefferson Standard, we concluded that it did not provide a suitable framework to analyze the Facebook posting here. We determined that this Facebook discussion was more analogous to a conversation among employees that is overheard by third parties than to an intentional dissemination of employer information to the public seeking their support, and thus that an Atlantic Steel analysis would be more appropriate. We recognized, however, that a Facebook posting does not exactly mirror the situation in an Atlantic Steel analysis, which typically focuses on whether the communications would disrupt or undermine shop discipline. We also noted that the Atlantic Steel analysis does not usually consider the impact of disparaging comments made to third parties. Thus, we decided that a modified Atlantic Steel analysis that considers not only disruption to workplace discipline, but that also borrows from Jefferson Standard to analyze the alleged disparagement of the employer's products and services, would more closely follow the spirit of the Board's jurisprudence regarding the protection afforded to employee speech.

IV. Memorandum OM 12-59

This is the third of the three memoranda issued by the Office of the General Counsel of the NLRB, and it was released to the public on May 30, 2012. It discusses seven recent decisions of the NLRB involving employees' use of social media, but, unlike the previous memoranda, it includes the specific text of the policies that the Board reviewed. The Board found that one or more provisions of the social media policies adopted by the companies in six of these cases violated the Act because they prohibited communication or conduct that was protected by Section 7.

The following is a sampling of the provisions and the Board's analysis of those provisions:

1. Provision:

Use technology appropriately * * * * *

*If you enjoy blogging or using online social networking sites such as Facebook and YouTube, (otherwise known as Consumer Generated Media, or CGM) please note that there are guidelines to follow if you plan to mention [Employer] or your employment with [Employer] in these online vehicles. . . .
Don't release confidential guest, team member or company information. . . .*

Board Analysis:

[I]nstruction that employees not "release confidential guest, team member or company information" would reasonably be interpreted as prohibiting employees from discussing

and disclosing information regarding their own conditions of employment, as well as the conditions of employment of employees other than themselves--activities that are clearly protected by Section 7.

2. Provision:

USE GOOD JUDGMENT ABOUT WHAT YOU SHARE AND HOW YOU SHARE

If you engage in a discussion related to [Employer], in addition to disclosing that you work for [Employer] and that your views are personal, you must also be sure that your posts are completely accurate and not misleading and that they do not reveal non-public company information on any public site. If you are in doubt, review the [Employer's media] site. If you are still in doubt, don't post. Non-public information includes:

- *Any topic related to the financial performance of the company;*
- *Information directly or indirectly related to the safety performance of [Employer] systems or components for vehicles;*
- *[Employer] Secret, Confidential or Attorney-Client Privileged information;*
- *Information that has not already been disclosed by authorized persons in a public forum; and*
- *Personal information about another [Employer] employee, such as his or her medical condition, performance, compensation or status in the company.*

When in doubt about whether the information you are considering sharing falls into one of the above categories, DO NOT POST. Check with [Employer] Communications or [Employer] Legal to see if it's a good idea. Failure to stay within these guidelines may lead to disciplinary action.

- *Respect proprietary information and content, confidentiality, and the brand, trademark and copyright rights of others. Always cite, and obtain permission, when quoting someone else. Make sure that any photos, music, video or other content you are sharing is legally sharable or that you have the owner's permission. If you are unsure, you should not use.*
- *Get permission before posting photos, video, quotes or personal information of anyone other than you online.*
- *Do not incorporate [Employer] logos, trademarks or other assets in your posts.*

Board Analysis:

We found various provisions in the above section to be unlawful. Initially, employees are instructed to be sure that their posts are “completely accurate and not misleading and that they do not reveal non-public information on any public site.” The term “completely accurate and not misleading” is overbroad because it would reasonably be interpreted to apply to discussions about, or criticism of, the Employer’s labor policies and its treatment of employees that would be protected by the Act so long as they are not maliciously false. Moreover, the policy does not provide any guidance as to the meaning of this term by specific examples or limit the term in any way that would exclude Section 7 activity.

We further found unlawful the portion of this provision that instructs employees not to “reveal non- public company information on any public site” and then explains that nonpublic information encompasses “[a]ny topic related to the financial performance of the company”; “[i]nformation that has not already been disclosed by authorized persons in a public forum”; and “[p]ersonal information about another [Employer] employee, such as . . . performance, compensation or status in the company.” Because this explanation specifically encompasses topics related to Section 7 activities, employees would reasonably construe the policy as precluding them from discussing terms and conditions of employment among themselves or with non-employees.

The section of the policy that cautions employees that “[w]hen in doubt about whether the information you are considering sharing falls into one of the [prohibited] categories, DO NOT POST. Check with [Employer] Communications or [Employer] Legal to see if it’s a good idea[,]” is also unlawful. The 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. See Brunswick Corp.,²⁸² NLRB 794, 794-795 (1987).

The Employer’s policy also unlawfully prohibits employees from posting photos, music, videos, and the quotes and personal information of others without obtaining the owner’s permission and ensuring that the content can be legally shared, and from using the Employer’s logos and trademarks. Thus, in the absence of any further explanation, employees would reasonably interpret these provisions as proscribing the use of photos and videos of employees engaging in Section 7 activities, including photos of picket signs containing the Employer’s logo. Although the Employer has a proprietary interest in its trademarks, including its logo if trademarked, we found that employees’ non-commercial use of the Employer’s logo or trademarks while engaging in Section 7 activities would not infringe on that interest.

3. Provision:

TREAT EVERYONE WITH RESPECT

Offensive, demeaning, abusive or inappropriate remarks are as out of place online as they are offline, even if they are unintentional. We expect you to abide by the same standards of behavior both in the workplace and in your social media communications.

OTHER [EMPLOYER] POLICIES THAT APPLY

Think carefully about ‘friending’ co-workers . . . on external social media sites. Communications with coworkers on such sites that would be inappropriate in the workplace are also inappropriate online, and what you say in your personal social media channels could become a concern in the workplace.

[Employer], like other employers, is making internal social media tools available to share workplace information within [Employer]. All employees and representatives who use these social media tools must also adhere to the following:

- *Report any unusual or inappropriate internal social media activity to the system administrator. [Employer's] Social Media Policy will be administered in compliance with applicable laws and regulations (including Section 7 of the National Labor Relations Act).*

Board Analysis:

As to these provisions, we found unlawful the instruction that “[o]ffensive, demeaning, abusive or inappropriate remarks are as out of place online as they are offline.” Like the provisions discussed above, this provision proscribes a broad spectrum of communications that would include protected criticisms of the Employer’s labor policies or treatment of employees. Similarly, the instruction to be aware that “[c]ommunications with coworkers . . . that would be inappropriate in the workplace are also inappropriate online” does not specify which communications the Employer would deem inappropriate at work and, thus, is ambiguous as to its application to Section 7.

The provision of the Employer’s social media policy instructing employees to “[t]hink carefully about ‘friending’ co-workers” is unlawfully overbroad because it would discourage communications among co-workers, and thus it necessarily interferes with Section 7 activity. Moreover, there is no limiting language clarifying for employees that it does not restrict Section 7 activity.

We also found unlawful the policy’s instruction that employees “[r]eport any unusual or inappropriate internal social media activity.” An employer violates the Act by encouraging employees to report to management the union activities of other employees. See generally Greenfield Die & Mfg. Corp., 327 NLRB 237, 238 (1998) and cases cited at n.6. Such statements are unlawful because they have the potential to discourage employees from engaging in protected activities. Here, the Employer’s instruction would reasonably be construed by employees as applying to its social media policy. Because certain provisions of that policy are unlawful, as set forth above, the reporting requirement is also unlawful.

Finally, we concluded that the policy’s “savings clause,” under which the Employer’s “Social Media Policy will be administered in compliance with applicable laws and regulations (including Section 7 of the National Labor Relations Act),” does not cure the ambiguities in the policy’s overbroad rules.

4. Provision:

Legal matters. Don't comment on any legal matters, including pending litigation or disputes.

Board Analysis:

We found that the prohibition on employees' commenting on any legal matters is unlawful because it specifically restricts employees from discussing the protected subject of potential claims against the Employer.

5. Provision:

Adopt a friendly tone when engaging online. Don't pick fights. Social media is about conversations. When engaging with others online, adopt a warm and friendly tone that will encourage others to respond to your postings and join your conversation. Remember to communicate in a professional tone. . . . This includes not only the obvious (no ethnic slurs, personal insults, obscenity, etc.) but also proper consideration of privacy and topics that may be considered objectionable or inflammatory—such as politics and religion. Don't make any comments about [Employer's] customers, suppliers or competitors that might be considered defamatory.

Board Analysis:

We found this rule unlawful for several reasons. First, in warning employees not to “pick fights” and to avoid topics that might be considered objectionable or inflammatory--such as politics and religion, and reminding employees to communicate in a “professional tone,” the overall thrust of this rule is to caution employees against online discussions that could become heated or controversial. Discussions about working conditions or unionism have the potential to become just as heated or controversial as discussions about politics and religion. Without further clarification of what is “objectionable or inflammatory,” employees would reasonably construe this rule to prohibit robust but protected discussions about working conditions or unionism.

6. Provision:

You are encouraged to resolve concerns about work by speaking with co-workers, supervisors, or managers. [Employer] believes that individuals are more likely to resolve concerns about work by speaking directly with co-workers, supervisors or other management-level personnel than by posting complaints on the Internet. [Employer] encourages employees and other contingent resources to consider using available internal resources, rather than social media or other online forums, to resolve these types of concerns.

Board Analysis:

We found that this rule encouraging employees “to resolve concerns about work by speaking with co-workers, supervisors, or managers” is unlawful. An employer may reasonably suggest that employees try to work out concerns over working conditions through internal procedures. However, by telling employees that they should use internal resources rather than airing their grievances online, we found that this rule would have the probable effect of precluding or inhibiting employees from the protected activity of seeking redress through alternative forums.

7. Provision:

Employees are permitted to express personal opinions regarding the workplace, work satisfaction or dissatisfaction, wages hours or work conditions with other [Employer] employees through Personal Electronic Communications, provided that access to such discussions is restricted to other [Employer] employees and not generally accessible to the public. . . . This policy is for the mutual protection of the company and our employees, and we respect an individual’s rights to self-expression and concerted activity. 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.

Board Analysis:

We found that the provision prohibiting employees from expressing their personal opinions to the public regarding “the workplace, work satisfaction or dissatisfaction, wages hours or work conditions” is unlawful because it precludes employees from discussing and sharing terms and conditions of employment with non-employees. The Board has long recognized that “Section 7 protects employee communications to the public that are part of and related to an ongoing labor dispute.” Valley Hospital Medical Center, 351 NLRB 1250, 1252 (2007), enfd. sub nom. Nevada Service Employees Union, Local 1107 v. NLRB, 358 F. App’x 783 (9th Cir. 2009).

We concluded that the Employer’s “savings clause” does not cure the otherwise unlawful provisions. The Employer’s policy specifically prohibits employees from posting information regarding Employer shutdowns and work stoppages, and from speaking publicly about “the workplace, work satisfaction or dissatisfaction, wages hours or work conditions.” Thus, employees would reasonably conclude that the savings clause does not permit those activities. Moreover, the clause does not explain to a layperson what the right to engage in “concerted activity” entails.

8. Provision:

[Employer] regards Social Media---blogs, forums, wikis, social and professional networks, virtual worlds, user-generated video or audio---as a form of communication and relationship among individuals. When the company wishes to communicate publicly--whether to the marketplace or to the general public---it has a well-established means to do so. Only those officially designated by [Employer] have the authorization to speak on behalf of the company through such media.

We recognize the increasing prevalence of Social Media in everyone's daily lives. Whether or not you choose to create or participate in them is your decision. You are accountable for any publication or posting if you identify yourself, or you are easily identifiable, as working for or representing [Employer].

You need to be familiar with all [Employer] policies involving confidential or proprietary information or information found in this Employee Handbook and others available on Starbase. Any comments directly or indirectly relating to [Employer] must include the following disclaimer: 'The postings on this site are my own and do not represent [Employer's] positions, strategies or opinions.'

You may not make disparaging or defamatory comments about [Employer], its employees, officers, directors, vendors, customers, partners, affiliates, or our, or their, products/services. Remember to use good judgment.

Unless you are specifically authorized to do so, you may not:

*- Participate in these activities with [Employer] resources and/or on Company time;
or*

- Represent any opinion or statement as the policy or view of the [Employer] or of any individual in their capacity as an employee or otherwise on behalf of [Employer].

Should you have questions regarding what is appropriate conduct under this policy or other related policies, contact your Human Resources representative or the [Employer]Corporate Communications Department. . . .

Board Analysis:

We concluded that several aspects of this social media policy are unlawful. First, the prohibition on making “disparaging or defamatory” comments is unlawful. Employees would reasonably construe this prohibition to apply to protected criticism of the Employer’s labor policies or treatment of employees. Second, we concluded that the prohibition on participating in these activities on Company time is unlawfully overbroad because employees have the right to engage in Section 7 activities on the Employer’s premises during non-work time and in non-work areas. See Republic Aviation Corp. v. NLRB, 324 U.S. 793, 803 n.10 (1945).

We did not find unlawful, however, the prohibition on representing “any opinion or statement as the policy or view of the [Employer] or of any individual in their capacity as an employee or otherwise on behalf of [Employer].” Employees would not reasonably construe this rule to prohibit them from speaking about their terms and conditions of

employment. Instead, this rule is more reasonably construed to prohibit comments that are represented to be made by or on behalf of the Employer. Thus, an employee could not criticize the Employer or comment about his or her terms and conditions of employment while falsely representing that the Employer has made or is responsible for making the comments. Similarly, we concluded that the requirement that employees must expressly state that their postings are “my own and do not represent [Employer’s] positions, strategies or opinions” is not unlawful. An employer has a legitimate need for a disclaimer to protect itself from unauthorized postings made to promote its product or services, and this requirement would not unduly burden employees in the exercise of their Section 7 right to discuss working conditions.

9. Provision:

The Corporate Communications Department is responsible for any disclosure of information to the media regarding [Employer] and its activities so that accurate, timely and consistent information is released after proper approval. Unless you receive prior authorization from the Corporate Communications Department to correspond with members of the media or press regarding [Employer] or its business activities, you must direct inquiries to the Corporate Communications Department. Similarly, you have the obligation to obtain the written authorization of the Corporate Communications Department before engaging in public communications regarding [Employer] of its business activities.

You may not engage in any of the following activities unless you have prior authorization from the Corporate Communications Department:

- All public communication including, but not limited to, any contact with media and members of the press: print (for example newspapers or magazines), broadcast (for example television or radio) and their respective electronic versions and associated web sites. Certain blogs, forums and message boards are also considered media. If you have any questions about what is considered media, please contact the Corporate Communications Department.

- Any presentations, speeches or appearances, whether at conferences, seminars, panels or any public or private forums; company publications, advertising, video releases, photo releases, news releases, opinion articles and technical articles; any advertisements or any type of public communication regarding [Employer] by the Company’s business partners or any third parties including consultants.

If you have any questions about the Contact with Media Policy, please contact the [Employer] Corporate Communications Department

Board Analysis:

We concluded that this entire section is unlawfully overbroad. While an employer has a legitimate need to control the release of certain information regarding its business, this rule goes too far. Employees have a protected right to seek help from third parties regarding their working conditions. This would include going to the press, blogging,

speaking at a union rally, etc. As noted above, Section 7 protects employee communications to the public that are part of and related to an ongoing labor dispute. An employer rule that prohibits any employee communications to the media or, like the policy at issue here, requires prior authorization for such communications, is therefore unlawfully overbroad.

10. Provision:

Phone calls or letters from government agencies may occasionally be received. The identity of the individual contacting you should be verified. Additionally, the communication may concern matters involving the corporate office. The General Counsel must be notified immediately of any communication involving federal, state or local agencies that contact any employee concerning the Company and/or relating to matters outside the scope of normal job responsibilities.

If written correspondence is received, notify your manager immediately and forward the correspondence to the General Counsel by PDF or facsimile and promptly forward any original documents. The General Counsel, if deemed necessary, may investigate and respond accordingly. The correspondence should not be responded to unless directed by an officer of the Company or the General Counsel.

If phone contact is made:

- Take the individual's name and telephone number, the name of the agency involved, as well as any other identifying information offered;*
- Explain that all communications of this type are forwarded to the Company's General Counsel for a response;*
- Provide the individual with the General Counsel's name and number . . . if requested, but do not engage in any further discussion. An employee cannot be required to provide information, and any response may be forthcoming after the General Counsel has reviewed the situation; and*
- Immediately following the conversation, notify a supervisor who should promptly contact the General Counsel.*

Board Analysis:

We concluded that this rule is an unlawful prohibition on talking to government agencies, particularly the NLRB. The Employer could have a legitimate desire to control the message it communicates to government agencies and regulators. However, it may not do so to the extent that it restricts employees from their protected right to converse with Board agents or otherwise concertedly seek the help of government agencies regarding working conditions, or respond to inquiries from government agencies regarding the same.

The General Counsel found the entirety of one company's social media policy to be lawful. The policy is attached.

Social Media Policy

Updated: May 4, 2012

At [Employer], we understand that social media can be a fun and rewarding way to share your life and opinions with family, friends and co-workers around the world. However, use of social media also presents certain risks and carries with it certain responsibilities. To assist you in making responsible decisions about your use of social media, we have established these guidelines for appropriate use of social media.

This policy applies to all associates who work for [Employer], or one of its subsidiary companies in the United States ([Employer]). Managers and supervisors should use the supplemental Social Media Management Guidelines for additional guidance in administering the policy.

GUIDELINES

In the rapidly expanding world of electronic communication, *social media* can mean many things. *Social media* includes all means of communicating or posting information or content of any sort on the Internet, including to your own or someone else's web log or blog, journal or diary, personal web site, social networking or affinity web site, web bulletin board or a chat room, whether or not associated or affiliated with [Employer], as well as any other form of electronic communication.

The same principles and guidelines found in [Employer] policies and three basic beliefs apply to your activities online. Ultimately, you are solely responsible for what you post online. Before creating online content, consider some of the risks and rewards that are involved. Keep in mind that any of your conduct that adversely affects your job performance, the performance of fellow associates or otherwise adversely affects members, customers, suppliers, people who work on behalf of [Employer] or [Employer's] legitimate business interests may result in disciplinary action up to and including termination.

Know and follow the rules

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. Inappropriate postings that may include discriminatory remarks, harassment, and threats of violence or similar inappropriate or unlawful conduct will not be tolerated and may subject you to disciplinary action up to and including termination.

Be respectful

Always be fair and courteous to fellow associates, customers, members, suppliers or people who work on behalf of [Employer]. Also, keep in mind that you are more likely to resolved 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. Examples of such conduct might include offensive posts meant to intentionally harm someone's reputation or posts that 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.

Be honest and accurate

Make sure you are always honest and accurate when posting information or news, and if you make a mistake, correct it quickly. Be open about any previous posts you have altered. Remember that the Internet archives almost everything; therefore, even deleted postings can be searched. 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.

Post only appropriate and respectful content

- Maintain the confidentiality of [Employer] trade secrets and private or confidential information. 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.
- Respect financial disclosure laws. It is illegal to communicate or give a "tip" on inside information to others so that they may buy or sell stocks or securities. Such online conduct may also violate the Insider Trading Policy.
- Do not create a link from your blog, website or other social networking site to a [Employer] website without identifying yourself as a [Employer] associate.
- Express only your personal opinions. 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]."

Using social media at work

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. Do not use [Employer] email addresses to register on social networks, blogs or other online tools utilized for personal use.

Retaliation is prohibited

[Employer] prohibits taking negative action against any associate for reporting a possible deviation from this policy or for cooperating in an investigation. Any associate who retaliates against another associate for reporting a possible deviation from this policy or for cooperating in an investigation will be subject to disciplinary action, up to and including termination.

Media contacts

Associates should not speak to the media on [Employer's] behalf without contacting the Corporate Affairs Department. All media inquiries should be directed to them.

For more information

If you have questions or need further guidance, please contact your HR representative.