



NLRB's Social Media Crackdown A Warning To Employers

By Leigh Kamping-Carder

Law360, New York (April 11, 2011) -- With a National Labor Relations Board office targeting Thomson Reuters Corp. over its allegedly overbroad Twitter policy, lawyers are advising employers to examine their social media rules lest they find themselves in the agency's cross hairs.

The NLRB's Manhattan office told the Newspaper Guild, which represents Reuters employees, on Wednesday that it would soon file a complaint alleging the news service improperly disciplined a reporter for sending a Tweet that said, "One way to make this the best place to work is to deal honestly with Guild members."

Though the NLRB office has given Reuters and the union a chance to settle the dispute, and the case mostly involves allegations over the parties' unsuccessful collective bargaining talks, attorneys said the threat of yet another complaint over muscular social media regulations highlights how seriously the agency is tracking employers' Internet policies.

"The board is clearly paying more attention to the issue," said Karen R Glickstein, a Polsinelli Shughart PC employment attorney who has written frequently about social media. "I don't think it's a one off. I think we're going to be seeing more of this."

The Reuters case followed an October complaint against an ambulance provider that fired an employee after she called her supervisor a "scumbag" and a "dick" on Facebook. The company maintained she was fired over performance issues but revised its Internet policy as part of a February settlement.

Then, on Feb. 4, a Service Employees International Union chapter filed a charge contesting a bus company's Internet policy, which apparently bans "the use of electronic communication and/or social media in a manner that may target, offend, disparage or harm customers, passengers or employees."

Taken together, the cases have made employers nervous, attorneys said.

"Since these cases have come up, we've been proactive in looking at policies that our clients have used to make sure they know that they may need to modify policies, or at least be cautious in enforcing a policy that would be violative of the National Labor Relations Act," said Travis Gemoets, a labor and employment partner with Jeffer Mangels Butler & Mitchell LLP.

Here, attorneys offer their best advice for employers.

Don't Issue A Blanket Policy

Employers have legitimate rights to restrict employee speech, especially when it comes to disparaging, offensive or false statements, attorneys said. But a social media policy that prevents workers from discussing working conditions, including compensation issues, or from criticizing their employers online won't hold up, attorneys said.

“Generally, the perception among employers [is] that social media policy can be drafted in an overbroad fashion and can curtail speech about the company in a general way, and I think that’s a blatant misconception of the law,” said Dana A. Kravetz, managing partner of Michelman & Robinson LLP and chair of the firm’s labor and employment department.

“Employers need to be aware that an employee could be criticizing the employer on a social media site and that that could be a protected activity,” he added.

It’s well settled that the NLRA protects employees who discuss working conditions, as well as public speech such as picketing, rallies or chats outside of work — and those protections extend to the digital world, attorneys said.

“Employees, as is human nature, when they have an outlet for communications, such as Facebook status updates, Twitter ... they’re going to talk about their job conditions, since that’s a part of their life,” Gemoets said.

Employers should consider deleting any policy provisions that make a worker’s online commentary or criticism of an employer a terminable offense, Kravetz said.

Include Provisions To Limit Social Media Use

But employers’ hands are not tied, and there are certain limits they can enforce to curtail their employees’ online statements, attorneys said.

For example, employers can limit employee Facebook updates and tweets during work hours, and they can prohibit them from making false statements or using profanity in relation to co-workers or management, Gemoets said. It’s also well within an employer’s right to forbid the dissemination of confidential information online, Glickstein said.

Gemoets has also counseled clients to implement anti-harassment and anti-discrimination policies that cover social media, giving an employer recourse if an employee makes sexual or discriminatory comments about a co-worker — whether in the office or on the Internet.

And it’s useful to add a disclaimer or safe harbor statement at the end spelling out that nothing in the policy is intended to limit employees’ labor rights, attorneys said.

Stay Vigilant

Part of an employer’s fear about workers using social media is the way comments made online can spread to a much broader audience than those made around the water cooler.

Employers cannot spend all day monitoring Facebook and Twitter, but Gemoets recommends they act on information that an employee has made inappropriate comments on the Internet. Whether that’s practical depends on how fast the comment or video has gone viral online, Glickstein noted.

Once, Gemoets had a client whose ex-employee had posted videos on YouTube criticizing the company and current management. In that case, the client went directly to YouTube because, it turned out, the videos violated YouTube’s own rules.

“If you hear a report about something inappropriate being said in any social media avenue, take steps to directly ask that employee to take it down and, if that doesn’t work, to go to the social media site,” Gemoets said.

When deciding how to enforce an Internet policy against an employee, Kravetz said he would first make sure whether the employer had articulated and disseminated a policy, then look at what kinds of outlets

employees had to address complaints, and ultimately try to uncover the reason behind the negative comments. Was it, for example, a rogue employee or a more widespread issue?

Don't Wait – In Some Cases

Although the NLR has yet to issue a ruling on social media policies and Section 7, employers should begin addressing their Internet rules now, rather than waiting for a judge's decision, attorneys said.

“The fact that there hasn't been a full board decision and that we haven't litigated this in district courts yet does not mean that employers should just take a wait-and-see attitude,” Gemoets said.

For one, the law governing worker communications is settled, and the Facebook and Twitter cases are simply applying an old law to a new avenue of communication, attorneys said. The courts are continuously playing catch-up with technology, and any policy that makes a company less of a target for a disgruntled employee or the plaintiffs bar is worth implementing, Kravetz said.

Plus, in the unlikely event that the NLRB determines it has no say over workers' online communications, an employer can change its policies, Gemoets added.

Glickstein, however, is being more cautious, and revising policies on a case-by-case basis based on the goals of her clients.

Some companies accustomed to using social media in the business world tend to be less willing to change their policies without a specific change in the law, she said. Others don't want to be on the wrong side of the law in the event of a ruling, and may scale back some of the language in their policies, she added.

“I'm purposely not giving any solid recommendations one way or another but looking at the individual ends and explaining the pros and cons to them,” Glickstein said.