

PUBLICATION

In Survey of Seven, NLRB Declares Only Walmart Social Media Policy 100% Lawful

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On May 30, 2012, National Labor Relations Board (NLRB) Acting General Counsel Lafe E. Solomon released a report on corporate social media policies for employees. Of the seven policies reviewed, one policy drafted by Walmart met the NLRB's approval under Section 7 of the National Labor Relations Act (NLRA). The other six were found to some degree to be unlawful.

Solomon's review of the seven social media policies repeat one common theme: overly broad policy statements are unlawful. The key question in assessing a policy is whether reasonable employees could perceive the policy to prohibit their Section 7 right to engage in union or concerted activity. For instance, policies that restrict an employee from posting "confidential information" or "non-public information" are overly broad because reasonable employees could read this to limit their right to disclose the conditions of their and others' employment. Likewise, a policy that posts "should be completely accurate and not misleading" could be perceived to infringe on the protected Section 7 right to criticize an employer's labor policies.

Attempts to regulate the tone of employees' social media posts also failed, including policies that encouraged workers to communicate in a "professional tone," not to pick fights, and not to use "objectionable or inflammatory" language. These policies provided little or no further explanation as to their meaning. Because they could limit "robust but protected discussions about working conditions or unionism," Solomon declared them unlawfully overbroad.

Walmart's social media policy, however, passed muster by providing specific examples of the types of conduct it permitted. Although it too contained broad recommendations such as "be respectful," it clarified its meaning by giving examples of disrespectful conduct. Under the "be respectful" heading, Walmart encouraged employees to be "fair and courteous" but stated, "Nevertheless, if you decide to post complaints or criticism, avoid using statements . . . that reasonably could be viewed as malicious, obscene, threatening or intimidating, . . . or that might constitute harassment or bullying." Examples provided were posts that intentionally harmed another's reputation or created a hostile work environment based on race, sex, disability or religion. Solomon found this provision lawful because its examples demonstrated the policy is directed at "plainly egregious conduct," not protected Section 7 activity. An employer has a legitimate basis to prohibit these workplace behaviors, and Walmart's policy does so without burdening protected statements about work conditions and employment.

Another policy statement restricted "inappropriate postings." The policy explained that these posts may include "discriminatory remarks, harassment, and threats of violence or similar inappropriate or unlawful conduct." Under the same reasoning, Solomon concluded a reasonable employee would perceive the statement to encompass only "plainly egregious conduct."

As to confidentiality, Walmart's policy required employees to "maintain the confidentiality of Walmart trade secrets and private or confidential information." Examples included "development of systems, processes, products, know-how and technology," as well as internal reports or "internal business-related confidential communications." Solomon stated that employees would understand from these examples that prohibited

disclosures do not reach protected communications about working conditions. Additionally, employees do not have the right to disclose trade secrets.

The lesson in Walmart's approved social media policy is that providing specific examples of prohibited conduct legitimizes a broad policy statement. An employer can limit employees' use of social media to disclose confidential information or communicate disrespectful content so long as the employer gives precise examples that do not breach Section 7 rights to engage in concerted activity. Solomon's approval of the Walmart policy marks a positive development for employers in drafting employee social media policies in compliance with the NLRA.

If you would like to obtain a copy of the Walmart social media policy, or if you have questions regarding your company's social media policy, please contact any of our more than 70 Labor & Employment attorneys located in Birmingham, Alabama; Atlanta, Georgia; Baton Rouge, Mandeville and New Orleans, Louisiana; Jackson, Mississippi; Chattanooga, Johnson City, Knoxville, Memphis and Nashville, Tennessee; and Houston, Texas.