CHICAGO LAWYER

Social media dos and don'ts: Without guidelines, employers can get into trouble in a hurry

June 01, 2015

By Nicholas A. Gowen
Nicholas A. Gowen is a partner at Schopf & Weiss, a litigation boutique, where he has a broad national practice representing businesses and individuals in a range of disputes.

Imagine the following scenario:

You just received a frantic phone call from your client — the president of a closely held corporation — who just learned that some of his employees posted a series of comments on a popular social-networking site regarding the client's business operations and complaining about the company's managers.

You believe the comments are innocuous, but your client is upset that his employees are posting anything online about his business.

You calm your client down but advise that the company immediately develop a social media policy to curtail any future improper online communications by employees.

The issue for you and your client becomes how to balance the business' interest in protecting its operations and not trampling the employees' freedom to use social media.

The meteoric rise in social media usage over the last 10 years — with nearly 2 billion people worldwide reportedly using various platforms — has created this type of obstacle as employers try to draft social media policies to regulate what employees may disclose online about their jobs.

Social media policies are critical for companies to preserve trade secrets, prevent discrimination and harassment, comply with industry regulations and protect the company's brand.

Employers, however, must be careful to create policies that balance protecting the employer's business goals while also respecting employees' rights to communicate regarding working conditions as allowed by the National Labor Relations Act (NLRA).

Specifically, Section 7 of the NLRA guarantees employees "the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection" as well as the right "to refrain from any or all such activities."

The National Labor Relations Board (NLRB) determines whether an employment policy unlawfully restricts employees from engaging in "concerted activity" by analyzing whether the policy would reasonably prevent an employee from exercising his Section 7 rights. The NLRB broadly interprets concerted activity under Section 7 to include acts such as discussing working conditions, salary or company policies. The NLRB determines an employee is engaged in protected, concerted activity when that employee acts for the benefit of others and not solely for his personal interest, even if the employees do not formally agree to act as a group.

An employment policy is unlawful if it explicitly restricts activities protected by Section 7 or if it implicitly restricts such activities because: employees would reasonably construe the policy's language to prohibit Section 7 activity; the policy was created in response to union activity; or the policy was applied to restrict the exercise of Section 7 rights.

Ambiguities are construed against the company, and violations may be found even in policies that are facially neutral. The NLRB considers both the plain language of an employment policy as well as how an employee might interpret it when determining if a policy is appropriate.

The NLRB treats social media policies no differently than other employment policies and has found that employees' discussion of their job using social media is reasonably interpreted to include concerted activity.

The NLRB has scrutinized, and found unlawful, numerous companies' social media policies that prohibited employees from discussing conditions of their employment or otherwise interfered with employees' rights to engage in concerted activity.

The NLRB considers social media to be a virtual watercooler where employees can share information. The NLRB finds that broad, vague and ambiguous social media policies may violate employees' rights to protected concerted activity because employees may believe that they are prohibited from participating in protected activities.

Accordingly, employers must be careful to craft social media policies carefully drafted with an eye toward protecting employees' Section 7 rights.

The next time you face this issue, consider the following five keys to creating an acceptable social media policy.

(1) The policy should be narrowly tailored to meet the company's specific purpose and include specific examples of prohibited conduct so that employees cannot reasonably interpret the policy to prohibit Section 7 activity;

(2) The policy should require employees to maintain the confidentiality of the employer's trade secrets and private and confidential information;

(3) The policy should provide sufficient examples of prohibited disclosures so employees understand that the policy does not prohibit communications about working conditions;

(4) The policy should specify the type of activities not protected by the NLRA that will subject employees to discipline, including comments that are discriminatory, harassing or otherwise create a hostile work environment; and

(5) Do not rely on boilerplate savings clauses that state that the policy is not intended to interfere with federal or state law as those clauses may be insufficient to prevent violations of the NLRA.