Uncertain Advice In NLRB's Social Media Memoranda

Law360, New York (June 26, 2012, 1:02 PM ET) -- The acting general counsel of the National Labor Relations Board continues to create more questions than provide clear answers about the legality of employers' social media policies.

On May 30, 2012, NLRB Acting General Counsel Lafe Solomon released his third in a series of memoranda describing the NLRB's approach to social media policies. This latest report follows the earlier August 2011 and January 2012 reports and attaches, for the first time, an entire social media policy — from retail giant Wal-Mart Stores Inc. — that Solomon characterizes as facially valid.

Employers seeking clarity on this issue may be tempted to look to the sample policy as the Rosetta Stone and simply adopt it as their own. However, that approach may be too hasty and too simplistic.

A close review of the May 30 report reveals continued inconsistent treatment of employer policies, both within this report and when compared to Solomon's earlier reports.

Thus, while the new report may reflect an evolution in Solomon's analysis, employers are still left without clear guidance as to whether certain elements of a social media policy pass muster with the NLRB.

In finding the Wal-Mart policy facially valid, Solomon's third report reiterates his position from the two earlier memoranda that: "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."

But a closer review of Solomon's third report exposes inconsistency in application of this supposed rule. For example, Solomon's third report treats the following provisions regarding confidential information in two employers' policies differently:

- Policy that states "Don't release confidential guest, team member or company information;" and
- Policy that prohibits posting of "[Employer] Secret, Confidential or Attorney-Client Privileged information."

If you guessed that Solomon would find the first provision invalid, but the second provision valid, you guessed correctly.

Solomon claims that the first provision would restrict employees from discussing and disclosing their own conditions of employment and that of co-workers — a clear violation of Section 7 rights.

Alternatively, Solomon finds the second provision valid because it does not refer to employees and the rule "is clearly intended to protect the Employer's legitimate interest in safeguarding its confidential proprietary and privileged information."

Solomon, however, fails to explain how he reaches different results when both policies seek to protect the employer's confidential information without including any examples of what is meant by "confidential information."

For instance, a reasonable employee would likely view the latter policy as prohibiting the posting of confidential information regarding the wages paid to co-workers, which renders it a clear violation of Section 7 rights under existing NLRB law.

Further, a similar provision in the Wal-Mart policy instructs employees to "Maintain the confidentiality of Wal-Mart's trade secrets and private or confidential information ... Do not post internal reports, policies, procedures or other internal business-related confidential communications."

The acting general counsel's report does not explain how a prohibition on positing "internal business-related confidential communications" is considered facially valid.

However, one could easily argue, as Solomon had in earlier reports, that such statements are overly broad and would be interpreted by employees to improperly restrict their discussions of working conditions and/or wages.

Thus, when comparing the acting general counsel's treatment of these provisions, it is easy to conclude that his latest pronouncement about social media policies fails to provide the clarity the acting general counsel believes he provides.

The third report's treatment of the rest of the Wal-Mart policy further highlights this inconsistency. In particular, the section titled "Be Respectful" implores employees to:

> "Always be fair and courteous to fellow associates, customers, members, suppliers or people who work on behalf of Wal-Mart ... 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 disparages 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."

While the above rule certainly espouses a common-sense approach, Solomon found a similar provision of General Motors Co.'s social media policy invalid in this very same report. That policy stated "[o]ffensive, demeaning, abusive or inappropriate remarks are as out of place online as they are offline, even if they are unintentional," under the header "Treat Everyone with Respect."

Solomon found this provision invalid because it "proscribes a broad spectrum of communications," including protected criticism of the employer's policies or treatment of employees.

Left unclear by Solomon's latest report is how Wal-Mart's policy requiring employees to be "fair and courteous" to other employees, including supervisors, and banning "offensive posts meant to harm someone's reputation" does not proscribe the exact same protected activity as that set forth in General Motors' allegedly invalid policy.

The acting general counsel cites the surrounding provisions that are clearly valid, such as the ban on threatening, intimidating, harassing or bullying behavior, as providing sufficient context to make this rule valid.

But this ban on unprotected behavior is a separate example from the policy's ban on posts intended to harm someone's reputation, as the clauses are separated by an "or," as shown above.

Thus, the policy does not provide any context for the restriction on offensive posts and fails to meet Solomon's standard for saving otherwise invalid posts by contextualizing them with valid examples of prohibited behavior.

Perhaps most telling in terms of Solomon's inconsistent positions is that Administrative Law Judge Ira Sandron recently found the General Motors provision valid.[1]

In his decision in the General Motors case, released on the same day as Solomon's report, Sandron noted that the General Motors policy made no specific reference to supervisors or suggested that they not be discussed. As a result, he held General Motors' policy was not facially invalid under Section 8(a)(1) and instead protected the employer's legitimate interest in maintaining a civil work place.

Sandron agreed with Solomon that several other provisions of the General Motors policy were facially invalid, but his finding regarding the "Treat Everyone with Respect" provision signals the infirmity of any "takeaways" from Solomon's third report.

To date, the acting general counsel's contradictory positions on the validity of employer social media policies have yet to be challenged before a circuit court.

In light of the obvious inconsistencies described above, it is quite likely an appellate court, such as the United States Court of Appeals for the District of Columbia, may be called upon to provide a more consistent approach to these policies.

Until that time, employers that are considering social media policies should adhere to the following guidelines:

- Ensure that any prohibitions on employee social media behavior are as narrowly drawn as possible
- Provide concrete examples of clearly unprotected behavior that would violate each provision to help restrict the breadth of the provision and provide arguments that a reasonable employee would not interpret the provision as prohibiting protected activity

- Do not bother including “savings clauses” that state that the policy or a provision of the policy are not intended to infringe on Section 7 rights; Solomon’s latest report makes it clear that such clauses will not save otherwise invalid provisions or policies
- Do include provisions that require employees who are posting about work-related issues or company products or services to include a disclaimer in such posts that identifies them as a company employee, but then specifies their views are their personal opinions and do not reflect those of the company — Solomon’s report found all such provisions in the various policies reviewed to be valid
- Prior to using the social media policy to impose discipline on an employee, make sure the facts related to the proposed discipline are reviewed by knowledgeable counsel to ensure the discipline does not violate the National Labor Relations Act.

Because of the NLRB acting general counsel’s inconsistent approach to employer social media policies, these guidelines cannot guarantee the NLRB will find a policy following these rules valid. However, abiding by these guidelines increases the likelihood that a social media policy will withstand a challenge.

One thing employers can be certain of is that the NLRB will continue to aggressively police and analyze employer social media policies and employee discipline pursuant to those policies.

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[1] General Motors, LLC, No. 07-CA-53570, 2012 WL 1951391 (N.L.R.B. Div. of Judges May 30, 2012).