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The NLRB Continues to Crack Down on Employer Social Media Policies

Over the past year, the National Labor Relations Board ("NLRB") has taken an interest in when employers can limit employee social media use. Continued developments from the NLRB over the past several months highlight the need for employers to take a close look at their own social media policies and other employment policies.

Back in August 2011, the NLRB's General Counsel issued a report summarizing recent NLRB decisions on the application of the National Labor Relations Act ("NLRA") to employee social media activity, including activity on such sites as Facebook and Twitter. The report reviewed and summarized recent decisions on whether employees who were disciplined for social media activity were engaged in "protected activity" under the NLRA. The report also examined decisions that considered whether certain employer-promulgated social media policies were overbroad and violated the NLRA.

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The NLRB's General Counsel issued an updated report on January 24, 2012. The new report summarized decisions addressing a variety of social media policies and provisions, ranging from no-defamation/non-disparagement rules to confidentiality requirements to policies limiting the use of logos, trademarks and communications with the media. In a variety of contexts, the NLRB found such policies to be overbroad and in violation of employee rights under the NLRA. Both reports are recommended reading for employers looking to implement or revise their employment policies.

Continuing the trend of the agency's activism in the social media arena, an NLRB administrative law judge ("ALJ"), in *G4S Secure Solutions (USA) Inc.*, Case No. 28-CA-23380 (March 29, 2012), recently held that a security company's social media policy, which prohibited employees from discussing "work-related legal matters," violated the NLRA. Of significant note, the policy also contained a disclaimer stating that the policy was not to be construed or applied in a way that interfered with employees' rights under federal law. However, the ALJ decided, the disclaimer did not save the provision because lay employees would not understand what is permissible under "federal law" and what would be a prohibited discussion of a "legal matter." The ALJ also found that the company's confidentiality provision violated the NLRA because it did not define what constituted

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"confidential information" and prohibited employees from giving interviews or making public statements about the company's "activities or policies," without providing a definition of those terms.

With the NLRB's continued focus on this area, employers should carefully review their existing social media policies. The ALJ's recent decision, consistent with prior decisions and the General Counsel's reports, highlights the importance of having a carefully defined and crafted policy and handbook, as well as the risk of relying on disclaimers to save otherwise overbroad provisions.

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