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HUMAN RESOURCES

## *Social media rules under microscope*

It's easy to imagine: An unhappy employee, using coarse language, posts on Facebook about something that happened at work for "friends" and the whole world to see.

A supervisor sees the post, as well as comments and "likes" from other employees and customers.

Understandably angry, the supervisor terminates the posting employee for violating the social media policy, which prohibits employees from "acting in a disrespectful or inappropriate manner," posting information about the company and doing anything "contrary to the company's business."

What may be harder to imagine is that the employee may have been engaged in conduct protected under federal law, and that the employer could get dragged before the National Labor Relations Board to defend its actions.

Worse, the employer might have to rescind the termination, reinstate the employee (with back pay and interest) and rewrite many of the rules it's long relied upon to promote harmony in the workplace and protect its confidential and proprietary information.

The prospect of running into trouble with the NLRB seems even more likely given the most recent report on social media cases (the third since August) issued by that agency's acting general counsel (AGC). Reading through the report, however, it is clear that employers can still navigate the sometimes confusing and contradictory world of labor law and avoid incurring big legal bills defending against unfair labor practice charges, even if the path is now a little narrower.

Some nonunion employers may be surprised to learn they are subject to the NLRB's jurisdiction, and their social media policies, handbooks and other rules must comply with the National Labor Relations Act.

Just as surprising: The NLRB does not consider an employer's motive for having the rule, whether the rule might be reasonable to many, or whether the employees involved are represented by a union. If the NLRB determines a rule is "over-broad," the employer could be forced to change it.

If the rule has been enforced, the employer could be required to rescind related discipline, and make the employees whole for any lost income or benefits. In the extreme case, that could mean reinstatement and back pay for unprofessional or divisive employees, who the employer was happy to see go.

In his May 30 report, the AGC (who does not decide cases,

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but investigates charges and has the authority to issue complaints that can lead to costly litigation) reiterated that he is guided by the principle that an employer violates the act if its rules "would reasonably tend to chill employees in the exercise of their ... rights" to speak with, or act in concert with, their co-workers and others about their terms and conditions of employment.

The AGC identified several provisions in social media policies as "unlawfully overbroad," including:

— Prohibiting employees from "releas(ing) confidential (customer), team member, or company information" except on a "need to know basis"

— Prohibiting disclosure of "nonpublic company information on any public site" (even where the employer provided examples of covered information)

— Requiring that employees' posts are "completely accurate and not misleading"

— Requiring employees to report any "unsolicited or inappropriate electronic communications"

The AGC also outlined how such overly broad rules could be made legal, and found the following rules, and several others, "not unlawful":

— Requiring employees to observe copyright and other intellectual property laws

— Prohibiting employees from engaging in online bullying or protected class harassment

— Prohibiting employees from posting in the employer's name, or in a manner that could be reasonably attributed to the employer

— Requiring employees to make clear that their postings reflect the employee's own views and do not represent their employer's positions, strategies or opinions

Until the NLRB rules on the social media cases pending before it, the AGC's approach — and that of some administrative law judges — reflects that agency's position on social media policies. In light of these developments, employers must review not only their social media policies, but also handbooks and other policies governing employees' communications with each other and third parties.

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