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Legal Trends

Get Antisocial

Not sure what to put in your social media policy? Try nothing.

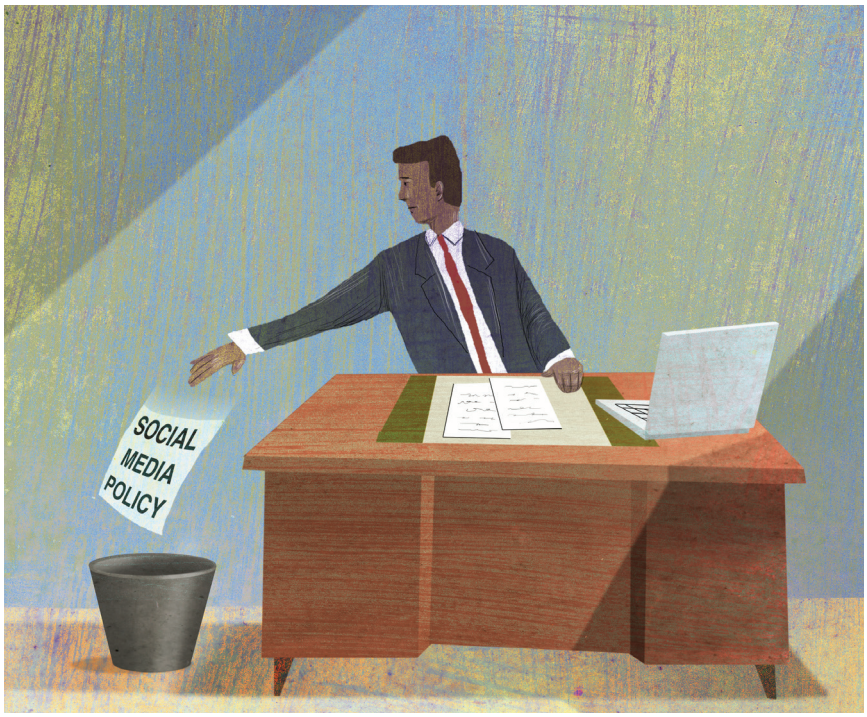

ILLUSTRATION BY STEVE DININNO FOR *HR MAGAZINE*

By David S. Rubin

A few years back, as the popularity of Facebook and other social networking sites exploded, U.S. labor lawyers—myself included—were advising businesses to draft and publish a social networking policy for employees.

By implementing such a policy, the thinking went, a company could prevent employees from engaging in online conduct that might be damaging, such as harassing or bad-mouthing co-workers, disclosing confidential information, or denigrating the company.

But that was before the National Labor Relations Board stepped in. Even if the courts strike down last year's NLRB recess appointments, the board isn't likely to become more employer-friendly during President Barack Obama's second term.

Recent experience suggests that social networking policies may be more likely to create problems than prevent them, and that there are more-effective ways for companies to protect their legitimate interests.

Just as a porch light attracts moths, a social media policy is likely to attract unwanted attention—a charge from the NLRB's general counsel, a successful legal challenge to the termination of an employee or legal leverage for a union trying to organize your employees.

'Concerted Activity'

Beginning in 2010, the NLRB's general counsel began filing complaints against companies—union and nonunion—on the basis of their social networking policies. The gist of these claims was that the companies violated the National Labor Relations Act (NLRA) to the extent that employees might interpret the social networking policies as prohibiting them from discussing or complaining about their working conditions with co-workers.

The act protects the right of employees to engage in "concerted activity." Such activity includes discussing and complaining about working conditions with co-workers. The general counsel, Lafe Solomon, has analogized social media to a 21st century office "water cooler" where employees can share information—though it strikes me as a very public water cooler.

As these complaints were issued by the general counsel, labor lawyers (again, myself included) advised business clients that they should maintain social networking policies but that the policies should be carefully drafted to avoid running afoul of the NLRA.

The general counsel kept issuing complaints, however, making it increasingly difficult to draft a useful policy that he would not find unlawful. For example, the general counsel took the position that a company cannot maintain a policy that forbids employees from posting the corporate logo or pictures of company facilities on the

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employees' Facebook pages. After all, the general counsel explained, such images might show up if employees posted photographs of picketing at their places of work—and picketing is protected concerted activity under the NLRA.

Protected Comments

In another case, an ambulance company terminated an employee who referred to her supervisor as a "dick" and "scumbag" on Facebook and who stated in a post "Love how the company allows a 17 to be a supervisor." The "17" is reportedly company code for a psychiatric patient.

The general counsel concluded that the employee's actions were protected by the NLRA and that the company's policy prohibiting employees from making disparaging, discriminatory or defamatory comments when discussing the company or the employee's "superiors, co-workers, and/or competitors" was overbroad and unlawful.

In still another case, the general counsel found a policy to be unlawful because it said "Don't release confidential guest, team member or company information." According to the general counsel, this language could be interpreted as forbidding employees from discussing their conditions of employment.

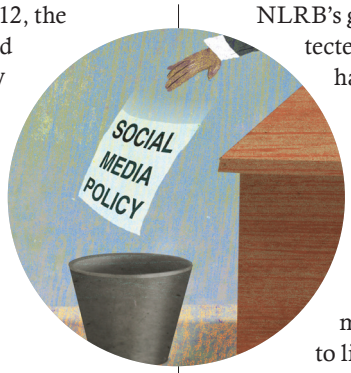
Forget About It

Of course, the general counsel is not final arbiter of what is and isn't permitted under the NLRA. He issues complaints that, unless resolved early in the process, are eventually decided by the NLRB, the federal agency charged with administering and enforcing the act.

In September 2012, the board issued its first decision on the subject, agreeing with the general counsel that Costco's electronic posting rule was overbroad and unlawful. That rule told employees they could be disciplined if they posted statements "that damage the company, defame any individual or damage any person's reputation."

It is possible to create a social media policy that will not be found to violate the NLRA. Earlier in 2012, the general counsel published an artfully drafted policy from Wal-Mart that he had found lawful as written.

Nevertheless, I have reached the conclusion that it's probably not worth it, especially for nonunion employers.



Rely on Other Policies

Of course, when I counsel clients not to post a social media policy, they ask some hard questions regarding disclosure, harassment and criticism, such as:

How can I prevent employees from disclosing confidential business information and trade secrets through social media?

Most employers should maintain confidentiality and nondisclosure policies, written so that they can be applied in a social media context if necessary. Bear in mind that confidential business information cannot be defined too broadly or the policy will run afoul of the NLRA. For instance, an employer cannot prohibit employees from discussing their salaries with co-workers.

What if an employee alleges that a co-worker is harassing him on Facebook or Twitter?

Every employer should have policies in place that prohibit sexual and other forms of harassment. While employers may not be keen on supervising employees' conduct outside the workplace, the online harassment or bullying of co-workers, customers or vendors is likely to be workplace-related. As always, there's a caveat: Criticism of managers or supervisors might be regarded by the NLRB's general counsel as protected speech rather than harassment.

How do I keep workers from badmouthing the company online?

Unfortunately, as disconcerting as this may be to owners and managers, it is difficult to limit this kind of behavior. According to the general counsel, it might be permissible to fire an employee who publicly criticizes his or her employer's product or service. But it's not OK to fire an employee who criticizes the employer's treatment of workers or who is generally critical of the employer.

In real life, of course, it's often difficult to see the line.

Regardless of what, if any, policies are in effect, these incidents should be analyzed and addressed carefully on a case-by-case basis.

Social media policies seem to attract trouble that overshadows the advantages such policies might provide. Companies can more effectively protect legitimate online interests through other well-drafted and carefully enforced policies, particularly nonharassment and confidentiality or nondisclosure policies.

That is not to say that these policies won't be challenged by the general counsel, but, at least as of now, they are not subject to the same degree of attention and scrutiny as social networking policies. Maybe we should not leave the porch light on. HR

> Criticism of managers or supervisors might be regarded as protected speech rather than harassment.

Online Resources

For more about social media policies, see the online version of this article at www.shrm.org/0213-no-social-media-policy. For other resources on employment law, visit www.shrm.org/LegalIssues.