

**OFFICE OF THE GENERAL COUNSEL
Division of Operations-Management**

MEMORANDUM OM 12-59

May 30, 2012

TO: All Regional Directors, Officers-in-Charge
and Resident Officers

FROM: Anne Purcell, Associate General Counsel

SUBJECT: Report of the Acting General Counsel
Concerning Social Media Cases

Attached is an updated report from the Acting General Counsel
concerning recent social media cases.

/s/
A. P.

Attachment

cc: NLRBU
Release to the Public

MEMORANDUM OM 12-59

REPORT OF THE GENERAL COUNSEL

In August 2011 and in January 2012, I issued reports presenting case developments arising in the context of today's social media. Employee use of social media as it relates to the workplace continues to increase, raising various concerns by employers, and in turn, resulting in employers' drafting new and/or revising existing policies and rules to address these concerns. These policies and rules cover such topics as the use of social media and electronic technologies, confidentiality, privacy, protection of employer information, intellectual property, and contact with the media and government agencies.

My previous reports touched on some of these policies and rules, and they are the sole focus of this report, which discusses seven recent cases. In the first six cases, I have concluded that at least some of the provisions in the employers' policies and rules are overbroad and thus unlawful under the National Labor Relations Act. In the last case, I have concluded that the entire social media policy, as revised, is lawful under the Act, and I have attached this complete policy. I hope that this report, with its specific examples of various employer policies and rules, will provide additional guidance in this area.

_____/s/

Lafe E. Solomon
Acting General Counsel

Rules on Using Social Media Technology and on
Communicating Confidential Information Are Overbroad

In this case, we addressed the Employer's rules governing the use of social media and the communication of confidential information. We found these rules unlawful as they would reasonably be construed to chill the exercise of Section 7 rights in violation of the Act.

As explained in my previous reports, an employer violates Section 8(a)(1) of the Act through the maintenance of a work rule if that rule "would reasonably tend to chill employees in the exercise of their Section 7 rights." Lafayette Park Hotel, 326 NLRB 824, 825 (1998), enfd. 203 F.3d 52 (D.C. Cir. 1999). The Board uses a two-step inquiry to determine if a work rule would have such an effect. Lutheran Heritage Village-Livonia, 343 NLRB 646, 647 (2004). First, a rule is clearly unlawful if it explicitly restricts Section 7 protected activities. If the rule does not explicitly restrict protected activities, it will only violate Section 8(a)(1) upon a showing that: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights.

Rules that are ambiguous as to their application to Section 7 activity, and contain no limiting language or context that would clarify to employees that the rule does not restrict Section 7 rights, are unlawful. See University Medical Center, 335 NLRB 1318, 1320-1322 (2001), enf. denied in pertinent part 335 F.3d 1079 (D.C. Cir. 2003). In contrast, rules that clarify and restrict their scope by including examples of clearly illegal or unprotected conduct, such that they would not reasonably be construed to cover protected activity, are not unlawful. See Tradesmen International, 338 NLRB 460, 460-462 (2002).

The Employer in this case operates retail stores nationwide. Its social media policy, set forth in a section of its handbook titled "Information Security," provides in relevant part:

Use technology appropriately

* * * * *

If you enjoy blogging or using online social networking sites such as Facebook and YouTube, (otherwise known as Consumer Generated Media, or CGM) please note that there are guidelines to follow if you plan to mention [Employer] or your employment with [Employer] in these online vehicles. . .

- Don't release confidential guest, team member or company information. . . .

We found this section of the handbook to be unlawful. Its instruction that employees not "release confidential guest, team member or company information" would reasonably be interpreted as prohibiting employees from discussing and disclosing information regarding their own conditions of employment, as well as the conditions of employment of employees other than themselves--activities that are clearly protected by Section 7. The Board has long recognized that employees have a right to discuss wages and conditions of employment with third parties as well as each other and that rules prohibiting the communication of confidential information without exempting Section 7 activity inhibit this right because employees would reasonably interpret such prohibitions to include information concerning terms and conditions of employment. See, e.g., Cintas Corp., 344 NLRB 943, 943 (2005), enfd. 482 F.3d 463 (D.C. Cir. 2007).

The next section of the handbook we addressed provides as follows:

Communicating confidential information

You also need to protect confidential information when you communicate it. Here are some examples of rules that you need to follow:

- Make sure someone needs to know. You should never share confidential information with another team member unless they have a need to know the information to do their job. If you need to share confidential information with someone outside the company, confirm there is proper authorization to do so. If you are unsure, talk to your supervisor.
- Develop a healthy suspicion. Don't let anyone trick you into disclosing confidential information. Be suspicious if asked to ignore identification procedures.
- Watch what you say. Don't have conversations regarding confidential information in the Breakroom or in any other open area. Never discuss confidential information at home or in public areas.

Unauthorized access to confidential information: If you believe there may have been unauthorized access to confidential information or that confidential information may have been misused, it is your responsibility to report that information. . . .

We're serious about the appropriate use, storage and communication of confidential information. A violation of [Employer] policies regarding confidential

information will result in corrective action, up to and including termination. You also may be subject to legal action, including criminal prosecution. The company also reserves the right to take any other action it believes is appropriate.

We found some of this section to be unlawful. Initially, we decided that the provisions instructing employees not to share confidential information with co-workers unless they need the information to do their job, and not to have discussions regarding confidential information in the breakroom, at home, or in open areas and public places are overbroad. Employees would construe these provisions as prohibiting them from discussing information regarding their terms and conditions of employment. Indeed, the rules explicitly prohibit employees from having such discussions in the breakroom, at home, or in public places--virtually everywhere such discussions are most likely to occur.

We also found unlawful the provisions that threaten employees with discharge or criminal prosecution for failing to report unauthorized access to or misuse of confidential information. Those provisions would be construed as requiring employees to report a breach of the rules governing the communication of confidential information set forth above. Since we found those rules unlawful, the reporting requirement is likewise unlawful.

We did not, however, find unlawful that portion of the handbook section that admonishes employees to "[d]evelop a healthy suspicion[,] " cautions against being tricked into disclosing confidential information, and urges employees to "[b]e suspicious if asked to ignore identification procedures." Although this section also refers to confidential information, it merely advises employees to be cautious about unwittingly divulging such information and does not proscribe any particular communications. Further, when the Employer rescinds the offending "confidentiality" provisions, this section would not reasonably be construed to apply to Section 7 activities, particularly since it specifically ties confidential information to "identification procedures." [Target Corp., Case 29-CA-030713]

Several Policy Provisions Are Overbroad, Including Those on 'Non-Public Information' and 'Friending Co-Workers'

In this case, we again found that certain portions of the Employer's policy governing the use of social media would reasonably be construed to chill the exercise of Section 7 rights in violation of the Act.

The Employer--a motor vehicle manufacturer--maintains a social media policy that includes the following:

USE GOOD JUDGMENT ABOUT WHAT YOU SHARE AND HOW YOU SHARE

If you engage in a discussion related to [Employer], in addition to disclosing that you work for [Employer] and that your views are personal, you must also be sure that your posts are completely accurate and not misleading and that they do not reveal non-public company information on any public site. If you are in doubt, review the [Employer's media] site. If you are still in doubt, don't post. Non-public information includes:

- Any topic related to the financial performance of the company;
- Information directly or indirectly related to the safety performance of [Employer] systems or components for vehicles;
- [Employer] Secret, Confidential or Attorney-Client Privileged information;
- Information that has not already been disclosed by authorized persons in a public forum; and
- Personal information about another [Employer] employee, such as his or her medical condition, performance, compensation or status in the company.

When in doubt about whether the information you are considering sharing falls into one of the above categories, DO NOT POST. Check with [Employer] Communications or [Employer] Legal to see if it's a good idea. Failure to stay within these guidelines may lead to disciplinary action.

- Respect proprietary information and content, confidentiality, and the brand, trademark and copyright rights of others. Always cite, and obtain permission, when quoting someone else. Make sure that any photos, music, video or other content you are sharing is legally sharable or that you have the owner's permission. If you are unsure, you should not use.
- Get permission before posting photos, video, quotes or personal information of anyone other than you online.
- Do not incorporate [Employer] logos, trademarks or other assets in your posts.

We found various provisions in the above section to be unlawful. Initially, employees are instructed to be sure that their posts are "completely accurate and not misleading and that they do not reveal non-public information on any public site." The term "completely accurate and not misleading" is overbroad because it would reasonably be interpreted to apply to discussions about, or criticism of,

the Employer's labor policies and its treatment of employees that would be protected by the Act so long as they are not maliciously false. Moreover, the policy does not provide any guidance as to the meaning of this term by specific examples or limit the term in any way that would exclude Section 7 activity.

We further found unlawful the portion of this provision that instructs employees not to "reveal non-public company information on any public site" and then explains that non-public information encompasses "[a]ny topic related to the financial performance of the company"; "[i]nformation that has not already been disclosed by authorized persons in a public forum"; and "[p]ersonal information about another [Employer] employee, such as . . . performance, compensation or status in the company." Because this explanation specifically encompasses topics related to Section 7 activities, employees would reasonably construe the policy as precluding them from discussing terms and conditions of employment among themselves or with non-employees.

The section of the policy that cautions employees that "[w]hen in doubt about whether the information you are considering sharing falls into one of the [prohibited] categories, DO NOT POST. Check with [Employer] Communications or [Employer] Legal to see if it's a good idea[,]" is also unlawful. The Board has long held that any rule that requires employees to secure permission from an employer as a precondition to engaging in Section 7 activities violates the Act. See Brunswick Corp., 282 NLRB 794, 794-795 (1987).

The Employer's policy also unlawfully prohibits employees from posting photos, music, videos, and the quotes and personal information of others without obtaining the owner's permission and ensuring that the content can be legally shared, and from using the Employer's logos and trademarks. Thus, in the absence of any further explanation, employees would reasonably interpret these provisions as proscribing the use of photos and videos of employees engaging in Section 7 activities, including photos of picket signs containing the Employer's logo. Although the Employer has a proprietary interest in its trademarks, including its logo if trademarked, we found that employees' non-commercial use of the Employer's logo or trademarks while engaging in Section 7 activities would not infringe on that interest.

We found lawful, however, this section's bulleted prohibitions on discussing information related to the "safety performance of [Employer] systems or components for vehicles" and "Secret, Confidential or Attorney-Client Privileged information." Neither of these provisions refers to employees, and employees would reasonably read the safety

provision as applying to the safety performance of the Employer's automobile systems and components, not to the safety of the workplace. The provision addressing secret, confidential, or attorney-client privileged information is clearly intended to protect the Employer's legitimate interest in safeguarding its confidential proprietary and privileged information.

We also looked at the following provisions:

TREAT EVERYONE WITH RESPECT

Offensive, demeaning, abusive or inappropriate remarks are as out of place online as they are offline, even if they are unintentional. We expect you to abide by the same standards of behavior both in the workplace and in your social media communications.

OTHER [EMPLOYER] POLICIES THAT APPLY

Think carefully about 'friending' co-workers . . . on external social media sites. Communications with co-workers on such sites that would be inappropriate in the workplace are also inappropriate online, and what you say in your personal social media channels could become a concern in the workplace.

[Employer], like other employers, is making internal social media tools available to share workplace information within [Employer]. All employees and representatives who use these social media tools must also adhere to the following:

- Report any unusual or inappropriate internal social media activity to the system administrator.

[Employer's] Social Media Policy will be administered in compliance with applicable laws and regulations (including Section 7 of the National Labor Relations Act).

As to these provisions, we found unlawful the instruction that "[o]ffensive, demeaning, abusive or inappropriate remarks are as out of place online as they are offline." Like the provisions discussed above, this provision proscribes a broad spectrum of communications that would include protected criticisms of the Employer's labor policies or treatment of employees. Similarly, the instruction to be aware that "[c]ommunications with co-workers . . . that would be inappropriate in the workplace are also inappropriate online" does not specify which communications the Employer would deem inappropriate at work and, thus, is ambiguous as to its application to Section 7.

The provision of the Employer's social media policy instructing employees to "[t]hink carefully about

'friending' co-workers" is unlawfully overbroad because it would discourage communications among co-workers, and thus it necessarily interferes with Section 7 activity. Moreover, there is no limiting language clarifying for employees that it does not restrict Section 7 activity.

We also found unlawful the policy's instruction that employees "[r]eport any unusual or inappropriate internal social media activity." An employer violates the Act by encouraging employees to report to management the union activities of other employees. See generally Greenfield Die & Mfg. Corp., 327 NLRB 237, 238 (1998) and cases cited at n.6. Such statements are unlawful because they have the potential to discourage employees from engaging in protected activities. Here, the Employer's instruction would reasonably be construed by employees as applying to its social media policy. Because certain provisions of that policy are unlawful, as set forth above, the reporting requirement is also unlawful.

Finally, we concluded that the policy's "savings clause," under which the Employer's "Social Media Policy will be administered in compliance with applicable laws and regulations (including Section 7 of the National Labor Relations Act)," does not cure the ambiguities in the policy's overbroad rules. [General Motors, Case 07-CA-053570]

Guidelines on Privacy, Legal Matters, Online Tone, Prior Permission, and Resolving Concerns Are Overbroad

In this case, we again found that some of the Employer's social media guidelines were overly broad in violation of Section 8(a)(1) of the Act.

The Employer is an international health care services company that manages billing and other services for health care institutions. We addressed challenges to various provisions in its social media policy, as set out below.

Respect Privacy. If during the course of your work you create, receive or become aware of personal information about [Employer's] employees, contingent workers, customers, customers' patients, providers, business partners or third parties, don't disclose that information in any way via social media or other online activities. You may disclose personal information only to those authorized to receive it in accordance with [Employer's] Privacy policies.

We found that the portion of the rule prohibiting disclosure of personal information about the Employer's employees and contingent workers is unlawful because, in the

absence of clarification, employees would reasonably construe it to include information about employee wages and their working conditions. We found, however, that the portion of the rule prohibiting employees from disclosing personal information only to those authorized to receive it is not, in these circumstances, unlawful. Although an employer cannot require employees to obtain supervisory approval prior to engaging in activity that is protected under the Act, the Employer's rule here would not prohibit protected disclosures once the Employer removes the unlawful restriction regarding personal information about employees and contingent workers.

Legal matters. Don't comment on any legal matters, including pending litigation or disputes.

We found that the prohibition on employees' commenting on any legal matters is unlawful because it specifically restricts employees from discussing the protected subject of potential claims against the Employer.

Adopt a friendly tone when engaging online. Don't pick fights. Social media is about conversations. When engaging with others online, adopt a warm and friendly tone that will encourage others to respond to your postings and join your conversation. Remember to communicate in a professional tone. . . . This includes not only the obvious (no ethnic slurs, personal insults, obscenity, etc.) but also proper consideration of privacy and topics that may be considered objectionable or inflammatory--such as politics and religion. Don't make any comments about [Employer's] customers, suppliers or competitors that might be considered defamatory.

We found this rule unlawful for several reasons. First, in warning employees not to "pick fights" and to avoid topics that might be considered objectionable or inflammatory--such as politics and religion, and reminding employees to communicate in a "professional tone," the overall thrust of this rule is to caution employees against online discussions that could become heated or controversial. Discussions about working conditions or unionism have the potential to become just as heated or controversial as discussions about politics and religion. Without further clarification of what is "objectionable or inflammatory," employees would reasonably construe this rule to prohibit robust but protected discussions about working conditions or unionism.

Respect all copyright and other intellectual property laws. For [Employer's] protection as well as your own, it is critical that you show proper respect for the laws governing copyright, fair use of copyrighted

material owned by others, trademarks and other intellectual property, including [Employer's] own copyrights, trademarks and brands. Get permission before reusing others' content or images.

We found that most of this rule is not unlawful since it does not prohibit employees from using copyrighted material in their online communications, but merely urges employees to respect copyright and other intellectual property laws. However, the portion of the rule that requires employees to "[g]et permission before reusing others' content or images" is unlawful, as it would interfere with employees' protected right to take and post photos of, for instance, employees on a picket line, or employees working in unsafe conditions.

You are encouraged to resolve concerns about work by speaking with co-workers, supervisors, or managers. [Employer] believes that individuals are more likely to resolve concerns about work by speaking directly with co-workers, supervisors or other management-level personnel than by posting complaints on the Internet. [Employer] encourages employees and other contingent resources to consider using available internal resources, rather than social media or other online forums, to resolve these types of concerns.

We found that this rule encouraging employees "to resolve concerns about work by speaking with co-workers, supervisors, or managers" is unlawful. An employer may reasonably suggest that employees try to work out concerns over working conditions through internal procedures. However, by telling employees that they should use internal resources rather than airing their grievances online, we found that this rule would have the probable effect of precluding or inhibiting employees from the protected activity of seeking redress through alternative forums.

Use your best judgment and exercise personal responsibility. Take your responsibility as stewards of personal information to heart. Integrity, Accountability and Respect are core [Employer] values. As a company, [Employer] trusts—and expects—you to exercise personal responsibility whenever you participate in social media or other online activities. Remember that there can be consequences to your actions in the social media world—both internally, if your comments violate [Employer] policies, and with outside individuals and/or entities. If you're about to publish, respond or engage in something that makes you even the slightest bit uncomfortable, don't do it.

We concluded that this rule was not unlawful. We noted that this section is potentially problematic because its

reference to "consequences to your actions in the social media world" could be interpreted as a veiled threat to discourage online postings, which includes protected activities. However, this phrase is unlawful only insofar as it is an outgrowth of the unlawful rules themselves, i.e., the Employer is stating the potential consequences to employees of violating the unlawful rules. Thus, rescission of the offending rules discussed above will effectively remedy the coercive effect of the potentially threatening statement here.

Finally, we looked at the Employer's "savings clause":

National Labor Relations Act. This Policy will not be construed or applied in a manner that improperly interferes with employees' rights under the National Labor Relations Act.

We found that this clause does not cure the otherwise unlawful provisions of the Employer's social media policy because employees would not understand from this disclaimer that protected activities are in fact permitted. [McKesson Corp., Case 06-CA-066504]

Provisions on Protecting Information and Expressing Opinions Are Too Broad, But Bullying Provision Is Lawful

In another case, we concluded that several portions of the Employer's social media policy are unlawfully overbroad, but that a prohibition on online harassment and bullying is lawful.

We first looked at the portion of the Employer's policy dealing with protection of company information:

Employees are prohibited from posting information regarding [Employer] on any social networking sites (including, but not limited to, Yahoo finance, Google finance, Facebook, Twitter, LinkedIn, MySpace, LifeJournal and YouTube), in any personal or group blog, or in any online bulletin boards, chat rooms, forum, or blogs (collectively, 'Personal Electronic Communications'), that could be deemed material non-public information or any information that is considered confidential or proprietary. Such information includes, but is not limited to, company performance, contracts, customer wins or losses, customer plans, maintenance, shutdowns, work stoppages, cost increases, customer news or business related travel plans or schedules. Employees should avoid harming the image and integrity of the company and any harassment, bullying, discrimination, or retaliation that would not be permissible in the workplace is not

permissible between co-workers online, even if it is done after hours, from home and on home computers. . .

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We concluded that the rule prohibiting employees from posting information regarding the Employer that could be deemed "material non-public information" or "confidential or proprietary" is unlawful. The term "material non-public information," in the absence of clarification, is so vague that employees would reasonably construe it to include subjects that involve their working conditions. The terms "confidential or proprietary" are also overbroad. The Board has long recognized that the term "confidential information," without narrowing its scope so as to exclude Section 7 activity, would reasonably be interpreted to include information concerning terms and conditions of employment. See, e.g., University Medical Center, 335 NLRB at 1320, 1322. Here, moreover, the list of examples provided for "material non-public" and "confidential or proprietary" information confirms that they are to be interpreted in a manner that restricts employees' discussion about terms and conditions of employment. Thus, information about company performance, cost increases, and customer wins or losses has potential relevance in collective-bargaining negotiations regarding employees' wages and other benefits. Information about contracts, absent clarification, could include collective-bargaining agreements between the Union and the Employer. Information about shutdowns and work stoppages clearly involves employees' terms and conditions of employment.

We also found that the provision warning employees to "avoid harming the image and integrity of the company" is unlawfully overbroad because employees would reasonably construe it to prohibit protected criticism of the Employer's labor policies or treatment of employees.

We found lawful, however, the provision under which "harassment, bullying, discrimination, or retaliation that would not be permissible in the workplace is not permissible between co-workers online, even if it is done after hours, from home and on home computers." The Board has indicated that a rule's context provides the key to the "reasonableness" of a particular construction. For example, a rule proscribing "negative conversations" about managers that was contained in a list of policies regarding working conditions, with no further clarification or examples, was unlawful because of its potential chilling effect on protected activity. Claremont Resort and Spa, 344 NLRB 832, 836 (2005). On the other hand, a rule forbidding "statements which are slanderous or detrimental to the company" that appeared on a list of prohibited conduct including "sexual or racial harassment" and "sabotage" would not be reasonably understood to restrict Section 7 activity.

Tradesmen International, 338 NLRB at 462. Applying that reasoning here, we found that this provision would not reasonably be construed to apply to Section 7 activity because the rule contains a list of plainly egregious conduct, such as bullying and discrimination.

Next, we considered the portion of the Employer's policy governing employee workplace discussions through electronic communications:

Employees are permitted to express personal opinions regarding the workplace, work satisfaction or dissatisfaction, wages hours or work conditions with other [Employer] employees through Personal Electronic Communications, provided that access to such discussions is restricted to other [Employer] employees and not generally accessible to the public. . . .

This policy is for the mutual protection of the company and our employees, and we respect an individual's rights to self-expression and concerted activity. This policy will not be interpreted or applied in a way that would interfere with the rights of employees to self organize, form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, or to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection or to refrain from engaging in such activities.

We found that the provision prohibiting employees from expressing their personal opinions to the public regarding "the workplace, work satisfaction or dissatisfaction, wages hours or work conditions" is unlawful because it precludes employees from discussing and sharing terms and conditions of employment with non-employees. The Board has long recognized that "Section 7 protects employee communications to the public that are part of and related to an ongoing labor dispute." Valley Hospital Medical Center, 351 NLRB 1250, 1252 (2007), *enfd. sub nom. Nevada Service Employees Union, Local 1107 v. NLRB*, 358 F. App'x 783 (9th Cir. 2009).

We concluded that the Employer's "savings clause" does not cure the otherwise unlawful provisions. The Employer's policy specifically prohibits employees from posting information regarding Employer shutdowns and work stoppages, and from speaking publicly about "the workplace, work satisfaction or dissatisfaction, wages hours or work conditions." Thus, employees would reasonably conclude that the savings clause does not permit those activities. Moreover, the clause does not explain to a layperson what the right to engage in "concerted activity" entails. [Clearwater Paper Corp., Case 19-CA-064418]

Duty to Report 'Unsolicited' Electronic Communications Is Overbroad, But 'Unauthorized Postings' Provision Is Lawful

In this case, we found that the Employer unlawfully maintains an overly broad rule requiring employees who receive "unsolicited or inappropriate electronic communications" to report them. We found, however, that a prohibition on "unauthorized postings" is lawful.

The Employer is a nonprofit organization that provides HIV risk reduction and support services. The Employer's employee handbook contains an "Electronic Communications" policy, providing as follows:

Improper Use: Employees must use sound judgment in using [Employer's] electronic technologies. All use of electronic technologies must be consistent with all other [Employer] policies, including [Employer's] Professional Conduct policy. [Employer] management reserves the right to exercise its discretion in investigating and/or addressing potential, actual, or questionable abuse of its electronic technologies. Employees, who receive unsolicited or inappropriate electronic communications from persons within or outside [Employer], should contact the President or the President's designated agent.

We concluded that the provision that requires employees to report any "unsolicited or inappropriate electronic communications" is overly broad under the second portion of the Lutheran Heritage test discussed above. We found that employees would reasonably interpret the rule to restrain the exercise of their Section 7 right to communicate with their fellow employees and third parties, such as a union, regarding terms and conditions of employment.

The policy also sets forth the following restriction on Internet postings:

No unauthorized postings: Users may not post anything on the Internet in the name of [Employer] or in a manner that could reasonably be attributed to [Employer] without prior written authorization from the President or the President's designated agent.

We found that this provision is lawful. A rule that requires an employee to receive prior authorization before posting a message that is either in the Employer's name or could reasonably be attributed to the Employer cannot reasonably be construed to restrict employees' exercise of their Section 7 right to communicate about working conditions among themselves and with third parties. [Us Helping Us, Case 05-CA-036595]

Portions of Rules on Using Social Media and Contact with
Media and Government Are Unlawful

In this case, we considered the Employer's rules governing employee use of social media, contact with the media, and contact with government agencies. We concluded that certain portions of these rules were unlawful as they would reasonably be interpreted to prohibit Section 7 activity.

Relevant portions of the Employer's rules are as follows:

[Employer] regards Social Media---blogs, forums, wikis, social and professional networks, virtual worlds, user-generated video or audio---as a form of communication and relationship among individuals. When the company wishes to communicate publicly---whether to the marketplace or to the general public---it has a well-established means to do so. Only those officially designated by [Employer] have the authorization to speak on behalf of the company through such media.

We recognize the increasing prevalence of Social Media in everyone's daily lives. Whether or not you choose to create or participate in them is your decision. You are accountable for any publication or posting if you identify yourself, or you are easily identifiable, as working for or representing [Employer].

You need to be familiar with all [Employer] policies involving confidential or proprietary information or information found in this Employee Handbook and others available on Starbase. Any comments directly or indirectly relating to [Employer] must include the following disclaimer: 'The postings on this site are my own and do not represent [Employer's] positions, strategies or opinions.'

You may not make disparaging or defamatory comments about [Employer], its employees, officers, directors, vendors, customers, partners, affiliates, or our, or their, products/services. Remember to use good judgment.

Unless you are specifically authorized to do so, you may not:

- Participate in these activities with [Employer] resources and/or on Company time;
or
- Represent any opinion or statement as the policy or view of the [Employer] or of any individual in their capacity as an employee or otherwise on behalf of [Employer].

Should you have questions regarding what is appropriate conduct under this policy or other related policies, contact your Human Resources representative or the [Employer] Corporate Communications Department. .

. .

We concluded that several aspects of this social media policy are unlawful. First, the prohibition on making "disparaging or defamatory" comments is unlawful. Employees would reasonably construe this prohibition to apply to protected criticism of the Employer's labor policies or treatment of employees. Second, we concluded that the prohibition on participating in these activities on Company time is unlawfully overbroad because employees have the right to engage in Section 7 activities on the Employer's premises during non-work time and in non-work areas. See Republic Aviation Corp. v. NLRB, 324 U.S. 793, 803 n.10 (1945).

We did not find unlawful, however, the prohibition on representing "any opinion or statement as the policy or view of the [Employer] or of any individual in their capacity as an employee or otherwise on behalf of [Employer]." Employees would not reasonably construe this rule to prohibit them from speaking about their terms and conditions of employment. Instead, this rule is more reasonably construed to prohibit comments that are represented to be made by or on behalf of the Employer. Thus, an employee could not criticize the Employer or comment about his or her terms and conditions of employment while falsely representing that the Employer has made or is responsible for making the comments. Similarly, we concluded that the requirement that employees must expressly state that their postings are "my own and do not represent [Employer's] positions, strategies or opinions" is not unlawful. An employer has a legitimate need for a disclaimer to protect itself from unauthorized postings made to promote its product or services, and this requirement would not unduly burden employees in the exercise of their Section 7 right to discuss working conditions.

We also considered the Contact with Media portion of the Employer's rules, which provides:

The Corporate Communications Department is responsible for any disclosure of information to the media regarding [Employer] and its activities so that accurate, timely and consistent information is released after proper approval. Unless you receive prior authorization from the Corporate Communications Department to correspond with members of the media or press regarding [Employer] or its business activities, you must direct inquiries to the Corporate Communications Department. Similarly, you have the

obligation to obtain the written authorization of the Corporate Communications Department before engaging in public communications regarding [Employer] of its business activities.

You may not engage in any of the following activities unless you have prior authorization from the Corporate Communications Department:

- All public communication including, but not limited to, any contact with media and members of the press: print (for example newspapers or magazines), broadcast (for example television or radio) and their respective electronic versions and associated web sites. Certain blogs, forums and message boards are also considered media. If you have any questions about what is considered media, please contact the Corporate Communications Department.
- Any presentations, speeches or appearances, whether at conferences, seminars, panels or any public or private forums; company publications, advertising, video releases, photo releases, news releases, opinion articles and technical articles; any advertisements or any type of public communication regarding [Employer] by the Company's business partners or any third parties including consultants.

If you have any questions about the Contact with Media Policy, please contact the [Employer] Corporate Communications Department

We concluded that this entire section is unlawfully overbroad. While an employer has a legitimate need to control the release of certain information regarding its business, this rule goes too far. Employees have a protected right to seek help from third parties regarding their working conditions. This would include going to the press, blogging, speaking at a union rally, etc. As noted above, Section 7 protects employee communications to the public that are part of and related to an ongoing labor dispute. An employer rule that prohibits any employee communications to the media or, like the policy at issue here, requires prior authorization for such communications, is therefore unlawfully overbroad.

Finally, we looked at the rules' provisions on contact with government agencies:

Phone calls or letters from government agencies may occasionally be received. The identity of the individual contacting you should be verified. Additionally, the communication may concern matters involving the corporate office. The General Counsel

must be notified immediately of any communication involving federal, state or local agencies that contact any employee concerning the Company and/or relating to matters outside the scope of normal job responsibilities.

If written correspondence is received, notify your manager immediately and forward the correspondence to the General Counsel by PDF or facsimile and promptly forward any original documents. The General Counsel, if deemed necessary, may investigate and respond accordingly. The correspondence should not be responded to unless directed by an officer of the Company or the General Counsel.

If phone contact is made:

- Take the individual's name and telephone number, the name of the agency involved, as well as any other identifying information offered;
- Explain that all communications of this type are forwarded to the Company's General Counsel for a response;
- Provide the individual with the General Counsel's name and number . . . if requested, but do not engage in any further discussion. An employee cannot be required to provide information, and any response may be forthcoming after the General Counsel has reviewed the situation; and
- Immediately following the conversation, notify a supervisor who should promptly contact the General Counsel.

We concluded that this rule is an unlawful prohibition on talking to government agencies, particularly the NLRB. The Employer could have a legitimate desire to control the message it communicates to government agencies and regulators. However, it may not do so to the extent that it restricts employees from their protected right to converse with Board agents or otherwise concertedly seek the help of government agencies regarding working conditions, or respond to inquiries from government agencies regarding the same. [DISH Network, Case 16-CA-066142]

Employer's Entire Revised Social Media Policy--With
Examples of Prohibited Conduct--Is Lawful

In this case, we concluded that the Employer's entire revised social media policy, as attached in full, is lawful. We thus found it unnecessary to rule on the Employer's social media policy that was initially alleged to be unlawful.

As explained above, rules that are ambiguous as to their application to Section 7 activity and that contain no limiting language or context to clarify that the rules do not restrict Section 7 rights are unlawful. In contrast, 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.

Applying these principles, we concluded that the Employer's revised social media policy is not ambiguous because it provides sufficient examples of prohibited conduct so that, in context, employees would not reasonably read the rules to prohibit Section 7 activity. For instance, the Employer's rule prohibits "inappropriate postings that may include discriminatory remarks, harassment and threats of violence or similar inappropriate or unlawful conduct." We found this rule lawful since it prohibits plainly egregious conduct, such as discrimination and threats of violence, and there is no evidence that the Employer has used the rule to discipline Section 7 activity.

Similarly, we found lawful the portion of the Employer's social media policy entitled "Be Respectful." In certain contexts, the rule's exhortation to be respectful and "fair and courteous" in the posting of comments, complaints, photographs, or videos, could be overly broad. The rule, however, provides sufficient examples of plainly egregious conduct so that employees would not reasonably construe the rule to prohibit Section 7 conduct. For instance, the rule counsels employees to avoid posts that "could be viewed as malicious, obscene, threatening or intimidating." It further explains that prohibited "harassment or bullying" would 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." The Employer has a legitimate basis to prohibit such workplace communications, and has done so without burdening protected communications about terms and conditions of employment.

We also found that the Employer's rule requiring employees to maintain the confidentiality of the Employer's trade secrets and private and confidential information is not unlawful. Employees have no protected right to disclose trade secrets. Moreover, the Employer's rule provides sufficient examples of prohibited disclosures (i.e., information regarding the development of systems, processes, products, know-how, technology, internal reports, procedures, or other internal business-related communications) for employees to understand that it does not reach protected communications about working conditions. [Walmart, Case 11-CA-067171]

Social Media Policy

Updated: May 4, 2012

At [Employer], we understand that social media can be a fun and rewarding way to share your life and opinions with family, friends and co-workers around the world. However, use of social media also presents certain risks and carries with it certain responsibilities. To assist you in making responsible decisions about your use of social media, we have established these guidelines for appropriate use of social media.

This policy applies to all associates who work for [Employer], or one of its subsidiary companies in the United States ([Employer]).

Managers and supervisors should use the supplemental Social Media Management Guidelines for additional guidance in administering the policy.

GUIDELINES

In the rapidly expanding world of electronic communication, *social media* can mean many things. *Social media* includes all means of communicating or posting information or content of any sort on the Internet, including to your own or someone else's web log or blog, journal or diary, personal web site, social networking or affinity web site, web bulletin board or a chat room, whether or not associated or affiliated with [Employer], as well as any other form of electronic communication.

The same principles and guidelines found in [Employer] policies and three basic beliefs apply to your activities online. Ultimately, you are solely responsible for what you post online. Before creating online content, consider some of the risks and rewards that are involved. Keep in mind that any of your conduct that adversely affects your job performance, the performance of fellow associates or otherwise adversely affects members, customers, suppliers, people who work on behalf of [Employer] or [Employer's] legitimate business interests may result in disciplinary action up to and including termination.

Know and follow the rules

Carefully read these guidelines, the [Employer] Statement of Ethics Policy, the [Employer] Information Policy and the Discrimination & Harassment Prevention Policy, and ensure your postings are consistent with these policies. Inappropriate postings that may include discriminatory remarks, harassment, and threats of violence or similar inappropriate or unlawful conduct will not be tolerated and may subject you to disciplinary action up to and including termination.

Be respectful

Always be fair and courteous to fellow associates, customers, members, suppliers or people who work on behalf of [Employer]. Also, keep in mind that you are more likely to resolve work-related complaints by speaking directly with your co-workers or by utilizing our Open Door Policy than by posting complaints to a social media outlet. Nevertheless, 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 disparage 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.

Be honest and accurate

Make sure you are always honest and accurate when posting information or news, and if you make a mistake, correct it quickly. Be open about any previous posts you have altered. Remember that the Internet archives almost everything; therefore, even deleted postings can be searched. Never post any information or rumors that you know to be false about [Employer], fellow associates, members, customers, suppliers, people working on behalf of [Employer] or competitors.

Post only appropriate and respectful content

- Maintain the confidentiality of [Employer] trade secrets and private or confidential information. Trade secrets may include information regarding the development of systems, processes, products, know-how and technology. Do not post internal reports, policies, procedures or other internal business-related confidential communications.
- Respect financial disclosure laws. It is illegal to communicate or give a "tip" on inside information to others so that they may buy or sell stocks or securities. Such online conduct may also violate the Insider Trading Policy.
- Do not create a link from your blog, website or other social networking site to a [Employer] website without identifying yourself as a [Employer] associate.
- Express only your personal opinions. Never represent yourself as a spokesperson for [Employer]. If [Employer] is a subject of the content you are creating, be clear and open about the fact that you are an associate and make it clear that your views do not represent those of [Employer], fellow associates, members, customers, suppliers or people working on behalf of [Employer]. If you do publish a blog or post online related to the work you do or subjects associated with [Employer], make it clear that you are not speaking on behalf of [Employer]. It is best to include a disclaimer such as "The postings on this site are my own and do not necessarily reflect the views of [Employer]."

Using social media at work

Refrain from using social media while on work time or on equipment we provide, unless it is work-related as authorized by your manager or consistent with the Company Equipment Policy. Do not use [Employer] email addresses to register on social networks, blogs or other online tools utilized for personal use.

Retaliation is prohibited

[Employer] prohibits taking negative action against any associate for reporting a possible deviation from this policy or for cooperating in an investigation. Any associate who retaliates against another associate for reporting a possible deviation from this policy or for cooperating in an investigation will be subject to disciplinary action, up to and including termination.

Media contacts

Associates should not speak to the media on [Employer's] behalf without contacting the Corporate Affairs Department. All media inquiries should be directed to them.

For more information

If you have questions or need further guidance, please contact your HR representative.