NLRB Offers Guidance on Employer Social Media Policies

On January 24, 2012, the General Counsel of the National Labor Relations Board (the "NLRB") issued a report on recent NLRB decisions concerning the impact of federal labor law (which applies to both union and non-union employers) on social media policies in the workplace. The report provides valuable guidance to employers seeking to craft appropriate social media policies.

The NLRB's report illustrates the application of a well-established principle of labor law that employers may not implement policies—including social media policies—that could reasonably be understood by employees to prohibit them from discussing their terms and conditions of employment for the purpose of their mutual aid and protection.

According to the NLRB, employers who wish to restrict their employees' use of social media must take care to specify the precise types of communications that will violate their social media policy, and avoid using broad, generic terms that could be understood to reach protected communication and activity. This includes such commonplace terms as "inappropriate" or "defamatory," frequently used in workplace social media policies to describe prohibited speech. For instance, one employer's social media policy instructed employees to discuss the terms and conditions of their employment only in an "appropriate" manner, without defining the term "appropriate." The NLRB ruled that employees might reasonably infer that comments critical of management would be considered "inappropriate" and forbidden by the employer's policy, even though the policy expressly stated that it would not be interpreted to interfere with employees' rights to participate in concerted activity. The NLRB thus concluded that the social media policy was unlawfully overbroad.

By contrast, employers may lawfully prohibit employees from publishing specific kinds of disparaging or harassing remarks using social media. In one recent NLRB case, for example, the NLRB approved an employer's social media policy that prohibited the posting or display of comments about co-workers or supervisors that were "vulgar, obscene, threatening, intimidating," or in violation of the employer's policies against discrimination or harassment.

Employers may also enact policies to stop the dissemination of sensitive and confidential company information, so long as the policy provides examples of indisputably protected information. For example, the NLRB recently held that an employer's social media policy barring the disclosure of "personal health information about customers or patients," as well as sensitive corporate information such as "[product] launch and release dates and pending reorganizations," did not violate the employees' rights under federal labor law. In another case, the NLRB held that employers may prohibit employees from revealing "trade secrets."

At the same time, the NLRB has emphasized that employers must take care to avoid adopting policies that prohibit dissemination of unspecified "nonpublic" information generally. Such vague terms could be interpreted to cover information relating to the terms and conditions of employment, such as compensation information or information relating to personnel actions.

Overbroad social media policies are high on the NLRB's current enforcement agenda. For more information about employer social media policies, or employer obligations under federal labor laws more generally, please contact an attorney in Ropes & Gray's labor & employment department.