



Special Report: Impact of the August 18, 2011 Advice Memorandum on Social Media Policies and Employee Discipline Issued by the National Labor Relations Board

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Given a three year flurry of social media cases, the acting general counsel for the National Labor Relations Board decided to issue a memorandum ("2011 Memo") to give advice on issues related to the protected nature of employee social media postings, as well as the lawfulness of employers' social media policies and rules. In releasing the document, Acting General Counsel Lafe Solomon said, "I hope that this report will be of assistance to practitioners and human resource professionals." The memo also discussed the coercive impact of a union's Facebook and YouTube postings which is not relevant for our purposes.

You can read the entire 2011 Memo by going to www.nlr.gov/news/acting-general-counsel-releases-report-social-media-cases. If you are an HR That Works Member you can watch my special video on the 2011 Memo by [clicking here](#). HR That Works Members should also train their managers using the Social Media Risks Training Module, which was also updated in light of the 2011 Memo.

What follows is my rewrite and analysis of this memo along with my recommendations. Remember this: I am not your attorney and you should have your attorney review this or any other social media policy before you use it. All italics and bold are mine.

First question: Is the employee posting a protected activity?

At issue is the National Labor Relations Act which states in part:

RIGHTS OF EMPLOYEES

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

UNFAIR LABOR PRACTICES

Sec. 8. (a) It shall be an unfair labor practice for an employer--(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7

Understand *this law applies to all companies, of all sizes, whether unionized or not*. The employees, unions and employers have fought over the meaning of this language for years. Very simply, the NLRA protects an employee engaged in concerted activity related to the terms and conditions of their employment. So if they are complaining about wages, hours, their boss or any other work related subject...and they are doing it “in concert” with other employees, they are protected. In a 2007 case, Valley Hospital 351 NLRB 1250, the NLRB extended this workplace protection to statements broadcast on the internet.

For example, the AG discussed a case where a group of salesmen were fired for criticizing their employer on Facebook because of how they managed an automobile sales event, claiming it was killing their commissions. It is important to note the employees never said anything negative about the quality of the cars they sold, only that the bosses were killing their sales with their cheesy promotion. (They even made fun of overcooked hotdogs and stale buns served at the event; kind of like the ones you get at the ballpark.) Bottom line: because the protest was tied to commissions it was protected and they could not be fired.

According to the 2011 Memo, where employees are “merely griping” about their job and not involving other employees in concerted activity a company is not in violation of the NLRA by firing them. So for example, if the salesmen noted above didn’t tie their ridicule of the employer’s promotion to its impact on their commissions (a protected activity) they too could have been fired.

Second question: Did they lose their protection because of the nature of their posting?

Where’s the line drawn about what conduct goes “too far”? Answer: a lot further out than employers may realize! The NLRB memo frequently cites the Atlantic Steel 24 NLRB 814 case and its analysis of the law in this area at pages 816 – 817. In that case the Board dealt with an employee using terms such as “lying son of a bitch,” “liar,” or M-F-lie” when discussing his boss. The Board claimed they know of no decision that has held “an employee’s use of obscenity to a supervisor on the production floor, following a question concerning working conditions, is protected as would be a spontaneous outburst during the heat of a formal grievance proceeding or in contract. ...[E]ven an employee who is engaged in concerted protected activity can, *by opprobrious conduct*, lose the protection of the Act....The decision as to whether the employee has crossed that line depends on several factors: **1) the place of the discussion; 2) subject matter of this discussion; 3) the nature the employee’s outburst; and 4) whether the outburst was, in any way, provoked by employer’s unfair labor practice**. In the Atlantic Steel case the Board ruled the employee had reacted in an obscene fashion without provocation and in a work setting where such conduct was not normally tolerated. That along with the employee's past record establish a reasonable basis for his discharge.

Going back to the 2011 Memo, it discusses cases where employees have called their bosses all sorts of names on social media including “scumbag” and “asshole” AND GET AWAY WITH IT simply because they do so within the context of a protest about the terms and conditions of their employment. These statements typically will not interrupt the work of any employee because they occur outside the workplace. Seems like it will be pretty hard to show employees are crossing the “opprobrious” threshold given this standard.

To summarize up to this point: there first has to be some form of *concerted activity which relates to the terms and conditions of employment*, in order to evoke Section 7 or Section 8 protections. Under the Atlantic Steel analysis, the question is then whether the statements are so *opprobrious* as to lose the Act's protection? Under the Jefferson standard also mentioned in the 2011Memo, which generally pertains within the context of a unionizing campaign, the question is whether or not the actions were so *disloyal, reckless, or maliciously untrue* as to lose the Act's protections.

Third question: Is any termination prevented because the policy we base it on is "overbroad"?

The rest of the 2011Memo focuses on what is and is not allowed in social media policies. Here's my summary of it. I invite you to go along on my video summary of this report where I get into even further detail.

1. You may not have policies that are "overbroad" in their effort to prevent employees making disparaging comments, engaging in disrespectful conduct, offensive conduct, rude or discourteous behavior, inappropriate discussions, or statements that might damage the reputation or goodwill of the company, its staff or employees.
2. You may not have overbroad policies designed to protect privacy, confidentiality, sensitive information, personal information or private information.
3. You may not have overbroad policies designed to limit use of and protect the employer's logos, equipment, vehicles, brand, clothing, products, etc.
4. The problem is that *overbroad policies may "chill" employee protest* of terms and conditions of employment. So for example, you can't limit the use of logos that "broadly" because some employee may want to use such items as part of a "concerted activity". Like wearing a My Company Sucks t-shirt complete with company logo on their Facebook page. According to the NLRB, employers have to make sure they don't "chill" that type of protest with an overbroad policy.
5. Of course, if they are wearing the shirt just to be a jerk, and not as a protest of terms and conditions of employment, then they are not engaging in protected activity. **However, the NLRB can also overturn the termination of an employee simply because the policy under which he or she was terminated was too broadly constructed.** In a sense the employee gets a free pass because your policy was defined by the NLRB as overbroad.
6. The NLRB memo advises employers to keep within the parameters of Section 7 and Section 8 constraints by providing policy *definition, guidance, examples, and limiting language*. (We'll get into that further real soon).
7. They did approve of a policy which states that "no employee should ever be pressured to 'friend' or otherwise connect with a coworker via social media"

8. They did approve of a media policy limiting access to the press which stated that “the purpose of the policy is to ensure that only one person speaks for the company. Therefore the company will respond to the news media in a timely and professional manner *only* through the designated spokespersons.”
9. In the last paragraph of the memo it dropped a little hint that you can't broadly prohibit employees from bring their own cameras into the workplace but you can limit them from inviting media cameras into the workplace.

The Sear Memo

So what does a legal social media policy look like? At this point I have to honestly say “who knows”? In my research I looked at the social media policies of Fortune 500 companies and *Federal agencies* and I can tell you that many of them violate the “overbroad” guidelines set forth in the 2011 Memo- because they don't provide ***definition, guidance, examples and limiting language***. And these policies were drafted by some of the top legal minds in the country!

On December 4, 2009 the NRLB issued an Advice Memorandum that addressed the legality of Sears Social Media Policy. It's one of the few polices they concluded was OK because “it cannot reasonably be interpreted in a way that would chill Section 7 activity”. Here are the relevant portions discussed in the memo:

“[I]n order to ensure that the Company and its associates adhere to their ethical and legal obligations, associates are required to comply with the Company's Social Media Policy. The intent of this Policy is not to restrict the flow of useful and appropriate information, but to minimize the risk to the Company and its associates.

....

Prohibited Subjects

In order to maintain the Company's reputation and legal standing, the following subjects may not be discussed by associates in any form of social media:

- Company confidential or proprietary information
- Confidential or proprietary information of clients, partners, vendors, and suppliers
- Embargoed information such as launch dates, release dates, and pending reorganizations
- Company intellectual property such as drawings, designs, software, ideas and innovation
- **Disparagement of company's or competitors' products, services, executive leadership, employees, strategy, and business prospects**
- Explicit sexual references
- Reference to illegal drugs
- Obscenity or profanity
- Disparagement of any race, religion, gender, sexual orientation, disability or national origin”

The memo highlighted the same type of disparaging comment provision found unlawful in the 2011 Memo. Apparently Sears added enough definition, guidance, examples or limiting language to past muster.

But did they???? Really??

Let me say this: as a lawyer who has drafted employment law policies for 25 years I still have no clue where the NLRB fine line is being drawn! All it seems to me is that the provisions ruled unacceptable in the 2011 Memo were bunched together with a few other rules related to sex, drugs, harassment, obscenity, race, religion, etc. and ruled acceptable in the Sears Memo. That and the fact they added these two sentences which are arguably more specific:

- Embargoed information such as launch dates, release dates, and pending reorganizations
- Company intellectual property such as drawings, designs, software, ideas and innovation

That's it. That's not definition, guidance, examples or limiting language. Maybe I'm missing something but **it is my opinion that if the NLRB were to issue the Sears Memo today, after President Obama's March 2010 NLRB recess appointments, the Sears policy would be viewed as overbroad as not containing enough definition, guidance, examples or limiting language.**

So, what's an employer to do? Interestingly a "safe" approach may be to have no policy at all! In the 2011 Memo the NLRB found no unlawful employer conduct because the conduct of the employee was not concerted AND the company didn't have an overbroad policy that could save him...because there was no such policy!

If you prefer to have a policy (and you should) here are my recommendations (and for the fifth time remember I am not your lawyer. Fact is the NLRB can create another twist to this next month!)

I would begin by having a nice flowery preamble that speaks to the purpose behind the policy and drop a hint in it that it is not meant to "chill" any concerted or protected activity.

So maybe something like the one in Sears modified a bit:

The purpose of this policy to ensure that the Company and its associates adhere to their ethical and legal obligations. All employees are required to comply with the Company's Social Media Policy. Our company strives for a balanced online dialogue. When we moderate postings to the company blog, or run across any postings put on public access social media, we expect our employees to act in a professional manner. This Policy is not intended to restrict the flow of useful and appropriate information, but to minimize the risk to the Company and its associates of inappropriate social media use. The purpose is not to chill or otherwise limit protected employee speech or activity but rather to improve and protect our employee, customer, vendor and other stakeholder relationships.

Then I would address each of the 3 major concerns: *disparagement, confidentiality and protection of “the brand”* separately adding as much definition, guidance, examples and limiting language as possible! Be sure to mix in a few other rules related to sex, drugs, harassment, obscenity, race, religion, etc. while you are at it!

So, for example:

1. **Prohibited Conduct** - The Company absolutely prohibits use of its name on social media or other internet sites, which include pornographic, violent, or illegal content, explicit sexual references, reference to illegal drugs, obscenity or profanity. The Company also prohibits the disparagement of any race, religion, gender, sexual orientation, disability or national origin or the disparagement of the company's or competitors' products, services, executive leadership, employees, strategy, and business prospects. Even if you are upset with your job, our customers or management, and you have the right to complain about the terms and conditions of your employment; there is no protection for engaging in opprobrious conduct or the posting malicious statements. For example, while you may not like one of our customers or competitors, disparaging online them can tarnish our brand, cause us to lose business or generate a lawsuit.
2. **Protecting Confidential Information** – The Company understands it is important to allow employees the ability to discuss the terms, conditions and experience of their employment on social media sites. It is also important to maintain the confidentiality of company, client, and customer information. Just like you can destroy the value of a company trade secret by sharing too much information at a trade show, you can do the same thing posting it on a social media site. Likewise, while you can be excited about a client project, inappropriate disclosure of that project, or information shared about that client, without client consent can cause upset, loss of business and breach of confidentiality, privacy and other claims.

Confidential information can include:

- Embargoed information such as launch dates, release dates, and pending reorganizations.
- Company intellectual property such as drawings, designs, software, trade secrets, ideas and innovation. Sales and marketing strategies, pricing and profitability strategies and the like.
- Client information such as social security numbers, financial information, legal information, business transactions and other private, sensitive or confidential information.
- Now you have the opportunity to be as specific as possible! Here’s a fine example of definitional overkill:

During the course of employment, you may receive and have access to trade secrets, private information, proprietary property and/or proprietary documents and information of the Company (collectively “Confidential Information”). Employee agrees not to disclose or communicate, in any manner, at any time during or after

their employment, information about the Company, its operations, clientele, or any other confidential information, that relate to the business of including, but not limited to, the names of its customers, its marketing strategies, operations, or any other information of any kind which would be deemed confidential, a trade secret, a customer list, or other form of proprietary information of including but not limited to: A) Information relating to other employees and independent contractors of the Company, B) Supplier, client and customer lists and all information regarding customers and clients who patronize the or whose business is being solicited by the Company, including their names, preferences and other information, C) Information and manuals related to the policies and procedures of the Company, D) Financial, business, tax, economic, sales, pricing, and investment information, E) Strategic and business plans, business opportunities, projections, proposals, methods, processes, and procedures, F) Marketing, advertising, and pricing strategies, G) Any media used to store, communicate, transmit, record, embody, or otherwise memorialize such Confidential Information, H) Software, computer programs, and algorithms, I) Scientific, technical or engineering information, research, experiments, formulas, findings, recipes, and evaluations, J) Information encompassed in any inventions, K) Records, reports, evaluations, forms, designs, drawings, and specifications, and L) Any information marked or treated by the Company as Confidential Information or otherwise identified as Confidential Information. Confidential Information is the above-described information that is not generally available to the public at large with the knowledge and consent of the Company, regardless of whether such information would be enforceable as a trade secret or the copying of which would violate copyright or patent laws or be enjoined or restrained by a court as constituting unfair competition. Confidential Information may be stored, compiled or memorialized physically, electronically, photographically, in writing, or in any other form.

I would also add some specific examples that are risks in your industry. Like the inappropriate disclosure of a patient condition if you are a medical office or a claims manager.

3. **Protect the Brand** – We spend a great deal of time, effort and money to build the company brand. Please keep this in mind when using logos, copyrights, trademarks, vehicles, commercials, buildings and other aspects of the company brand on social media sites. Unless you have been authorized in advance to use these properties we request you seek confirmation as to the appropriateness of your use. This policy is not intended to limit your ability to use these items if otherwise permitted by law.
4. **Transparency** - Always identify yourself; especially if you're saying anything related to our business, including our company, the competition, or any products on the marketplace. Indicate you are a company employee where appropriate.
5. **Have Integrity and Be Honest** - Stick to your area of expertise. Don't pretend to be a know-it-all. Half-truths and outright lies will be quickly ferreted out by today's social media watchdogs, competitors, regulators and others. Whether it's a comment you make on a Facebook page or in an update to a Wiki page, chances are, somebody

- may be monitoring your activities; if not the company, the government, the corporate media, or some other watchdog is likely to be paying close attention.
6. **Your Opinion vs. Company Opinion** - Unless you have *specific permission* to speak on behalf of the company, clearly indicate that all postings represent *your opinion*. When posting to any site outside of the company, please use the following disclaimer: “The postings on this site are my own and don’t represent the company’s positions, strategies, or opinions.”
 7. **Company Policies and Procedures Apply** - Your social media activities are subject to the same policies and procedures as your other workplace activities. So, for example, if it is inappropriate to engage in sexual harassment while at work, then it is equally inappropriate to do so through the context of social media. This policy is also meant to support and integrate with our internet and emailing policies. [Remember, double check the language in those.]
 8. **Take Advantage of Social Media Privacy Settings** - Protect your personal information. It will help avoid identity theft, scams, and other risks.
 9. **“Friending”** - No employee should ever be pressured to ‘friend’ or otherwise connect with a coworker via social media”. If you are in management, think twice about friending an employee.
 10. **Be Professional** - Watch for typos and misspellings. All the protocols surrounding proper e-mailing also apply to the use of social media (i.e., no “shouting,” defamatory language, or incendiary words).
 11. **Media Policy**- The purpose of the policy is to ensure that only one person speaks to the media as an official representative of the company. Do not respond to a media request without express permission, unless you are doing so in your individual capacity. The company will respond to the news media in a timely and professional manner *only* through its designated spokespersons.
 12. **Don’t Waste Company Time** - Personal social media use should be restricted to personal time *only*. This is no different than it is for phone calls or e-mails. Make sure that you have permission to access personal social media sites on company equipment. Otherwise, you should not use the company’s time and equipment to participate in personal use of social media.
 13. **Be a Watchdog** - If you find a negative, disparaging, or otherwise concerning posts about the company, its products, services, or clients, let us know! Please contact your manager, HR or the IT department ASAP. Please do not respond to it without first receiving instruction unless you have specific permission to do so.

Some last thoughts:

1. The so called guidelines issued by the NLRB are nebulous at best. Most attorneys who commented on their blog sites about the 2011 Memo seem at a loss to give you specific direction. Like me, they thought the policy they wrote last year was a pretty good one! Now we cross our fingers once again.
2. Get your employees involved in creating your social media policy.
3. If you write the policy during an organizing campaign it will undergo additional scrutiny.
4. Add as much definition, guidance, examples and limiting language as you can stomach.
5. **Don't use our template or any other one without your attorney reviewing so it fits your business.**
6. Under current law employees can get away with saying most anything, as long as it includes the magic language related to the terms and conditions of employment, and they get others involved in their complaint. Understand it's a new world for employers.
7. Don't assume the employees gripe is illegitimate. Maybe their gripe was an act of bravery you should welcome. Maybe you really do have a poor manager or are violating the law. Or maybe you really are giving away cheesy hotdogs at a marketing event.
8. Whether you have a policy or not *check with an attorney first* before firing an employee for their social media posts.
9. Remember, many other laws can come in play including those related to wrongful termination, whistleblowing, HIPPA, slander and more.
10. Note: here are some additional social media policies to take a look at:
 - Department of Veteran Affairs (updated June 2011)
www.va.gov/vapubs/viewPublication.asp?Pub_ID=551&FTYPE=2
 - IBM www.ibm.com/blogs/zz/en/guidelines.html
 - SHRM's Sample Template
www.shrm.org/TemplatesTools/Samples/Policies/Pages/SocialNetworkingPolicy.aspx
 - A Collection of Policies <http://socialmediagovernance.com/policies.php>