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*Social media and the National Labor
Relations Board 337* in Research
Handbook on Electronic Commerce Law
Edited by John A. Rothchild

Solidarity on Social Media, 2016 Colum.
Bus. L.R. 303

Introduction



- “Many view social media as the new water cooler,” said Mark G. Pearce, the board's [National Labor Relations Board] chairman, noting that federal law has long protected the right of employees to discuss work-related matters. “All we're doing is applying traditional rules to a new technology.”
- Steven Greenhouse, *Even if It Enrages Your Boss, Social Net Speech is Protected*, NEW YORK TIMES, Late Edition (East Coast), January 22, 2013, ProQuest Newsstand Platform

- [T]he Board has seen fit to engage in mission creep and attempt to micro-manage employers' workplaces. It has done this by declaring what can and what cannot be in employer handbooks, even on issues such as social media usage. The Board's recent actions in this area are creating a labyrinth of rules that few employers will be able to navigate without an army of lawyers. Other benign policies that sound perfectly acceptable to any rational person have been deemed by the Board to be violations of federal law.
- -Nathan Mehrens, *Conservative mandate puts focus on NLRB abuses*, THE EXAMINER [Washington, D.C.], January 17, 2015, ProQuest Newsstand Platform.

Section 7

Employees shall have the right to self-organization . . . and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection

Protected Concerted Activity



Concerted Activity

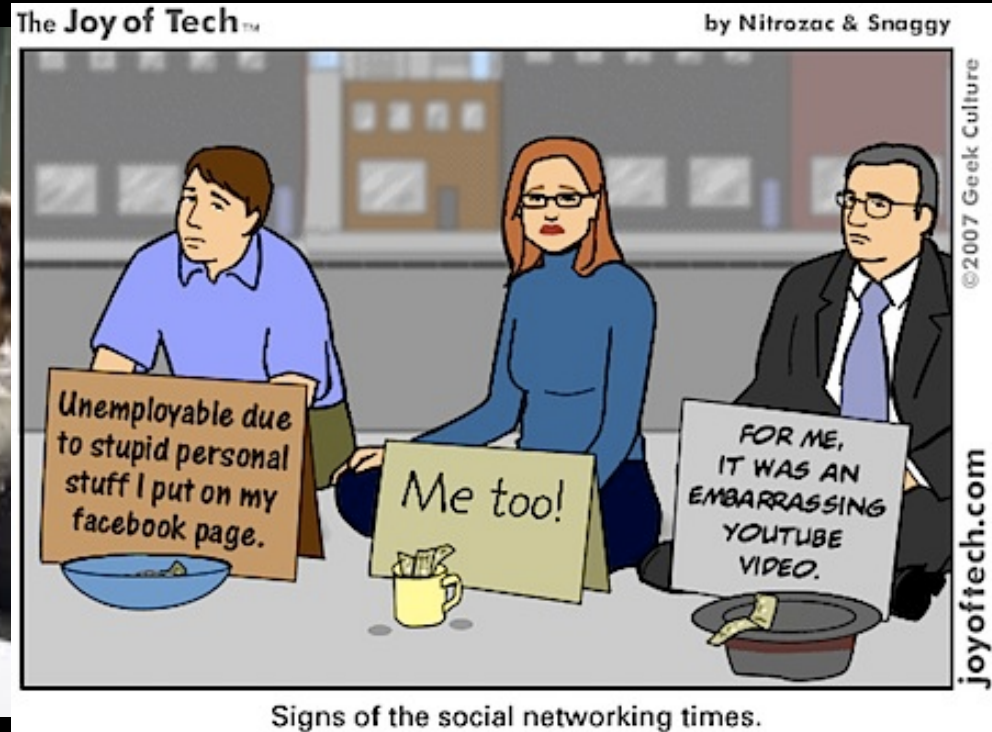


Mutual Aid and Protection



Heart & Weight Inst.,
2017 NLRB LEXIS 152 (April 5, 2017)

Loss of Protection



(1) Whether the record contained any evidence of the [employer's] antiunion hostility; **(2) whether the [employer] provoked [the employee's] conduct;** (3) whether [the employee's] conduct was impulsive or deliberate; **(4) the location of [the employee's] Facebook post;** **(5) the subject matter of the post;** **(6) the nature of the post;** (7) whether the [employer] considered language similar to that used by [the employee] to be offensive; (8) whether the employer maintained a specific rule prohibiting the language at issue; and (9) whether the discipline imposed upon [the employee] was typical of that imposed for similar violations or disproportionate to [the] offense.

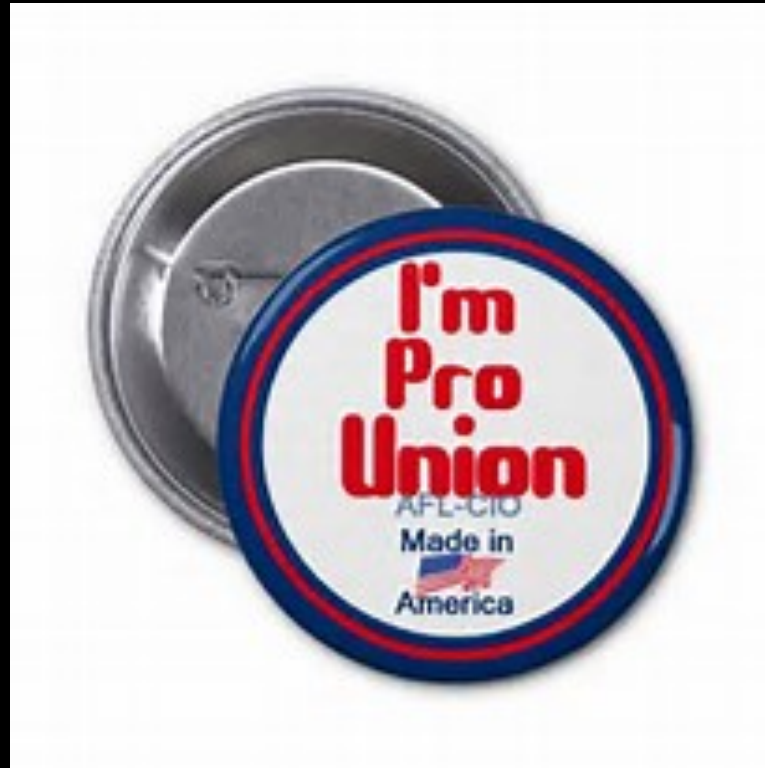
Policies with the Tendency to Interfere with Protected Concerted Activity



Solicitation and Distribution Policies



Insignia Policies



Board Regulation of Social Media Activity and Policies



Social Media Policies with the Tendency to Interfere with Protected Concerted Activity



Unlawful

- “prohibiting employees from electronically posting statements that “damage the Company . . . or damage any person’s reputation.””
- ““Employees are cautioned against communicating about work and/or related topics on social networking sites as this type of communication may breach (sic) client confidentiality or may potentially lead to incidents of dignity and respect violations.””

Unlawful

“If you enjoy blogging or using online social networking sites . . . Please note there are guidelines to follow if you plan to mention Target or your employment with Target in these online vehicles.

(1) don't release confidential guest, team member, or company information . . .”

The policy explained that all employer “information that is not public must be treated as confidential” and provided examples such as store sales, strategic plans, customer information, and employee personnel records.

Novelis Corp.,
364 NLRB No. 101 (2016)

Cy-Fair Volunteer Fire Dep't, 364 NLRB No. 49 (July 15, 2016)

- Social media policy prohibited activities “that have the effect of harming goodwill and the reputation of the employer among its partners, vendors, or in the community at large.”
- “The use of embarrassing, insulting, demeaning, or damaging information about the employer, its products, customers, or employees is expressly prohibited.”

TPI Iowa, 2016 NLRB LEXIS 708 (Sept. 22, 2016),
adopted by 2016 NLRB LEXIS 874 (Dec. 16, 2016)

Unlawful

- “Before creating online conduct, 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 the employer or the employer’s legitimate business interests may result in disciplinary action up to and including termination. . . . Do not post internal reports, policies, procedures or other internal business-related confidential information.”

TPI Iowa, 2016 NLRB LEXIS 708 (Sept. 22, 2016) Lawful

- ““Make sure you are always honest and accurate when posting information or news, and if you make a mistake, correct it quickly Never post any information or rumors that you know to be false about the employer, fellow associates, members, customers, suppliers, people working on behalf of the employer, or competitors.””

Disclaimers



Acting General Counsel Report 2012

“be respectful” elaborates “avoiding posts that could be viewed as malicious, obscene, threatening or intimidating”

Prohibits “plainly egregious conduct” such as “discriminatory remarks, harassment and threats of violence”

Prohibition on revealing confidential information , including information about trade secrets, “information regarding the development of systems, processes, products, know-how, technology, internal reports, [and] procedures”

March 2015 Report - Wendy's Settlement - Prohibits

- » Commenting on “trade secrets and proprietary Company information” without advance approval, but clarifies that “company information” means “Business, financial and marketing strategies
- » Taking pictures or making recordings of work areas but states “an exception would be to engage in activity protected by the National Labor Relations Act including, for example, taking pictures of health, safety and/or working condition concerns or of strike, protest, and work-related issues and/or other protected concerted activity.”
- » Using company logos “for any business/commercial venture” without permission
- » Making “knowingly false representation about your credentials or your work”
- » Posting blogs related to Wendy's without company approval but specifies it does not include “blogs or discussions involving wages, benefits, or other terms and conditions of employment, or protected concerted activity”
- » “Never harass (as defined by our anti-harassment policy), threaten, libel or defame fellow professionals, employees, clients, competitors or anyone else.”

2012 Advice Memo

- Provision mandating employees to “express themselves on social media in a ‘respectful manner’” did not violate Act
- Required employees to “respect their readers and fellow employees,” stating that “[e]mployees are free to express themselves, but they must do so in a respectful manner’”
- In another section of the handbook the requirement to act respectfully was followed by a statement “[t]he use of threatening and/or abusive, demeaning, vulgar and profane language toward another, on or off duty, is prohibited, as is any threat of violence or actual violent act.”

Alternative Community Living fix

Unlawful

- “Employees are cautioned against communicating about work and/or related topics on social networking sites as this type of communication may breach (sic) client confidentiality or may potentially lead to incidents of dignity and respect violations.”

Lawful

- You must “be respectful” when discussing work on social networking sites and “avoid[] posts that could be viewed as malicious, obscene, threatening or intimidating”
- Do not reveal on social networking sites confidential information such as information about trade secrets, “information regarding the development of systems, processes, products, know-how, and technology, internal reports, [and] procedures”
- These requirements do not prohibit you from discussing on social networking sites wages, benefits, or other terms and conditions of employment, or protected concerted activity”

Cy-Fair fix

Unlawful

- Social media policy prohibited activities “that have the effect of harming goodwill and the reputation of the employer among its partners, vendors, or in the community at large.”
- “The use of embarrassing, insulting, demeaning, or damaging information about the employer, its products, customers, or employees is expressly prohibited.”

Lawful

- You are free to express yourself on social media, including through blogging, but must do so in a respectful manner. “The use of threatening and/or abusive, demeaning, vulgar and profane language toward another is prohibited as is any threat of violence or actual violent act.”
- You must not make “knowingly false representation about your credentials or your work” on social media or a blog.
- These requirements do not prohibit you from discussing on social media or a blog wages, benefits, or other terms and conditions of employment, or protected concerted activity”

Conclusion



- <https://www.youtube.com/user/LaborRelated>