

# When Posts Speak Louder Than Words: Considerations for Avoiding Litigation Through Effective Employee Social Media Policies

By Asari A. Aniagolu

It is Monday morning and the company president rushes to the general counsel's office in a panic. Some employees are furious about the latest company policy and are harshly criticizing the company and its board of directors on a public social media platform. Worried about the unfavorable publicity, the president wants to: (a) terminate the employees and (b) implement a social media policy that forbids employees from engaging in such behavior in the future. What should the general counsel do?

## 1. Step One: Consider Legal Precedent Regarding Employee Social Media Use

There has been a marked uptake in corporate social media incidents in the last few years. Since 2012, the National Labor Relations Board (NLRB) has issued several decisions in cases concerning the limits employers can or cannot place on employees' use of social media platforms to express their opinions regarding workplace issues.<sup>1</sup>

The NLRB's earliest decision was in *Costco Wholesale Corporation and United Food and Commercial Workers Union, Local 371*.<sup>2</sup> In *Costco*, the local union was campaigning to organize the meat department in one of the company's facilities. Weeks before the union petition was filed, two employees were suspended and ultimately terminated after vandalizing the meat room. The NLRB found that the terminations were in violation of National Labor Relations Act (NLRA), as was the company's "Electronic Communications and Technology Policy" that prohibited employees from electronically posting statements that "damage the Company, defame any individual or damage any person's reputation." The Board determined that the policy broadly prohibited employees from expressing "concerted communications protesting the [Costco's] treatment of its employees" in violation of the employees' NLRA Section 7 rights.

The NLRB's strong pro-employee stance continued in *Karl Knauz Motors, Inc. and Robert Becker*.<sup>3</sup> Even though the NLRB upheld the salesman's termination because the posts did not concern the terms and conditions of his employment, the dealership's Courtesy Policy came under fire because it "expected [employees] to be courteous, polite and friendly" to coworkers and third parties, and not "be disrespectful or use profanity or any other language which injures the image or reputation of the Dealership." The NLRB found this all-encompassing language would have a chilling effect on employees' exercise of their NLRA rights. A few months later, the NLRB ruled in *His-*

*panics United of Buffalo, Inc. and Carlos Ortiz*,<sup>4</sup> where five employees from a victims assistance non-profit organization were fired for "bullying and harassing" after swapping multiple messages on Facebook about a coworker who intended to report their poor work performance to management. The NLRB ruled that the Facebook conversation was protected activity under the NLRA and the terminations were unlawful.

The NLRB and various administrative law judges have ruled in favor of employees' protected activities in *Lily Transp. Corp.*,<sup>5</sup> *Durham School Servs., L.P.*,<sup>6</sup> *Professional Elec. Contrs. of Connecticut, Inc.*,<sup>7</sup> and *Laurus Technical Institute*,<sup>8</sup> as all of these cases included company social media policies that broadly prohibited employees' protected activities rather than including narrowing language that sufficiently stated what is and is not permissible under the company policies. In *Three D, LLC d/b/a Triple Play Sports Bar and Grille*,<sup>9</sup> employees who complained about management's tax accounting mistakes on Facebook were discharged. The NLRB ruled that a portion of the company's Internet/Blogging policy that threatened termination for "engaging in inappropriate discussions about the company, management, and/or co-workers" was unlawful as employees could reasonably construe this policy to have a chilling effect on their rights to participate in protected activities. The Board's most resounding display of support for employees' rights came recently on March 31, 2015 in *Pier Sixty, LLC and Hernan Perez and Evelyn Gonzalez*.<sup>10</sup> Here, employees at a catering business were considering joining a local union. After the assistant director reprimanded employees during a catering event, one employee posted a comment on Facebook using expletives to express frustration about the assistant director's managerial style and urge others to support the union. Although the employee's post was laden with profanity, the NLRB found that the language was not "so egregious as to exceed the Act's protection."

## 2. Step Two: Draft a Well-Rounded Social Media Policy and Educate Company Personnel

With these cases in mind, the savvy general counsel must appreciate the need for a well-crafted employee social media policy. Fortunately, one does not have to start from scratch. On August 18, 2011, the NLRB General Counsel's Office released the first of three reports discussing NLRB investigations in social media cases.<sup>11</sup> The second report was issued Jan 24, 2012.<sup>12</sup> This second report underscored two main themes: (1) "Employer policies should not be so sweeping that they prohibit the

kinds of activity protected by federal labor law, such as the discussion of wages or working conditions among employees” and (2) “An employee’s comments on social media are generally not protected if they are mere gripes not made in relation to group activity among employees.” The third, most recent report was issued on May 30, 2012.<sup>13</sup> Besides analyzing cases in which the NLRB had ruled, the third report also included a sample of a lawful social media policy. The main sections of this sample policy asked employees to (a) know and follow the rules, (b) be respectful, (c) be honest and accurate, (d) post only appropriate and respectful content, (e) refrain from using social media at work and (f) a prohibition against retaliation for reporting any deviation from the policy. Most importantly, each section of the sample policy included narrow, explanatory language in order to avoid broad prohibitions on employees’ protected activities.

Another helpful example of effective social media policy came earlier this year when the NLRB upheld a company’s social media policy in *Landry’s Inc. and Sophia Flores*.<sup>14</sup> This national restaurant and hospitality operation terminated an employee after the employee made unfavorable comments about her employment on a social media website. The NLRB found Landry’s policy at the time of the employee’s termination was lawful. Some of the noteworthy aspects of the Landry’s policy were that:

- it required employees to acquire prior approval from the Vice President of Marketing “[i]n order to post on external social media sites for work purposes” and
- also “urg[ed] all employees not to post information regarding the Company, their jobs, or other employees which could lead to morale issues in the workplace or detrimentally affect the Company’s business” and repeatedly asked employees to “be mindful” about their posts.

The policy was written in such a manner that it informed employees about which social media postings to avoid but it also did not forbid employees from engaging in protected activities.

This is a delicate but useful balance to strike. Once company management and the general counsel are satisfied that their social media policy has been drafted in a way that equally protects employees’ rights, company reputation and morale, the general counsel should work with management to adequately educate employees about the policy.

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Against this backdrop of the NLRB’s repeated decisions in favor of employees and their rights to post opinions about workplace issues absent fear of termination, it would be prudent for the general counsel to proceed

with caution before firing employees for unfavorable comments about the company on social media or creating a social media policy that would create a chilling effect on employees’ protected rights under NLRA, Section 7. Consulting outside counsel well-versed in labor and employment law would also be helpful so the company can develop a social media action plan that complies with the NLRB precedent and preserves the company’s reputational objectives.

## Endnotes

1. Please note that this article solely discusses the NLRB’s treatment of corporate social media policies and does not address implications under state-specific laws. According to the National Conference for State Legislatures, legislation has been introduced or considered in at least twenty-three states in 2015 and nine states have enacted legislation in 2015 to prevent employers from requesting passwords to personal Internet accounts as a requirement for employees to gain or maintain employment. See National Conference of State Legislatures, *Access to Social Media Usernames and Passwords* (Sept. 14, 2015), available at <http://www.ncsl.org/research/telecommunications-and-information-technology/employer-access-to-social-media-passwords-2013.aspx>. Please consult outside counsel to better understand if and how state-specific laws may impact your company’s social media policy.
2. *Costco Wholesale Corporation and United Food and Commercial Workers Union, Local 371*, 358 NLRB No. 106 (Sept. 7, 2012).
3. *Karl Knauz Motors, Inc. and Robert Becker*, 358 NLRB No. 164 (Sept. 28, 2012).
4. *Hispanics United of Buffalo, Inc. and Carlos Ortiz*, 359 NLRB No. 37 (Dec. 14, 2012).
5. *Lily Transp. Corp.*, Case No. 01-CA-108618; JD (NY)-18-14) Cheshire, CT (Apr. 22, 2014).
6. *Durham School Servs., L.P.*, 360 NLRB No. 85 (Apr. 25, 2014).
7. *Professional Elec. Contrs. of Connecticut, Inc.*, Case No. 34-CA-071532; JD(NY)-25-14, Plainville, CT (June 4, 2014).
8. *Laurus Technical Institute*, 360 NLRB No. 133 (June 13, 2014).
9. *Three D, LLC d/b/a Triple Play Sports Bar and Grille*, 361 NLRB No. 31 (Aug. 22, 2014).
10. *Pier Sixty, LLC and Hernan Perez and Evelyn Gonzalez*, 362 NLRB No. 59 (Mar. 31, 2015).
11. NLRB, Office of the General Counsel, Division of Operations-Management Memorandum OM 11-74 (Aug. 18, 2011).
12. NLRB, Office of the General Counsel, Division of Operations-Management Memorandum OM 12-31 (Jan. 24, 2012).
13. NLRB, Office of the General Counsel, Division of Operations-Management Memorandum OM 12-59 (May 30, 2012).
14. *Landry’s Inc. and Sophia Flores*, 362 NLRB No. 69 (Apr. 16, 2015).

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