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NLRB Issues Social Media Guidance

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The NLRB's Acting General Counsel recently released a second round of guidance regarding employers' social media policies and their application. The report contained the following five take away's:

1. The prohibitions in an employer's policy cannot be so broad that they encompass conduct that is protected by the National Labor Relations Act. For example, according to the guidance, prohibitions of the following types of employee communications in a social media policy are considered overbroad and illegal: disparaging the company, disrespectful conduct, inappropriate conversations, unprofessional communication, defamatory communications, inflammatory communications, harassing comments (without reference to protected classification).
2. An employer is permitted to prohibit employees' online posts that violate the company's policies against harassment based on protected classes. Similarly, an employer may require employees to comply with SEC and FTC regulations in their online posts. In sum, an employer may require employees to comply with the law and to refrain from conduct that could make the employer liable for the employee's comments.
3. Employees are not engaged in protected conduct online when they are expressing a purely personal gripe that: (1) is not made on behalf of other employees; (2) is not intended to induce group complaints by other employees; and (3) does not arise out of protected offline conduct.
4. A "savings clause" or disclaimer will not cure an otherwise overbroad policy. So, for example, a provision that says that the policy will not apply to any activity protected by the National Labor Relations Act will not save the policy, if the policy is otherwise overbroad.
5. Profanity in online posts, even where directed toward the employer, does not render an employee's comments automatically unprotected.