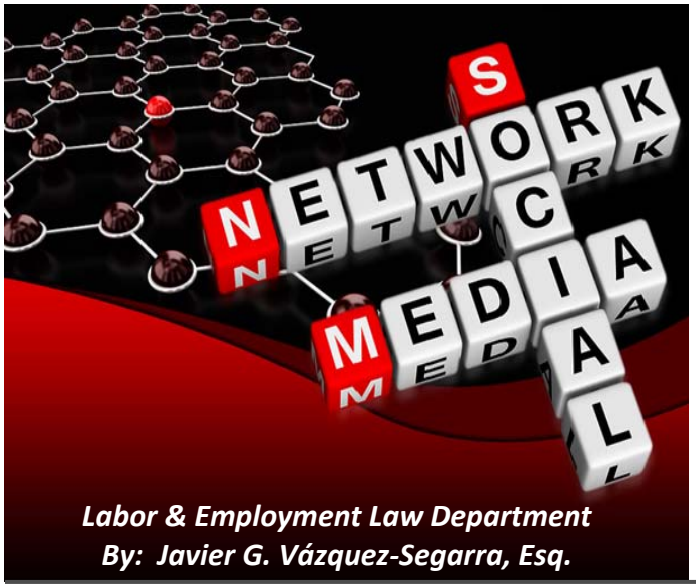

Labor & Employment Law Department
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CLIENT ALERT

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NLRB ISSUES GUIDELINES TO EMPLOYERS REGARDING facebook AND OTHER SOCIAL MEDIA

The Office of the General Counsel of the National Labor Relations Board ("NLRB") has recently issued a report discussing the outcome of 14 cases that it has investigated in the last year involving social media use (*like Facebook, Twitter and Tumblr*) in the employment context. The report summarizes the views of the NLRB's Chief Attorney, who sets guidelines for what cases will be presented to the NLRB for litigation and decision. The topics addressed in the report fall into two broad categories:

First, when does employee use of social media rise to the level of concerted activity that falls under the protection of the National Labor Relations Act ("NLRA") and may not be impaired or restricted by employers?

The report states that social media use is more likely to qualify as "protected concerted activity" where the employee discusses the terms and conditions of his employment in a manner that is meant to induce or further group action. The General Counsel appears more inclined to characterize social media use in this fashion when it either is directed to fellow co-workers, or grows out of an earlier discussion about terms and conditions of employment among co-workers. However, employee social media use is unlikely to rise to the level of protected concerted activity where it is best characterized as an individual complaint about working conditions specific to the employee, and is not directed to co-workers or meant to induce group action. The report also suggests that employee comments that are "maliciously false" will not be protected under the NLRA.

Second, to what extent will employers' social media policies will be considered so overly broad that they could be reasonable construed to prohibit employee rights to engage in protected concerted activity?

The report states that social media policies will be found to be invalid where they would effectively prohibit employees from engaging in protected activity. For example, a social media policy will be considered overly broad where it prohibits "inappropriate discussions" about the company, its management, or its employees because such prohibition encompasses "protected concerted activity."

Employers should avoid such overly broad prohibitions. Furthermore, employers should also consider including a disclaimer in their social media policies specifically indicating that none of the prohibitions contained therein should be interpreted to interfere with employee rights under the NLRA.

As the General Counsel investigates more cases and continues to issue guidance, and as the NLRB issues case decisions, the law in this area will quickly develop and produce more tangible guidelines for employers to consider.

The NLRB Office of the General Counsel's report (Memorandum OM-11-74) may be found at: https://nlrb.gov/publications/operations-management-memos.

We at Goldman remain committed in assisting you and your business to adjust to these changes in the Law. For further information you may contact Luis F. Antonetti, Esq. or any of the attorneys in the Labor & Employment Law Department.

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