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Release of 2012 Advice Memo Pulls Together Principles Applied by the NLRB in Evaluating Employer Social Media Policies

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A 2012 Advice Memo from the National Labor Relations Board's ("NLRB") General Counsel was publicly released two weeks ago in response to a Freedom of Information Act ("FOIA") request. While the Advice Memo applies the long-standing framework used by the NLRB to evaluate the lawfulness of workplace rules more generally, it is noteworthy because it addresses a number of hot social media topics affecting the workplace.

The Advice Memo concludes that portions of Giant Food, LLC's ("Company") social media policy, including prohibitions against disclosing confidential or nonpublic information, using the Company's logo, trademark or graphics, and photographing or video recording the Company's facility, were unlawful because they could reasonably be construed to restrict employees' Section 7 rights under the National Labor Relations Act ("NLRA").

The relevant portions of the Company's social media guidelines stated:

- You have an obligation to protect confidential, nonpublic information to which you have access in the course of your work. Do not disclose, either externally or to any unauthorized Associate, any confidential information about the Company or any related companies . . . or about other Associates, customers, suppliers or business partners. If you have questions about what is confidential, ask your manager.
- Do not use any Company logo, trademark or graphics, which are proprietary to the Company, or photographs or video of the Company's premises, processes, operations or products, which includes confidential information owned by the Company, unless you have received the Company's prior written approval.
- Do not defame or otherwise discredit the Company's products or services . . .
- Speak up if you believe that anyone is violating these guidelines or misusing a Company-sponsored site. . . .

. . .

- Please note that the Company will not construe or apply these guidelines in a manner that improperly interferes with or limits employees' rights under any state or federal laws, including the National Labor Relations Act.

Confidentiality Rule: According to the Division of Advice, the confidentiality rule failed to include sufficient limiting language and clarification of terms, such as "nonpublic information" and "confidential information," informing employees that the rule did not restrict their Section 7 rights. Therefore, because of the lack of specificity in the rule, the Division of Advice concluded that employees could reasonably construe the policy to include a prohibition against disclosing information concerning their working conditions in violation of the NLRA.

Logo, Trademarks, Graphics: Similarly, the Advice Memo concluded that the prohibition against using the Company's logo, trademarks or graphics could reasonably be interpreted by employees to prohibit the use of the Company's logo or trademark while engaging in Section 7 communications, including photos of picket signs, cartoons or electronic leaflets. While the Advice Memo recognized that the Company has a proprietary interest in its trademarks (including its logo, if trademarked), it concluded that none of the interests protected by trademark laws are infringed upon by an employee's "noncommercial use of a name, logo or other trademark to identify the Employer in the course of engaging in Section 7 activity related to their working conditions."

Photography: The Advice Memo also concluded that prohibiting employees from photographing or videotaping the Company's premises could "reasonably be interpreted to prevent employees from using social media to communicate and share information regarding their Section 7 activities through pictures or videos, such as of employees engaged in picketing or other concerted activities." The Advice Memo does not offer much guidance for employers regarding the circumstances under which photographing or videotaping can be prohibited and does not specifically address videos and pictures taken "inside" the Company as opposed to taken of the "premises." Employers would appear to have some latitude in this area where they can articulate business concerns that do not "chill" protected activity.

Disclaimer: The Advice Memo also discussed the disclaimer contained in the handbook. The disclaimer informed employees that the "guidelines" in the handbook would not be construed or applied in a manner that interfered with its employees' rights under the NLRA. Consistent with previous advice memoranda, the Advice Memo found that the disclaimer is insufficient to inoculate overbroad and ambiguous prohibitions included in the handbook rules at issue. According to the Advice Memo, "a general disclaimer is insufficient where employees would not understand from the disclaimer that protected activities are in fact permitted." This suggests that a simply worded, easily understood disclaimer may be effective.

Defamation of Products and Services: Notably, the Advice Memo did uphold the Company's rule prohibiting employees from defaming or otherwise discrediting the Company's products or services because the conduct prohibited was not protected under Section 7 of the NLRA (*i.e.,* it could not be reasonably interpreted to prohibit criticism of the Company's labor practices or treatment of employees). Similarly, the Company's instruction that employees "speak up" if they believed that anyone was violating the Company's guidelines also was upheld because the policy did not expressly threaten discipline or restrict employee communications. Moreover, once the provisions of the Company's social media guidelines held unlawful were removed, the Advice Memo concluded that employees could not reasonably construe the Company's social media guidelines as chilling lawful Section 7 activity.

The Advice Memo reminds employers once again to refrain from overly broad and ambiguous language when promulgating employee policies. As noted in the Advice Memo, policies should be written in a manner that clarifies their scope and should include specific examples of prohibited or required conduct that do not interfere with protected activity under the NLRA.

If you have any questions about this client alert, please contact your Proskauer relationship lawyer or any co-chair of the Employment Law Counseling & Training Group or the Labor-Management Relations Group.

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