

# Labor Board Approves Carefully Crafted Social Media Policies

By Laura A. Pierson-Scheinberg

January 21, 2021

## Meet the Authors



**Laura A. Pierson-Scheinberg**

(She/Her)

Principal

415-796-5408

Laura.PiersonScheinberg@jacksonlewis.com

## Related Services

Labor Relations

The National Labor Relations Board (NLRB) has reversed the decision of an administrative law judge (ALJ) and held lawful an employer’s social media policy prohibiting disparagement of the company and others, “inappropriate communications,” disclosing confidential information, posting photos of coworkers, or using the company logo to denigrate people or causes. [\*Medic Ambulance Service\*](#), 370 NLRB No. 65 (Jan. 4, 2021).

### Background

The employer’s social media guidelines expressly ban “inappropriate communications, even if made on your own time using your own resources.” The ALJ found that the policy unlawfully restricted employee rights under the National Labor Relations Act (NLRA) to criticize their terms and conditions of employment.

### Lawful Guidelines

The NLRB disagreed with the ALJ. It held that the employer’s prohibitions, when read in the context of the guidelines, were lawful.

The NLRB ruled the following provisions are lawful:

1. *“Do not disclose confidential or proprietary information regarding the company or your coworkers.”* The NLRB found this provision did not unlawfully restrict employees’ right to share information about coworkers, because this language was followed by “express prohibitions limited to the use of copyrighted or trademarked company information, trade secrets, or other company information.” Moreover, these concerns were not outweighed by the company’s interest in protecting patient and customer privacy, the NLRB said.
2. *A prohibition on use of the company name to endorse, denigrate, or otherwise comment on a person, product, cause, or opinion.* The NLRB held that the context of the policy makes clear the concern is with employees appearing to speak on the company’s behalf. Social media policies should be written to make the distinction between employees speaking for the company rather than for themselves quite clear, as overly restricting an employee’s right to be critical on their own social media would be unlawful interference with employee Section 7 rights under the NLRA.
3. *A ban on using photos of coworkers without their express consent.* Because this policy was couched as respect for the privacy and dignity of coworkers, the NLRB read the policy in that context and found it lawful.
4. *A policy prohibiting sharing employee compensation information.* Although banning employee discussion of their compensation has long been unlawful,

this policy, read in context, was not a violation of the NLRA, the NLRB said. The provision emphasizes the importance of protecting the company’s confidential information, and that all telephone calls from outside regarding current or former employees be forwarded to supervisors. The NLRB read this as a limited restriction, protecting confidential company information, and reflecting the limitation on who can speak for the company. It saw this as *not* restricting employees from discussing it among themselves or with a union. Guidelines should be drafted to highlight the intent of the rules to protect legitimate company interests and give specific context where possible, but strict prohibitions on discussing wages generally continues to be problematic.

5. *Prohibition on using social media to disparage the company or others.* The NLRB noted that, although this rule potentially may interfere with employee rights, it is lawful because, on balance, companies have a compelling interest in “being able to depend on the loyalty of their employees.” This is consistent with the NLRB’s decision in *Motor City Pawn Brokers*, 369 NLRB No. 132 (July 24, 2020).

The NLRB relied on *Boeing Co.*, 365 NLRB No. 154 (Dec. 15, 2017), balancing the “nature and extent of the potential impact on NLRA rights” with the “legitimate justifications associated with the rule,” evaluated from the perspective of a reasonable employee to determine the potential for infringement on employee rights.

\*\*\*

Social media policies must be crafted to be readily understood by a reasonable employee to address legitimate company interests and not to interfere with employee rights. Employers should partner with counsel to develop social media policies.

Under President Joe Biden, NLRB decisions restricting an employer’s ability to promulgate policies that potentially restrict Section 7 rights are likely to return eventually. However, for now, an employer’s rights to create policies continues to be clarified in the favor of protecting the employer’s business interests.

Please contact a Jackson Lewis attorney with any questions about this case or the NLRB.

©2021 Jackson Lewis P.C. This material is provided for informational purposes only. It is not intended to constitute legal advice nor does it create a client-lawyer relationship between Jackson Lewis and any recipient. Recipients should consult with counsel before taking any actions based on the information contained within this material. This material may be considered attorney advertising in some jurisdictions. Prior results do not guarantee a similar outcome.

Focused on employment and labor law since 1958, Jackson Lewis P.C.’s 1,000+ attorneys located in major cities nationwide consistently identify and respond to new ways workplace law intersects business. We help employers develop proactive strategies, strong policies and business-oriented solutions to cultivate high-functioning workforces that are engaged and stable, and share our clients’ goals to emphasize belonging and respect for the contributions of every employee. For more information, visit <https://www.jacksonlewis.com>.