

**United States Government  
National Labor Relations Board  
OFFICE OF THE GENERAL COUNSEL**

# Advice Memorandum

DATE: June 22, 2011

TO: Robert Chester, Regional Director  
Region 6

FROM: Barry J. Kearney, Associate General Counsel  
Division of Advice

SUBJECT: Giant Eagle, Inc.  
Case 6-CA-37260

512-5012-0125  
512-5012-0133-2275  
512-5012-6762  
512-5072-2000  
512-7550-0143

The Region submitted this Section 8(a)(1) case for advice as to whether the Employer's new social media policy is unlawful on its face. We conclude that the provisions of the policy that prohibit the disclosure of personal information of co-workers and the use of Company logos and photographs of Company stores are unlawfully broad and may reasonably be interpreted to restrain employees in the exercise of their Section 7 rights. However, the policy guideline precluding employees from pressuring their co-workers to connect with them via social media is not violative because it is narrowly drawn to restrict harassing conduct and cannot reasonably be construed to interfere with protected activity.

### FACTS

The Employer, Giant Eagle, Inc., operates a chain of supermarkets and convenience stores located in Pennsylvania, Ohio, Virginia, and West Virginia. UFCW Local 23 has had a collective-bargaining relationship with the Employer for decades covering two separate bargaining units of store employees. Effective January 1, 2011, the Employer implemented a new "Social Media and Electronic Communication Policy." The introduction to that policy indicates that it is designed to protect the Employer's reputation and governs employee communications "during both work and personal time[.]" The policy states that a violation of the policy guidelines may result in discipline up to and including discharge. The policy also states that nothing in the guidelines or the Employer's application of those guidelines "should be construed as any limitation on any right available under the National Labor Relations Act (NLRA)."

The Region has requested advice specifically as to the lawfulness of the following three policy guidelines:

3. No Team Member is required to participate in any social media or social networking site (unless required as a part of the job), and no Team Member should ever be pressured to 'friend,' 'connect,' or otherwise communicate with another Team Member via a social media outlet.

5. Team Members may not reference (including through use of photographs), cite, or reveal personal information regarding fellow Team Members, company clients, partners, or customers without their express consent.

6. Use of Company logos, photographs of any Company store, brand, or product, or use of any other intellectual property is not permitted without written proper authorization from the Company.

To date, no employee has been disciplined under the social media policy.

#### **ACTION**

We conclude the Region should issue a Section 8(a)(1) complaint, absent settlement, based on the maintenance of guidelines 5 and 6 of the Employer's social media policy.

An employer violates Section 8(a)(1) through the mere maintenance of a work rule if the rule "would reasonably tend to chill employees in the exercise of their Section 7 rights."<sup>1</sup> The Board has developed a two-step inquiry to determine if a work rule would have that effect.<sup>2</sup> First, a rule is clearly unlawful if it explicitly restricts Section 7 activities. If it does not, the rule will violate Section 8(a)(1) only upon a showing that: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights.<sup>3</sup>

Here, the Employer's social media policy does not explicitly forbid Section 7 activity. Nor is there evidence that the policy was promulgated in response to union

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<sup>1</sup> See *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), *enforced mem.*, 203 F.3d 52 (D.C. Cir. 1999).

<sup>2</sup> *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 646-47 (2004).

<sup>3</sup> *Id.* at 647.

activity or has been applied to restrict the exercise of Section 7 rights. Thus, the issue is whether guidelines 3, 5, and 6 can reasonably be construed by employees to prohibit Section 7 activity.

In *Lutheran Heritage*, the Board cautioned against "reading particular phrases in isolation" rather than in context and counseled that it will not find a violation simply because a rule could conceivably be read to restrict Section 7 activity.<sup>4</sup> Rules that are ambiguous, and contain no limiting language or context that would clarify to employees that the rule does not restrict Section 7 rights, are unlawful.<sup>5</sup> In contrast, rules that clarify and restrict their scope by including examples of clearly illegal or unprotected conduct, so that they could not reasonably be construed to cover protected activity, are not unlawful.<sup>6</sup>

Applying these standards here, we conclude that the Employer's admonition in guideline 3 of its policy that no employee should ever be pressured to "friend" or otherwise connect with a co-employee via social media cannot be reasonably read to restrict Section 7 activity. The rule is sufficiently specific in its prohibition against *pressuring* co-employees and clearly applies only to harassing conduct. It cannot reasonably be interpreted to apply more broadly to restrict employees from attempting to "friend" or otherwise contact their colleagues for the purposes of engaging in protected concerted or union activity.

In contrast, guideline 5's restriction upon the revelation of "personal information" is unduly broad and can reasonably be interpreted as restraining Section 7 activity. Employees have a Section 7 right to discuss their wages and

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<sup>4</sup> *Id.* at 646-47.

<sup>5</sup> See *University Medical Center*, 335 NLRB 1318, 1320-1322 (2001), *enforcement denied in pertinent part*, 335 F.3d 1079 (D.C. Cir. 2003) (work rule that prohibited "disrespectful conduct" held unlawful because it included "no limiting language [that] removes [the rule's] ambiguity and limits its broad scope").

<sup>6</sup> See *Tradesmen International*, 338 NLRB 460, 462 (2002) (prohibition against statements that are "slanderous or detrimental" to the employer or its employees would not be reasonably construed to cover protected activity, given the rule's focus on other clearly illegal or egregious activity, such as sabotage and sexual or racial harassment).

other terms and conditions of employment.<sup>7</sup> A rule that precludes employees from discussing terms and conditions of employment, or sharing information about themselves or their fellow employees with each other or with non-employees, violates Section 8(a)(1).<sup>8</sup> Nothing clarifies or narrows the scope of guideline 5 so as to exclude Section 7 activity. Absent such limitations or examples of what is covered, the rules would reasonably be interpreted as prohibiting employees' right to discuss wages and other terms and conditions of employment.

Similarly, guideline 6's prohibition on the use of Company logos or photographs of Company stores would restrain an employee from engaging in protected activity. For example, an employee would be prevented from posting pictures of employees carrying a picket sign depicting the Company's name, peacefully handbilling in front of a store, or wearing a t-shirt portraying the company's logo in connection with a protest involving the terms and conditions of employment.<sup>9</sup>

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<sup>7</sup> *Cintas Corp.*, 344 NLRB 943 (2005), *enforced*, 482 F.2d 463 (D.C. Cir. 2007) (rule's unqualified prohibition of the release of any information regarding its employees could reasonably be construed by employees to restrict discussion of wages and other terms and conditions of employment with their fellow employees and with the union); *Double Eagle Hotel & Casino*, 341 NLRB 112, 114-115 (2004), *enforced*, 414 F.3d 1249 (10th Cir. 2005), *cert. denied*, 546 U.S. 1170 (2006) (rule that expressly prohibited disclosure of wages and working conditions violated Section 8(a)(1)).

<sup>8</sup> *Double Eagle Hotel & Casino*, 341 NLRB at 114-115; *Bigg's Foods*, 347 NLRB 425, 425 n.4 (2006) (rule prohibiting employees from discussing their own or their fellow employees' salaries with anyone outside the company); *University Medical Center*, 335 NLRB at 1322 (rule prohibiting disclosure of confidential information concerning patients or employees); *Labinal, Inc.*, 340 NLRB 203, 210 (2003) (policy prohibiting one employee from discussing another employee's pay without the latter's knowledge and permission); *Flamingo Hilton-Laughlin*, 330 NLRB 287, 288 n.3, 291-92 (1999) (rule prohibiting employees from revealing confidential information regarding fellow employees, hotel's customers, or hotel's business).

<sup>9</sup> See, e.g., *Pacific Northwest District of Carpenters*, 339 NLRB 1027, 1029 (2003) (finding picket signs depicting employer's name protected); *Boise Cascade Corp.*, 300 NLRB 80, 86 (1990) (finding that wearing of a t-shirt depicting employer's logo in connection with a protest of terms and conditions of employment was protected).

Finally, the "savings clause" in the Employer's social media policy, stating that nothing in the guidelines should be construed as a limitation upon NLRA protected rights, does not render lawful any unlawful provisions of that policy. An employer may not prohibit employee activity protected by the Act and then seek to escape the consequences of the prohibition by a general reference to rights protected by law.<sup>10</sup> This is because employees may very well not know what conduct is protected and, "rather than take the trouble to get reliable information on the subject, would elect to refrain from engaging in conduct that is in fact protected by the Act."<sup>11</sup> Here, the general savings clause did not provide the employees any guidance as to what activities would be protected by the NLRA and therefore not restricted by the social media policy.

In sum, the Region should issue a complaint, absent settlement, alleging that guidelines 5 and 6 of the Employer's social media policy violate Section 8(a)(1) of the Act.

B.J.K.

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<sup>10</sup> *Allied Mechanical*, 349 NLRB 1077, 1084 (2007), citing *Ingram Book Co.*, 315 NLRB 515, 516 and 516 n.2 (1994) ("Rank-and-file employees do not generally carry lawbooks to work or apply legal analysis to company rules ..., and cannot be expected to have the expertise to examine company rules from a legal standpoint").

<sup>11</sup> *McDonnell Douglas Corporation*, 240 NLRB 794, 802 (1979) (citations omitted).