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

DATE: March 21, 2012

TO: Wayne Gold, Regional Director
Region 5

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

SUBJECT: Giant Food LLC 512-5012-0125
Cases 05-CA-064793, 05-CA-065187, and 05-CA-064795 512-5012-6722

The Region submitted this case for advice as to (1) whether the Employer unilaterally implemented a new social media policy in three separate bargaining units; and (2) whether that policy would reasonably be construed to chill the exercise of Section 7 rights in violation of the Act.

We conclude that the Employer unlawfully unilaterally implemented the policy in the units represented by Locals 730 and 922, but the third unit represented by Local 639 waived its right to bargain over the policy by inaction. We also conclude that portions of the Employer's social media policy would reasonably be construed to chill the exercise of Section 7 activity and, therefore, violate Section 8(a)(1), including a prohibition against disclosing confidential or non-public information and a prohibition against using the Employer's logo, trademark, or graphics, or photographing or video recording the Employer's facility. We further conclude that employees would not reasonably construe the Employer's rule prohibiting employees from defaming or discrediting the Employer's products or services to restrict protected conduct. Moreover, the Employer's rule encouraging employees to report violations of the policy to management will not chill Section 7 activity once the unlawful provisions of the policy are removed. Lastly, we conclude that the policy's savings clause does not cure the otherwise unlawful policy provisions.

FACTS

Giant Food, LLC (the Employer) has a collective-bargaining relationship with three different Unions covering three different bargaining units: Teamsters Local 730 represents warehousemen, Teamsters Local 639

represents drivers and yard jockeys, and Teamsters Local 922 represents dock workers, battery workers, and truck washers. The Employer and the three Unions bargained for new collective-bargaining agreements in March and April 2011.[1] A social media policy was not discussed during these negotiations nor is such a policy contained in current or past collective-bargaining agreements.

The parties' collective-bargaining agreements all contain identical management rights clauses which state in part:

> All matters having to do with the management and conduct of the business of the Employer and *all policies*, authority and responsibility for the conduct of the same, shall repose exclusively in the management of the Employer, and in no instance shall the Union or its representatives interfere with the exercise of such authority and responsibility. (Emphasis added).

Notwithstanding the broad language of the management rights clauses, whenever the Employer previously wanted to change a policy or rule, it met and bargained with one of the Unions before implementing the change. For example, in the past few years, the Employer has met and bargained over an attendance policy, a new driver policy, and subcontracting out management of the dry grocery warehouse. Additionally, as recently as September and October, the Employer sought to meet and bargain with Local 730 over a light duty policy that it wanted to implement.

Teamsters Local 639

In June or July, the Employer and Local 639 officials met to discuss grievances. After the meeting ended, the Employer's HR Director pulled out a copy of the Employer's social media guidelines and slid it across the table to the Local 639 Vice President and stated, "this is something we are looking at, why don't you look this over and let me know what you think." The Local Vice President put the piece of paper in his notebook and said he would get back to her.

The Local Vice President never read the piece of paper and forgot about it until around August 30 when two stewards called him and told him that a social media policy was read to employees and those employees were told to sign it. He did not request bargaining at that point because he believed it would have been futile.

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[1] All dates hereafter are in 2011.

Teamsters Local 730

In the beginning of July, the Employer's HR Director informed the Local 730 President over the telephone that the Employer wanted to implement social media guidelines to deal with employees talking "bad" about the company online. The Local President said that it was "BS," was not right, and it violated freedom of speech. He then asked the Employer to send him a copy of the social media guidelines, which it did. A few days later, the Local President called back the HR Director and told her that the policy went against freedom of speech and that the Union did not agree to it. According to the Local President, the HR Director told him that she'd get back to him about it. The Local President did not hear back from the Employer and subsequently forgot about the policy.

During the first week of September, the Local President found out from stewards that supervisors were trying to get bargaining unit employees to sign the same social media policy. The Local President then called the HR Director and asked why the Employer implemented the policy even though the Union never agreed to it. According to the Local President, the HR Director said that the policy was "coming from the higher-ups" and that she did what she was told to do. The Local President never requested bargaining because he had no notice that the Employer was actually going to implement the policy and once it was implemented, it was too late.

Teamsters Local 922

About September 7, the Local 730 President asked the Local 922 President if she had heard anything about the Employer's new social media guidelines. The Local 922 President said no, and the Local 730 President told her that he would send her a copy. About September 9, the Employer's HR Vice President and the Local 922 President discussed the social media guidelines in a phone conversation. The Local President told the Employer that she had not received a copy of the policy from the Employer. The Employer promised to email the Union a copy. According to the Employer, the Local President said "okay" after the Employer stated its intention to implement the policy.

During the week of September 12, the Employer emailed a copy of the policy to the Local President. The same week, the Local President was notified by stewards that employees were called into a supervisor's office one at a time, given a copy of the social media policy, and asked to sign it. The Local President did not request to bargain and has not had any other conversation with the Employer about the social media policy other than the short phone conversation.

The Employer's Social Media Guidelines

The Social Media Guidelines state in relevant part:

. . .

- You have an obligation to protect confidential, non-public 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 including Ahold USA, 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 submit such reports to your manager and provide as much specific information as possible. . . .

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.

ACTION

We conclude that the Region should issue complaint, absent settlement, alleging that the Employer unilaterally implemented its social media guidelines in the units represented by Locals 730 and 922. However, in the third unit represented by Local 639, the Employer was privileged to unilaterally implement the guidelines because the Union waived its right to bargain by inaction. We also conclude that portions of the Employer's social media policy violate Section 8(a)(1) because they would reasonably be construed to chill Section 7 activity, including a prohibition against disclosing confidential or non-public information, and a prohibition against using the Employer's logo, trademark, or graphics, or photographing or video recording

the Employer's facility. We further conclude that employees would not reasonably construe the Employer's rule prohibiting employees from defaming or discrediting the Employer's products or services to restrict protected conduct. Further, the provision encouraging employees to report violations of the policy to management will not chill Section 7 activity once the unlawful provisions of that policy are removed. Lastly, we conclude that the policy's savings clause does not cure the otherwise unlawful policy provisions

The Employer was Required to Bargain over the Social Media Guidelines

Initially, we note that the social media guidelines are a mandatory subject of bargaining that the Employer was required to bargain over before implementation. The Board has long held that work rules that could be grounds for discipline are mandatory subjects of bargaining.[2] Further, as the social media guidelines impose a new independent basis for discipline, there was a "material, substantial and significant" impact upon bargaining unit employees' terms and conditions of employment.[3] Thus, the Employer was required to bargain over the policy.

Moreover, contrary to the Employer's claim, the management rights clauses contained in the three collective-bargaining agreements did not privilege the Employer to unilaterally implement the social media guidelines. The Board will interpret the parties' agreement to determine whether there has been a clear and unmistakable waiver of the union's right to bargain over a mandatory subject.[4] A waiver may be found if the contract either "expressly or by necessary implication" confers on management the right to unilaterally take the action in question.[5] Absent specific contractual language, an employer claiming a waiver must show that "the matter sought to be waived was fully discussed and consciously explored and that the waiving party

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[2] *Southern Mail, Inc.*, 345 NLRB 644, 646 (2005).

[3] See *Flambeau Airmold Corp.*, 334 NLRB 165, 166 (2001) (changes in sick leave policy that could subject employees to discipline); *see also Bath Iron Works Corp.*, 302 NLRB 898, 902 (1991) (changes to alcohol and drug policies which "created entirely new grounds for discipline" were material, substantial and significant unilateral changes).

[4] *Provena St. Joseph Medical Center*, 350 NLRB 808, 810-15 (2007).

[5] *Id.* at 812, n.19, citing *New York Mirror*, 151 NLRB 834, 839-840 (1965).

thereupon consciously yielded its interest in the matter."[6] The factors to consider in determining whether or not an effective waiver exists are : (1) the wording of the proffered sections of the agreement at issue; (2) the parties' past practices; (3) the relevant bargaining history; and (4) any other provisions of the collective-bargaining agreement that may shed light on the parties' intent concerning bargaining over the change at issue.[7]

A general contractual clause will not in itself constitute a waiver unless the subject of the purported waiver is explicitly stated.[8] Thus, the Board has repeatedly held that a generally worded management rights clause does not constitute a clear and unmistakable waiver of statutory rights.[9] Here, the management rights clauses make no explicit reference to social media guidelines. The language "all policies" is too broad and too vague to find that the Unions clearly and unmistakably waived their right to bargain over any new rules, including the social media policy.

In addition, we find that the remaining *Provena* factors also fail to establish a waiver. In fact, the parties' past practice indicates that the management rights clauses were not intended to waive the Unions' rights to bargain over new rules or policies not contained in the agreements. The Employer previously provided notice and bargained with the Unions over a new attendance policy, a new driver policy, and the subcontracting out of work. Additionally, even after the Employer implemented the social media

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[6] *Trojan Yacht*, 319 NLRB 741, 742 (1995). See also *Amoco Chemical Co.*, 328 NLRB 1220, 1221-22 (citing *Georgia Power Co.*, 325 NLRB 420, 420-21 (1998)) enforced mem. 176 F.3d 494 (11th Cir. 1999), cert. denied 528 U.S. 1061.

[7] See generally *American Diamond Tool*, 306 NLRB 570, 570 (1992); *Johnson-Bateman Co.*, 295 NLRB 180, 184-87 (1989).

[8] *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983).

[9] See, e.g., *Hi-Tech Cable Corp.*, 309 NLRB 3, 4 (1992) ("general" contractual right to make "reasonable rules and regulations" insufficient to constitute clear and unmistakable waiver), enforced mem. 25 F.3d 1044 (5th Cir. 1994); *Johnson-Bateman*, 295 NLRB at 185 (contractual right to issue, enforce and change company rules without reference to any specific subject matters is not "express, clear, unequivocal, and unmistakable" waiver). See also *The Bohemian Club*, 351 NLRB 1065, 1067 (2007) (right to modify "methods, means and procedures" constitutes "general language" insufficient to act as waiver, even if management rights clause survived contract expiration).

guidelines, it provided notice and bargained with Local 730 for a light duty policy. As to bargaining history, it is undisputed that the parties never explored or discussed a social media policy during negotiations. Lastly, the Employer does not point to any other provisions in the contracts which would shed any light on the parties' intention to allow the Employer to unilaterally implement a social media policy. Thus, we agree with the Region that nothing in the parties' contractual language, past practice, or bargaining history evidences a clear and unmistakable waiver and, accordingly, the Employer was obligated to provide notice and opportunity to bargain to the Unions prior to unilaterally implementing the policy.

The Employer additionally claims that Local 639 and Local 730 waived their right to bargain over the social media policy by inaction. Before implementing a change involving a mandatory bargaining subject, an employer is required to give timely notice to the union and a meaningful opportunity to bargain. Once adequate notice is received, the union must promptly request that the employer bargain over the matter; a union that takes no action or simply protests the change waives its right to bargain.[10] A union's request need not take any particular form, and must only be sufficient to put the employer on notice that the union does not intend to acquiesce to the employer's decision.[11]

On the other hand, the Board does not require a union to request bargaining, as a condition precedent for a Section 8(a)(5) violation, where the request would be futile, or where the employer presented the union with a fait accompli.[12] The Board will find a fait accompli where the time between notice

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[10] *Citizens National Bank of Willmar*, 245 NLRB 389, 389-90 (1979) (union "cannot be content with merely protesting the action"), enforced 644 F.2d 39 (D.C. Cir. 1981); *American Buslines*, 164 NLRB 1055, 1055- 56 (1967) (no violation where union only protested proposed change and filed ULP charge). See also *Medicenter, Mid-South Hospital*, 221 NLRB 670, 678-79 (1975) (holding that the Union waived its right to bargain regarding employer implementation of mandatory limited polygraph examination when it failed to request bargaining for eight days and merely protested change).

[11] See *Oak Rubber Co.*, 277 NLRB 1322, 1323 (1985) (Board approved ALJ's finding that a union's offer to "try and work out any problems" was a request for bargaining and properly alerted the employer that it did not acquiesce in the employer's decision), enforcement denied mem. on other grounds 816 F.2d 681 (6th Cir. 1987).

[12] See *Ciba-Geigy Pharmaceuticals Div.*, 264 NLRB 1013, 1017 (1982) (bargaining request unnecessary "if the notice is too short a time before

and implementation is too short or where the union receives notice at the same time as the employees it represents.[13] The Board will also look at objective factors to determine whether a fait accompli existed, including an employer's use of definite language in making its announcement[14] and statements reflecting a fixed position to implement changes as announced, or otherwise disclaiming a duty to bargain over the changes.[15]

Further, the employer's notice to the union must be clear and contain enough details so the union can reasonably evaluate the employer's plan and present counter proposals before implementation.[16] Where the employer has

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implementation or . . . the employer has no intention of changing its mind"), enforced 722 F.2d 1120 (3d Cir. 1983).

[13] See *id.* (fait accompli where union notified of change at same time as employees); *Champion International Corp.*, 339 NLRB 672 , 687-88 (2003) (finding fait accompli where union was notified of change the evening before implementation); *Laro Maintenance Corp.*, 333 NLRB 958, 959 (2001) (notice given the day before implementation); *Emsing's Supermarket*, 284 NLRB 302, 313 ((1987) (three or four days between notice and implementation insufficient), enforced 872 F.2d 1279 (7th Cir. 1989).

[14] See *S&I Transportation*, 311 NLRB 1388, 1390 (1993) (finding that employer's announcement of changes in definite terms, with date certain for implementation, directly to employees, indicated that employer intended to make changes without consulting union).

[15] See *Roll & Hold Warehouse*, 325 NLRB 41, 42-43 (1997) (finding that union request to bargain would have been futile where employer's witness testified at hearing that he believed employer had no obligation to bargain over changes), enforced 162 F.3d 1349 (7th Cir. 1998); *S&I Transportation*, 311 NLRB at 1388-89 (finding fait accompli where employer's testimony at hearing revealed employer's "fixed position to implement the changes as announced" because of its grave financial condition).

[16] See *Pan American Grain Co.*, 343 NLRB 318, 318 (2004) (employer's general statement of intent to lay off employees in the future not specific enough to constitute notice), remanded on other grounds 448 F.3d 465 (1st Cir. 2005).

not reached a firm decision about the change, the union is not required to request bargaining, and silence by the union will not amount to a waiver.[17]

Here, the Employer presented Locals 639 and 730 with its written social media policy proposal in June and July. Although the Employer did not provide a timeframe for implementation, its proposal was sufficient to give the Unions notice that the Employer wanted to implement this policy. In this regard, the Employer did not imprecisely mention the possibility of creating a policy in the future, rather it presented a full and complete written proposal to the Unions. Thus, Locals 639 and 730 had actual and sufficient notice of the proposed policy.

We conclude that Local 639 waived its right to bargain over the policy by failing to request bargaining. The Union admits that the Employer provided a copy of the policy and the Union did not even look at it for two months or so. The Union also admits it never requested bargaining over the policy. As Local 639 had adequate notice before implementation and failed to demand bargaining, the Union waived its right to bargain by inaction, and the Employer could lawfully implement its proposal.

Local 730, on the other hand, informed the Employer that it did not agree with the proposal and that it interfered with employees' freedom of speech. The Employer then responded that it would get back to the Union. Although Local 730 did not specifically request to bargain, we conclude that the Union sufficiently expressed its interest in bargaining when it informed the Employer that it did not agree to the policy because it violated freedom of speech.[18] Moreover, the Employer treated the Union's comments as a bargaining request and stated that it would get back to the Union. It was then the Employer's responsibility to respond to the Union and engage in bargaining before implementing its social media guidelines. Thus, the Employer violated Section 8(a)(5) by unilaterally implementing the social

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[17] See *Oklahoma Fixture Co.*, 314 NLRB 958, 960-61 (1994) (employer's "inchoate and imprecise" statement about future plans was insufficient notice to trigger union's duty to request bargaining), enforcement denied on other grounds 79 F.3d 1030 (10th Cir. 1996); *Sierra International Trucks, Inc.*, 319 NLRB 948, 950 (1995) (decision to sell dealership was not firm enough to trigger union's obligation to request effects bargaining where sale date unknown and sale contingent on third-party approval).

[18] See *Oak Rubber Co.*, supra. Compare *Medicenter, Mid-South Hospital*, 221 NLRB at 679 (protesting not enough where, inter alia, the union did not advance any reasoned arguments against implementation).

media guidelines in the unit represented by Local 730 because it failed to bargain further with Local 730 after Local 730 expressed its interest in bargaining.

As to Local 922, we conclude that the Employer presented the Union with a fait accompli when it provided the Union with the social media policy the same week that it distributed the policy to unit employees. Although the Employer claims that the Union waived any right to bargain over the policy because the Local President said "okay" when informed of the Employer's intent to implement, there is ample objective evidence indicating that the Employer presented its social media policy as a fait accompli over which it had no intention of bargaining. The Employer gave the Union almost no time to evaluate the written proposal and present counterproposals before the Employer began implementing it. Moreover, the Employer had already implemented the policy in other units before it even provided notice to Local 922, demonstrating that the policy was finalized and the Employer had no intention of bargaining over it. Local 922 was therefore excused from the futile act of requesting bargaining over the social media policy because the Employer's proposal essentially was a fait accompli. Thus, the Employer violated Section 8(a)(5) by unilaterally implementing that policy in the unit represented by Local 922.

Portions of the Social Media Guidelines Violate the Act

An employer violates Section 8(a)(1) of the Act through the maintenance of a work rule if that rule would "reasonably tend to chill employees in the exercise of their Section 7 rights."[19] The Board has developed a two-step inquiry to determine if a work rule would have such an effect.[20] First, a rule is unlawful if it explicitly restricts Section 7 activities. Second, if the rule does not explicitly restrict protected activities, it will violate the Act 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.[21]

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[19] *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), enforced 203 F.3d 52 (D.C. Cir. 1999).

[20] *Lutheran Heritage Village–Livonia*, 343 NLRB 646, 647 (2004).

[21] *Id.*

Rules that are ambiguous as to their application to Section 7 activity, and contain no limiting language or context that would clarify to employees that the rule does not restrict Section 7 rights, are unlawful.[22] In contrast, rules that clarify and restrict their scope by including examples of clearly illegal or unprotected conduct, such that they could not reasonably be construed to cover protected activity, are not unlawful.[23]

Applying these standards, we find that portions of the Employer's social media rules are unlawful because employees would reasonably construe them to restrict Section 7 activity. First, the rule prohibiting employees from posting information regarding the Employer that could be deemed "confidential" or "non-public," is unlawful. As to "non-public information," in the absence of clarification, the term is so vague that employees would reasonably construe it to include subjects that involve their working conditions.[24] Similarly, the Board has long recognized that the term "confidential information" without limiting language would reasonably be interpreted to include information concerning terms and conditions of employment.[25] Thus, employees would reasonably construe these

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[22] See *University Medical Center*, 335 NLRB 1318, 1320-22 (2001) (work rule that prohibited "disrespectful conduct towards [others]" unlawful because it included "no limiting language [that] removes [the rule's] ambiguity and limits its broad scope."), enforcement denied in pertinent part 335 F.3d 1079 (D.C. Cir. 2003).

[23] See *Tradesmen Intl.*, 338 NLRB 460, 460-62 (2002) (prohibition against "disloyal, disruptive, competitive, or damaging conduct" would not be reasonably construed to cover protected activity, given the rule's focus on other clearly illegal or egregious activity and the absence of any application against protected activity).

[24] See *Freemont Manufacturing Co.*, 224 NLRB 597, 603-04 (1976) (finding overly broad rule prohibiting employees from "[m]aking any statement or disclosure regarding company affairs, whether express or implied as being official, without proper authorization from the company"); *Pontiac Osteopathic Hospital*, 284 NLRB 442, 465–66 (1987) (unlawful rule prohibiting employees from discussing hospital affairs).

[25] See, e.g., *University Medical Center*, 335 NLRB at 1320, 1322 (employees "might reasonably perceive terms and conditions of employment, including wages, to be within the scope of the broadly-stated category of 'confidential information' about employees"); *Flamingo Hilton-Laughlin*, 330

prohibitions to restrict their Section 7 right to discuss terms and conditions of employment.

Second, we agree with the Region that the portion of the policy prohibiting employees from using the Employer's logo, trademarks or graphics is unlawful. Employees would reasonably understand the rule to prohibit the use of the Employer's logo or trademark in their online Section 7 communications, which could include electronic leaflets, cartoons, or even photos of picket signs containing the Employer's logo.[26] Although the Employer has a proprietary interest in its trademarks, including its logo if trademarked, employees' use of its name, logo, or other trademark while engaging in Section 7 activity would not infringe on that interest. Courts have identified three interests that are protected by the trademark laws: (1) the trademark holder's interest in protecting the good reputation associated with his mark from the possibility of being tarnished by inferior merchandise sold by another entity using the trademark; (2) the trademark holder's interest in being able to enter a related commercial field at some future time and use its well-established trademark; and (3) the public's interest in not being misled as to the source of products offered for sale using confusingly similar marks.[27] These interests are not remotely implicated by employees' non-commercial 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.[28]

NLRB 287, 288 n.3, 291-92 (1999) (rule prohibiting employees from revealing confidential information regarding hotel's customers, fellow employees or hotel business unlawful). See also *Albertson's, Inc.*, 351 NLRB 254, 258 (2007) (employer unlawfully used its confidentiality rule to discipline an employee for engaging in protected concerted activity, namely, providing employee names to assist the union's organizing campaign).

[26] *Cf. Pepsi-Cola Bottling Co.*, 301 NLRB 1008, 1019-20 (1991) (finding unlawful prohibition against employees wearing company logo or insignia while engaging in union activity during non-working time away from the plant), enforced 953 F.2d 638 (4th Cir. 1992).

[27] See *Scarves by Vera*, 544 F.2d 1167, 1172 (2d Cir. 1976). See also *Smith v. Chanel, Inc.*, 402 F.2d 562, 565 (9th Cir. 1968) (touchstone of trademark infringement is likelihood of confusion that the product sold by the second entity is the product of the trademark holder).

[28] Even if trademark principles were applicable to this kind of use, there is no unlawful infringement where use of a trademark would not confuse the public

We further find that the portion of the rule prohibiting employees from photographing or videotaping the Employer's premises is unlawful as such a prohibition would 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.[29]

We find lawful, however, the provision in the Employer's social media guidelines requiring that employees not defame or otherwise discredit the Employer's products or services. The rule only prohibits statements defaming or discrediting the Employer's products or services, conduct that is not protected under Section 7.[30]

We also conclude that the policy's instruction that employees "[s]peak up if you believe that anyone is violating these guidelines" is not unlawful.

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regarding the source, identity, or sponsorship of the product. See, e.g., *Smith v. Chanel, Inc.*, 402 F.2d at 565, 569 (use of trademark in an advertisement comparing the alleged infringer's product to the trademark holder's product not unlawful because it did not create a reasonable likelihood that purchasers would be confused as to the source, identity, or sponsorship of the advertiser's product).

[29] *See, e.g., Sullivan, Long & Hagerty*, 303 NLRB 1007, 1013 (1991) (employee tape recording at jobsite to provide evidence in a Department of Labor investigation considered protected), enforced, 976 F.2d 743 (11th Cir. 1992). *Contrast with Flagstaff Medical Center,* 357 NLRB No. 65, slip op. at 4-5 (August 26, 2011) (holding lawful rule prohibiting employees from taking photographs of hospital patients or property in light of "weighty" privacy interests of hospital patients and "significant" employer interest in preventing wrongful disclosure of individually identifiable health information).

[30] See *NLRB v. IBEW, Local No. 129 (Jefferson Standard*), 346 U.S. 464, 471-72 (1953) (Section 7 activity does not include comments that are unrelated to any ongoing labor dispute and constitute "a sharp, public, disparaging attack upon the quality of a company's product"). Compare *Rite Aid Corporation*, Cases 8-CA-62080, et al., Advice Memorandum dated September 22, 2011 (rule that prohibited employees from "disparg[ing] [the employer's] or competitors' products, services, executive leadership, employees, strategy, or business prospects" found unlawful and overbroad only as it related to executive leadership and employees because it could apply to protected criticism of the employer's labor policies and treatment of employees).

First, the provision does not expressly restrict communication or threaten discipline. Second, once the unlawful provisions, discussed above, are removed, employees would not reasonably interpret the Employer's social media guidelines as restricting Section 7 activity. Thus, the Employer's instruction that employees report violations of a lawful policy would not restrain or chill Section 7 activity.[31]

Finally, the Employer's "savings clause" does not cure the otherwise unlawful policy provisions. An employer may not prohibit specific employee activity protected by the Act and then escape the consequences of the prohibition by a general reference to rights protected by the Act.[32] Thus, where certain protected activities are specifically prohibited, employees would reasonably conclude that the general declaration of rights set out in the savings clause either does not include - or that the employer does not interpret the savings clause to include - those activities. Furthermore, with regard to overbroad prohibitions that reasonably would be interpreted to prohibit protected activities, a general disclaimer is insufficient where employees would not understand from the disclaimer that protected activities are in fact permitted.[33]

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[31] *Cf. Bloomington-Normal Seating Co.,* 339 NLRB 191, 191 n.2 (2003) (employer's invitation to employees that they inform it of protected card solicitation by other employees unlawful because of the potential for chilling legitimate union activity).

[32] *See Allied Mechanical*, 349 NLRB 1077, 1084 (2007) (employer's unlawful conditioning of the settlement of employee wage claims upon the requirement that employees not engage in protected activity was not saved by clause stating "unless . . . permitted by federal or state law including but not limited to the National Labor Relations Act").

[33] *Ingram Book Co.*, 315 NLRB 515, 516 (1994) (finding employer maintenance of a disclaimer that "[t]o the extent any policy may conflict with state or federal law, the Company will abide by the applicable state or federal law" did not salvage the employer's overbroad no-distribution policy); *McDonnell Douglas Corporation*, 240 NLRB 794, 802 (1979); A*llied Mechanical*, 349 NLRB at 1077 n.1, Member Kirsanow concurring ("[t]he problem with this release, as the judge observed, is that it assumes employees 'are knowledgeable enough to understand that the Act permits the very thing prohibited in the first portion' of the release").

Accordingly, the Region should issue complaint, absent settlement, alleging that the Employer violated Section 8(a)(5) by unilaterally implementing its social media policy in the units represented by Locals 730 and 922 and violated Section 8(a)(1) by maintaining its overly-broad social media policy.

/s/
B.J.K.