Courts rule social media is form of free speech

By Steven Greenhouse, New York Times

As Facebook and Twitter become as central to workplace conversation as the company cafeteria, federal regulators are ordering employers to scale back policies that limit what workers can say online.

Employers often seek to discourage comments that paint them in a negative light. Don't discuss company matters publicly, a typical social media policy will say, and don't disparage managers, co-workers or the company itself. Violations can be a firing offense.

But in a series of recent rulings and advisories, labor regulators have declared many such blanket restrictions illegal. The National Labor Relations Board says workers have a right to discuss work conditions freely and without fear of retribution, whether the discussion takes place at the office or on Facebook.

In addition to ordering the reinstatement of various workers fired for their posts on social networks, the agency has pushed companies nationwide, including giants like General Motors, Target and Costco, to rewrite their social media rules.

"Many view social media as the new water cooler," said Mark G. Pearce, the board's chairman, noting that federal law has long protected the right of employees to discuss work-related matters. "All we're doing is applying traditional rules to a new technology."

The decisions come amid a broader debate over what constitutes appropriate discussion on Facebook and other social networks.

Schools and universities are wrestling with online bullying and student disclosures about drug use. Governments worry about what police officers and teachers say and do online on their own time. Even corporate chieftains are finding that their online comments can run afoul of securities regulators.

The labor board's rulings, which apply to virtually all private sector employers, generally tell companies that it is illegal to adopt broad social media policies – like bans on "disrespectful" comments or posts that criticize the employer – if those policies discourage workers from exercising their right to communicate with one another with the aim of improving wages, benefits or working conditions.

But the agency has also found that it is permissible for employers to act against a lone worker ranting on the Internet.

Several cases illustrate the differing standards.

At Hispanics United of Buffalo, a nonprofit social services provider in upstate New York, a caseworker threatened to complain to the boss that others were not working hard enough. Another worker, Mariana Cole-Rivera, posted a Facebook message asking, "My fellow co-workers, how do you feel?"

Several of her colleagues posted angry, sometimes expletive-laden, responses. "Try doing my job. I have five programs," wrote one. "What the hell, we don't have a life as is," wrote another.

Hispanics United fired Cole-Rivera and four other caseworkers who responded to her, saying they had violated the company's harassment policies by going after the caseworker who complained.

In a 3-to-1 decision last month, the labor board concluded that the caseworkers had been unlawfully terminated. It found that the posts in 2010 were the type of "concerted activity"

for “mutual aid” that is expressly protected by the National Labor Relations Act.

“The board’s decision felt like vindication,” said Cole-Rivera, who has since found another social work job.

The NLRB had far less sympathy for a police reporter at the Arizona Daily Star.

Frustrated by a lack of news, the reporter posted several Twitter comments. One said, “What?!?!?! No overnight homicide. … You’re slacking, Tucson.” Another began, “You stay homicidal, Tucson.”

The newspaper fired the reporter, and board officials found the dismissal legal, saying the posts were offensive, not concerted activity and not about working conditions.

The agency also affirmed the firing of a bartender in Illinois. Unhappy about not receiving a raise for five years, the bartender posted on Facebook, calling his customers “rednecks” and saying he hoped they choked on glass as they drove home drunk.

Labor board officials found that his comments were personal venting, not the “concerted activity” aimed at improving wages and working conditions that is protected by federal law.

NLRB officials did not name the reporter or the bartender.

The board’s moves have upset some companies, particularly because it is taking a law enacted in the industrial era, principally to protect workers’ right to unionize, and applying it to the digital activities of nearly all private-sector workers, union and nonunion alike.

Brian E. Hayes, the lone dissenter in the Hispanics United case, wrote that “the five employees were simply venting,” not engaged in concerted activity, and therefore were not protected from termination. Rafael O. Gomez, Hispanics

United’s lawyer, said the nonprofit would appeal the board’s decision, maintaining that the Facebook posts were harassment.

Some corporate officials say the NLRB is intervening in the social media scene in an effort to remain relevant as private-sector unions dwindle in size and power.

“The board is using new legal theories to expand its power in the workplace,” said Randel K. Johnson, senior vice president for labor policy at the United States Chamber of Commerce. “It’s causing concern and confusion.”

But board officials say they are merely adapting the provisions of the National Labor Relations Act, enacted in 1935, to the 21st century workplace.

The NLRB is not the only government entity setting new rules about corporations and social media. On Jan. 1, California and Illinois became the fifth and sixth states to bar companies from asking employees or job applicants for their social network passwords.

Lewis L. Maltby, president of the National Workrights Institute, said social media rights were looming larger in the workplace.

He said he was disturbed by a case in which a Michigan advertising agency fired a Web site trainer who also wrote fiction after several employees voiced discomfort about racy short stories he had posted on the Web.

“No one should be fired for anything they post that’s legal, off-duty and not job-related,” Maltby said.

As part of the labor board’s stepped-up role, its general counsel has issued three reports concluding that many companies’ social media policies illegally hinder workers’ exercise of their rights.

The general counsel’s office gave high marks to Wal-Mart’s

social policy, which had been revised after consultations with the agency. It approved Wal-Mart's prohibition of "inappropriate postings that may include discriminatory remarks, harassment and threats of violence or similar inappropriate or unlawful conduct."

But in assessing General Motors's policy, the office wrote, "We found unlawful the instruction that 'offensive, demeaning, abusive or inappropriate remarks are as out of place online as they are offline.' " It added, "This provision proscribes a broad spectrum of communications that would include protected criticisms of the employer's labor policies or treatment of employees." A G.M. official said the company has asked the board to reconsider.

In a ruling last September, the board also rejected as overly broad Costco's blanket prohibition against employees' posting things that "damage the company" or "any person's reputation." Costco declined to comment.

Denise M. Keyser, a labor lawyer who advises many companies, said employers should adopt social media policies that are specific rather than impose across-the-board prohibitions.

Do not just tell workers not to post confidential information, Keyser said. Instead, tell them not to disclose, for example, trade secrets, product introduction dates or private health details.

But placing clear limits on social media posts without crossing the legal line remains difficult, said Steven M. Swirsky, another labor lawyer. "Even when you review the NLRB rules and think you're following the mandates," he said, "there's still a good deal of uncertainty."