

NLRB GENERAL COUNSEL ISSUES SOCIAL MEDIA REPORT

On January 24, 2012 the NLRB's General Counsel issued yet another report on the employment issues that surround social media. The report reviewed 14 cases, half of which involved employer social media policies. Only one policy was upheld as written, once again showing how critical the current NLRB is of employer attempts to limit employee use of social media.

The report stresses: (1) The importance of having a social media policy that is tailored to the employer's specific environment, needs, and culture; (2) the current NLRB's position that it is illegal to restrict all employee usage of social media; and (3) that the NLRB will not find social media comments protected if they are "mere gripes" not made concerning group activities.

If you have not reviewed and updated your social media policy, this report underscores the risk you are running.

THE OSHA REVIEW COMMISSION ESTABLISHES A TEST FOR APPLYING THE ATTORNEY-CLIENT PRIVILEGE TO THIRD-PARTY REPORTS

The OSHA Review Commission recently established a test to determine whether audits prepared by independent safety consultants at the direction of an employer's attorney are protected from disclosure to OSHA by the attorney client privilege. In *Secretary of Labor v. Delek Refining Ltd.*, the Commission established such a privilege under certain conditions.



405 Madison Ave., Ste. 1300
Toledo, Ohio 43604
(419) 244-6788

www.Bugbee-Conkle.com

Gregory B. Denny
Tybo Alan Wilhelms
Robert L. Solt, III
Robert P. King
Mark S. Barnes
Janelle M. Matuszak
Carl E. Habekost
Carolyn A. Davis



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In *Delek*, the company contracted with outside experts to conduct an internal audit to assist its attorneys in assessing technical issues associated with compliance of its safety program. Four months later, following an explosion and fire at a Delek facility, OSHA issued multiple citations against the company and litigation ensued. During discovery, the Secretary of Labor subpoenaed the audit report. Delek moved to quash the subpoena, claiming that the report was protected by the attorney-client privilege. The Administrative Law Judge denied Delek's motion to quash, and the company sought review of that denial with the Commission. Although the Commission recognized that such a privilege might exist, it declined to say whether the privilege applied in this particular case, and remanded the matter back to the Administrative Judge for him to decide if the privilege should apply.

Although *Delek* provides a framework to guide employers when deciding when and how to perform safety and health audits in their facility, the test leaves many important questions unanswered, such as what is "legal advice" in such circumstances. Therefore, we anticipate this will be an area of continued activity, with OSHA increasing its efforts to get its hands on such reports, if they exist. Therefore, great caution needs to be used when considering whether and how to conduct such "audits."

If you have any questions concerning the application of the NLRB's report or the Delek decision to your business, please contact a member of our Labor and Employment Law practice group at (419) 244-6788.

Tybo Alan Wilhelms (twilhelms@bugbee-conkle.com)
Carl E. Habekost (chabekost@bugbee-conkle.com)
Carolyn A. Davis (cdavis@bugbee-conkle.com)

THE EMPLOYER is not intended to provide legal advice, but is intended as a service to the clients of Bugbee & Conkle, LLP and to alert them to recent developments affecting the employment relationship, with a particular emphasis on the perspective of the employer.

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