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

DATE: September 5, 2018

TO: Mori Rubin, Regional Director
Region 31

FROM: Jayme L. Sophir, Associate General Counsel
Division of Advice

SUBJECT: CVS Health 512-5012-0125
Case 31-CA-210099 512-5012-0133

The Region submitted this case for advice as to whether various Employer social media rules are unlawfully overbroad under the Board's recent decision in *Boeing Co.*[1] We conclude that all of the submitted provisions are lawful under *Boeing* except for the rules requiring employees to identify themselves by their real name when discussing the Employer or their work on social media, and the rules restricting employees from disclosing "employee information" on social media.

CVS Health (the Employer) is a retail drug store chain with over 9,600 retail pharmacy locations throughout the United States. It maintains various social media rules in its Code of Conduct, Colleague Handbook, and Social Media Policy. The rules at issue are set forth at length, below.

In cases where a facially-neutral employer work rule, if reasonably interpreted, would potentially interfere with Section 7 rights, the Board will evaluate two things: (i) the nature and extent of the potential impact on Section 7 rights, and (ii) legitimate business justifications associated with the requirement(s).[2] The Board will conduct this evaluation "consistent with the Board's 'duty to strike the proper balance between . . . asserted business justifications and the invasion of employee rights in light of the Act and its policy,' focusing on the perspective of employees."[3] In so doing,

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[1] 365 NLRB No. 154, slip op. at 2-3 (Dec. 14, 2017) (expressly overruling the "reasonably construe" standard set forth in *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 647 (2004)).

[2] *Boeing Co.*, 365 NLRB No. 154, slip op. at 2-3.

[3] *Id.*, slip op. at 3 (quoting *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26, 33-34 (1967)).

"the Board may differentiate among different types of NLRA-protected activities (some of which might be deemed central to the Act and others more peripheral)," and make "reasonable distinctions between or among different industries and work settings."[4] The Board will also account for particular events that might shed light on the purpose served by the rule or the impact of its maintenance on Section 7 rights.[5]

The *Boeing* Board also indicated that its balancing test will ultimately result in its ability to classify the various types of employer rules into three categories, thereby eliminating the need to conduct case-specific balancing as to certain types of rules so as to provide employers, employees, and unions with greater certainty in the future. The Board described the following categories:

> • *Category 1* will include rules that the Board designates as *lawful* to maintain, either because: (i) the rule, when reasonably interpreted, does not prohibit or interfere with the exercise of Section 7 rights and thus no balancing of rights and justifications is required; or (ii) even though the rule has a reasonable tendency to interfere with Section 7 rights, the potential adverse impact on those protected rights is outweighed by employer justifications associated with the rule. The Board included in this category rules requiring "harmonious relationships" in the workplace, rules requiring employees to uphold basic standards of "civility," and rules prohibiting cameras in the workplace.
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> • *Category 2* will include rules that warrant individualized scrutiny in each case as to whether the rule, when reasonably interpreted, would prohibit or interfere with the exercise of Section 7 rights, and if so, whether any adverse impact on protected conduct is outweighed by legitimate business justifications.
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> • *Category 3* will include rules that the Board will designate as *unlawful* to maintain because they would prohibit or limit Section 7 conduct, and the adverse impact on Section 7 rights is not outweighed by justifications associated with the rule. The Board included as an example of a Category 3 rule one that prohibits employees from discussing wages and benefits with each other.[6]

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[4] *Id.*, slip op. at 15.

[5] *Id.*, slip op. at 16.

[6] *Id.*, slip op. at 3-4, 15.

The Board specified that these categories represent the results of the new balancing test but are not part of the test itself.[7]

A. CVS HEALTH CODE OF CONDUCT

1. Consistent with the Company's approach to interacting with the traditional news media, only designated CVS Health employees are authorized to speak on behalf of the Company in social media. Colleagues who choose to speak on social media about the Company in any way must make it clear that they are a CVS Health employee, but not speaking on behalf of the Company or as an official Company Representative.

We conclude that this rule is lawful, as the General Counsel has determined that restrictions on who can speak on an employer's behalf fall in Category 1 and are facially lawful.[8] Thus, such rules ordinarily will have no real impact on Section 7 rights, and employers have a significant interest in ensuring that only authorized employees speak for the company.

2. All CVS-branded social media accounts (using "CVS," "CVS Health" or any CVS business unit, department, or product name as part of the account name or URL and/or using the CVS logo or portion of the logo in any way) must be approved in advance.

We first conclude that the restriction on the use of the CVS logo falls in Category 1 and is facially lawful.[9] Although some protected activity may fall under such a rule, including posting pictures of picket signs or leaflets with the Employer's logo, usually employees will understand this type of rule as protecting the employer's intellectual property from commercial and other non-Section 7 related use. Even where employees would reasonably interpret such a rule to apply to fair use of an employer's logo as part of protected concerted activity, there would be only a peripheral effect on

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[7] *Id.*, slip op. at 4.

[8] *See* Memorandum GC 18-04, "Guidance on Handbook Rules Post-*Boeing*," at 14 (June 6, 2018); *see also UPMC*, 362 NLRB No. 191, slip op. at 14 n.17 (Aug. 27, 2015) (Member Johnson, concurring in part) (recognizing that the employer has a "legitimate interest in prohibiting non-authorized employees from acting as representatives or spokespeople" for the employer).

[9] *See* Memorandum GC 18-04, at 13-14.

Section 7 rights, as employees may refrain from using the logo as part of their protected concerted activity but not stop the protected concerted activity itself. By contrast, employers have a strong interest in protecting their intellectual property, including logos and trademarks, as that property can have significant value and failure to police its use may result in significant financial loss.

We also conclude that, on balance, the restriction on the use of the CVS name as part of a social media account name or URL is lawful.[10] Employers have a substantial interest in ensuring that employees do not, intentionally or unintentionally, make statements that can be interpreted as coming from the company. If an employee who is perceived as speaking for the company makes unprofessional, rude, or bigoted comments, it can cause serious damage to a company's reputation. Worse yet, an employee speaking with apparent authority from the company might even create unwanted contractual obligations or liabilities for the employer. Significantly, the Employer's rule does not restrict employees from referencing the Employer's name in their social media postings regarding Section 7 activity; the rule only applies to the account name or URL.[11] The rule's effect on employee Section 7 activity is thus comparatively slight, and it is outweighed by the Employer's business justification.

B. CVS HEALTH COLLEAGUE HANDBOOK

1. **Distinguish personal social media and work social media**. Personal opinions should be stated as such. CVS Health colleagues who choose to mention or discuss their work, CVS Health, colleagues, or CVS Health products or services in personal social media interactions must identify themselves by their real name and, where relevant, title or role. You must also identify that you work for CVS Health and make clear in your postings that you are not speaking for or on behalf of CVS Health.

We conclude that this rule's requirement that employees identify themselves by name if they mention the Employer or discuss their work on social media falls in

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[10] The General Counsel has determined that restrictions on the use of an employer's name, unlike restrictions on the use of an employer's logos and trademarks, falls in Category 2. *See id.* at 17.

[11] *Cf. Schwan's Home Service*, 364 NLRB No. 20, slip op. at 16 (June 10, 2016) (Miscimarra concurring that rule banning publication of *any* material mentioning employer's name was unlawful, applying his *William Beaumont* test rather than *Lutheran Heritage*).

Category 2 and, on balance, is facially unlawful. This would require employees to self-identify whenever discussing terms and conditions of employment with one another or with third parties such as labor organizations. The Board has recognized that requiring employees to self-identify in order to participate in collective action would impose a significant burden on Section 7 rights.[12] And, while the Employer has a legitimate interest in ensuring that readers know that employees' social media postings are not being made on its behalf, the Employer maintains other facially lawful rules (including the last sentence of the above provision) that protect this interest.

2. The disclaimers outlined in the CVS Health Social Media Policy *must be used* on your personal social media accounts if you are speaking about CVS Health in any way, including re-sharing information from official CVS Health social media accounts.

We conclude that this disclaimer requirement is lawful. Our analysis is contained below in Section C.3. of this memorandum, which addresses the disclaimer requirement in the Social Media Policy.

3. **Protect personal and confidential information.** Our Code of Conduct makes clear the importance of protecting the privacy and security of PHI [protected health information], PII [personally identifiable information], and employee information. It is not permissible to disclose this information through social media or other online communications.

We conclude that the restriction on disclosing "employee information" falls in Category 2 and is unlawful.[13] "Employee information" would reasonably be read by employees to include employee contact information and other non-confidential employment-related information, in which case prohibiting its disclosure would significantly restrict employees from engaging in core Section 7 activities.[14] Indeed,

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[12] *See Boch Honda*, 362 NLRB No. 83, slip op. at 2 (Apr. 30, 2015) (citing *Farah Manufacturing Co.*, 202 NLRB 666, 675 (1973)), *enforced*, 826 F.3d 558 (D.C. Cir. 2016).

[13] *See* Memorandum GC 18-04, at 17 (stating that confidentiality rules broadly encompassing "employee information" fall in Category 2).

[14] *See Schwan's Home Service*, 364 NLRB No. 20, slip op. at 15 (Miscimarra concurring that rule restricting disclosure of "information concerning . . . employees" would affect conduct that is central to many or most types of Section 7 activity and was unlawful, even though majority relied on *Lutheran Heritage*, with which Miscimarra disagreed).

"it is hard to fathom how *any* Section 7 activity can be conducted . . . without having employee-related information 'disclosed' or 'used' in some manner."[15] The rule contains no limiting context or language that makes clear that "employee information" does not include employee contact information or terms and conditions of employment. Thus, "employee information" is not defined anywhere else in the rule, the Colleague Handbook, or the Code of Conduct, and there is nothing to indicate that it only encompasses information that is legitimately confidential, such as *employees'* personal medical information or private records. While the Employer has a legitimate business interest in keeping customers' and employees' personal and medical information confidential, it has no legitimate interest in preventing employees from sharing contact information or discussing wages, working conditions, or employment disputes. Nor has the Employer identified any business interests justifying the aspects of the rule that interfere with employees' Section 7 rights. Accordingly, this rule violates Section 8(a)(1) of the Act.

4. **Do not be disrespectful or break the law:** You should not post anything discriminatory, harassing, bullying, threatening, defamatory, or unlawful. Don't post content, images or photos that you don't have the right to use.

We conclude that this rule is lawful. The Board made clear in *Boeing* that employees may maintain work rules requiring "harmonious relationships" in the workplace and requiring employees to uphold basic standards of "civility."[16] In so holding, the Board noted that any adverse effect of such rules on Section 7 rights would be comparatively slight because a broad range of NLRA-protected activities are consistent with basic standards of harmony and civility.[17] The Board incorporated by reference the civility rules at issue in *William Beaumont Hospital* and Member Miscimarra's dissent arguing for their legality, in which he reasoned that the vast majority of conduct covered by such rules does not implicate Section 7 at all.[18] Although the above rule's admonition to "not be disrespectful" applies to social media posts, as opposed to conduct at the workplace, it is akin to a lawful civility rule. We further conclude that the rule's last sentence—prohibiting employees from posting

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[15] *Id.* (Miscimarra, concurring).

[16] 365 NLRB No. 154, slip op. at 3-4, 15.

[17] *Id.*, slip op at 4 n.15.

[18] *See William Beaumont Hospital*, 363 NLRB No. 162, slip op. at 21-23 (Apr. 13, 2016) (incorporated by reference in *Boeing Co.*, 365 NLRB No. 154, slip op. at 4 n.15).

materials that employees "don't have the right to use"—is lawful. Employees would reasonably construe this to be a lawful restriction on posting Employer logos or intellectual property, particularly when viewed in context with the rule's first sentence, which states "[d]o not . . . break the law," and the second sentence's prohibition on "post[ing] anything . . . unlawful."

C. CVS HEALTH SOCIAL MEDIA POLICY

The Social Media Policy—unlike the Code of Conduct and the Colleague Handbook—contains the following savings clause on the first page:

> Nothing in this policy is meant to limit your legal right to use social media to speak about your political or religious views, lifestyle and personal issues, working conditions, wages, or union-related topics or activities with others inside or outside the Company, or to restrict any other legal rights.
>
> This policy is not intended to interfere with any rights provided by the National Labor Relations Act.

1. **Protect personal and confidential information.** Our Code of Conduct makes clear the importance of protecting the privacy and security of protected health information (PHI), personally identifiable information (PII) and employee information. It is **not permissible** to disclose this information through social media or other online communications.

Remember, it is never appropriate to discuss or post personal information about other colleagues, customers, patients, clients, plan members, or partners unless we have their written consent to do so. It is never appropriate to post protected health information, Social Security numbers, account information, or any other information that constitutes "personal information" or protected health information. Please respect the privacy of others when choosing what you share and post.

Do not take or share photos from non-public areas or internal meetings. Photos taken in break rooms, stock rooms, conference rooms, and any other area that is not open to the public should not be shared on social media for any reason. Company confidential information, like staffing, inventory, company goals/strategies and patient information could be compromised. Any photos of company presentations/slides, documents, notices or computer screens of any kind are also not allowed on any social media platforms or channels.

We conclude that the first paragraph of this rule, like the identical provision in the Colleague Handbook (*see* Section B.3. of this memorandum, above), is facially unlawful. That determination is not changed by the Social Media Policy's savings clause. Although the savings clause is in some ways comprehensive, it does not cure this particular provision, because it does not cover all kinds of "employee information," including employee contact information. The concluding sentence of the savings clause, regarding "rights provided by the National Labor Relations Act," also is insufficient to save this paragraph of the rule because employees, who are laypersons, do not necessarily know the full panoply of their rights under the NLRA.[19]

The second paragraph, however, is lawful. Employees would not reasonably construe the restriction on "personal information" to cover employee contact information or other information concerning terms and conditions of employment, particularly when considered in context with the sentence mentioning Social Security numbers and account information as examples of "personal information."[20]

The third paragraph is also lawful. Rules prohibiting photography at the workplace are lawful Category 1 rules.[21] It follows that a rule prohibiting employees from posting such photographs on social media is lawful. We recognize that the last sentence of the paragraph has broad language prohibiting "any photos of company . . . documents, notices," which likely also includes photographs taken away from the workplace. And, read in isolation, this sentence arguably prohibits posting of Section

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[19] *See Allied Mechanical*, 349 NLRB 1077, 1077 n.1, 1084 (2007) (finding savings clause's general reference to protected rights did not cure rule's otherwise overbroad prohibition on protected activity; although "employees may understand that their NLRA rights are unaffected, . . . [they] may not know the fully [sic] panoply of those rights"); *Ingram Book Co.*, 315 NLRB 515, 516 & n.2 (1994) (finding savings clause stating that employer will "abide by the applicable state or federal law" if its policies conflict with such laws did not salvage overbroad no-distribution policy; "[r]ank-and-file employees do not generally carry lawbooks to work or apply legal analysis to company rules as do lawyers, and cannot be expected to have the expertise to examine company rules from a legal standpoint").

[20] *See Cellco Partnership d/b/a Verizon Wireless*, 365 NLRB No. 38, slip op. at 9 (Feb. 24, 2017) (Miscimarra concurring that rule requiring employees to protect "confidential personal employee information" was lawful because it listed as examples "social security numbers, identification numbers, passwords, bank account information and medical information").

[21] *Boeing Co.*, 365 NLRB No. 154, slip op. at 5.

7-related photographs of company documents—such as the Employer's handbook—that employees have the right to possess. But viewed in context with the prior sentence listing confidential company information (staffing, inventory, company goals/strategies, patient information), and the Social Media Policy's savings clause, employees would understand that this paragraph's last sentence is focused on legitimately confidential information, not Section 7 communications.

2. **Keep internal communications and information confidential.** Internal communications programs that CVS Health uses to provide employees with information about the company, including town hall meetings, employee forums, internal e-mails and memos, are designed specifically to inform and engage our colleagues about our company. While some of the information discussed as part of these communications may already be public, they are not designed for external audiences and it is important that the information be kept confidential. Employees may not take information that is provided internally and post it to internet message boards or blog sites, nor disclose it in other public forums. Photos of internal-only presentations, slides, designs, prototypes and/or meetings should not be shared on social media.

We conclude that this rule's restriction on publicly disclosing company-provided "internal" communications and information is lawful. This rule is akin to those restricting disclosure of "company business," which the General Counsel has determined falls in Category 2.[22] Many of the Employer's internal communications programs are undoubtedly unrelated to employees' terms and conditions of employment. Although the rule is arguably broad enough to cover communications that do concern such matters—the rule forbids employees from disclosing any "information that is provided internally"—the focus of the rule is on Employer *presentations* to employees, which employers are permitted to keep confidential. Moreover, the Social Media Policy's savings clause helps clarify that the rule does not restrict Section 7 communications regarding working conditions. Thus, the savings clause states that the policy does not "limit your legal right to use social media to speak about . . . working conditions, wages, or union related topics or activities with others inside or outside the Company."

[22] *See* GC Memorandum 18-04, at 17.

We also conclude that the last sentence of the rule, concerning "[p]hotos of internal-only presentations," etc., is lawful because employees do not have a right under the Act to disclose internal company documents.[23]

3. **Distinguish personal social media and work social media.** Personal opinions should be stated as such. CVS Health colleagues who choose to mention or discuss their work, CVS Health, colleagues, or CVS Health products or services in personal social media interactions must identify themselves by their real name and, where relevant, title or role. You must also identify that you work for CVS Health and must make clear in your postings that you are not speaking for or on behalf of CVS Health.

The following disclaimers *must be used* on your personal social media accounts if you are speaking about CVS Health in any way, including re-sharing information from official CVS Health social media accounts:

- Twitter or other similar platforms with very restrictive word count allowances – use one of the following options at the end of your bio. (It is not necessary to include this information in actual posts):
    - *Tweets my own.*
    - *Views my own.*
    - *All thoughts my own.*
- For individual posts you may be authoring on other platforms with less restrictive word counts, including comments on blogs and news sites – use one of the following options, appended to the end of your post or comment:
    - *The opinions expressed in this post and in any corresponding comments are the personal opinions of the original authors, not those of CVS Health. They may not be used for advertising or product endorsement purposes.*
    - *The opinions expressed in this post and in any corresponding comments are the personal opinions of the original authors, not those of CVS Health.*

[23] *See, e.g., Roadway Express*, 271 NLRB 1238, 1239 (1984) (taking employer's private business records from limited-access office and giving it to union, in attempt to enforce collective-bargaining agreement's work-preservation clause, unprotected).

We conclude that the rule's requirement that employees identify themselves by their real name is unlawful for the same reasons that the identical restriction in the CVS Colleague Handbook is unlawful (*see* Section B.1. of this memorandum, above). This determination is not changed by the Social Media Policy's savings clause. Although the savings clause is in some ways comprehensive, it does not mitigate the chilling effect of the self-identification requirement.

We also find, however, that the rule's disclaimer requirements are in support of the Employer's legitimate business interest in ensuring that only authorized personnel speak on its behalf and are not unlawful. In particular, we note that the requirements for Twitter and other similar platforms with restrictive word count allowances are not burdensome—employees only need to post one of the disclaimers at the end of their Twitter bio, not after every "tweet." And, although the disclaimers are in singular form, employees would not reasonably construe them as restricting Twitter messages reflecting concerted action. The Social Media Policy's savings clause further bolsters this determination. Accordingly, any impact on Section 7 rights would be comparatively slight.

4. **Leave employee recommendations to the formal process.** Professional Employment recommendations, references or testimonials regarding current and former Employees should not be made in a social media posting. These are matters to be handled by the HR Department.

We conclude that this rule is facially lawful. Read in context, employees would understand that this rule—which mentions *professional* employment recommendations, references, etc.—was intended to protect the Employer's legitimate managerial interests concerning references for a current or former employee. The rule is thus akin to rules ensuring that only authorized employees may speak on the Employer's behalf, and employees would not reasonably construe it to prohibit them from writing testimonials about mismanagement that affects working conditions. This view is further bolstered by the Social Media Policy's savings clause.

5. **Use social media appropriately.** Social media is not the appropriate venue for voicing complaints about the Company or particular colleagues that could be resolved more constructively through the appropriate channels consistent with the Company's commitment to maintain a diverse and safe workplace. If CVS Health colleagues wish to use social media to voice complaints or criticisms, they must avoid posting anything that is or could be viewed as discriminatory, harassing, threatening, defamatory, or invasive of another individual's privacy. Such prohibited posts may include disparaging customers, falsely and intentionally harming someone's reputation, bullying co-workers, or otherwise creating a hostile work environment. Threats of violence, discrimination and harassment will not be tolerated.

We conclude that this rule is lawful. Initially, the General Counsel has determined that rules regarding disparagement or criticism of the employer fall in Category 2.[24] Concerted criticism of a company's employment and compensation practices is central to rights guaranteed by the NLRA, and a restriction on "voicing complaints about the Company," without any additional context, would likely cause employees to refrain from this kind of protected concerted activity, and from the kinds of discussions that are often the seed for protected concerted activity. Here, however, employees would not reasonably interpret the rule in this way. First, the rule is about the Employer's commitment to maintain a safe and diverse workplace, and it advises employees that if they have complaints about those issues, going through official company channels is more constructive than complaining on social media. And the second sentence of the rule makes clear that employees remain free to complain or criticize on social media, but that such complaints should be made civilly.[25] Finally, we note that the rule's penultimate sentence, which prohibits, among other things, *falsely and intentionally* harming someone's reputation, is focused on knowingly false statements.

Based on the foregoing, the Region should issue complaint, absent settlement, as to the rules requiring employees to identify themselves by their real name when discussing the Employer or their work on social media, and the rules restricting employees from disclosing "employee information" on social media. The Region should dismiss, absent withdrawal, the allegations concerning the other submitted rules.

/s/
J.L.S.

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[24] *See* Memorandum GC 18-04, at 17.

[25] *See Boeing Co.*, 365 NLRB No. 154, slip op. at 4 n.15; *Comprehensive Healthcare Management Services, LLC d/b/a Brighton Rehabilitation & Wellness Services*, Case 06-CA-209251, Advice Memorandum dated July 3, 2018, at 5.