Labor & Employment ADVISORY

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NLRB Strikes Down Handbook Policy on Social Media as Overbroad

On September 7, 2012, the National Labor Relations Board (NLRB or the "Board") held that an employer's social media policy prohibiting statements that "damage the Company, defame any individual or damage any person's reputation" violated the National Labor Relations Act (NLRA). The Board found that employees would reasonably construe the policy to restrict certain protected concerted activities, namely communications, regarding the employer's treatment of its employees.

Background

In recent years, the NLRB has taken the position that it has the authority to regulate employer policies on the use of social media.

Section 7 of the NLRA applies to both union and non-union employers and grants employees the right "to self-organization, to form, join, or assist labor organizations . . . and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . ." The NLRB's position is that certain restrictions on communication through social media unlawfully restrict these rights in violation of § 8(a)(1). Traditionally, a work rule violates § 8(a)(1) of the NLRA when it tends to chill employees in the exercise of their § 7 rights, either by application or by reasonable interpretation of its terms.

On May 30, 2012, the NLRB General Counsel issued a report—the third in a series of three—outlining his position on employer policies governing social media. The highlights of his report are summarized as follows:

- Employer policies that restrict whether or how employees talk about work on social media websites will often be construed as restricting protected concerted activity.
- Employer policies that contain blanket restrictions—without appropriate qualifying language—that prohibit disclosing confidential information, addressing controversial topics, or using company trademarks and logos, will often be construed as overbroad and/or impermissibly vague.
- Employer policies that use disclaimers and specific examples that focus on non-section 7 conduct to ensure restrictions cannot be misconstrued are recommended.

An example of a lawful policy governing employee social media use under the NLRA, as provided by the NLRB's General Counsel, can be viewed at: http://www.nlrb.gov/news/acting-general-counsel-releases-report-employer-social-media-policies.

While NLRB administrative law judges have ruled on social media policies in several cases (discussed in the General Counsel's May report), prior to the September 7th decision, the Board itself had not issued a binding decision on this issue.

The NLRB's Decision

The complaint challenged several of Costco Wholesale Corporation's ("Costco") employee handbook policies as violating § 8(a)(1), including Costco's policy on employee use of social media. The relevant portion of Costco's social media policy read as follows:

> Employees should be aware that statements posted electronically (such as to online message boards or discussion groups) that damage the Company, defame any individual or damage any person's reputation, or violate the policies outlined in the Costco Employee Agreement, may be subject to discipline, up to and including termination of employment.

Using its traditional analytical framework, the Board concluded that the rule would chill employees in the exercise of their § 7 rights and therefore violated § 8(a)(1). The Board reasoned that the policy's broad prohibition against making statements that "damage the Company, defame any individual or damage any person's reputation" clearly encompassed protected activity, and, without qualifying language that restricted the policy to non-section 7 activities, allowed employees to reasonably conclude that certain protected activities were prohibited. The Board's opinion mentioned several times that the policy appeared to prohibit the protected activity of communicating criticisms about Costco's treatment of its employees.

The Board distinguished several decisions where it upheld rules prohibiting certain employee statements, for example, verbal abuse, profane language, harassment, or conduct that is injurious, offensive, threatening, or intimidating to other employees.

Implications of the *Costco* Decision

The primary takeaway from the *Costco* decision is that the current NLRB is going to pursue a highly employee-friendly approach when analyzing employers' social media policies. Employers should be aware that the Board will not accept policies with generalized prohibitions, especially when those prohibitions encompass communications that may be critical of the employer's treatment of its employees. Rather, to pass muster under the Board's current interpretation of the NLRA, social media policies need to be narrowly tailored to prohibit only conduct that is not protected under § 7.

In light of this decision, in order to minimize risks associated with potentially unlawful social media policies, employers should consider doing the following:

- carefully reviewing the General Counsel's report and the recent NLRB decision;
- reviewing social media and electronic communication policies;

- maintaining reasonable restrictions regarding confidential information, inappropriate language and content, false information, and speaking on behalf of company;
- avoiding broad or vague restrictions on social media and electronic communications;
- using limiting and clarifying language in these restrictions, as well as specific examples of permissible and impermissible conduct that make clear the prohibitions apply to conduct not protected by § 7; and
- consulting counsel to determine the best approach for drafting an effective social media policy for your company.

Finally, as employers assess the various risks associated with their employees' use of social media in connection with the workplace, it is important to note that penalties for simply instituting a social media policy found to be in violation of the NLRA are not particularly harsh and generally include: (1) posting a notice of the violation, (2) rescinding or modifying the violating language, and (3) providing employees with inserts reflecting a provision has been rescinded or modified. The potential risks associated with an unlawful policy increase significantly, however, if an employee is terminated as a result of the unlawful policy and subsequently files an unfair labor practice charge challenging the policy and the resulting discharge.

The NLRB decision can be viewed at: http://nlrb.gov/cases-decisions/case-decisions/board-decisions.

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