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NLRB Tackles Social Media Policies and a Firing Related to a Facebook Posting

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This article addresses two recent National Labor Relations Board decisions. The first found the electronic posting rules of Costco Wholesale Corp. overly broad. The second found a "courtesy rule" of car dealership Karl Knauz Motors Inc. overly broad, but upheld the car dealership's firing of an employee regarding his Facebook posting. These decisions follow the May 30, 2012 report from the NLRB's acting general counsel that criticized employer social computing policies and signaled that the NLRB will follow the report in future rulings.

Employers should note that, regardless of whether a workplace is unionized, acting against employees who violate social media or other business communication policies could have National Labor Relations Act implications and offer otherwise unprotected employees relief. Employers should review their policies to ensure they are not overbroad and neither explicitly restrict Section 7 rights, nor potentially chill them.

Page 22 of the acting general counsel's May 30, 2012 memo (the "Memo") provided an example policy considered valid under the NLRA. Employers should review it and compare it to their social media policies. Policies should specifically address information employers are genuinely trying to protect, such as trade secrets or patient data. However, these recent decisions do not address whether a savings or disclaimer clause that attempts to limit a policy's application to Section 7 rights would be sufficient to cure an otherwise unlawfully broad policy. The Memo rejected this position, but the Board's decision left unanswered whether the NLRB will adapt a "savings clause" argument in future cases.

General NLRA Rights

Generally, an employer violates Section 8(a)(1) of the NLRA when it maintains a work rule that reasonably tends to chill employees in the exercise of Section 7 rights. Section 7 of the NLRA protects employees, regardless of whether they are unionized, who engage in "protected concerted activity." This necessarily includes the right to discuss and criticize their employers with co-workers if engaged in collective bargaining or other "mutual aid or protection." In reviewing an employer's workplace rules regulating social media and other forms of expression, the Board's analysis begins with whether the rule *explicitly* restricts activities protected by Section 7. If it does not explicitly restrict activity protected by Section 7, whether a policy violates the NLRA depends upon a showing of one of the following: (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.

The Costco Policies

In Costco's case, the NLRB reviewed several rules, including one that stated, "employees shall refrain from discussing private matters of members and other employees. This includes such topics as, but not limited to, sick calls, leaves of absence, FMLA callouts, ADA accommodations, workers' compensation injuries, personal health information, etc." The NLRB upheld the administrative law judge's (ALJ) finding that the rule explicitly prohibits Section 7 activity because all of the "private matters" are terms and conditions of employment that would preclude employees from discussing these terms with anyone, including other employees or union representatives, so it is overbroad and unlawful. The rule was also found ambiguous because it did not contain any language limiting its application to the protection of private information contained in the employer files that must be kept confidential. The NLRB noted in particular that the Costco policy did not contain any modification or limitation on the application of the rule to non-protected activity.

The Board also reviewed Costco's "Electronic Communications and Technology Policy," which included the following language: "Sensitive information such as membership, *payroll*, confidential financial, credit card numbers, social security number or employee personal health information may not be shared, transmitted, stored for personal or public use without prior management approval. Additionally, *unauthorized removal of confidential material from Company premises is prohibited."* Although the ALJ found that the portions of the policy prohibiting the dissemination of confidential financial information, credit card numbers, social security numbers or employee personal health were non-Section 7 items, the payroll portion of the policy was unlawful because it included discussion of wages and other terms and conditions of employment, and the Board agreed.

Also, the NLRB found that the policy unlawfully prohibited employees from sharing information that included an employee's name, address, telephone number or email address, which violated Section 8(a)(1). The NLRB expressed concern that the policy did not contain a savings clause that would at least carve out or exclude Section 7 conduct from the Rule, nor did the policy distinguish between information obtained in the normal course of work, or from contact or discussions with other employees; from information learned from an employer's private or confidential records.

The NLRB also reviewed a different Costco policy requiring employees to use "Appropriate Business Decorum" in communicating with others and Precluding Employees from Damaging Another Employee's Reputation." Although the NLRB agreed that the "Appropriate Business Decorum" part of the rule did *not* violate Section 8(a)(1) because it merely regulated the manner of the speech, it found that the portion of the rule that prohibits employees from electronically posting statements that "damage the Company…or damage any person's reputation" *did in fact* violate Section 8(a)(1) because it impacted the content of speech. The NLRB specifically found that the prohibition "clearly encompasses concerted communications protesting the Respondent's treatment of its employees." The NLRB also distinguished the offending rule with other cases in which it upheld restrictions for language that was "malicious, abusive or unlawful," "verbal abuse," "abusive or profane language," and "harassment" or "conduct which is injurious, offensive, threatening, intimidating, coercing or interfering with other employees" as more specific and narrow restrictions.

Karl Knauz Motors Inc.'s Courtesy Policy

Similarly, the NLRB found the car dealership's "courtesy policy," which stated that "[n]o one should be disrespectful or use profanity or any other language which injures the image or reputation of the Dealership," was too broad. The NLRB found in this case that the rule, unlike the Costco policy, went beyond attempting to restrict the manner of speech, to impact the content of speech because of the sanctions that could be imposed on employees who engaged in protected Section 7 speech covered by the rule. The NLRB was troubled by the fact that the policy, like the Costco policy, did not contain any statement that communications protected by Section 7 were not covered.

Although it found that the policy violated the NLRA, the NLRB upheld the dealership's firing of a salesman who posted photos and sarcastic comments about an accident at a dealership next door. That accident involved a customer's son who was allowed to sit behind the wheel of a car after a test drive and apparently hit the gas, driving the vehicle into a pond. The salesman posted pictures of the accident with the statement: "This is your car. This is your car on drugs." The NLRB upheld the ALJ's finding that the posting was not protected under the NLRA because it was posted absent discussions with any other employees, and was unconnected to the terms and conditions of employment.

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