

CLIENT ALERT

NLRB Issues its First Social Media Policy Decision

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In a case of first impression, addressing whether an employer's social media policy is lawful under the National Labor Relations Act (NLRA), the National Labor Relations Board (NLRB or "Board") held that Costco's social media policy, which prohibited social media postings that damage the reputation of Costco or any person, was unlawful because it was overly broad and had a reasonable tendency to inhibit employee protected activity under the NLRA. *Costco Wholesale Corp. and United Food and Commercial Workers Union, Local 371*, 358 NLRB No. 106 (2012). The NLRA prohibits employer practices that "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7," namely, to engage in concerted activities, including the right to make statements critical of an employer's treatment of its employees. Particularly noteworthy in *Costco* was the Board's decision to uphold Costco's rule prohibiting employees from leaving its premises during a work shift without management approval, and its decision to affirm an NLRB administrative law judge's opinion that the company's rule requiring employees to use "appropriate business decorum" when communicating with others was lawful.

The disputed language concerning social media, set forth in Costco's "Electronic Communications and Technology Policy," prohibited employees from posting statements "electronically (such as [to] online message boards or discussion groups) that damage the Company, defame any individual or damage any person's reputation," and warned that employees who violate the policy "may be subject to discipline, up to and including termination of employment."

Holding that "employees would reasonably construe this rule as one that prohibits Section 7 activity," the Board reasoned that the broad prohibitions set forth in Costco's policy "clearly encompass concerted communications protesting [Costco's] treatment of its employees," which are otherwise specifically protected under the NLRA. The Board further explained that there was no language in Costco's policy that provided an exception for protected communications, such as making critical comments about Costco or its managers. Under these circumstances, the Board held, "employees would reasonably conclude that the rule requires them to refrain from engaging in certain protected communications." In invalidating Costco's social media policy, the Board referred to other workplace rules limiting employee communications that have been deemed unlawful, including a rule prohibiting "derogatory attacks" on an employer and its agents, and a rule prohibiting "negative conversations about associates and/or managers."

Another reason the Board concluded that Costco's social media policy ran afoul of the NLRA was, according to the Board, that Costco's policy was devoid of language "that would tend to restrict its application" to communications not protected by Section 7 of the NLRA, i.e., workplace rules that prohibit employee conduct that is "malicious, abusive or unlawful," which is not afforded protection under the NLRA. As a result, the Board concluded, employees would reasonably assume that the ban would also cover certain protected activities, including "communications that are critical" of how Costco treats its employees. In other words, the Costco policy, as construed by the Board, "has a reasonable tendency to inhibit employees' protected activity" and, therefore, is unlawful.

The Board's decision in *Costco* still leaves many unanswered questions about how broadly employers may limit employees' speech on social media without infringing on their Section 7 rights. What is clear, however, is that the Board has adopted much of the reasoning set forth in the memoranda on social media that were previously issued by NLRB General Counsel Lafe Solomon.

With respect to Costco's rule prohibiting employees from "[l]eaving Company premises during working shift without permission of management," the Board held that the rule was lawful and could not reasonably be construed to limit employees' Section 7 activity. The Board reasoned that because the rule does not include language that could be interpreted to prohibit employees from "walking off" their jobs, "the reference to leaving the premises during worktime would be reasonably understood as pertaining to employees leaving their posts (for reasons unrelated to concerted activity) without first seeking permission."

As for Costco's rule requiring employees to use "appropriate business decorum" in their communications with others, the Board adopted the reasoning of an administrative law judge (ALJ) who upheld the rule. In holding that the "appropriate business decorum" rule lawful, the ALJ explained that "a reasonable employee would infer that [Costco's] purpose in promulgating the challenged rules was to ensure a civil and decent workplace and not to restrict Section 7 activity."

In light of the *Costco* decision and the General Counsel memoranda, and as set forth in our February 2, 2012 Client Alert, it is prudent for employers to ensure that the limitations on employee speech or conduct contained in social media policies are specific and narrowly drawn, and that the contexts in which such restrictions apply are clearly defined. Based on the Board's observation that Costco's policy was devoid of language excluding protected communications from its broad restrictions, it is likewise worthwhile to include language in social media policies that makes clear that the restrictions set forth in the policy are not intended to limit employees' Section 7 rights, which should be summarized by employers in easy-to-understand terms.

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