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Social Media Policies in the NLRB's Crosshairs

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Between the summer of 2011 and the spring of 2012, the Acting General Counsel of the National Labor Relations Board (NLRB), Lafe Solomon, published three Advice Memos[1] that expressed his views on the application of the National Labor Relations Act (NLRA) to social media policies. The memoranda addressed both the legality of particular policy provisions and the legality of discipline issued by employers based on employees' personal social media content. These memoranda, however, revealed only the *litigation* positions that the NLRB's cadre of enforcement attorneys would take in this new and evolving area of the law. The views expressed in the memos did not bind the Board. The Board finally weighed in on September 7, 2012, issuing an opinion that, while not analyzing the employer's social media policy *per se*, revealed the Board's thinking on several provisions commonly found in social media policies.

In *Costco Wholesale Corporation*, 358 NLRB No. 106 (Sept. 7, 2012), the Board addressed a number of different policies the employer maintained. One of the policies, entitled the "Electronic Communications and Technology Policy," provided in relevant part that "[a]ny communication transmitted, stored or displayed electronically must comply with the policies outlined in the [Company] Employee Agreement. 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 [Company] Employee Agreement, may be subject to discipline, up to and including termination of employment."

The administrative law judge (ALJ) concluded that employees would not reasonably construe this policy as regulating or inhibiting protected communications under the NLRA (Section 7 activity). The Board disagreed, remarking that the policy included a broad prohibition and did not include any language to suggest that Section 7 activity was excluded from its reach. Finding that the policy did not include language that would tend to restrict its application and that, as a result, the policy had a "reasonable tendency to inhibit employees' protected activity, the Board held that the policy violated Section 8(a)(1).

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1 *See* Mark Robbins and Jennifer Mora, *The NLRB and Social Media: General Counsel's New Report Offers Employers Some Guidance*, Littler ASAP (Sept. 9, 2011); Philip Gordon, *NLRB Report Challenges Validity of Many Commonly Used Social Media Policies*, Littler ASAP (Jan. 27, 2012); Philip Gordon, *Three's a Charm: NLRB's Acting General Counsel Issues Third Guidance Document on Social Media and Approves One Policy*, Littler ASAP (June 5, 2012).

In finding that the policy violated the NLRA, the Board went on to suggest language that would be permissible. The Board cited prior decisions that approved prohibitions on speech that was: (a) "malicious, abusive or unlawful;" (b) "profane language" and "harassment;" (c) "injurious, offensive, threatening, intimidating, coercing, or interfering with" other employees; and (d) "slanderous or detrimental to the company."

Next, the Board addressed other policies that the ALJ found to violate Section 8(a)(1). These policies included the following provisions, which prohibited employees:

- discussing private matters of members and other employees, including topics such as, but not limited to, sick calls, leaves of absence, FMLA call-outs, ADA accommodations, workers' compensation injuries, personal health information, etc.;
- sharing, transmitting, or storing for personal or public use, without prior management approval, sensitive information, such as membership, payroll, confidential financial, credit card numbers, Social Security numbers or employee personal health information; and
- sharing confidential information, such as employees' names, addresses, telephone numbers and email addresses.[2]

The Board agreed with the ALJ that the policy prohibiting employees from discussing private matters, including health issues, violated the NLRA because all of the "private matters" listed related to terms and conditions of employment. However, the Board reassured employers that they may prohibit discussion of private medical information and other personnel information that comes into an employee's possession through access to company records in the course of their job. The Board's concern with the policy was not the employer's goal of protecting private information, but rather that the policy, as written, precluded discussions of topics that included terms and conditions of employment (*i.e.*, leaves of absence, FMLA leave, etc.). The Board suggested the solution is to add a clarifying paragraph, such as: "This policy does not prohibit you from disclosing or discussing personal, confidential information with others, so long as you did not come into possession of such information through access which you have as part of your formal company duties."

The Board found the policy prohibiting employees from discussing "sensitive information" to be unlawful for similar reasons. It concluded that "payroll," as referred to in the policy, related to a term and condition of employment – namely an employee's own compensation – and thus the rule would inhibit the exercise of Section 7 conduct. The Board rejected the employer's explanation that the term "payroll" referred only to confidential business information such as budgeted payroll and expenses, finding that the policy's context suggested that the term "payroll" was intended to be broader and to encompass compensation and, therefore, could be interpreted to prohibit discussion of employee pay.

Similarly, the Board held that the policy prohibiting employees from sharing confidential information was overbroad because employees have the right to share such information with each other and with third parties, including unions, in the course of protected activities. Because this policy too could be perceived to inhibit Section 7 activity, the Board held it to be unlawful.

The Board held that one provision was not unlawful as written. It rejected the Acting General Counsel's contention that the employer's policy requiring employees to use "appropriate business decorum" in communications, including conversations, violated the NLRA. The Acting General Counsel argued that an employee "could" understand the policy to prohibit discussions regarding the terms and conditions of employment. The Board, however, held that employers are allowed to establish rules intended to promote a "civil and decent workplace." Consequently, according to the Board, as long as a reasonable employee would understand such a rule to be aimed at achieving that purpose, then the fact that the rule might restrict protected activities in some circumstances is irrelevant.

The most significant takeaways from the *Costco* case are not surprising. As expected, the Board closely scrutinized the employer's policies to determine whether the policies would be interpreted by employees to limit protected Section 7 activity. Even where it was apparent that the intent of a policy was not to inhibit Section 7 activity, the risk of an interpretation that would limit Section 7 activity was sufficient to render the policy unlawful in whole.

However, the decision is embedded with suggestions for drafting policies that pass muster with this Board. The Board indicated that "curing" language, including examples clarifying that a policy does not relate to Section 7 activity, may save an otherwise unlawful policy. Further, the decision makes clear that an employer must be cautious of the precise wording it uses in a policy to ensure that there can be no reasonable inference made that the language limits Section 7 activity. To illustrate, if the employer had defined the term "payroll," as used in the policy, to

2 The various policies were maintained as subparts of the same section of the Employee Agreement. The policies are abbreviated here as they were by the Board in its decision.

mean "business information such as budgeted payroll and expenses," as the employer had explained the term to the Board, the policy would likely have been found not to violate Section 8(a)(1).

In short, it is not only social media policies but all handbook policies that are subject to the Board's stringent review.

And, since *Costco*, the Board has been quick to reinforce the impact of that decision with a string of other decisions that cite to Costco and further expound on the Board's treatment of various handbook policies. For example, in *Flex Frac Logistics, LLC*, 358 NLRB No. 127 (Sept. 11, 2012), the Board found part of an employer's at-will employment agreement to be invalid because that agreement prohibited employees from disclosing "confidential information," including "personnel information," to individuals "outside the organization." The Board held that by prohibiting such disclosure, the at-will provision thereby prohibited employees from discussing the terms and conditions of their employment with union representatives.

In *TT&W Farm Products, Inc.*, 358 NLRB No. 125 (Sept. 11, 2012), the Board looked at five handbook provisions addressing employees' leaving their workstations during worktime. While finding that the rules prohibiting unauthorized leaves or breaks were permissible, the Board found that rules prohibiting employees from "walking off the job" or from "willfully restricting production" were unlawful because they prohibited participating in a protected strike.

A few days later, in *Ambassador Services, Inc.*, 358 NLRB No. 130 (Sept. 14, 2012), the Board similarly struck down a work rule prohibiting "walking off the job and/or leaving the premises during working hours without permission" as violative of Section 8(a)(1) because it could reasonably be construed as prohibiting employees' Section 7 rights.

And finally, in *Knauz BMW*, 358 NLRB No. 164 (Sept. 28, 2012), the Board found that a rule in the employer's handbook addressing employee courtesy violated Section 8(a)(1). The rule stated, "No one should be disrespectful or use profanity or any other language which injures the image or reputation of the Dealership." The problem with the rule, according to the Board, was that "employees would reasonably construe its broad prohibition against 'disrespectful' conduct and 'language which injures the image or reputation of the Dealership' as encompassing Section 7 activity." The Board, citing *Costco*, pointed out the absence from the rule of any saving language, noting there was nothing in the handbook or the rule itself "that would reasonably suggest to employees that employee communications protected by Section 7 of the Act are excluded from the rule's broad reach."

What is clear in this recent line of cases is that the NLRB has fully endorsed the Acting General Counsel's prior memoranda on the legality of handbook policies within the context of employee Section 7 rights. It is expected that the Acting General Counsel will continue to issue complaints related to employee handbooks and policies, including social media policies, and that the Board will issue additional rulings that continue to shape this new area of Board law. Consequently, employers should review their handbook policies to ensure that they are carefully drafted to cover only the conduct they are intended to cover and do not tread into protected Section 7 rights.

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