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NLRB Weighs In On Social Media Policies

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Over the past couple of years, the National Labor Relations Board's Acting General Counsel has placed heightened emphasis on the application of the National Labor Relations Act (NLRA) to social media. Most of this emphasis has been on employer policies that "chill" employee rights to engage in protected concerted activity under the NLRA, such as the right to discuss wages, hours, and other terms and conditions of employment. Through three separate reports, the Acting General Counsel has provided guidance regarding employer polices that are overly broad and thus unlawfully regulate protected concerted activity. Whereas the Acting General Counsel has issued guidance and several Administrative Law Judges have opined on this issue, the National Labor Relations Board (NLRB or Board) had not yet weighed in.

This changed on September 7, 2012, when the NLRB issued a decision in *Costco Wholesale Corporation*. In *Costco*, the Board reviewed several policies implicating employee social media use and found that Costco violated the NLRA because these policies were unlawfully overbroad. For example, the Board concluded that several of Costco's policies governing the disclosure of "confidential" information – including "payroll," employee contact information, and "all information relating to Costco and its employees" – unlawfully chilled discussions regarding wages, hours, and other terms and conditions of employment.

One of the key policies at issue directly governed electronically posted statements by employees:

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

Finding that this policy violated the NLRA because it was unlawfully overbroad, the NLRB reasoned that "the broad prohibition against making statements that 'damage the Company, defame any individual or damage any person's reputation' clearly encompasses concerted communications protesting the [Company]'s treatment of its employees." "[N]othing in this rule," continued the NLRB, "even arguably suggests that protected communications are excluded from the broad parameters of the rule." The policy did not, for example, "present accompanying language that would tend to restrict its application" to non-protected statements or conduct "that is malicious, abusive, or unlawful." Accordingly, the NLRB concluded, "employees would reasonably conclude that the rule requires them to refrain from engaging in certain protected communications (i.e., those that are crucial of the [Company] or its agents)."

The decision in *Costco*, when considered in light of prior reports from the Acting General Counsel and decisions from Administrative Law Judges, confirms that employers – even those without a unionized workforce – should revisit their policies (including their social media policy) to ensure they are compliant. Miller Canfield's Employment and Labor Department follows these rapidly developing changes in this area of the law and is available to assist employers to continue to navigate these murky waters.

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