JONES DAY

OCTOBER 2012

NATIONAL LABOR RELATIONS BOARD ISSUES TWO DECISIONS ENJOINING EMPLOYER RULES LIMITING SOCIAL MEDIA ACTIVITIES

In recent weeks, the National Labor Relations Board ("NLRB" or "Board") has issued its first two decisions in the social media context, providing guidance to employers on the permissible scope of employment policies limiting employees' social media use. On September 7, 2012, in its first substantive decision involving social media, the Board held that several employee handbook provisions governing electronic communications violated Section 8(a)(1) of the National Labor Relations Act ("NLRA"), including a provision prohibiting employees from electronically posting statements that "damage the Company, defame any individual or damage any person's reputation." *Costco Wholesale Corp.*, 358 N.L.R.B. No. 106 (Sept. 7, 2012). Just three weeks later, on September 28, the NLRB issued a second decision involving social media, holding that a rule encouraging "courtesy" in communications with customers and other employees violated the NLRA while upholding an employee's discharge for an "unprotected" Facebook posting. *Knauz BMW*, 358 N.L.R.B. No. 164 (Sept. 28, 2012).

While the Board's two September decisions purport to apply traditional NLRA standards for evaluating employer policies, the decisions are significant for a number of reasons. First, these cases are the first precedential Board decisions addressing the NLRA's application to social media policies. Second, they continue a developing trend at the Board of invalidating facially neutral employment policies primarily applicable to *non-union* employees, even in the absence of any evidence of discriminatory enforcement against union activities. And, third, these decisions confirm that the current Board will likely endorse the NLRB's Acting General Counsel's ("AGC") broad-based challenges to social media policies on the basis that employees would "reasonably construe" them as restricting their Section 7 rights to communicate about wages, hours, and working conditions.

THE *COSTCO* DECISION

The Board in *Costco* breaks no new ground on the applicable legal standards for reviewing employer policies under the NLRA. As outlined in the June 2012 *Jones Day Commentary*, "NLRB Acting General Counsel Issues Enforcement Guidance on Social Media Policies," *available at* http://www.jonesday.com/nlrb_acting_general_counsel, the Board in *Lutheran Heritage Village Livonia*, 343 N.L.R.B. 646 (2004), reaffirmed that a rule is unlawful if it "reasonably tends to chill employees in the exercise of their Section 7 rights." *Id.* at 646. To make that determination, the Board follows a two-step inquiry. First, a rule is unlawful if it explicitly restricts activities that Section 7 of the NLRA protects. Second, "[i]f the rule does not explicitly restrict activity protected by Section 7," it is still unlawful if "(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." *Id.* at 647. In conducting this inquiry, the Board "must refrain from reading particular phrases in isolation, and it must not presume improper interference with employee rights." *Id.* at 646.

Applying these standards in *Costco*, the Board held that several provisions in Costco's Electronic Communications and Technology Policy and the Costco Employee Agreement unlawfully inhibited employees' rights under the NLRA, either because they explicitly restricted protected activities or because employees would "reasonably construe" them as prohibiting such activities. In finding the following provisions unlawful, the Board provided some insight into how it will evaluate social media policies, including whether the policies contain sufficient "accompanying language" to make clear, in context, that they do not restrict protected activities:

Postings that "Damage the Company, Defame Any Individual or Damage Any Person's Reputation." Overruling the ALJ, the Board invalidated Costco's rule stating that employees could be disciplined for "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." 358 N.L.R.B. No. 106, at *1. The Board concluded that "by its terms, the broad prohibition against making [such] statements ... clearly encompasses concerted communications protesting the Respondent's treatment of its employees" and that employees would "reasonably conclude that the rule requires them to refrain from engaging in certain protected communications (i.e., those that are critical of the Respondent or its agents)." *Id.* at *2. The Board added that "nothing in the rule ... even arguably suggests that protected communications are excluded from the broad parameters of the rule"—even though the ALJ had found that the rule, read in context, was clearly intended to promote a "civil and decent workplace" and not to restrict protected communications. *Id.* at *2, 14. Contrasting prior Board decisions validating rules prohibiting similarly "detrimental" statements, the Board stated that the Costco rule "does not present accompanying language that would tend to restrict its application." *Id.* at *2.

Sharing of "Confidential" Information. The Board also invalidated several employment policies restricting electronic disclosure of "confidential information"—adopting the AGC's previously articulated position that employees would reasonably construe restrictions on discussing "confidential" information to prohibit discussion of wages and other terms or conditions of employment. On that basis, the Board agreed with the ALJ that the following restrictions were overly broad:

- **Rule stating that "[s]ensitive information" such as payroll information "may not be shared, transmitted, or stored for personal or public use without prior management approval."** *Id.* at *1. The Board held that employees would construe this provision as applying to employee wages and not just the "confidential business information component of payroll"—even though the reference to "payroll" appeared among a list of what the ALJ considered "clearly non-Section 7 items, such as 'confidential financial,' 'credit card numbers,' 'social security numbers' or 'employee personal health' information." *Id.* at *12.
- **Rule prohibiting the sharing of "confidential information" such as employees' names, addresses, phone numbers, and email addresses.** The Board concluded that employees would reasonably construe this rule as prohibiting the sharing of such contact information with other employees and unions for organizational purposes. Because the rule could be read to apply to information that employees

obtained during the normal course of their work, as opposed to the employer's confidential files, the rule was deemed overly broad.

- **Rule prohibiting employees from discussing "private matters of members and other employees … includ[ing] topics such as, but not limited to, sick calls, leaves of absence, FMLA call-outs, ADA accommodations, workers' compensation injuries, personal health information, etc."** *Id.* at *1. The Board concluded that this policy not only "explicitly prohibits" protected activities, but that employees would reasonably construe it to prohibit discussions of terms and conditions of employment with other employees or unions, rejecting the employer's argument that, in context, the rule was intended to prevent disclosure of personal health information. *Id.* at *10.

Finally, the Board concluded that one provision of the challenged Costco electronic communications policy was lawful: a rule requiring employees to use "appropriate business decorum" in their electronic communications. *Id.* at *13. The Board adopted the ALJ's reasoning that the AGC had to prove that employees "*would* reasonably construe"—not simply "*could*" construe—the rule as prohibiting protected activities. On that basis, the Board held that this rule was intended to promote a "civil and decent workplace" and that employees would not reasonably construe the rule to restrict protected activities. *Id.* at *14.

THE *KNAUZ BMW* DECISION

Three weeks after deciding *Costco*, a majority of the Board applied that decision in invalidating a "courtesy" provision in an auto dealership's handbook governing its non-union employees, triggering a sharp dissent from Board Member Hayes. In *Knauz BMW*, the three Board members agreed on one thing: to uphold the discharge of an employee for "his unprotected Facebook postings about an auto accident" at an adjacent dealership, which did not relate to his own terms and conditions of employment. 358 N.L.R.B. No. 164, at *1 n.1. However, the majority and Member Hayes sharply disagreed on the lawfulness of the "courtesy" policy, which stated that employees were expected to be "courteous, polite and friendly" to customers, vendors, suppliers, and coworkers and added that employees should not be "disrespectful or use profanity or any other language which injures the image or reputation of the Dealership." *Id.* at *1.

The majority concluded that this "courtesy" rule was unlawful because employees "would reasonably construe its broad prohibition[s] … as encompassing Section 7 activity, such as employees' protected statements … that object to their working conditions and seek the support of others in improving them." *Id.* Citing *Costco*, the majority found "nothing in the rule, or anywhere else in the employee handbook, that would reasonably suggest to employees that employee communications protected by Section 7 of the Act are excluded from the rule's broad reach." *Id.* In the majority's view, employees "reading this rule would reasonably assume that the Respondent would regard statements of protest or criticism as 'disrespectful' or 'injur[ious] [to] the image or reputation of the Dealership.'" *Id.* While the majority noted that it might have agreed that the "courtesy" statement, alone, could be viewed as a commonsense behavioral standard, it dismissed that "context" and faulted the policy for its added language that "proscribes not a manner of speaking, but the content of employee speech—content that would damage the Respondent's reputation." *Id. at *2.*

Member Hayes dissented, asserting that the majority improperly invalidated the courtesy policy "by reading words and phrases in isolation and by effectively determining that the [NLRA] invalidates any handbook policy that employees conceivably could construe to prohibit protected activity, regardless of whether they *reasonably* would do so." *Id. at* *3. He thus dissented "[b]ecause the majority's analysis departs from precedent, and because employees and employers alike have a right to expect a civil workplace, promoted through policies like the one that [the majority] find[s] unlawful." *Id.*

THE IMPACT OF *COSTCO* AND *KNAUZ BMW*

The *Costco* and *Knauz BMW* decisions confirm that the current Board believes that both union and non-union employees have a federally protected right under the NLRA to communicate about their employers and working conditions

using social media. However, this right is not unlimited. In *Knauz BMW*, the Board recognized that the NLRA does not protect certain statements that have no connection to terms and conditions of employment and are not part of a conversation among affected employees, and that employers can lawfully discipline employees for such unprotected social media communications. Employers must await future NLRB decisions to determine where these lines will be drawn, and when employees' social media activities fall into the realm of unprotected activities.

The *Costco* and *Knauz BMW* decisions also confirm that the Board will view social media policies using the same legal framework that it applies to other employment policies. Employing its "reasonable employee" standard, the Board will carefully scrutinize individual provisions in social media policies to determine whether employees would reasonably construe these policies to restrict employees' exercise of their statutory rights to organize unions and discuss terms and conditions of employment. On this point, employers can expect the current Board to invalidate employment policies, even policies designed to promote courtesy and civility in the workplace, if these policies could be interpreted to apply to Section 7 activities. The *Costco* and *Knauz BMW* decisions also signal that the current Board may adopt the positions that the AGC has advocated in his Operations Memoranda on social media. *See,* e.g., NLRB, Operations Memorandum 12-59 (May 30, 2012) ("OM 12-59"), *available at* http://www.nlrb.gov/publications/operations-management-memos.

For now, it is clear from *Costco* and *Knauz BMW* that the Board will critically view social media policies that contain broad-brush prohibitions on disclosure of "confidential information" and communications that "damage" the employer or "injure" its reputation, unless the employer includes in its policy appropriate "accompanying language that would tend to restrict its application." 358 N.L.R.B. No. 106, at *2. What that means, however, is far from clear. At a minimum, the *Costco* and *Knauz BMW* decisions indicate that broad language like "confidential information" and "damaging" or "disrespectful" statements must be narrowed through lists, examples, or other accompanying language describing the types of conduct that the policy prohibits. Whether an express disclaimer (e.g., stating that the policy does not apply to Section 7 activities or interfere with employees' NLRA rights) would constitute such "accompanying language" remains to be seen. Such a disclaimer was not before the Board in *Costco* or *Knauz BMW*, and the Board, therefore, did not address the AGC's view that a disclaimer does not cure a defectively overbroad social media policy.

The *Costco* and *Knauz BMW* decisions leave unresolved several other important questions regarding employees' social media activities. They do not decide whether employees have the legal right to use an employer's computer equipment for social media communications and whether employers can proscribe such activities during working time. They likewise do not discuss whether an employer can lawfully monitor the social media communications of its employees. And, as noted above, these cases do not clearly define the boundaries of when an employer may lawfully discipline employees for communications on social media channels. However, the NLRB will likely confront these and other social media issues as more cases on social media reach the Board in coming months.

MORE ALJ DECISIONS IN THE PIPELINE

The *Costco* and *Knauz BMW* decisions will not be the final word on social media policies. On September 20, another ALJ issued a decision invalidating an employer's overbroad social media policy, finding that its restrictions tended to "chill" employees in the exercise of their Section 7 rights. In *Echostar Technologies, LLC*, Case No. 27-CA-066726 (N.L.R.B. Div. of Judges, Sept. 20 2012) (Anderson, ALJ), the ALJ found unlawful a social media policy's restriction on making "disparaging or defamatory comments" about the employer or "its employees, officers, directors, vendors, customers, partners, affiliates, or our, or their, products/services." The ALJ concluded that a reasonable employee would read the prohibition against "disparaging" comments to intrude on protected activities, citing the *Costco* decision, and that the rule's broader context did not negate that interpretation. The ALJ also concluded that the policy's legal disclaimer "does not save an otherwise invalid rule under the Act."

Numerous other ALJ decisions have recently addressed social media policies, ensuring that the Board will have more

to say about social media policies after *Costco* and *Knauz BMW*. *See*, e.g., *Cent. Peninsula Hosp., Inc.*, 19-CA-32835, 19-CA-32977, 2012 WL 3144634 (N.L.R.B. Div. of Judges Aug. 2, 2012) (Kocol, ALJ) (rejecting AGC's challenge to hospital policy prohibiting serious misconduct or conduct that interfered with hospital operations, including conduct on social media outside of the workplace, as unlawfully overbroad; policy contained nonexclusive list of rules "in an effort to avoid misunderstanding[s] about what constitutes acceptable behavior in the workplace," including list of at least 15 types of "serious misconduct" that could lead to immediate termination); *General Motors, LLC*, Case No. 07-CA-53570 (N.L.R.B. Div. of Judges, May 30, 2012) (Sandron, ALJ) (finding some parts of social media policy unlawful but upholding restriction on use of employer logo and rule stating that "offensive, demeaning, abusive or inappropriate remarks are as out-of-place online as they are offline"); *Triple Play Sports Bar & Grille*, Case Nos. 34-CA-12915 & 12926 (N.L.R.B. Div. of Judges, Jan. 3, 2012) (Esposito, ALJ) (rejecting argument that social media policy prohibiting "inappropriate" communications was unlawful); *G4S Secure Solutions (USA) Inc.*, Case No. 28-CA-23380 (N.L.R.B. Div. of Judges, Mar. 29, 2012) (Laws, ALJ) (finding parts of social media policy unlawful but upholding restriction on posting photos of uniformed employees based on employer privacy concerns).

DRAFTING SOCIAL MEDIA POLICIES

While these and other social media cases work their way through the Board's adjudicative processes, employers should consult with legal counsel to draft and revise social media policies to conform to the guidance in the Board's *Costco* and *Knauz BMW* decisions, especially heeding the importance of adding "accompanying language" to narrow otherwise broad terms and provide context. The June 2012 *Jones Day Commentary* provides some guidelines for writing social media policies. *See* "NLRB Acting General Counsel Issues Enforcement Guidance on Social Media Policies," *available at* http://www.jonesday.com/nlrb__acting__general__counsel. In the meantime, as more decisions on social media are appealed to the Board and eventually the courts, employers will need to continue monitoring how the Board applies traditional legal standards to various social media policies on a case-by-case basis, and how employers can draft their policies to survive challenge under the NLRA.

LAWYER CONTACTS

For further information, please contact your principal Firm representative or one of the lawyers listed below. General email messages may be sent using our "Contact Us" form, which can be found at www.jonesday.com.

Lawrence C. DiNardo
Chicago
+1.312.269.4306
lcdinardo@jonesday.com

George S. Howard, Jr.
San Diego
+1.858.314.1166
gshoward@jonesday.com

Patricia A. Dunn
Washington
+1.202.879.5425
pdunn@jonesday.com

G. Roger King
Columbus
+1.614.281.3874
rking@jonesday.com

Willis J. Goldsmith
New York
+1.212.326.3649
wgoldsmith@jonesday.com

Jessica Kastin
New York
+1.212.326.3923
jkastin@jonesday.com

F. Curt Kirschner, Jr.
San Francisco
+1.415.875.5769
ckirschner@jonesday.com

E. Michael Rossman
Columbus
+1.614.281.3866
emrossman@jonesday.com

Stanley Weiner
Cleveland
+1.216.586.7763
sweiner@jonesday.com

James S. Urban
Pittsburgh
+1.412.394.7906
jsurban@jonesday.com

Brian W. Easley
Chicago
+1.312.269.4230
beasley@jonesday.com

Robert L. Ford
San Francisco
+1.415.875.5740
rlford@jonesday.com