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NLRB's Social Media Initiative: Not Much To "Like"

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Under the mantra of preserving workers' rights under the National Labor Relations Act ("NLRA"), the National Labor Relations Board ("NLRB" or "Board") has actively pursued a number of initiatives designed to extend the Act's protections and expand the NLRB's relevance in union and non-union workplaces alike. Few initiatives have garnered more attention than the NLRB Acting General Counsel's ("AGC") efforts to protect employee activities on Facebook and other social media. Embracing the modern and expansive playing field that social media provides, the AGC has launched a two-pronged attack, challenging employers' discipline of employees for "protected concerted activities" on social media and the lawfulness of employers' social media policies. These developments underscore that all employers – even those without unions – must be vigilant about their NLRA obligations in the evolving world of social media.

In September, the Board issued its first substantive decisions on social media – for the most part siding with the AGC's expansive views on employee rights on social media and invalidating policies that would seem completely innocuous to most employers. In one case, the Board invalidated handbook provisions prohibiting employees from electronically posting statements that "damage the Company, defame any individual or damage any person's reputation" and from disclosing "confidential information" like employees' names, addresses, phone numbers and email addresses. *Costco Wholesale Corp.*, 358 N.L.R.B. No. 106 (Sept. 7, 2012). Just three weeks later, the NLRB invalidated a rule encouraging "courteous, polite and friendly" communications with customers and other employees. *Knauz BMW*, 358 N.L.R.B. No. 164 (Sept. 28, 2012). In both cases, the Board purported to apply traditional NLRA principles, holding that employees would "reasonably construe" these provisions as restricting their NLRA Section 7 rights to discuss wages, hours and other terms and conditions of employment.

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The Board's first two social media decisions are significant. *First*, they are the first precedential Board decisions addressing the NLRA's application to social media, providing authoritative guidance on permissible limits on employees' social media use. *Second*, these cases continue the Board's trend of invalidating facially neutral policies primarily applicable to *non-union* employees, even in the absence of any discrimination against union activities. And, *third,* these decisions confirm that the current Board will likely endorse the AGC's broad challenges to social media policies on the basis that employees would "reasonably construe" them as restricting their rights to discuss their employers and working conditions on social media.

The *Costco* And *Knauz* Decisions

In *Costco,* its first social media decision, the Board broke no new ground on the legal standards for reviewing employer policies. Under *Lutheran Heritage Village Livonia*, 343 N.L.R.B. 646 (2004), a rule is unlawful if it "reasonably tends to chill employees in the exercise of their Section 7 rights." *Id.* at 646. Thus, a rule is unlawful if it explicitly restricts activities that Section 7 protects; "[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 evaluating policies under *Lutheran*, 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 Costco's electronic communications policy unlawfully chilled employees' exercise of their NLRA rights because it either explicitly restricted protected activities or employees would "reasonably construe" it as prohibiting such activities. In so doing, the Board provided insight into how it will evaluate social media policies, including whether they contain sufficient "accompanying language" to make clear, in context, that they do not restrict protected activities:

- The Board invalidated Costco's rule against "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 it 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." *Id.* at *2, 14. Distinguishing prior decisions upholding rules against "detrimental" statements, the Board

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stated that the Costco rule "does not present accompanying language that would tend to restrict its application." *Id*. at *2.

- The Board also invalidated restrictions on electronic disclosure of "confidential information," finding that employees would reasonably construe such restrictions to prohibit discussion of wages and working conditions. The Board thus considered unlawful rules 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"; prohibiting sharing of "confidential information" such as employees' names, addresses, phone numbers and email addresses; and 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.

In *Costco* the Board found one provision lawful: a rule requiring "appropriate business decorum" in electronic communications. *Id*. at *13. The Board adopted the Administrative Law Judge's ("ALJ") reasoning that the AGC had to prove that employees "*would" –* not simply *could* – "reasonably construe" the rule as prohibiting protected activities. Because this rule was intended to promote a "civil and decent workplace," the Board held that employees would not reasonably construe it to restrict protected activities. *Id*. at *14.

Three weeks after *Costco*, two Board members invalidated a "courtesy" provision in an auto dealership's handbook for its non-union employees, triggering a sharp dissent from Member Hayes. In *Knauz,* the three Board members agreed on one thing: facing the first opportunity to address "protected concerted activities" on social media, they upheld an employee's discharge for his Facebook postings about an accident at an adjacent dealership on the basis that those postings did not relate to terms and conditions of employment and were thus "unprotected." 358 N.L.R.B. No. 164, at *1 n.1. The Board did not decide whether the employee's other Facebook postings, criticizing a company marketing event, constituted "protected concerted activities," since the company did not discharge him for those postings.

However, the majority and Member Hayes sharply disagreed on the lawfulness of the "courtesy" policy, which required employees to be "courteous, polite and friendly" to customers, vendors, suppliers and co-workers 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 rule was unlawful because employees "would reasonably construe its broad prohibition[s] . . . as encompassing Section 7 activity." *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 agreed that the "courtesy" statement, alone, might be viewed as a common-sense behavioral standard, it dismissed that "context" and faulted the additional 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 pointed out the difficulty of reconciling the majority's invalidation of this "courtesy" policy with the *Costco* decision upholding a "business decorum" rule. He 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*

Costco and *Knauz* confirm the Board's view that both union and non-union employees have a federally protected right to communicate about their employers and working conditions on social media. For that reason, employers can expect the current Board to invalidate social media policies, even ones designed to promote courtesy and civility, if they could be interpreted to limit Section 7 activities. Under the "reasonable employee" standard that it applies to other policies, the Board will critically view social media policies that contain broad-brush prohibitions on disclosure of "confidential information" and on communications that "damage" the employer or "injure" its reputation, unless "accompanying language" limits those restrictions.

What "accompanying language" will suffice, however, is far from clear. At a minimum, *Costco* and *Knauz* indicate that broad prohibitions must be narrowed through lists, examples or other 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) would constitute such "accompanying language" remains to be seen. Such a disclaimer was not before the Board in *Costco* or *Knauz*; however, the AGC's view that a disclaimer does not cure an overbroad social media policy will likely be addressed in several cases on appeal. *See, e.g., General Motors, LLC*, Case No. 07-CA-53570 (N.L.R.B. Div. of Judges, May 30, 2012) (Sandron, ALJ).

Costco and *Knauz* leave unresolved several other important questions, including whether employees have the right to use an employer's computer equipment for social media communications; whether employers can proscribe such activities during working time; whether employers can lawfully monitor employees' social media use; and when employers can lawfully discipline employees for their social media activities. In *Knauz*, the Board recognized that the NLRA does not protect all statements on social media, including those unrelated to terms and conditions of employment and not part of a conversation among affected employees. But future NLRB decisions will determine where that line between protected and unprotected social media communications will be drawn, as well as what amounts to "concerted" group action on social media (e.g., is hitting the "Like" button enough?).

For now, there is not much for employers to "Like" about the Board's approach to social media. The Board will undoubtedly have more to say on the subject after *Costco* and *Knauz,* as ALJs continue to issue a steady stream of social media decisions. *See, e.g*., *Echostar Technologies, LLC*, Case No. 27-CA-066726 (N.L.R.B. Div. of Judges, Sept. 20 2012) (Anderson, ALJ); *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); *Triple Play Sports Bar & Grille*, Case Nos. 34-CA-12915 & 12926 (N.L.R.B. Div. of Judges, Jan. 3, 2012) (Esposito, ALJ); *G4S Secure Solutions (USA) Inc.,* Case No. 28-CA-23380 (N.L.R.B. Div. of Judges, Mar. 29, 2012) (Laws, ALJ). Until more cases work their way through the Board and the courts, employers will have to glean whatever guidance they can from *Costco* and *Knauz* – and expect more challenges to facially neutral policies promoting civility in electronic communications as the current Board uses social media to redefine its role in protecting the online activities of union and non-union employees alike.