Client Alert

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# First NLRB Decisions on Social Media Give Employers Cause to Update Policies, Practices

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*The National Labor Relations Board ("NLRB") recently issued its first two rulings on employer social media policies and its first ruling on an employee's termination due to posts on Facebook. These rulings are significant for all employers – not just those with unionized workforces – because they provide guidance regarding what social media behaviors will be deemed protected activity under the National Labor Relations Act ("NLRA") and, therefore, what employers can and cannot regulate in their policies and practices.*

The NLRA protects employees' rights to engage in "concerted activity" for the purpose of collective bargaining, or for other mutual aid or protection (Section 7) and prohibits employers from interfering with, restraining, or coercing employees who are exercising rights guaranteed under Section 7 (Section 8). The Acting General Counsel of the NLRB, the government agency that investigates and remedies unfair labor practices, has made litigation of NLRA claims involving social media a priority. Many employers assume – mistakenly – that the NLRA and NLRB are relevant only if their workforce is unionized. To the contrary, the NLRA covers all private employers that have an impact on interstate commerce (with certain exceptions, such as public employers and railways) – approximately six million private employers nationwide. The NLRA's reach is expansive, and when the NLRB determines that an employer's policy inhibits activity protected by the NLRA, all private employers would do well to pay attention.

The Acting General Counsel of the NLRB has issued guidance memoranda concerning social media, and various NLRB administrative law judges have issued opinions in social media cases, but until now, the NLRB itself had never handed down a decision analyzing social media policies or addressing when an employee can be fired for his or her posts on Facebook. However, in September 2012, the NLRB issued two such decisions: *Costco Wholesale Corp.*, 358 NLRB No. 106 (Sept. 7, 2012) and *Karl Knauz Motors*, Inc., 358 NLRB No. 164 (Sept. 28, 2012).

## The *Costco* Decision

In the *Costco* case, the NLRB examined Costco's social media policy, which provided in relevant part:

> 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 Costco's Employee Agreement, may be subject to discipline, up to and including termination of employment.

Reversing the administrative law judge, the NLRB rejected this policy as violating Section 8 of the NLRA because it was overbroad and "would reasonably tend to chill employees" in the exercise of their rights to engage in "concerted activity" as set forth in Section 7 of the NLRA.

The NLRB explained that where a challenged rule or policy does not explicitly restrict Section 7 rights (as was the case with Costco), the violation is dependent upon a showing of one of the following: (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 rules had been applied to restrict the exercise of Section 7 rights.

The NLRB found that, in Costco's case, employees could reasonably conclude that the social media policy prohibited them from engaging in protected communications because the policy contained a broad prohibition that "clearly encompasses concerted communications" protesting Costco's treatment of its employees and contained no language excluding protected communications.

## The Karl Knauz Motors Decision

In *Karl Knauz Motors, Inc.,* an employee of a BMW dealership took pictures of an accident at an adjacent Land Rover dealership owned by his employer in which a customer's 13-year old son drove a Land Rover into a pond. The employee posted the photos on his Facebook page with the caption: "This is your car: This is your car on drugs." The employee was terminated, and the NLRB agreed with the administrative law judge's finding that the employee's post regarding the Land Rover accident was not protected concerted activity because it was posted "as a lark," not as part of protected communications with any other dealership employee, and the post had no connection to any of the employees' terms and conditions of employment.

The terminated employee had also made Facebook posts the same day related to an event at his dealership for the introduction of a new BMW model. At a meeting prior to the event, the employee and one of his colleagues disagreed with the dealership's decision to have a hot dog cart at the event rather than more upscale catering. At the event itself, the employee took photos of the hot dog stand and posted them on his Facebook page with commentary such as "I was happy to see that Knauz went "All Out" for the most important launch of a new BMW in years . . . but to top it all off. . . the Hot Dog Cart. Where our clients could attain a over cooked weiner and a stale bunn [sic]."

The administrative law judge had found that the employee's Facebook post regarding the sales event was a protected "concerted activity" under the NLRA because both he and another employee had spoken up at the earlier meeting regarding the inadequacies of the food being offered at the event and such activity could affect his compensation. However, the NLRB did not address whether these posts regarding the sales event were protected, because the employee was terminated solely due to the unprotected Land Rover Facebook posts, providing little guidance on what type of work-related comments will be considered protected concerted activity.

In addition, applying the same reasoning from its *Costco* opinion, the NLRB affirmed the judge's finding that the employer's "Courtesy" policy in its employee handbook violated Section 8 of the NLRA. The employer's "Courtesy" policy provided as follows:

> (b) Courtesy: Courtesy is the responsibility of every employee. Everyone is expected to be courteous, polite and friendly to our customers, vendors and suppliers, as well as to their fellow employees. No one should be disrespectful or use profanity or any other language which injures the image or reputation of the Dealership.

The NLRB found this policy unlawful because employees could reasonably construe its broad prohibition against "disrespectful" conduct and "language which injures the image or reputation of the Dealership" as encompassing protected Section 7 activity. Just as in the *Costco* opinion, the NLRB specifically focused on the fact that there was nothing in the policy, or in the handbook generally, indicating that protected communications were to be excluded from this policy.[1]

## Best Practices

In light of these NLRB opinions, employers are well-advised to follow these best practices for designing and implementing social media policies:

(1) Promulgate a well-crafted and up-to-date written social media policy that is widely distributed and requires written acknowledgements of receipt by employees.

(2) Apply anti-violence, harassment, and discrimination policies to social media participation.

(3) Apply confidentiality and proprietary information restrictions to social media participation.

(4) Require employees, when disclosing their professional identity, to state that the opinions are their own and not the opinions of the company.

(5) Emphasize personal responsibility for representing the company in a professional manner.

(6) Avoid overbreadth and provide examples to help give context. The NLRB General Counsel has found the following general prohibitions to be overly broad:

   a. "Talking badly" about the employer; posts that "damage" or "disparage" the employer

   b. Posting "anything you would not want your supervisor to see"

   c. Disclosing "sensitive" or "inappropriate" information about the employer

   d. Posting pictures or comments about the employer or its employees that "could be viewed as inappropriate"

[1] This focus on overbreadth and lack of exceptions for protected communications comports with the recent NLRB General Counsel's Advice Memorandum finding Walmart's social media policy to be lawful (May 30, 2012 Advice Memorandum 11-CA-06717). Notably, Walmart's policy is the only social media policy that has ever been deemed to be lawful by the General Counsel (or the NLRB). Walmart's policy was found to be lawful because it provides sufficient examples of prohibited conduct so that, in context, employees would not reasonably construe the rules to prohibit Section 7 activity. For instance, the rule explains that prohibited "harassing or bullying" posts would include "offensive posts meant to intentionally harm someone's reputation" or "could contribute to a hostile work environment on the basis of race, sex, disability, religion or any other status protected by law of company policy."

(7) Clearly state that the policy is not intended to discourage concerted activity, i.e., discussion of or efforts to change working conditions and terms of employment.

(8) Before terminating an employee for a social media posting consider:

a. Does the posting fall within NLRA protections?

b. What is the employee's position (only non-supervisory employees receive NLRA protection)

c. Does the content impact the workplace?

(9) Stay abreast of changes in the legal landscape and consult with counsel when implementing such policies and when possible violations of the policies arise.

Pillsbury's Employment attorneys are available to help draft social media policies that are clear, narrowly tailored, and responsive to the needs of individual employers.

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If you have any questions about the content of this alert, please contact the Pillsbury attorney with whom you regularly work, or the authors below.

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