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Finding balance on social media

By Eli Kantor

The Greek philosopher Heraclides said that you can never go into the same river twice because it is constantly changing. Likewise, the law regulating social media in the workplace is constantly evolving. Employers must be vigilant to make sure that their social media policies are compliant with the latest changes in the law.

Thus, employers must have policies regulating how their employees utilize social media and the Internet in the workplace since they are obligated to provide their employees with a harassment free workplace. However, they must be careful that their policies are not so broad that they violate the National Labor Relations Act. In two recent cases, the National Labor Relations Board has struck down employer policies regulating social media and Internet usage.

The NLRB, originally created in 1935, has attempted to become relevant in the nonunion work place in the digital age. Section 7 of the NLRA protects workers right to engage in "protected concerted activity." Section 8(a)(1) makes it an unfair labor practice for an employer to interfere with an employee's Section 7 rights. This applies in both the union and nonunion workplaces. Thus, if two or more employees discuss their wages, hours or working conditions at the "water cooler," their right to have those discussions are protected concerted activity and, therefore, protected by Section 7. In fact, even one employee's actions can be protected if they are undertaken on behalf of a group. The NLRB has found that social media is the modern day equivalent of the water cooler.

In its first published decision concerning employers limiting how employees use social media, the NLRB recently held that Costco's social media policy prohibiting employees from electronically posting statements that "damage Costco ... defame any individual or damage any person's reputation" violated the NLRA because it could reasonably tend to chill employees from exercising their rights, rejecting an administrative law judge's finding that the employees would not reasonably construe the rule as inhibiting Section 7 conduct, in *Costco Wholesale Corp. and United Food Commercial Workers Union*, 358 NLRB No. 106 (Sept. 7, 2012).

Costco's policy restricted employees from posting statements on electronic media such as online message boards and social media sites that could damage Costco or the reputation of others. The policy stated in part that: "Any communication transmitted, stored or displayed electronically must comply with the policies outlined in the Costco Employee Agreement. Employees should be aware that statements posted electronically such as in online message boards or discussion groups that the damage the company, or defame any individual or damage any person's reputation, or violate the policies outlined in the agreement may be subject to discipline, up to and including termination of employment."

This policy was challenged by the UFCW, a union which was seeking to organize Costco workers. The union filed unfair labor practice charges alleging that that the challenged rules regulating employee communication violated Section 8(a)(1) of the NLRA. The Administrative Law Judge held that the employees would not reasonably construe Costco's policy as regulating and prohibiting Section 7 activity. Costco and the NLRB's general counsel both filed exceptions to the ALJ's decision.

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On Sept. 7, the NLRB issued a decision reversing the ALJ and held that Costco's electronic posting rule is unlawful because it could reasonably tend to chill employees in the exercise of their Section 7 rights. The NLRB noted that an employer rule is unlawful if it explicitly restricts employee Section 7 rights, though that was not the case here. Nevertheless, a rule is still unlawful if: (1) employees would reasonably construe it to prohibit Section 7 activity; (2) it was promulgated in response to union activity; or (3) it is used to restrict the exercise of Section 7 rights.

The board found that Costco's electronic posting rule was overbroad. Although the rule did not explicitly restrict Section 7 rights, employees could reasonably construe it to prohibit protected Section 7 activity since statements that criticize their terms and conditions of employment could arguably damage the company.

Significantly, the board noted that Costco's rule did not provide for any exceptions for employee statements protected by Section 7. The rule did not include any language indicating that protected communications are excluded from the prohibition, and, therefore, "employees would reasonably conclude that the rule requires them to refrain from engaging in certain protected communications."

The second NLRB decision, *Karl Knauz Motors Inc. d/b/a Knauz BMW and Robert Becker*, 358 NLRB No. 164, was issued on Sept. 28. In that case the board ruled that a "courtesy" rule contained in the BMW dealership's employee handbook was overbroad. In the same case, the board ruled for the first time on the legality of a discharge for Facebook postings, holding that the firing of a BMW salesman for photos and comments posted to his Facebook page did not violate the NLRA because the activity was not concerted or protected.

The issue was whether the salesman was fired exclusively for posting photos of an embarrassing and potentially dangerous accident at an adjacent Land Rover dealership, which was not protected, or for posting mocking comments and photos with co-workers about serving hot dogs at a Luxury BMW car event, which arguably would be concerted protected activity. Both sets of photos were posted to Facebook on the same day. The salesman was fired a week later. The board decided that the salesman was fired for the posting of the photos of the accident with sarcastic commentary, including: "OOPS," which was clearly not concerted or protected activity.

In view of the rapid changes in the law, employers need to immediately review their social media and Internet usage policies to make sure that they are not overly broad and to insert a disclaimer for Section 7 activity if needed. Employers are now placed in a very delicate position. On the one hand, they have a duty to provide a harassment free workplace for their employees. On the other, they must not chill employees' protected Section 7 rights. Thus, employers need to strike a balance by expressly forbidding harassing and discriminatory behavior, while allowing employees to discuss their wages, hours and working conditions without fear of reprisal.

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