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Labor and Employment Law Alert - NLRB Decides First Social Media Case; Finds Employer's Policy Unlawfully Over-Broad

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While the **National Labor Relations Board's (the NLRB)** Acting General Counsel Lafe Solomon has issued multiple reports on social-media policies over the course of the last year, signaling NLRB scrutiny of employer policies, the NLRB itself had yet to rule on any cases until early September 2012. On Sept. 7, 2012, however, the NLRB issued its first decision on these policies. In that decision, the NLRB reversed an administrative law judge (the ALJ) finding and ruled that that **Costco Wholesale Corp.'s social-media policy** violated Section 8(a)(1) of the **National Labor Relations Act (the NLRA)** by inhibiting employees' from exercising their rights under Section 7. Costco Wholesale Corp., 358 NLRB No. 106 (2012).

The policy at issue prohibited, in pertinent part, statements posted electronically that "damage the Company, defame any individual or damage any person's reputation" and stated that such statements could potentially be grounds for discipline, up to and including termination. The ALJ, in his subsequently overturned opinion, held that the NLRB General Counsel had not met his burden that Costco's policy would be perceived by employees as inhibiting NLRA-protected conduct. Rather, the ALJ found that employees would reasonably infer that Costco's purpose in promulgating the rule was to ensure a "civil and decent workplace." (Section 7 of the NLRA permits employees, among other activities, to "join, form, or assist unions" and "to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.")

On appeal, however, the NLRB found that the rule, though not explicitly prohibiting Section 7 activity and not specifically in response to any union activity, "clearly encompasses concerted communications protesting [Costco's] treatment of its employees" and, therefore, employees "would reasonably conclude that the rule requires them to refrain from engaging in certain protected communications (i.e., those that are critical of [Costco] or its agents)." The NLRB also noted that nothing in the rule excluded protected activity from its broad prohibitions. This combination of factors led the NLRB to find that the rule had a "reasonable tendency to inhibit employees' protected activity and, as such, violates Section 8(a)(1)".

While the remedy in this case was not monetary, but rather required the offending language to be rescinded or modified and a remedial notice to be posted, facing an investigation and possible prosecution by a federal agency can be expensive and bad for business. Further, unlawful policies can be used by unions as the basis for setting aside NLRB representation elections in the event the

union loses in an attempt to organize non-union workers. Accordingly, employers should contact experienced counsel when drafting, implementing, or enforcing social-media policies. As this case makes clear, a well-meaning, but incorrectly worded or overbroad, social-media policy can lead to an adverse finding by the NLRB.

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