

NLRB Strikes Down Employee Handbook Language and Issues First Social Media Decision

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Continuing its aggressive foray into nonunion workplaces, the NLRB has weighed in on social media and employee handbook issues, finding certain language to be unlawful under Section 8(a)(1) of the National Labor Relations Act.

In September, the **National Labor Relations Board (NLRB or Board)** issued two decisions confirming that it will now use Section 8(a)(1) of the **National Labor Relations Act (NLRA or Act)** to find basic (and widespread) handbook and policy language to be unlawful even when it does not involve protected activity under Section 7 of the NLRA. In ***Costco Wholesale Corp.***, 358 N.L.R.B. No. 106 (Sept. 7, 2012),^[1] the Board reviewed a variety of handbook provisions protecting certain confidential information and found them unlawful under the Act. The Board's more recent decision in ***Knauz BMW***, 358 N.L.R.B. No. 164 (Sept. 28, 2012),^[2] built on the *Costco* decision and deemed that a rule requiring workplace courtesy violated Section 8(a)(1). The *Knauz* case is the Board's first decision in a case involving posts to the social media website Facebook. Given the Board's expansive interpretation of Section 8(a)(1), it is likely that one or both of these decisions could face appellate court scrutiny in the near future.

Costco Wholesale Case

In its *Costco* decision, issued on September 7, the Board found that the following policy language was unlawful under Section 8(a)(1) of the NLRA:

- Prohibiting "unauthorized posting, distribution, removal or alteration of any material on Company property."
- 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."

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- Disseminating "[s]ensitive information such as membership, payroll, confidential financial, credit card numbers, social security numbers, or employee personal health information." The policy stated that such information "may not be shared, transmitted, or stored for personal or public use without prior management approval."
 - Sharing "confidential" information, such as employees' names, addresses, telephone numbers, and email addresses.
 - Electronically posting statements that "damage the Company, defame any individual or damage any person's reputation."

The Board's decision confirms that even basic policy language common in nonunion workplaces will be struck down if there is a reference to one "inappropriate" item. In this case, a reference to "payroll" information (as in the third bullet above) rendered an entire section unlawful. As a result, employers should carefully review their employee handbooks to avoid an adverse finding by the NLRB.

Knauz Case

Knauz—issued on September 28, three weeks after *Costco*—involved a nonunion car dealership with a handbook provision stating that

[c]ourtesy 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 Board majority found this rule unlawful under Section 8(a)(1) of the NLRA because employees would reasonably view the prohibition against "disrespectful" conduct and the "language which injures the image or reputation of the Dealership" to encompass Section 7 activity. Employees who wished to avoid discipline, according to the majority, would mind this rule in the context of disputes related to wages, hours, or terms and conditions of employment and therefore would be inhibited in exercising NLRA rights. It also is noteworthy that the Board upheld, in a footnote, the administrative law judge's (ALJ's) dismissal of the allegation that the dealership fired an employee based on his Facebook postings about an automobile accident at one dealership. These Facebook postings were deemed unprotected under Section 7. The judge had reasoned that the employee posted the information apparently "as a lark, without any discussion with any other employee of the [dealership], and had no connection to any of the employees' terms and conditions of employment."

The one Republican NLRB member, Brian Hayes—who was not on the panel for the *Costco* case—issued a dissenting opinion on *Knauz*. Member Hayes discussed the Board's overreach in applying Section 8(a)(1) and cited a great deal of precedent in support. He also signaled that the appellate courts likely would pare back the Board's recent expansion into the world of employee handbooks and social media policies. Specifically, Member Hayes cited case law holding that the Board must not review policy language in isolation or come up with a theory whereby employees "conceivably could construe [language] to prohibit protected activity," as opposed to whether they "reasonably would do so." Member Hayes pointedly argued that the majority's "analysis instead represents the views of the Acting General Counsel and Board members whose post hoc deconstruction of such rules turns on their own labor relations 'expertise.'"

Conclusion

While the Acting General Counsel's view and the views of some ALJs on these issues have been widely publicized, the decisions in *Costco* and *Knauz* provide the first look at the Board's majority view. The law is changing, and handbook language should be reviewed to determine if the language "could be" read to restrict Section 7 activity, even with a strained interpretation. The Acting General Counsel will continue to prosecute these types of cases against nonunion employers, which constitute 93% of all private sector workplaces. While many employers have already reviewed their policy language based on the legal developments in this area over the past several years, as developed by the Acting General Counsel's three guidance memoranda, the *Costco* and *Knauz* decisions provide another opportunity to review policy language in order to minimize the risk of a violation. Notably, unions have and will continue to use handbook policies to threaten and file unfair labor practice charges against an employer at strategic times—including organizing campaigns and collective bargaining negotiations.

[1]. Read the *Costco* decision at [here](#).

[2]. Read the *Knauz* decision [here](#).

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