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NLRB and ALJ Decisions Continue to Refine Social Media Policy Parameters

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NLRB judgments continue to refine the parameters of the social media policies landscape, offering more insight for employers who are developing policies and procedures that attempt to protect both the company and the employees. Two recent decisions by the **National Labor Relations Board** illuminate the legality of social media policies or policies addressing any and all electronic communications. These decisions further set expectations of what is acceptable online behavior by employees, and more clearly define what an employer can and cannot restrict in the language of the policy.

In September, the NLRB partially reversed an Administrative Law Judge's (ALJ) 2010 decision against Costco Wholesale Corporation regarding their electronic communications policy. The NLRB held that the policy prohibiting employees from posting negative statements about the company online was a violation of Section 7 of the **National Labor Relations Act (NLRA).** The decision did not specifically mention social media nor was the recently released social media policy guidance referenced. However, it was clear that the issue at the center of this decision was online activity including social media.

On the heels of this NLRB decision, Administrative Law Judge Clifford H. Anderson ruled against EchoStar Corporation, in a similar case involving the restriction of employees making critical comments about the company on social media sites. The EchoStar policy broadly banned employees from "disparaging" comments and accessing social media sites with company resources on company time. In the ruling Judge Anderson found that an employee would reasonably interrupt "disparaging" as interference with Section 7 protected activities. As well, the ban on accessing social media sites on "company time," was too all-encompassing and could include smart phones and employee's personal time such as breaks and lunch.

In the Costco case, the NLRB cited the fact Costco's policy contained no savings clause protecting Section 7 activities, suggesting that the decision might have been different if such a clause had been included. However, EchoStar did have a savings clause included in their employee handbook, which Judge Anderson did not think would counteract the language in the EchoStar policy. So, this begs the question: what are savings clauses and are they helpful in protecting employers carefully developed policies and procedures? It is a subject worth exploring. We will discuss savings clauses on Friday in relation to these cases and your own electronic communication policy. However, what we take away

from these recent decisions is again, social media policies need to be clear and concise. Overbroad generalizations make policies vague and leave too much for interpretation, and it is obvious from these rulings that broad social media and electronic communications policies will fail in front of the NLRB.

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