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NRLB Continues to be Active in the Areas of Social Media and Employment-at-Will Policies

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As we have reported previously this year, the **National Labor Relations Board (NLRB)** has been extremely active in expanding its reach to non-unionized workplaces. Included in this expansion has been the Acting General Counsel for the NLRB's defense of employees' rights to act together informally through the use of social media to address terms and conditions of their work. At issue has been the extent to which private employers may regulate employees' social media activities consistent with the employees' right to engage in "concerted activity." Examples of such protected concerted activity include employees communicating with each other, or with third parties (for example, union representatives), regarding wages, working conditions or alleged unfair treatment by an employer. As we reported earlier this year in June, the Acting General Counsel for the NLRB has issued several publications describing the NLRB's view of ways that social media can be legitimately used by employees to engage in concerted activity.

In recent weeks, the NLRB has issued its first two decisions in the social media context, providing some guidance to employers on the permissible scope of social media policies. On September 7, 2012, the NLRB found unlawful certain portions of Costco Wholesale Corporation's employee handbook, including a provision prohibiting employees from electronically posting statements that "damage the Company, defame any individual or damage any person's reputation."
The Costco decision is also important because the NLRB invalidated several employment policies which restricted the disclosure of "confidential information," on the grounds that employees would reasonably construe restrictions on discussing confidential information to prohibit discussion of wages and other terms and conditions of employment. ***Costco Wholesale Corporation and United Food and Commercial Workers Union***, Local 371, 358 N.L.R.B. No. 106 (Sept. 7, 2012). On September 28, 2012, the NLRB issued a second decision involving social media, finding in a split decision that a rule encouraging "courtesy" in communications with customers and other employees violated the **National Labor Relations Act (NLRA**) because the employer could regard statements of protest or criticism by its employees to be in violation of the policy. Knauz BMW, 358 N.L.R.B. No. 164 (Sept. 28, 2012).

Both cases are troublesome because they continue the trend of the NLRB invalidating seemingly neutral employment policies which are primarily applicable to non-union employees, even where there is no evidence of discriminatory enforcement against union activities. Until other cases clarify this area of the law, prudent employers should draft all employment policies with an intense focus on

how those policies might impact employees' protected concerted activities under the NLRA.

On a somewhat brighter note, on October 31, 2012, the NLRB's Acting General Counsel released an analysis of two at-will employment clauses in two separate employee handbooks, finding them to be lawful under the NLRA. As we reportedearlier this year in July, the NLRB has been carefully scrutinizing employment-at-will disclaimers and, in one instance, an NLRB administrative law judge ruled that the American Red Cross' handbook disclaimer violated the NLRA because it was overbroad and an employee might reasonably believe that he or she could not engage in concerted activity protected by the NLRA. The Acting General Counsel's advice memos help clarify the NLRB's position, although this area of the law remains unsettled. In view of these advice memos, however, employers now have two examples of employment-at-will policies that the NLRB has found to be lawful. Employers should have their employment-at-will disclaimers reviewed by counsel to be sure they follow this recently issued guidance.

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