



Time to Re-Examine Your Social Media Policy

Costco's Violation of Social Media Policy

In what is likely to be the first of many rulings impacting the effect of social media policies, the National Labor Relations Board has invalidated a policy in Costco Wholesale Corp.'s national employee handbook, which generally banned employees from posting damaging or disparaging content on electronic message boards, finding that the policy was overbroad and constituted unfair labor practice under Section 8 of the National Labor Relations Act (NLRA). The policy at issue specifically stated "Employees should be aware that statements posted electronically (such as to online message boards or discussion groups) that damage the company, defame any individual or damage any person's reputation, or violate the policies outlined in the Costco Employee Agreement may be subject to discipline, up to and including termination of employment." The NLRB panel found that while it did not explicitly prohibit protected activity under the NLRA, the policy clearly encompassed protected communications, such as those 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 the company or its agents)."

NLRA's Restrictions

Section (8)(a)(1) of the NLRA makes it an unfair labor practice for an employer to interfere with, restrain or coerce employees in the exercise of their rights guaranteed in Section 7 to engage in "other concerted activities for the purpose of collective bargaining or other mutual aid or protection," including the right to protest working conditions or address other work-related issues.

Key Learning Points

While the panel invalidated the discount shopping giant's policy, it did not do so based on any rules or guidance specific to social media policies (in fact, the opinion does not even mention the term "social media" at all) but rather by applying traditional analysis broadly defining the universe of protected employee speech to communications across electronic platforms. The decision indicates that the social media policies with generalized language prohibiting employees from posting disparaging comments will not pass muster with the NLRB. The NLRB decision also specifically noted that the company's policy failed to carve out protected activity and "does not present accompanying language that would tend to restrict its application." Had the rule included language specifically exempting concerted protected activities, such as communications that were critical of Costco's treatment of employees, or had it prohibited only egregious conduct, such as sabotage or sexual harassment, the NLRB may have found the policy narrow enough not to be in violation of Section 8(a)(1). While such a carve-out or disclaimer might move a policy governing the content of employees' speech on social media platforms more in the direction of being acceptable, whether the inclusion of that language alone will cure what would otherwise be an overly broad provision remains unclear.

Next Steps

Social media policies are clearly on the radar of the NLRB, and the *Costco* decision, which we anticipate will be the first of many decisions in this arena, is very much in line with the three recent memos released by NLRB Acting General Counsel calling employers' attention to

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the possibility that their social media policies might be in violation of the NLRA. At a minimum, companies should review their social media policies to determine whether any existing provisions would violate the NLRA under the *Costco* decision. Employers should also consider drafting or revising policies to include language that specifically exempts protected communications and behavior under Section 7 while prescribing specific prohibited behavior. Not an easy task, and a tightrope that Costco learned to its cost that it was unable to walk.

For more advice on social media policies, please contact [leuan Jolly](mailto:leuan.jolly@loeb.com) at ljolly@loeb.com or 212.407.4810.

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