Is Blogging a Concerted Protected Activity?

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You Can't Blog About That! Or Can You?

As social media continues to pervade our lives, companies have begun creating labor and employment policies placing restrictions on employees' use of social media. Since August 2011, the National Labor Relations Board's (NLRB) Acting General Counsel, Lafe Solomon, issued three reports outlining his view of how the National Labor Relations Act (the Act) applies to employers' social media policies and employees' social media postings. More recently, the NLRB issued its first ruling on employer social media policies in the Costco Wholesale Corporation decision. There, the NLRB found that certain language might be too restrictive under the Act.

In the Costco decision, the policy language at issue stated, "Any communication transmitted, stored or displayed electronically must comply with the policies outlined in the Costco Employee Agreement. 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."It isn't too farfetched that most employers would look at the statement and think it quite reasonable. So what problems did the NLRB have with the statement?

The NLRB held that Costco's policies violated Section 8(a)(1) of the National Labor Relations Act (NLRA), which prohibits employers from interfering with employees' rights guaranteed under Section 7. Under Section 7, employees' rights to engage in "concerted activity" for the purpose of collective bargaining or other mutual aid or protection are protected.

Costco's policies did not have explicitly restricting language. Instead, the language was determined to be overbroad in prohibiting the making of statements that "damage the company, defame any individual or damage any person's reputation." Further, there was no language in the rule that would carve out exceptions, such as a phrase excluding communications protected by Section 7 that would have restricted the rule's application. Therefore, the NLRB found, employees would look at this policy and reasonably conclude that it required them to refrain from engaging in activities that otherwise would have been protected communications. As the NLRB stated of Costco's policy, it "allows employees to reasonably assume that it pertains to — among other things — certain protected concerted activities, such as communications that are critical of the respondent's treatment of its employees."

In light of the Board's stance on social media policies, as now confirmed in its Costco decision (and the application of this decision to both unionized and non-unionized employers), it would be wise for employers to thoroughly review their social media policies to ensure that the prohibitions are not overly broad or restrictive of Section 7 protected communications. Also, the language of the policy should be drafted so that the meaning would not reasonably be construed by employees as prohibiting Section 7 protected activities. Additionally, in a rapidly developing area of the law, such as the social media arena, it is important for employers to stay abreast of any changes in the law and ensure that their policies remain compliant.

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