



LABOR & EMPLOYMENT

ALERT

THE NLRB ISSUES ITS FIRST RULING STRIKING DOWN AN EMPLOYER'S SOCIAL MEDIA POLICY

By Christina A. Stoneburner

After months of speculation and no less than three guidance memoranda issued by the NLRB's counsel, the NLRB has for the first time decided that an employer's social media policy was too broad and violated Section 8(a)(1) of the National Labor Relations Act (the Act).

In Costco Wholesale Corporation and United Food and Commercial Workers Union, Local 371, Case 34-CA-012421, the Board reviewed several portions of Costco's employee handbook to determine if those provisions chilled concerted activity under the Act.

The Act provides in part that employees have a right to engage in "concerted activity." Concerted activity is defined as when employees take action for their mutual aid or protection regarding terms and conditions of employment. Employees have the right to engage in concerted activity even in a non-union setting. Section 8(a)(1) of the Act prohibits employers from interference, restraint of, or coercion directed against union or collective activity.

Notably, one of the provisions challenged in Costco's handbook was the "Electronic Communications and Technology Policy." The Union challenged several provisions of that policy, including the following statement:

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 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 Board overruled the Administrative Law Judge and found that this provision violated Section 8(a)(1) since the statement that an employee may not damage the Company or defame any individual could be read broadly enough to prohibit employees from discussing terms and conditions of work.

Although the guidance to date and case law has not been clear or consistent as to what policies will pass muster under the Act, one thing is certain – employers need to review policies to ensure compliance. Generally, policies have been upheld that contain more specific prohibitions rather than a vague statement that employees cannot disparage the Company or employees. Policies should contain specific examples of inappropriate conduct, such as conduct that violates the company's anti-harassment and discrimination policies or is threatening.

In addition to the Board's decision on Costco's social media policy, the Board went on to criticize and strike down four other policy provisions in the

handbook including a provision that confidential information about employees (defined as name, address, telephone and email) not be disclosed.

More concerning for employers was the striking down of the provision prohibiting employees from discussing private matters such as FMLA leaves, ADA accommodations, workers' compensation injuries, and personal health information. Costco likely had these provisions put into place to comply with confidentiality requirements set forth in other laws such as the ADA and HIPAA. The Board found that the provision directly restricted the discussion of terms and conditions of employment even though Costco argued that they were merely protecting the confidentiality of employees' medical conditions.

Employers will need to review similar policies to ensure that confidential medical information such as health conditions and treatments are not disclosed, but that the policy is not so broad that it can be read to prohibit an employee from requesting a leave or other benefits or protesting an improper denial of leave or accommodation.

Employers are encouraged to contact Christina A. Stoneburner at 973.994.755 or cstoneburner@foxrothschild.com, or any member of Fox Rothschild's Labor and Employment Department to review their handbooks and social media policies in order to help craft policies in compliance with the Act and other competing federal and state laws.



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