EMPLOYMENT LAW- CONSIDERATIONS FOR DRAFTING A SOCIAL MEDIA POLICY

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While is clear that social media usage is extending to the workplace, a report by Manpower employer services found that only 29% of companies in the Americas have a "formal policy regarding employee use of social networking sites."

Employer responses to employee activity in social media and employer social media policies are receiving intense scrutiny from the National Labor Relations Board (NLRB). The NLRB protects all employees, union and non-union, who participate in "concerted" or group activity. If an employer disciplines or terminates an employee who posts negative statements about the workplace that may violate the Act since employees has a right to use social media to complain about their working conditions. However, group activity is needed and posting personal complaints about the employer will not protect an employee from discharge.

On May 30, 2012 the NLRB issued its third review regarding social media policies which focused on seven cases that the Board pursued against employers. In six of the seven cases, Lafe Solomon, Acting General Counsel of the NLRB, "concluded that at least some of the provisions in the employers' policies and rules are overbroad and thus unlawful under the National Labor Relations Act." Solomon stated, "As explained in my previous reports, an employer violates Section 8(a)(1) of the Act through the maintenance of a work rule if that rule "would reasonably tend to chill employees in the exercise of their Section 7 rights." Section 7 of the NLRA provides to all employees—unionized and non-unionized—the right to engage in protected "concerted activities for the purpose of collective bargaining or other mutual aid or protection."

Solomon found that "rules that are ambiguous as to their application to Section 7 activity, and contain no limiting language or context that would clarify to employees that the rule does not restrict Section 7 rights, are unlawful. In contrast, rules that clarify and restrict their scope by including examples of clearly illegal or unprotected conduct, such that they would not reasonably be construed to cover protected activity, are not unlawful." Solomon upheld Wal-Mart's Social Media Policy, finding that it contained tangible examples of what is and isn't permissible which helped employees understand that the prohibitions did not extend to protected concerted activity.

In September the NLRB issued two opinions regarding social media policies. In *Costco Wholesale Corp.*, 358 N.L.R.B. No. 106 (Sept. 7, 2012), NLRB found that Costco's employee policies that are too broad regarding the use of the Internet and social media since the policy language would reasonably "chill" the exercise of rights under Section 8(a)(1) of the NLRA and found the following provisions unlawful: "unauthorized posting, distribution, removal or alteration of any material on Company property" is prohibited; Employees are prohibited from discussing "private matters of members and other employees . . . includ[ing] topics such as, but not limited to, sick calls, leaves of absence, FMLA call-outs, ADA accommodations, workers'

compensation injuries, personal health information, etc.;" "sensitive information such as membership, payroll, confidential financial, credit card numbers, social security number or employee personal health information may not be shared, transmitted, or stored for personal or public use without prior management approval;" Employees are prohibited from sharing "confidential" information such as employees' names, addresses, telephone numbers and email addresses; and Employees are prohibited from "electronically posting [including online message boards and discussion groups] statements that "damage the company, defame any individual or damage any person's reputation

The Board found that language prohibiting "unauthorized posting" of any material on Company property was lawful because it prohibited posting in nonworking areas. Under current law, restrictions on distribution or posting must be confined to "work areas." Prohibiting employees from discussing "private matters" was unlawful since as defined in the handbook it includes terms and conditions of employment, which employees have a right to discuss amongst themselves and union representatives. Prohibitions related to discussing "sensitive information" could regard information relating to employees' terms and conditions of employment and specifically, payroll information, which the employer could not bar employees from discussing. Prohibitions related to sharing "confidential" information was unlawful since overbroad and would be understood to chill protected concerted activity. Prohibiting employees from electronically posting statements that "damage the Company, defame any individual or damage any person's reputation" was held unlawful because it would be reasonably read to prohibit employees from complaining about the company's treatment.

The Board upheld provisions of the handbook which required employees to observe "appropriate business decorum" when communicating with others because it would be viewed as requiring general workplace civility. The employer was also allowed to prohibit employees from leaving company premises during their shift without management permission because this would not be reasonably understood as requiring employees to get management permission to go on strike.

In *Knauz BMW*, 358 N.L.R.B. No. 164 (Sept. 28, 2012), relying on *Costco*, the Board found that a rule requiring workplace courtesy violated Section 8(a)(1). The Board found a violation of the provision which read. "Everyone is expected to be courteous, polite and friendly to our customers, vendors and suppliers, as well as to their fellow employees. No one should be disrespectful or use profanity or any other language which injures the image or reputation of the Dealership." The Board found this rule unlawful since employees who wanted to avoid discipline would view this rule in the context of disputes related to wages, hours, or terms and conditions of employment and therefore would be inhibited in exercising NLRA rights.

The *Knauz* case is the Board's first ruling involving posts to the social media website Facebook involving a nonunion car dealership. The Board upheld the dismissal of an employee fired based on his Facebook postings that included mocking comments and photos regarding a BMW event. The employee alleged that his posts were protected because his commissions may suffer because the choice of food offerings was not appropriate for potential luxury car buyers.

After his posts, as well as others relating to an auto accident at a neighboring dealership owned by the same employer, the salesman's employment was terminated. The Board found that these Facebook postings were deemed unprotected under Section 7 since that the employee posted the information apparently "as a lark, without any discussion with any other employee of the dealership, and had no connection to any of the employees' terms and conditions of employment."

The *Costco* and *Knauz* decisions are largely consistent with Solomon's reports and although the Board did not specifically rely on those reports, many of the same cases found in the reports were cited by the Board. Since employers can expect continued litigation over social media policies, the success of these polices will be based on how carefully the policy is drafted so that does not violate the employees Section 7 rights.