MB&J | MORGAN BROWN&JOY

www.morganbrown.com

CLIENT ALERT: NLRB's First Social Media Decision Finds that Policy Prohibiting Posting of Damaging Statements Is Unlawful

Over the past year, the National Labor Relations Board ("NLRB" or the "Board") has paid close attention to employers' regulation of their employees' use of social media sites in both unionized and nonunion workplaces. The NLRB's Acting General Counsel, who represents the prosecutorial arm of the Board, issued three reports describing his views on the application of the National Labor Relations Act ("NLRA") to social media policies. The Acting GC largely found such policies to be unlawful if they used generalized language to preclude employees from making disparaging remarks or revealing confidential information on social media websites. Although these reports were useful in predicting the NLRB's likely course of action toward social media policies, they were not binding on employers.

The legal landscape changed on September 7, 2012, when the NLRB issued its first decision on a social media policy. A three-member panel held that a provision in Costco Wholesale Corp.'s ("Costco") nationwide employee handbook prohibiting employees from electronically posting statements that damage the company or other employees was unlawful. *Costco Wholesale Corp.,* 358 N.L.R.B. No. 106 (2012). Costco's policy prohibited employees from electronically posting statements that "damage the Company, defame any individual or damage any person's reputation, or violate the policies outlined in the Costco Employee Agreement." The NLRB found that the policy was overly broad. It held the policy was unlawful because it could reasonably tend to chill employees in the exercise of their rights under Section 7 of the NLRA. Because Costco's social media rule does not have any accompanying language that would restrict its application, the NLRB stated that "[i]t therefore allows employees to reasonably assume that it pertains to —among other things — certain protected concerted activities, such as communications that are critical to the respondent's treatment of its employees." In other words, the NLRB distinguished Costco's generalized policy from other policies that lawfully prohibited specific communications falling outside the protection of Section 7, such as sexual harassment or communications used to intimidate. As a result of its infringement on Costco employees' Section 7 rights, the NLRB ordered Costco to revise and reissue the social media policy in its handbook.

Through the *Costco* decision, we see that the NLRB is ignoring the larger audience and greater impact that damaging and/or defamatory comments can have when made on social media sites. Also frustrating to employers is the fact that the *Costco* decision does not offer much guidance in crafting an acceptable social media policy.

While the decision is notable for its effect on social media policies, it also demonstrates the trend of the NLRB's expansion of its enforcement actions into non-unionized workplaces by criticizing what were once thought of as routine policies. The far-reaching decision also held that Costco violated Section 8(a)(1) of the NLRA by maintaining policies prohibiting employees from: (a) "unauthorized posting, distribution, removal or alteration of any material on company property"; (b) discussing

private employee matters including various terms and conditions of employment; (c) sharing sensitive information such as payroll data; and (d) sharing "confidential" information like employees' names, addresses, telephone numbers, and email addresses. By limiting the aforesaid policies, the NLRB elevated Section 7 rights at the potential expense of employee privacy, which may expose employers to future liability in other areas. MBJ's client alerts dated August 13, 2012 and September 13, 2012 discuss the NLRB's activities with regard to challenging policies and practices adopted by many non-unionized companies.

Given the NLRB's finding, we anticipate that the Board will continue to scrutinize employers' social media policies with regard to limitations on employee expressions, even when such communications disparage the company or other employees. By finding that even defamatory statements about company officials made through social media cannot subject employees to discipline, it is apparent that the NLRB intends to afford employees wide latitude in their social media activities.
The *Costco* decision also demonstrates the NLRB's prioritization of potential organizing activity over employee and company privacy rights. We recommend that you contact your MBJ attorney to discuss the impact of this decision on your company's social media policy and other relevant handbook provisions. Also, in light of the NLRB's recent expansion of its actions, we also encourage employers to review all of their policies, even those formerly thought of as routine.

Laura E. Coltin Ogden, Esq., is an attorney with Morgan, Brown & Joy, LLP. Laura may be reached at (617) 523-6666 or at logden@morganbrown.com. Morgan, Brown & Joy, LLP focuses exclusively on representing employers in employment and labor matters.

This alert was published on September 21, 2012.