

To: Our Clients and Friends

October 8, 2012

## The National Labor Relations Board Has Spoken: Employers Can Not Have A Policy That Prohibits Employees From “Using Inappropriate Business Decorum Online,” or Posting Statements That “Damage The Company, Defame Any Individual or Damage Any Person’s Reputation.”

As you know, we have been closely following the National Labor Relation Board’s (NLRB) advice memoranda on social media policies. Recently, the NLRB issued its first binding decision about an employer’s social media policy. In Costco Wholesale Corp., the National Labor Relations Board decided that Costco’s policy violated employees’ Section 7 rights under the National Labor Relations Act (NLRA). Regardless of union membership, Section 7 of the NLRA protects employee’s “right . . . to form, join, or assist labor organizations . . . and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.” Employers may not “interfere with, restrain, or coerce employees in the exercise of” their Section 7 rights, and this is where Costco’s policy had a problem.

The NLRB took issue with Costco’s broad prohibitions, such as the prohibition against making statements that “damage the Company, defame any individual or damage any person’s reputation” because the policy clearly encompasses concerted communications. The NLRB found that employees reading the policy would “reasonably conclude” that it prohibits them from engaging in protected communications.” The NLRB also found problematic the absence of any restricting language, such as a statement explaining that the policies do not apply to communications protected under Section 7 of the NLRA. For these reasons, it held that Costco’s policy had “a reasonable tendency to inhibit employees’ protected activity,” and therefore violated the NLRA.

In the end, the board ordered Costco to cease and desist from the following: (a) prohibiting the unauthorized posting, distribution, or alteration of any material on company property; (b) prohibiting employees from discussing their wages and conditions of employment with other employees and third parties, including union representatives; (c) prohibiting its employees from sharing or storing wage information or information relating to other terms and conditions of employment of employees without permission of management; (d) prohibiting employees from electronically posting statements that

damage any person's reputation; (e) prohibiting the removal of confidential material from company premises, defined as conduct that may reasonably be interpreted as including wages or other terms and conditions of employment of its employees; and (f) interfering with, restraining or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act. The board also ordered Costco to modify or rescind the language in many of its policies.

The Costco ruling comes as no big revelation, as it is consistent with previous advice memoranda. The ruling however is further evidence of the NLRB's aggressive review of social media and employment policies.

For both union and non-union employers, the NLRB's Costco decision highlights the importance of revisiting and developing a social media policy that is consistent with the NLRA. There is no one size fits all for a social media policy. All employers should continue to review and update all of their policies to ensure that they are narrowly tailored to their business needs and do not sweep so broadly as to interfere with employee rights under federal labor law.

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