**SONYA ROSENBERG**

# Understanding and surviving in the NLRB's new age

The National Labor Relations Board has entered a new age. Until recently, while the Board certainly had issued guidance and decisions, its activity was contained to relatively limited, predictable issues. The last several years under President Obama's first administration, however, have revealed a new, revamped, active Board that is only all too willing to reopen, reexamine and even rescind long-established and long-accepted employer policies and practices. Although the validity of the Board's recent activity was just recently questioned by a federal appellate court in the January 25, 2013 decision of *Canning v. NLRB,* the Board's precedent and pronouncements will remain the law of the land until and unless the case is decided by the Supreme Court. Meanwhile, all indications are that the next four years at the NLRB will be just as active, if not more active, than the preceding four. For one, a democratic administration tends to coincide with more employee-centric legal initiatives. In addition, today's Board may be struggling to remain relevant in the age of changing technologies and dwindling unionization. Whatever the drivers, it is apparent that employers can expect more and more active initiatives designed to educate and encourage employees' union-related activities from the new NLRB.

## The NLRB and social networking sites

We might as well admit it. The days of employees congregating and chatting around the water coolers are, for the most part, behind us. What water coolers, when we can e-mail, text, and post on Facebook! It should come as no surprise to most employers that, over the past several years, social networking sites have become more prevalent than ever. In October 2012, Facebook reported reaching one billion users; Twitter currently boasts over 500 million active users, who generate over 340 million tweets daily; and the LinkedIn site reports a membership of over 175 million. Combine these telling statistics with the fact that employees in this country tend to spend most of their waking life working, and an employer can be sure that in one way or another, work has made its way into its employees' social networking.

Failure to recognize and effectively deal with this reality can spell a recipe for disaster, but recent precedent indicates that employers must be extremely careful in how they word their social media policies so as not to attract unwelcome attention from the Board. In several recent decisions, the NLRB has held that seemingly reasonable, well-written and well-intentioned policies may violate the law if they can be interpreted as interfering with employees' right to discuss their terms and conditions of work, including by criticizing management. Grounding its analysis in Section 7 of the National Labor Relations Act, which gives employees in unionized and non-union workplaces the right to engage in protected concerted activities — i.e., to discuss and otherwise interact with one another regarding, among other things, their various terms and conditions of work — the NLRB has shown a ready willingness to strike down policy provisions that it deems to interfere with or chill employees' Section 7 rights.

### A. *Costco Wholesale Corp.*

The NLRB's first decision on social media, *Costco Wholesale Corp.,* 358 NLRB No. 106 (Sept. 7, 2012), considered an employer policy that prohibited employees from posting "defamatory" or "damaging" statements about the Company on social networking sites. Specifically, Costco's "Electronic Communications and Technology Policy" stated: "Employees should be aware that statements posted elec-

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tronically (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 NLRB held Costco's policy unlawful on reasoning that employees could reasonably construe prohibitions against any statements that "damage the Company" or "damage any person's reputation" to include employees' statements that may protest Costco's treatment of employees, and thus to prohibit Section 7 activities.

**B. *Knauz BMW***

Shortly after *Coscto Wholesale Corp.,* the NLRB issued its second social media decision: *Knauz BMW,* 358 NLRB No. 164 (Sept. 28, 2012). Not unlike *Costco Wholesale Corp.'s* policy in question, Knauz BMW maintained a "courtesy" rule in its employee handbook stating: "Courtesy is the responsibility of every employee. 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 NLRB found this rule to be unlawful on the grounds that employees could reasonably construe it as encompassing employees' protected communications, including criticism of working conditions.

**C. DISH Network Corp.**

On November 14, 2012, an NLRB administrative law judge struck down DISH Network's social media policy, which provided: "You may not make disparaging or defamatory comments about DISH Network, its employees, officers, directors, vendors, customers, partners, affiliates or our, or their, products/services. . . . Unless you are specifically authorized to do so, you may not participate in these activities with DISH Network resources and/or on Company time . . ." See *DISH Network Corp.,* Case Nos. 16-CA-62433, 16-CA-66142, 16-CA 68261 (Nov. 14, 2012). Consistent with the NLRB's decisions in *Costco Wholesale Corp.* and *Knauz BMW,* the administrative law judge in *DISH Network Corp.* reasoned that the policy's prohibitions against "disparaging or defamatory comments" and the ban of any social media discussions, including on "Company time," could be reasonably interpreted by employees to interfere with or prohibit their Section 7 activities.

### The NLRB and confidentiality of internal employer investigations

Beyond social media policies, the NLRB also recently forayed into the long-settled and long-upheld employer investigation practices. Many employers provide general confidentiality instructions to employees in connection with internal, various workplace investigations, asking employees to not discuss the investigation and the underlying circumstances in or outside of the workplace. The NLRB has taken issue with that precise practice.

In yet another recent, controversial decision — *Banner Health System,* 358 NLRB No. 93 (July 30, 2012) — the Board held that employers' confidentiality instructions in internal investigations better be supported by a legitimate business interest in order to withstand a challenge under the National Labor Relations Act. Banner Health System's human resources consultants routinely instructed employees to not discuss matters under investigation while such investigations were ongoing, regardless of the underlying subject of the investigation. The Board held this generalized, blanket practice to violate employees' Section 7 rights, reasoning that every investigation must be treated individually, on its own facts, and evaluated as to whether it involves a specific need to protect witnesses, avoid spoliation of evidence or fabrication of testimony, or to prevent a cover-up, to support and legitimize a confidentiality instruction. Only where such a need is properly determined to exist — and it may well exist in many, if not most, investigations — an appropriate confidentiality instruction may be given.

### The NLRB and employment at-will policies

Do you have an "employment at-will" policy in your employee handbook? If you do not, an employment lawyer is certain to tell you to get one, and rightfully so. An at-will policy is among the most ubiquitous and the most important policies in the employment relationship. It informs the employee that the employment relationship is not guaranteed for any term: it may be terminated by the employer, or the employee, at any time, for any lawful reason, with or without notice. An appropriately drafted and implemented at-will policy is key in helping an employer to prevent and defend against contract-based employment claims from former employees.

Although at-will policies have been around for decades and decades as the basic staple in employee handbooks, the NLRB administrative law judges recently issued decisions criticizing and striking down such policies as unlawful under Section 7 of the National Labor Relations Act. For example, in *American Red Cross Arizona* (Case No. 28-CA-23443, Feb. 1, 2012), an administrative law judge held the following statement to be overbroad and discriminatory under the Act: "I further agree that the at-will employment relationship cannot be amended, modified or altered in any way." The administrative law judge concluded that this language effectively waived employees' right to engage in Section 7 activities. Similarly, in *Hyatt Hotels Corp.,* (28-CA-061114), the NLRB alleged that the at-will acknowledgement "that no oral or written statements or representations regarding my employment can alter my at-will employment status, except for a written statement signed by me and either Hyatt's Executive VP/Chief Operation Officer or Hyatt's President" also violated the Act, for the same reason.

To employers' relief, in late October 2012 the NLRB issued advice memoranda clarifying that the Board took issue only with those employment at-will statements that extracted promises from employees that their at-will status could never be changed. Thus, a carefully drafted at-will statement is likely to be deemed lawful, so long as the Board determines that employees are unlikely to reasonably construe it as a waiver of their right to engage in union-related activities.

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### The message: Review and, where appropriate, update your policies

If recent NLRB activity has left you scratching your head and concerned about whether or not your workplace is likely to be deemed in compliance with the National Labor Relations Act, you are not alone! Many employers and management-side labor attorneys have expressed concern that the Board has lost its way in attacking some of the most basic, established and long-accepted employer policies and practices. Be that as it may, and while the recent NLRB decisions certainly do not favor employers, they are also not devoid of legal logic. An employer assisted by competent counsel should be able to discern the NLRB's string of thought, including which policy provisions are likely to withstand scrutiny from the Board and which may send "red flags" as to non-compliance. With these considerations in mind, recent NLRB activity should give employers good reason to revisit their policies and practices to ensure that they both appropriately and currently meet the needs of their business and likely would not attract unwelcome attention from the Board. ■

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