First NLRB Ruling on Social Media and Protected Activity

By Jessica Summers

On September 7, 2012, the National Labor Relations Board (NLRB) issued a decision in the case of Costco Wholesalers Corporation, ruling that the provision in Costco's employee handbook that subjected employees to discipline for inappropriate electronic posts violated Section 7 of the National Labor Relations Act (NLRA).

As we have discussed in previous blog posts, the NLRB has been taking an increasing interest in the relationship between employers' social media and networking policies and the concerted activities protected under the NLRA. NLRB General Counsel Lafe E. Solomon has released three reports on this issue, summarizing a number of decisions by NLRB Administrative Law Judges (ALJs). The Costco case, however, represents the first time that this issue has been ruled on by the Board itself, rather than by an ALJ.

The Costco handbook provision at issue in this case stated that employees may be subject to discipline, up to and including termination, for electronic posts that "damage[d] the Company, defame[d] any individual or damaged[d] any person's reputation or violate[d] the policies outlined in the [handbook]." The ALJ who initially ruled on this case concluded that employees would not construe this provision as restraining Section 7 activity. The NLRB disagreed, emphasizing that where, as here, the handbook policy does not explicitly restrict Section 7 rights, the inquiry must be whether the policy would reasonably be construed to chill the exercise of those rights. The Board concluded that, based on its broad language, Costco's policy could be read to encompass protected activity.

Costco's downfall in this case was its use of a broad policy without any limiting language. The Board pointed out that Costco's policy was distinct from other handbook policies the NLRB had previously upheld. The NLRB concluded that the policy could be read to cover actions that fell both inside and outside of the NLRA's protection and contained no accompanying language that would mitigate an employee's reasonable assumption that the policy applied to concerted activities.

The result in this case is generally consistent with everything else that has come out of the NLRB on this issue. It is clear from this decision that employers who wish to utilize handbook provisions dealing with employees' use of social media or networking should be sure to include limiting language that makes clear that these policies are not intended, and should not be interpreted, to restrain protected activity.

