



RECENT DEVELOPMENT CONCERNING SOCIAL MEDIA POLICIES

The use of social media has expanded exponentially in recent years. As a result, every employer should have a policy addressing its employees' use of social media. If you do not have one, you should consider taking the appropriate steps to implement one. If you already have a social media policy in place, you should review it to ensure that it is keeping pace with developments in this rapidly evolving area of the law.

A recent decision by the National Labor Relations Board ("NLRB") demonstrates why some employers currently may have social media policies in place that could, at least in part, be unenforceable. In *Costco Wholesale Corp.*, the NLRB held that a rule in Costco's employee handbook that provided as follows violated the National Labor Relations Act (the "Act"): "Employees should be aware that statements posted electronically (such as [to] online message boards or discussion groups) that damage the Company, defame any individual or damage any person's reputation . . . may be subject to discipline, up to and including termination of employment." The NLRB held that this provision was invalid because its prohibition of statements that "damage the Company . . . or damage any person's reputation" reasonably could be interpreted to "chill" employees from exercising their right to engage in concerted activity protected by the Act, such as communications that protest the employer's treatment of its employees or are critical of the employer – a right that the Act gives to both union and non-union employees. In its decision, the Board noted that there was nothing in the policy that suggested communications protected by the Act were excluded from the scope of the policy.

The *Costco* decision calls into question the validity of social media policies that broadly prohibit employees from using social media to post communications that criticize the employer or that could harm the employer. After *Costco*, social media policies should be revised to exclude any prohibition on communications that otherwise are protected. In addition, such policies should identify specific types of communications that are prohibited under the policy, such as postings that are defamatory, abusive, harassing or that contain trade secrets of the employer. Finally, you should review the terms of service of any social media site being used and consider monitoring the sites on which you have a presence to guard against harmful postings.

The lawyers at **Kleinbard Bell & Brecker LLP** can help you with drafting an appropriate social media policy if you do not have one or updating an existing policy to ensure that it complies with this evolving area of law. Please contact us if we can be of any assistance.

Please contact our attorneys below with any questions on your existing social media policy or for our assistance with drafting a social media policy for your company.

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