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NLRB Social Media Decisions Leave Questions For Employers

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The NLRB issued its first decision on a social media policy on Sept. 7, 2012, finding the employer's policy of preventing employees from posting statements that "damage the Company, defame any individual or damage any person's reputation" as being unlawful. This was to be expected given the ever expanding interpretations of the NLRB's General Counsel Guidance Memoranda on social media policies.

However, on Sept. 28, 2012, the NLRB ruled on its first social media termination case and found in favor of the employer (*Knauz BMW*) finding that the employee was terminated for posting pictures of (and sarcastic comments about) a new Land Rover which had been driven into a pond by a customer's 13-year old son at a sister dealership across the street. The Board agreed that the salesman had not been terminated for Facebook comments critical of the food and drink the dealership had purchased for a promotional event for the new 5 series BMW.

While this newest decision was in favor of the employer, it did not address the more difficult question of what types of work-related posts constitute "protected concerted activity." However, given the General Counsel's guidance on this point, it likely could have been interpreted as protected concerted activity, if it had been the basis for the termination.

The issue of the potential pitfalls of social media policies applies equally for union and non-union employers. Many of the scenarios described in the GC's

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Memorandum relate to unlawful policies of nonunion employers who face potential organizing campaigns. Therefore, nonunion employers as well as unionized employers should be aware of these developments and revise their policies accordingly.