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## #ihatemyboss: Rethinking the NLRB's Approach to Social Media Policies

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# #IHATEMYBOSS:<sup>1</sup>

## RETHINKING THE NLRB'S APPROACH TO SOCIAL MEDIA POLICIES

### INTRODUCTION

*North Carolina, 1960:* Four black college students order coffee at a restaurant counter.<sup>2</sup> Service is denied because of their race, but they remain seated and refuse to leave.<sup>3</sup> News of the sit-in spreads—first by word-of-mouth, then by local newspaper coverage.<sup>4</sup> What begins as a small sit-in gains momentum, spreading protests to four states within the week and as far as Texas by the end of the month.<sup>5</sup> It was not until four years later that the Civil Rights Act of 1964 was passed, which outlawed discrimination based upon “race, color, religion, sex or national origin.”<sup>6</sup>

*Tahrir Square, Cairo, Egypt, January 25, 2011:* A small group of protesters gather to protest against the regime of Egyptian President Hosni Mubarak.<sup>7</sup> News of the resulting demonstrations spreads through the social media platform Twitter. Within hours, tens of thousands of people gather throughout Egypt, and within days, millions of people march in protest.<sup>8</sup> The government attempts to stop the protests by blocking all social media sites, but the attempt fails.<sup>9</sup> As one protester states, “We use Facebook to schedule the protests, Twitter to coordinate, and YouTube to tell the world.”<sup>10</sup> Social media thrusts the Egyptian uprising to the front pages of

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1. “#” is a Twitter symbol called a “hashtag,” which is used to categorize messages by keyword or topic in a “tweet.” See *Using Hashtags on Twitter*, TWITTER HELP CENTER, <https://support.twitter.com/articles/49309-what-are-hashtags-symbols> (last visited Nov. 17, 2013).

2. Malcolm Gladwell, *Small Change*, NEW YORKER, Oct. 4, 2010, at 42, available at [http://www.newyorker.com/reporting/2010/10/04/101004fa\\_fact\\_gladwell](http://www.newyorker.com/reporting/2010/10/04/101004fa_fact_gladwell).

3. *Id.*

4. *Id.*

5. The second morning, Tuesday, there were thirty-one protesters. On Wednesday, the number of protesters increased to eighty. By Thursday, there were 300. By Saturday, there were 600. One week later, the sit-ins had spread fifty miles away to Durham. By Thursday and Friday, the protest crossed state lines and reached Virginia, South Carolina, and Tennessee. By the end of the month, the sit-ins spread as far as Texas. *Id.*

6. *The Civil Rights Act of 1964*, U.S. SENATE COMMITTEE ON JUDICIARY, <http://www.judiciary.senate.gov/about/history/CivilRightsAct.cfm> (last visited Nov. 17, 2013).

7. Kareem Fahim & Mona El-Naggar, *Violent Clashes Mark Protests Against Mubarak's Rule*, N.Y. TIMES, Jan. 26, 2011, at A1, available at <http://www.nytimes.com/2011/01/26/world/middleeast/26egypt.html>.

8. *Protesters Flood Egypt Streets*, AL JAZEERA, <http://www.aljazeera.com/news/middleeast/2011/02/20112113115442982.html> (last modified Feb. 2, 2011).

9. *Did Social Media Create Egypt's Revolution?*, BBC NEWS (Feb. 11, 2011, 12:23 PM), <http://www.bbc.co.uk/news/world-middle-east-12435550>.

10. Philip N. Howard, *The Arab Spring's Cascading Effects*, PAC. STANDARD (Feb. 23, 2011), <http://www.psmag.com/politics/the-cascading-effects-of-the-arab-spring-28575/>; see also L. Gordon Crovitz, *Egypt's Revolution by Social Media*, WALL ST. J. (Feb. 14, 2011), <http://online.wsj.com/article/SB10001424052748703786804576137980252177072.html> (“The events in Egypt reflect different roles for different kinds of social media . . . Facebook helps

newspapers all around the world.<sup>11</sup> Eighteen days later, on February 11, 2011, the thirty-year regime was over: Hosni Mubarak resigned.<sup>12</sup> The world media called it “Revolution 2.0.”<sup>13</sup>

The difference in the way these two historic events unfolded demonstrates the profound impact of social media. The world is a different place today from what it was before Internet access became nearly universal, which has facilitated contact with social media.<sup>14</sup> Almost everyone is in some way connected to social media, and social media has completely altered how people communicate.<sup>15</sup> The way people relate to one another, express themselves, and conduct business have all been profoundly changed by social networking and blogging.

Social media has also blurred the line between people’s private and professional lives. Increasingly, employees use social media to discuss issues arising in the workplace.<sup>16</sup> A worker might use social media to announce a promotion, report rumors of downsizing, complain about a co-worker or boss, or discuss dangerous working conditions.<sup>17</sup> In response, many employers have issued social media policies, which set forth rules or guidelines on what is appropriate for employees to post online about their workplace.<sup>18</sup> A social media policy might, for example, provide that an

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organize people, such as detailing how and where to gather physically, while Twitter is for ‘amplification,’ enabling people in real time to share news and comment.”).

11. See, e.g., Anthony Shadid, *Uncharted Ground After End of Egypt’s Regime*, N.Y. TIMES, Feb. 12, 2011, at A1, available at <http://www.nytimes.com/2011/02/12/world/middleeast/12revolution.html>; see also Fahim & El-Naggar, *supra* note 7.

12. Benjamin Wiederkehr, *Visualizing the Egyptian Revolution*, +DATAVISUALIZATION.CH (Feb. 28, 2011), <http://datavisualization.ch/showcases/egyptian-revolution/>.

13. John D. Sutter, *The Faces of Egypt’s ‘Revolution 2.0.’* CNN (Feb. 21, 2011, 12:25 PM), <http://www.cnn.com/2011/TECH/innovation/02/21/egypt.internet.revolution/index.html>; see also Nathan Olivarez-Giles, *Wael Ghonim, Google Exec, Says Egypt’s Revolution Is ‘Like Wikipedia.’* L.A. TIMES (Feb. 14, 2011, 6:28 PM), <http://latimesblogs.latimes.com/technology/2011/02/wael-ghonim-google-exec-says-egypts-revolution-is-like-wikipedia.html>.

14. In October 2012, Facebook announced it had reached one billion active users. Haydn Shaughnessy, *Facebook’s 1 Billion Users: Why the Sky Is Still the Limit*, FORBES (Oct. 4, 2012, 8:31 AM), <http://www.forbes.com/sites/haydnshaughnessy/2012/10/04/facebooks-1-billion-users-why-the-sky-is-still-the-limit/>. Approximately one billion “tweets” are sent every five days. Jeff Bullas, *11 New Twitter Facts, Figures and Growth Statistics*, JEFFBULLAS’S BLOG, <http://www.jeffbullas.com/2011/09/21/11-new-twitter-facts-figures-and-growth-statistics-plus-infographic/#tkIfLqKCID7HE25Q.99> (last visited Nov. 17, 2013).

15. Nicky Jatana et al., *Advising Employers on the Use of Social Media in the Workplace*, L.A. LAW., Feb. 2012, at 12, 12, available at <http://www.lacba.org/Files/LAL/Vol34No11/2891.pdf>.

16. Bryan Russell, *Facebook Firings and Twitter Terminations: The National Labor Relations Act as a Limit on Retaliatory Discharge*, 8 WASH. J.L. TECH. & ARTS 29, 30 (2012).

17. See *id.*

18. See *EchoStar Technologies, L.L.C.*, No. 27-CA-066726, 2012 WL 4321039 (NLRB Div. of Judges, Sept. 20, 2012); *Three d, LLC*, No. 34-CA-12915, 2012 WL 76862 (NLRB Div. of Judges, Jan. 3, 2012).

employee may not divulge trade secrets,<sup>19</sup> use company computers to access social media sites,<sup>20</sup> or speak disrespectfully of co-workers.<sup>21</sup>

As social media and the workplace increasingly intersect, the National Labor Relations Board (the NLRB) has struggled to apply the now seventy-eight-year-old National Labor Relations Act (the NLRA or Act)<sup>22</sup> in this new world. Most cases in this area deal with whether the discharge or discipline of an employee for statements made on a social media site violates section 7 of the NLRA, which protects an employee's right to "engage in . . . concerted activities for the purpose of collective bargaining or other mutual aid or protection."<sup>23</sup> More recently, the NLRB has addressed the related issue of whether, apart from its application to a particular employee, an employer's social media policy violates section 8(a)(1) of the NLRA, which prohibits an employer from "interfer[ing] with, restrain[ing], or coerc[ing] employees in the exercise of the rights guaranteed in Section 7,"<sup>24</sup> thereby chilling the employee's exercise of section 7 rights.<sup>25</sup> The inquiry in a typical section 8(a)(1) facial challenge to a social media policy is whether some provision of the policy is so general or ambiguous that an employee would reasonably construe the provision as prohibiting or restricting a section 7-protected activity, such as the discussion of working conditions.<sup>26</sup>

This Note will analyze, and critique, the NLRB's approach to challenges to an employer's social media policy under section 8(a)(1) of the Act. As discussed below, the NLRB's approach fails to recognize the unique nature of conversing over social media and has failed to give either employees or employers adequate guidance in this critical area. This failure is particularly important because of the widespread use of social media and the extensive reach of the NLRA, which broadly covers employees in the

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19. See *EchoStar*, 2012 WL 4321039.

20. *Costco Wholesale Corp.*, 358 N.L.R.B. No. 106, 1 (2012).

21. *Karl Knauz Motors, Inc.*, 358 N.L.R.B. No. 164, 1 (2012).

22. National Labor Relations Act, Pub. L. No. 74-198, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151-69 (2012)).

23. Section 7 rights, as they are commonly known, are codified at 29 U.S.C. § 157.

24. 29 U.S.C. § 158(a)(1). Section 158 is commonly referred to as section 8.

25. *Costco Wholesale Corp.*, 358 N.L.R.B. No. 106 at 2.

26. For instance, in *Costco*, the Board found that although the rule did not explicitly reference section 7-protected activity,

by its terms, the broad prohibition against making statements that "damage the Company, defame any individual or damage any person's reputation" clearly encompasses concerted communications . . . [T]here is nothing in the rule that even arguably suggests that protected communications are excluded from the broad parameters of the rule. In these circumstances, employees would reasonably conclude that the rule requires them to refrain from engaging in certain protected communications.

*Id.*

private sector, regardless of whether or not they are represented by a union.<sup>27</sup>

Part I of this Note provides background on the NLRA and NLRB. Part II discusses the unique nature and characteristics of social media as compared to more traditional forms of employee communication and activity and discusses how these differences might affect the review of a social media policy under section 8(a)(1). Part III discusses the NLRB's approach to section 8(a)(1) challenges to an employer's workplace rules and considers how the Board has applied this approach in cases involving social media policies. Part IV proposes an alternate approach to challenges to social media policies—an approach that furthers the purposes of the NLRA while taking into account the unique nature of communication over social media. Finally, Part V sets forth a Model Social Media Policy based on the proposed approach.

## I. BACKGROUND

### A. THE NATIONAL LABOR RELATIONS ACT

Congress enacted the NLRA in 1935 “to protect the rights of employees and employers, to encourage collective bargaining, and to curtail certain private sector labor and management practices, which can harm the general welfare of workers, businesses and the U.S. economy.”<sup>28</sup> The NLRA applies to private sector employees, regardless of whether they are represented by a union, subject to certain exceptions.<sup>29</sup>

The purpose of the Act was to “prohibit unfair labor practices by employers”<sup>30</sup> at a time when employees had little bargaining power.<sup>31</sup> Before the Act's passage, employees were subjected to dangerous working conditions, low wages, and violence.<sup>32</sup> It was much easier for an employer to hire a new employee than it was for an employee to find a new job, so

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27. See 29 U.S.C. § 152; see also *infra* note 29 (discussing exceptions to NLRA coverage).

28. *National Labor Relations Act*, NLRB, <http://www.nlr.gov/national-labor-relations-act> (last visited Nov. 17, 2013).

29. The NLRA does not include

any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act.

29 U.S.C. § 152.

30. *National Labor Relations Act*, U-S-HISTORY.COM, <http://www.u-s-history.com/pages/h1612.html> (last visited Nov. 17, 2013).

31. *Id.*

32. Robert J. Rojas, Note, *The NLRB's Difficult Journey down the Information Super Highway: A New Framework for Protecting Social Networking Activities Under the NLRA*, 51 WASHBURN L.J. 663, 666 (2012).

employees had virtually no bargaining power.<sup>33</sup> Thus, the Act significantly leveled the playing field between employers and employees.<sup>34</sup>

### B. THE NATIONAL LABOR RELATIONS BOARD

The NLRB is made up of three divisions: the General Counsel, Administrative Law Judges (ALJs), and a five-member board consisting of presidential appointees (the Board).<sup>35</sup> When an employee believes he or she was the victim of an unfair labor practice, that employee can file a charge against the employer.<sup>36</sup> The NLRB General Counsel investigates charges and determines whether they are legitimate and should be prosecuted.<sup>37</sup> If the General Counsel decides the claim has merit, it will generally begin the process of prosecuting the case by issuing a complaint.<sup>38</sup> If the case is not settled, the claim is brought before an ALJ, who issues a decision on the claim.<sup>39</sup> An ALJ decision is not considered precedent but can be useful in predicting how the full Board might decide a case.<sup>40</sup> The ALJ decision can be appealed to the full Board by either the General Counsel or the charged party.<sup>41</sup> Decisions of the Board are appealed directly to a Court of Appeals.<sup>42</sup>

## II. BEYOND THE WATER COOLER

The NLRA was enacted in 1935, in a world vastly different from the world of Twitter and Facebook.<sup>43</sup> The vast majority of the NLRA caselaw was decided in the pre-Internet era and involved employee telephone usage,<sup>44</sup> employee gatherings in the parking lot after the shift,<sup>45</sup> or union activities during nonworking hours.<sup>46</sup> The NLRB has been applying the

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33. *National Labor Relations Act*, *supra* note 30.

34. Rojas, *supra* note 32, at 665.

35. *Who We Are*, NLRB, <http://www.nlr.gov/who-we-are> (last visited Nov. 17, 2013).

36. *Id.*

37. MICHAEL J. EASTMAN, A SURVEY OF SOCIAL MEDIA ISSUES BEFORE THE NLRB 3 (2011), available at <http://www.uschamber.com/sites/default/files/reports/NLRB%20Social%20Media%20Survey.pdf>.

38. *Id.*

39. *Id.* at 4.

40. *Protected Speech and the Rights of Private Sector Employees: Social Media Postings: Are They Protected Speech?*, BOGATIN, CORMAN & GOLD, <http://bcgattorneys.com/protected-speech-and-the-rights-of-private-sector-employees-social-media-postings-are-they-protected-speech/> (last visited Nov. 17, 2013) [hereinafter *Protected Speech*].

41. EASTMAN, *supra* note 37, at 4.

42. 29 U.S.C. § 160(f) (2012). In addition to an appeal by a party of a proceeding, the Board can petition a Court of Appeals for an order of enforcement if a party fails to comply with a Board order. *Id.* § 160(e).

43. See *National Labor Relations Act*, *supra* note 28.

44. Kenrich Petrochems, 294 N.L.R.B. 519, 525 (1989).

45. See *Eastex, Inc. v. NLRB*, 437 U.S. 556, 558 (1978) (employees engaged in union activities in nonworking areas of petitioner's property during nonworking hours).

46. See *id.* (Employees "sought to distribute a union newsletter in nonworking areas of petitioner's property during nonworking time urging employees to support the union and

standards and test developed in the pre-Internet context to online activities, with little or no acknowledgment of how social media activities differ from more traditional employee activities and how those differences might be legally significant.<sup>47</sup> Other federal agencies, including the Food and Drug Administration (the FDA)<sup>48</sup> and the Federal Trade Commission (the FTC),<sup>49</sup> have recognized that social media is different, and these agencies are undertaking an open, inclusive study of social media, holding public hearings, and taking public comment in an effort to determine how the traditional rules may need to be modified in light of the unique nature of social media.<sup>50</sup>

In contrast, the NLRB is “operating under the false assumption that online activity mirrors offline activity”<sup>51</sup> and is applying its traditional rules

discussing a proposal to incorporate the state ‘right-to-work’ statute into the state constitution and a Presidential veto of an increase in the federal minimum wage.”)

47. Steven Greenhouse, *Even If It Enrages Your Boss, Social Net Speech Is Protected*, N.Y. TIMES, Jan. 22, 2013, at A1, available at <http://www.nytimes.com/2013/01/22/technology/employers-social-media-policies-come-under-regulatory-scrutiny.html>; see Angie Cowan Hamada, Annual Meeting of the American Bar Association, Labor & Empt Law Section, *An Old Act and New Technology [sic]: Applying the NLRA to Social Media 3* (Aug. 4, 2012).

48. For example, in U.S. DEP’T OF HEALTH & HUMAN SERVS. ET AL., GUIDANCE FOR INDUSTRY RESPONDING TO UNSOLICITED REQUESTS FOR OFF-LABEL INFORMATION ABOUT PRESCRIPTION DRUGS AND MEDICAL DEVICES: DRAFT GUIDANCE (2011), available at <http://www.fda.gov/downloads/Drugs/GuidanceComplianceRegulatoryInformation/Guidances/UCM285145.pdf>, a coalition of health agencies and organizations addresses the use of social media by pharmaceutical companies to promote their products, and specifically focuses on the duties and limitations that apply when a company responds on social media to a question about “off-label,” or unapproved, use of their product. Prior to issuing this Guidance, the FDA held two days of hearings, at which representatives of the drug industry, social media companies, and consumers testified, and the FDA then issued proposed guidelines for public comment. Bob Pearson, *Perspective on the FDA Social Media Hearing*, COMMON SENSE (Nov. 16, 2009, 9:35 AM), <http://www.csmg.us/2009/11/perspective-on-the-fda-social-media-hearing.html> (last visited Nov. 17, 2013).

49. For example, in 2009, the FTC updated its *Guides Concerning the Use of Endorsement and Testimonials in Advertising (Guides)* to address the unique issues posed by the expanding use of social media for advertising. *Guides Concerning the Use of Endorsements and Testimonials in Advertising*, 74 Fed. Reg. 53,124, 53,124 (Oct. 15, 2009). The *Guides* deal with such issues as the disclosure of a “material connection,” such as payments or free use of a product, between the advertiser and the endorser. *Id.* at 53,133. The updated *Guides* address such social media issues as blog comments by celebrities. *Id.* at 53,128, 53,133. Prior to issuing the updated *Guides*, the FTC issued a draft of the proposed changes for public comment. *Guides, Proposed Plans*, 73 Fed. Reg. 72,374, 72,374 (Nov. 28, 2008).

50. In many other areas of the law, the unique characteristics of social media are requiring an examination of whether, and if so, how, traditional rules must be modified to apply to this new medium. See, e.g., H. Christopher Boehing & Daniel J. Toal, *Authenticating Social Media Evidence*, N.Y.L.J., Oct. 2, 2012, at 5 (“Because social media is often stored on remote servers, is assessed through unique interfaces, can be dynamic and collaborative in nature, and is uniquely susceptible to alteration and fabrication, evidentiary standards developed for other types of electronically stored information [ESI] may not be adequate.”); see also Peter A. Crusco, *An Impartial Jury in the Milieu of Social Media Networks*, N.Y.L.J., Oct. 23, 2012, at 5.

51. Ariana C. Green, *Privacy Law: Using Social Networking to Discuss Work: NLRB Protection for Derogatory Employee Speech and Concerted Activity*, 27 BERKELEY TECH. L.J. 837, 885 (2012).

to social media cases without considering public comment, a study of social media, or an analysis of how online activity differs from water cooler conversations, pamphleting, or other traditional types of concerted activities. In fact, Board Chairman Mark G. Pearce recently stated that “many view social media as the new water cooler. . . . [A]ll we’re doing is applying traditional rules to a new technology.”<sup>52</sup>

### A. WHAT’S DIFFERENT ABOUT SOCIAL MEDIA

However, there are a number of very significant differences between posting a comment on Twitter and engaging in a verbal, face-to-face exchange.

#### 1. Here, There, Everywhere

First, unlike a conversation with a person or a few people, a statement posted on the Internet can potentially be read by millions of people.<sup>53</sup> Even before the proliferation of social media, it was possible, albeit difficult, for an ordinary person to make a public statement that would reach a large audience. Anyone can put on a thirty-second commercial during the Super Bowl and reach an audience of more than 100 million viewers.<sup>54</sup> However, the theoretical availability of these fora never posed a real problem because of their high cost. Social media differs in that almost everyone has access to the Internet, and through it, a virtually unlimited audience.

#### 2. Spreads Like Wildfire

The Internet is “marvelously efficient.”<sup>55</sup> Something posted to the Internet can “go viral” and be viewed by countless people very quickly, particularly because of the ability to “share” or “re-tweet” a posting without having to ask permission.<sup>56</sup> For example, during the 2012 Obama-Romney

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52. Greenhouse, *supra* note 47.

53. Gladwell, *supra* note 2, at 45 (“Twitter is a way of following (or being followed by) people you may never have met. Facebook is a tool for efficiently managing your acquaintances, for keeping up with the people you would not otherwise be able to stay in touch with. That’s why you can have a thousand ‘friends’ on Facebook, as you never could in real life.”).

54. A thirty-second commercial during the 2012 Super Bowl cost on average \$3.5 million, and the expected audience was to exceed 111 million viewers. *See* Associated Press, *Super Bowl Ads Cost Average of \$3.5 million*, ESPN, [http://espn.go.com/nfl/playoffs/2011/story/\\_id/7544243/super-bowl-2012-commercials-cost-average-35m](http://espn.go.com/nfl/playoffs/2011/story/_id/7544243/super-bowl-2012-commercials-cost-average-35m) (last updated Feb. 6, 2012).

55. “There is strength in weak ties, as the sociologist Mark Granovetter has observed. Our acquaintances—not our friends—are our greatest source of new ideas and information. The Internet lets us exploit the power of these kinds of distant connections with marvellous efficiency.” Gladwell, *supra* note 2, at 45.

56. One NFL player posted to Twitter regarding the replacement referees, and within twelve hours his tweet had been retweeted 85,000 times. *See* Nick Carbone, *Monday Night Football: The 14 Best Tweets About the Controversial Packers-Seahawks Call*, TIME NEWSFEED (Sept. 25, 2012), <http://newsfeed.time.com/2012/09/25/monday-night-football-the-14-best-tweets-about-the-controversial-packers-seahawks-call/slide/interception-explosion/>.



presidential election, television stations recognized that the early broadcasting of exit poll data could influence the election's result.<sup>57</sup> To avoid that risk, television stations agreed not to release early exit poll data—“[t]hat means no tweeting exit polls, posting on Facebook, or re-tweeting figures reported by others.”<sup>58</sup>

### 3. Cheap ‘n’ Easy

In addition, social media is easily and inexpensively available. Over the past two decades there have been major changes in technology and in the availability of social media. In the 1990s home-computer ownership more than doubled, from fifteen percent of households to thirty-five percent.<sup>59</sup> Now many people own or have access to a computer or a smartphone, often Internet-enabled for easy access to the Internet—anytime, anywhere.<sup>60</sup> The widespread availability of these devices means that people can constantly be in touch with anyone in the world for little or no cost.

### 4. There for the Long Haul

A post to Facebook or Twitter lingers; it never disappears unless it is deleted, and even then, in the complex world of technology and cyberspace, it may never actually cease to exist.<sup>61</sup> Once something is posted, the poster might not be able to delete or control it.<sup>62</sup> In contrast, a face-to-face conversation, unless recorded, is fleeting and lasts only as long as the words are being spoken.

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57. Lisa Richwine, *TV Networks to Staff: Watch What You Tweet on Election Day*, REUTERS (Nov. 6, 2012), <http://www.reuters.com/article/2012/11/06/net-us-usa-campaign-media-idUSBRE8A41LY20121106>.

58. *Id.*

59. *Computer Ownership Up Sharply in the 1990s*, U.S. BUREAU LAB. STAT. (Apr. 5, 1999), <http://www.bls.gov/opub/ted/1999/apr/wk1/art01.htm>.

60. *Trend Data (Adults)*, PEW INTERNET, [http://www.pewinternet.org/Trend-Data-\(Adults\)/Device-Ownership.aspx](http://www.pewinternet.org/Trend-Data-(Adults)/Device-Ownership.aspx) (last visited Nov. 17, 2013).

61. See, e.g., *Cajun Boy, Tori Spelling's Husband Accidentally Tweeted a Photo of Her Breasts*, UPROXX (Nov. 17, 2011), <http://www.uproxx.com/webculture/2011/11/tori-spellings-husband-accidentally-tweeted-a-photo-of-her-breasts/>. Though Ms. Spelling's husband immediately deleted the photo, the image is still easily found with a simple Internet search.

62. Even erroneous online statements that are quickly corrected can have serious consequences. For instance, for several hours following Adam Lanza's mass murder of children and staff members at Sandy Hook Elementary School in Newtown, Connecticut, police mistakenly named Ryan Lanza—Adam Lanza's brother—as the shooter. Even after authorities corrected themselves later that day, Ryan's picture continued to be sent all over the world, and he was the target of online death threats and condemned as a murderer by a “jury of Internet denizens.” Helen A.S. Popkin, *Social Media Quick to Judge, Slow to Absolve Shooter's Brother*, NBC NEWS, <http://www.nbcnews.com/technology/technolog/social-media-quick-judge-slow-absolve-shooters-brother-1C7621187> (last visited Nov. 17, 2013).

### 5. Is Anyone There?

It is often unclear who the audience is when using social media. In contrast to a personal conversation, a communication over social media does not require an audience. In fact, often when people post something online, they are not addressing a particular person but rather post with the idea that someone will read the post. Although the poster might not be attempting to communicate with anyone in particular, the potential audience on a social media website could be the entire world.

### 6. “Online Disinhibition Effect”

Finally, many people behave differently online and will say things that they would never say in a direct, in-person exchange.<sup>63</sup> Internet addiction disorder has now been formally recognized by the American Psychological Association as a disorder.<sup>64</sup> Though research in the area has only just begun, the medical profession has recognized that the Internet makes people act differently from how they would act in person.<sup>65</sup>

[I]f inhibition is when behavior is contrained [sic] or restrained through self-consciousness, anxiety about social situations, worries about public evaluation, and so on, then disinhibition can be characterized by an absence or reversal of these same factors. . . . With regard to an individual’s behavior on the Internet, disinhibition could be summarized as behavior that is less inhibited than comparative behavior in real life.<sup>66</sup>

People do and say things on the Internet that they would not even consider doing or saying in person.<sup>67</sup> This phenomenon has been widely discussed in the popular press<sup>68</sup> and has also attracted scholarly attention, where it has been labeled the “online disinhibition effect.”<sup>69</sup> The effect operates in two

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63. Britney Fitzgerald, *Facebook Psychology: 7 Reasons Why We Act Differently Online*, HUFFINGTON POST (Oct. 11, 2012, 6:41 PM), [http://www.huffingtonpost.com/2012/10/11/facebook-psychology-7-reasons\\_n\\_1951856.html](http://www.huffingtonpost.com/2012/10/11/facebook-psychology-7-reasons_n_1951856.html) (“But why exactly do we feel empowered enough to act a certain way on social networking platforms like Facebook? The site requires users to sign up with their real names, so we’re not truly anonymous or far removed from virtual conversation. Even so, our behavior online can be . . . less than charming.”).

64. See *Internet Addiction Disorder*, ENCYCLOPEDIA MENTAL DISORDERS, <http://www.minddisorders.com/Flu-Inv/Internet-addiction-disorder.html> (last visited Nov. 17, 2013).

65. See, e.g., Keith Wilcox & Andrew T. Stephen, *Are Close Friends the Enemy? Online Social Networks, Self-Esteem, and Self-Control*, 40 J. CONSUMER RES. 90 (2013) (finding that use of social networks enhances self-esteem in users who focus on close friends, and this increase in self-esteem reduces self-control).

66. John M. Grohol, *Online Disinhibition Effect*, PSYCHCENTRAL, <http://psychcentral.com/encyclopedia/2009/online-disinhibition-effect/> (last visited Nov. 17, 2013).

67. John Suler, *The Online Disinhibition Effect*, 7 CYBERPSYCHOL. & BEHAV. 321, 321 (2004), available at [http://lacomunidad.elpais.com/blogfiles/apuntes-cientificos-desde-el-mit/71994\\_Suler.pdf](http://lacomunidad.elpais.com/blogfiles/apuntes-cientificos-desde-el-mit/71994_Suler.pdf).

68. See generally Fitzgerald, *supra* note 63 (discussing reasons we act differently online).

69. Suler, *supra* note 67; see generally Adam N. Joinson, *Self-Disclosure in Computer-Mediated Communication: The Role of Self-Awareness and Visual Anonymity*, 31 EUR. J. SOC.

directions; sometimes people will reveal personal information about themselves online that they would not share in a one-on-one conversation (so-called benign disinhibition), and sometimes people will act out online and make statements, including obscene, vicious rants, that they would not make directly (known as toxic disinhibition).<sup>70</sup>

## B. WHY THESE DIFFERENCES MATTER

These differences have practical implications. Risks are amplified on social media. After a difficult day in the workplace, an employee may impulsively and angrily post a message that he or she would never communicate in person and may soon regret, yet have no way to delete or retract the message.<sup>71</sup> Without the employee's permission or knowledge, the statement can be forwarded. Confidential information can be disclosed, privacy violated, and reputations damaged.

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PSYCHOL. 177, 177-92 (2001) (finding the level of self-disclosure in communication over a computer significantly higher than in-person communication); Louis Leung, *Loneliness, Self-Disclosure, and ICQ ("I Seek You") Use*, 5 CYBERPSYCHOL. & BEHAV. 241, 241-50 (2002), available at [http://www.com.cuhk.edu.hk/ccpos/en/pdf/self\\_disclosure.pdf](http://www.com.cuhk.edu.hk/ccpos/en/pdf/self_disclosure.pdf) (describing how computer-mediated communication allows people to interact without being face-to-face).

70. Suler, *supra* note 67. Professor Suler has identified six factors that interact to create the online disinhibition effect:

(1) "Dissociative anonymity." When you do things on the Internet, most people you encounter cannot easily tell who you are. *Id.* at 322.

(2) "Invisibility." Many online social media environments are "text-driven," and the participants do not see or hear each other. In such an environment, even if one's identity is known, the "opportunity to be physically invisible amplifies the disinhibition effect." *Id.*

(3) "Asynchronicity." Most social media interaction does not take place in "real time." As a result, there are not the same interpersonal "cues" as in a face-to-face exchange, and the person posting a statement does not have to react to the immediate reaction of others. *Id.* at 322-23.

(4) "Solipsistic introjection." This is the idea that people view online activity as being similar to daydreaming or fantasizing, which can cause people to believe that online conversations take place in their mind rather than with another human being. *Id.* at 323.

(5) "Dissociative imagination." Many social media participants believe that they are operating in a "make-believe dimension, separate and apart from the demands and responsibilities of the real world." As a result, they "split or dissociate online fiction from offline fact." *Id.* at 323-24.

(6) "Minimization of status and authority." The Internet is the ultimate "level playing field," where there are no monitors, and anyone, "regardless of status, wealth, race, or gender," is free to speak. As a result of this minimization of authority and the perception of a peer environment, "people are much more willing to speak out and misbehave." *Id.* at 324.

71. These risks are not unique to rank and file employees. Clothing designer Kenneth Cole is notorious for using global events as opportunities for promoting his brand. For instance, during the violent protests in Egypt in 2011, Cole tweeted: "Millions are in uproar in #Cairo. Rumor is they heard our new spring collection is now available online . . . -KC." The Cole tweet immediately became "the target of the Internet's collective wrath," condemned as "repulsive" and "in poor taste." Ken Sweet, *Kenneth Cole Egypt Tweets Ignite Firestorm*, CNNMONEY (Feb. 4, 2011, 9:59 AM), [http://money.cnn.com/2011/02/03/news/companies/KennethCole\\_twitter/index.htm](http://money.cnn.com/2011/02/03/news/companies/KennethCole_twitter/index.htm). Within an hour of the post, Cole apologized: "[W]e weren't intending to make light of a serious situation. We understand the sensitivity of this historic moment." *Id.*

Employers' reputations are at stake, as employees represent the company they work for and can cast their employer in a negative light with one distasteful comment.<sup>72</sup> Similarly, employees put themselves at risk with comments they make and can damage their own reputations.<sup>73</sup> Statements that an employee makes and later regrets may not be erasable. With social media, what used to be a private gripe about work can now become a message heard around the world, which once sent cannot easily be retrieved. The Third Circuit Court of Appeals recently noted that there are differences between online communication and in-person communication, "given that the universe of individuals who are able to see and respond to a comment on Facebook or a blog is significantly larger."<sup>74</sup>

These unique characteristics of social media create dangers for both employees and employers. An employee might say something on Facebook that she would never say in person in the employee lunchroom or at the water cooler. The posting might be re-posted by someone else, so the employee is unable to retrieve, delete, or control the message. As a result, the company's proprietary or confidential information may be disclosed, personal information may be revealed, reputations tarnished, relationships harmed, and legal vulnerability created (e.g., for harassment, defamation, or the creation of a hostile work environment).

The unique characteristics of social media, and the potential dangers to both employee and employer, have significant implications for the NLRA and how it is applied in this new area. Most of the Board's decisions in this area deal with whether the discharge or discipline of an employee for social media activity violated the section 7 protection of concerted activity.<sup>75</sup> In this context, cases have turned on such novel issues as whether clicking the "like" button on Facebook in response to an employee message qualifies as protected "concerted activity"<sup>76</sup> and the significance of "LOL" in a

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72. See Wesley Lowery, *Woman Explains Obama Assassination Facebook Posting*, L.A. TIMES (Nov. 10, 2012, 7:36AM), <http://latimesblogs.latimes.com/lanow/2012/11/woman-obama-assassination-facebook-posting.html?dlvrit=649324> (An employee posted "maybe [Obama] will get assassinated" along with a racial slur on her personal Facebook page and was fired after the post went viral, prompted a secret service investigation, and the national ice cream chain received more than twenty angry voicemails from customers. The chain attempted to distance itself from the comments made by the employee, stating that "[t]he employee is no longer w/the company. We were as shocked as you were by her outrageous & completely unacceptable comments.").

73. See *id.* ("If the Secret Service were to determine her remarks were a legitimate threat toward the president, Helms would face a felony.").

74. *United States v. Fumo*, 655 F.3d 288, 305 (3d Cir. 2011); see also *Crusco*, *supra* note 50.

75. The Boards in *Meyers Indus., Inc.*, 268 N.L.R.B. 493, 497 (1984) (*Meyers I*) and *Meyers Indus., Inc.*, 281 N.L.R.B. 882, 885 (1986) (*Meyers II*) held that an employee's activity is concerted if engaged "with or on the authority of other employees, and not solely by and on behalf of the employee himself." In *Meyers II*, the Board emphasized that concerted activity included activity where "individual employees seek to initiate or to induce or to prepare for group action, as well as individual employees bringing truly group complaints to the attention of management." *Meyers II*, 281 N.L.R.B. at 887.

76. *Three d, LLC*, No. 34-CA-12915, 2012 WL 76862 (NLRB Div. of Judges, Jan. 3, 2012).

response.<sup>77</sup> Because of the unique nature of social media, scarcity of guiding precedent, and varied interpretations of what constitutes group action and concerted activity, decisions in this area have been inconsistent,<sup>78</sup> and it appears to be form over substance that counts.<sup>79</sup>

In response, some commentators are advising employees to say “we,” not “I” in messages, which has the effect of bringing a statement that might otherwise not be concerted activity within the reach of section 7.<sup>80</sup> Employees are also being advised to include a call for group action in a post—an employee gripe is not protected,<sup>81</sup> but if the employee adds a call for group action, the statement is likely to be found protected, concerted activity.<sup>82</sup>

This Note addresses the related issue of employers’ attempts to prophylactically guard against the danger of employee activity on social media by issuing policies. The next Part of this Note addresses, first, the Board’s traditional approach to section 8 challenges to workplace rules and policies, and, second, the Board’s application of its traditional rules to social media policies.

77. NLRB Gen. Couns. Adv. Mem., Case No. 17-CA-25030, at \*1–2 (July 19, 2011) [hereinafter Wal-Mart Advice Memorandum], available at [http://www.laborrelationstoday.com/uploads/file/WalMart\\_17\\_CA\\_25030\\_doc.pdf](http://www.laborrelationstoday.com/uploads/file/WalMart_17_CA_25030_doc.pdf).

78. *Compare Three d.*, 2012 WL 76862 (ALJ held that an employee clicking the “like” button on Facebook was “an assent to the comments being made, and a meaningful contribution to the discussion”), with Wal-Mart Advice Memorandum, *supra* note 77, at \*1–2 (NLRB dismissed case brought by a Wal-Mart employee who was fired for posting “Wuck Falmart! I swear if this tyranny doesn’t end in this store they are about to get a wakeup call because lots are about to quit!” Co-workers’ responses included “bahaha like!” and “What the hell happens after four that gets u so wound up??? Lol.” The fired employee responded: “You have no clue [Employee 1] . . . [Assistant Manager] is being a super mega puta! Its retarded I get chewed out cuz we got people putting stuff in the wrong spot and then the customer wanting it for that price . . . [T]hat’s false advertisement if you don’t sell it for that price . . . I’m talking to [Store Manager] about this shit cuz if it don’t change walmart can kiss my royal white ass!”); see also NLRB Gen. Couns. Adv. Mem., Case No. 34-CA-12576 (October 5, 2010) (Am. Med. Response of Conn., Inc.) (EMT calls boss a “dick” on Facebook and is protected by section 7); but see NLRB Gen. Couns. Adv. Mem., Case No. 11-CA-22936 (July 28, 2011) [hereinafter Buel Advice Memorandum] (truck driver stuck on a road, unable to get in touch with dispatch to help, so he posted about the situation on his Facebook page and was fired and was not protected by section 7).

79. See, e.g., Green, *supra* note 51, at 840 (“[M]inor variations in language used in a post can have profound consequences.”); see also *Protected Speech*, *supra* note 40 (advising employees to make sure comments about employer and work issues made on social media are “in a context of protected concerted activity and on topics concerning terms and issues of employment that you have been discussing with co-employees”).

80. Cowan Hamada, *supra* note 47, at 15.

81. See Buel Advice Memorandum, *supra* note 78, at \*4 (“[T]he Charging Party plainly was not seeking to induce or prepare for group action. Instead, he was simply expressing his own frustration and boredom while stranded by the weather, by griping about his inability to reach the on-call dispatcher.”).

82. Cowan Hamada, *supra* note 47, at 15.

### III. WORKPLACE RULES AND THE NLRB

In reviewing challenges to employee policies, including workplace rules, the NLRB has traditionally followed the test adopted in *Martin Luther Memorial Home*<sup>83</sup> and *Lafayette Park Hotel*.<sup>84</sup> The NLRB has adopted, without modification, this traditional test in cases challenging social media policies.<sup>85</sup> As a result, there has been confusion as to what the law is and what an employer may lawfully include in a social media policy. One commentator has criticized the NLRB's approach to social media policies as an "unrealistic, hair-splitting mess," in which the legality of a policy rises or falls based on subtle nuances in wording.<sup>86</sup> For example, a social media policy that "encourages" employees to first use internal workplace procedures for resolving disputes are found to violate section 7, but it is lawful for employers to "suggest" that employees use such procedures before posting about a workplace dispute online.<sup>87</sup>

#### A. THE *MARTIN LUTHER MEMORIAL HOME/LAFAYETTE PARK* TEST

In ruling on permissible workplace rules, the Board considers if a rule violates section 8(a)(1) of the Act, which prohibits an employer from infringing on an employee's section 7 rights.<sup>88</sup> A rule that an employee would reasonably construe to chill the exercise of section 7 rights is a violation of section 8(a)(1).<sup>89</sup> To determine if a work rule would have such an effect, the Board uses the two-step inquiry developed in *Martin Luther Memorial Home*<sup>90</sup> and *Lafayette Park*.<sup>91</sup> First, a rule that explicitly restricts section 7-protected activities is clearly unlawful.<sup>92</sup> If the rule does not explicitly restrict section 7-protected activities, "it will only violate Section 8(a)(1) upon a showing that: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the

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83. *Martin Luther Mem'l Home, Inc.*, 343 N.L.R.B. 646 (2004).

84. *Lafayette Park Hotel*, 326 N.L.R.B. 824 (1998), *enforced* 203 F.3d 52 (D.C. Cir. 1999).

85. *See* Karl Knauz Motors, Inc., 358 N.L.R.B. No. 164, 1 (2012).

86. Robin Shea, *The NLRB's Dos and Don'ts for Employer Social Media Policies*, LEXISNEXIS LEGAL NEWSROOM, <http://www.lexisnexis.com/legalnewsroom/labor-employment/b/labor-employment-top-blogs/archive/2012/06/09/the-nlr-b-s-dos-and-don-ts-for-employer-social-media-policies.aspx> (last visited Nov. 17, 2013).

87. NLRB, MEMORANDUM OM 12-59, REPORT OF THE ACTING GENERAL COUNSEL CONCERNING SOCIAL MEDIA CASES (2012) [hereinafter MEMORANDUM OM 12-59], *available at* [http://op.bna.com/tpif.nsf/id/mlon-8wypyg/\\$File/NLRB%20GC%20May%2030%202012%20Memo.pdf](http://op.bna.com/tpif.nsf/id/mlon-8wypyg/$File/NLRB%20GC%20May%2030%202012%20Memo.pdf).

88. *Id.* at 3 (citing *Lafayette Park Hotel*, 326 N.L.R.B. at 825).

89. *Id.*

90. 343 N.L.R.B. at 647.

91. 326 N.L.R.B. at 825.

92. EchoStar Technologies, L.L.C., No. 27-CA-066726, 2012 WL 4321039 (NLRB Div. of Judges, Sept. 20, 2012).

exercise of Section 7 rights.”<sup>93</sup> In making this determination, the Board must “give the rule a reasonable reading . . . , refrain from reading particular phrases in isolation, and . . . not presume improper interference with employee rights.”<sup>94</sup>

In a number of decisions pre-dating its recent social media rulings, the NLRB found section 8 violations based on workplace rules that included language similar to that now found in many employers’ social media policies, such as provisions prohibiting “abusive or threatening language” in the workplace.<sup>95</sup> The Board has consistently found such provisions ambiguous, and therefore unlawful, on the ground that an employee “could” interpret it as applying to section 7 activity and that the provision would therefore tend to chill such protected activity.<sup>96</sup>

The Board’s position that such facially neutral phrases as “abusive language” extend to communications protected by section 7 has been subject to stinging judicial criticism. For example, in *Adtranz*, the NLRB held that the employer’s policy prohibiting the use of “abusive or threatening language to anyone on company premises” violated the NLRA because it had the “unrealized potential to chill the exercise of protected activity [and] could reasonably be interpreted as barring lawful” activity that is protected by section 7.<sup>97</sup> On review, the Court of Appeals vacated the NLRB’s determination, stating that “the Board’s position that the imposition of a broad prophylactic rule against abusive and threatening language is unlawful on its face is simply preposterous.”<sup>98</sup>

The *Adtranz* court also accused the Board of being “remarkably indifferent to the concerns and sensitivities which prompt many employers to adopt” rules prohibiting abusive language in the workplace.<sup>99</sup> The court found that many employers adopt such workplace courtesy rules not to restrict section 7 activity, but rather to protect themselves from liability under federal and state statutes for failing “to maintain a workplace free of racial, sexual, and other harassment.”<sup>100</sup> The court criticized the Board for

93. MEMORANDUM OM 12-59, *supra* note 87, at 3; *see also Martin Luther Mem'l Home, Inc.*, 343 N.L.R.B. at 647.

94. *Martin Luther Mem'l Home, Inc.*, 343 N.L.R.B. at 646 (citing *Lafayette Park Hotel*, 326 N.L.R.B. at 825).

95. The NLRB affirmed an ALJ’s ruling that abusive or threatening language was in violation of section 8, but the decision was later vacated by the D.C. Circuit Court of Appeals. *Adtranz ABB Daimler-Benz Transp., N.A., Inc. v. NLRB*, 253 F.3d 19, 24–25 (D.C. Cir. 2001), *vacating as moot* 331 N.L.R.B. 291 (2000).

96. *See, e.g.,* MEMORANDUM OM 12-59, *supra* note 87, at 20; *see also* Karl Knauz Motors, Inc., 358 N.L.R.B. No. 164, 2 (2012) (quoting *Flex Frac Logistics, LLC*, 358 N.L.R.B. No. 127, 2 (2012) (“Board law is settled that ambiguous employer rules—rules that reasonably could be read to have a coercive meaning—are construed against the employer.”)).

97. *Adtranz*, 331 N.L.R.B. at 293.

98. *Adtranz*, 253 F.3d at 28.

99. *Id.* at 27.

100. *Id.*

holding that employers' "zero tolerance" rules, adopted to avoid liability under workplace harassment laws, in fact violate section 7 of the NLRA, which places employers in a "catch-22" situation.<sup>101</sup>

Two years later, the D.C. Circuit denied the Board's application for enforcement of its determination that an employer policy that prohibited "insubordination, refusing to follow directions, obey legitimate requests or orders, or other disrespectful conduct towards a supervisor or other individual" violated section 7.<sup>102</sup> In rejecting the Board's determination that an employee "might interpret the term 'disrespectful conduct'" to cover section 7 activities,<sup>103</sup> the court found that the rule "clearly" did not apply to section 7 activity and that "'any arguable ambiguity' in the rule 'arises only . . . [by] attributing to the [employer] an intent to interfere with employee rights.'"<sup>104</sup>

As discussed in the next section, in its recent decisions finding social media policies in violation of section 7, the NLRB has, without any discussion or meaningful consideration of the unique characteristics of social media, utilized the *Martin Luther Memorial Home/Lafayette Park* test, and it has taken the same rigid interpretative approach criticized by the D.C. Circuit in *Adtranz* and *Community Hospitals*.

**B. NEW WINE IN OLD WINESKINS: THE NLRB'S APPLICATION OF  
THE *MARTIN LUTHER MEMORIAL HOME/LAFAYETTE PARK*  
TEST TO SOCIAL MEDIA POLICIES<sup>105</sup>**

The Board did not issue a decision in an 8(a)(1) challenge to an employer social media policy until the fall of 2012. Then in September 2012, the Board issued three decisions in less than one month.<sup>106</sup> However, prior to that time there were a number of decisions by ALJs and three

101. *Id.*

102. *Cnty. Hosps. of Cent. Cal. v. NLRB*, 335 F.3d 1079, 1087–88 (D.C. Cir. 2003).

103. *Id.* at 1088.

104. *Id.* at 1089 (quoting *Lafayette Park Hotel*, 326 N.L.R.B. 824, 825 (1998), *enforced* 203 F.3d 52 (D.C. Cir. 1999)).

105. The expression "new wine in old wineskins" is based on a biblical passage in which Jesus responds to a question about why he and his followers do not follow traditions regarding religious fasting. In his response, Jesus explained the dangers of mixing the new with the old:

And he spake also a parable unto them; No man putteth a piece of a new garment upon an old; if otherwise, then both the new maketh a rent, and the piece that was taken out of the new agreeth not with the old. And no man putteth new wine into old bottles; else the new wine will burst the bottles, and be spilled, and the bottles shall perish. But new wine must be put into new bottles; and both are preserved.

*Luke* 5:36–38.

106. *Costco Wholesale Corp.*, 358 N.L.R.B. No. 106, 1 (2012); *EchoStar Technologies, L.L.C.*, No. 27-CA-066726, 2012 WL 4321039 (NLRB Div. of Judges, Sept. 20, 2012); *Karl Knauz Motors, Inc.*, 358 N.L.R.B. No. 164, 1 (2012).



important advisory memoranda issued by the Acting General Counsel of the NLRB.

In the first memorandum, the Acting General Counsel presented the NLRB's pro-employee stance with regard to social media in the workplace. The memorandum "made clear that when analyzing whether an employee's comments on social media are protected by the Act, it will apply current Board standards and consider whether: (1) the employee engaged in concerted activity; and (2) whether that activity was protected."<sup>107</sup>

The second memorandum "analyzes cases involving social media policies and disciplines and discharges due to conduct involving social media."<sup>108</sup> "In analyzing these policies, the Division of Advice focused on the relative breadth of the policy language, possible examples that limited their application, and actual instances of application."<sup>109</sup> The memorandum made clear that any ambiguity in the policy is to be construed against the employer, as the policy was written by the employer and it was the employer's responsibility to clarify.<sup>110</sup>

The third memorandum focused exclusively on employer social media policies.<sup>111</sup> The memorandum examined seven social media policies, six of which contained at least some provisions that were unlawful, and one of which, the social media policy of Wal-Mart, was found by the Acting General Counsel to be lawful in its entirety.<sup>112</sup> The memorandum "provide[s] the NLRB's view or analysis of such policies in general," and importantly, "outside of the context of specific discipline/discharge situations."<sup>113</sup> The report made it clear that the NLRB is concerned with policies that it believes employees "would reasonably interpret" as infringing on section 7 activity.<sup>114</sup> Further, it states that the NLRB would apply the *Martin Luther Memorial Home/Lafayette Park* test to social media policy cases.<sup>115</sup> The memorandum also reveals that the focus is on the use of certain language, such as "offensive," "demeaning," and

107. Cowan Hamada, *supra* note 47, at 3 (citing NLRB, MEMORANDUM OM 11-74, REPORT OF THE ACTING GENERAL COUNSEL CONCERNING SOCIAL MEDIA CASES (2011), available at <http://mynlrb.nlr.gov/link/document.aspx/09031d458056e743>).

108. Cowan Hamada, *supra* note 47 at 3 (citing NLRB, MEMORANDUM OM 12-31, REPORT OF THE ACTING GENERAL COUNSEL CONCERNING SOCIAL MEDIA CASES (2012), available at <http://mynlrb.nlr.gov/link/document.aspx/09031d45807d6567>).

109. *NLRB Acting General Counsel Issues Second Report on Social Media*, WINSTON & STRAWN LLP (Jan. 2012), <http://www.lexology.com/library/detail.aspx?g=00136eda-9f14-4050-8cc1-5ef6bbf146e3>.

110. MEMORANDUM OM 12-59, *supra* note 87, at 3.

111. *Id.*

112. *Id.* at 2.

113. Dinsmore & Shohl LLP, *Policy Provisions: NLRB Issues Third Report on Social Media*, NAT'L L. REV. (June 24, 2012), <http://www.natlawreview.com/article/policy-provisions-nlr-issues-third-report-social-media-0>.

114. *Id.*

115. MEMORANDUM OM 12-59, *supra* note 87, at 3.

“abusive.”<sup>116</sup> Read in its entirety, the Acting General Counsel’s memorandum shows that the NLRB “underestimates the ability of employees to reasonably understand employer policies, and purports to invalidate social media policies that employees could potentially interpret as infringing on Section 7, rather than merely policies that employees would reasonably interpret that way.”<sup>117</sup>

In its first case concerning a social media policy, the Board adopted the approach that was outlined in the Acting General Counsel’s third advisory memorandum.<sup>118</sup> On September 7, 2012, the Board issued its decision reviewing Costco’s social media policy, where it found that Costco’s policy violated section 8(a)(1).<sup>119</sup> The *Costco* decision focused on the portion of the policy that prohibited employees from posting online statements that would “damage the Company, defame any individual or damage any person’s reputation, or violate the policies outlined in the Costco Employee Agreement.”<sup>120</sup> The ALJ found the provision lawful on the ground that employees could not reasonably construe the provision as regulating section 7 conduct, but rather would reasonably understand that the purpose of this provision would ensure a “civil and decent workplace.”<sup>121</sup> In reversing the ALJ and finding the provision in violation of section 8(a)(1), the Board applied the factors set forth in *Lafayette Park*.<sup>122</sup> The Board found that while the provision does not explicitly reference section 7 activities, the broad prohibitions in the provision would be interpreted by an employee as encompassing protected activities.<sup>123</sup> This decision was consistent with prior advice of the Acting General Counsel in his advisory memorandum regarding permissible social media policies and ALJ decisions.<sup>124</sup> As a remedy, the Board required Costco to post, in each of its stores in the United States where the invalid provision was in effect,<sup>125</sup> a notice that included the statement: “WE WILL NOT maintain provisions in our Employee Agreement that may reasonably be interpreted as prohibiting you from discussing your wages and conditions of employment with other employees and third parties, including union representatives.”<sup>126</sup>

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116. *Id.* at 8.

117. Dinsmore & Shohl LLP, *supra* note 113.

118. See MEMORANDUM OM 12-59, *supra* note 87, at 10.

119. The case concerned a group of Costco employees who were engaged in union-organizing discussions. It was alleged that the assistant general warehouse manager said, “I hear that you signed a paper for the Union,” which, according to prior cases decided by the Board, would likely be ruled coercive or unlawful. *Costco Wholesale Corp.*, 358 N.L.R.B. No. 106, 5–6, 8–9 (2012).

120. *Id.* at 2.

121. *Id.*

122. *Id.*

123. *Id.*

124. MEMORANDUM OM 12-59, *supra* note 87, at 3.

125. *Costco Wholesale Corp.*, 358 N.L.R.B. No. 106 at 4.

126. *Id.* at 7.

Just two weeks after finding the Costco policy violative of the NLRA, the Board issued its second decision in the area of social media policies, where it found most sections of the employer's social media policy to be overbroad.<sup>127</sup> In the *EchoStar* decision, the Board found that “[t]he Respondent’s maintenance of the rule in question in the context and circumstances described chills employees [sic] Section 7 rights and therefore violates Section 8(a)(1) of the Act.”<sup>128</sup> The Board recognized that while a company “has a legitimate interest in controlling the content and timing of the release of certain business information,”<sup>129</sup> it must tailor its social media policy to meet that legitimate need and cannot make broad prohibitions restricting communications.<sup>130</sup> The Board found EchoStar’s rule unlawful because it “broadly prohibits all disclosures about the Respondent ‘or its business activities’ without prior approval” of the company.<sup>131</sup>

In the third decision regarding an employer’s social media policy, the Board again affirmed the ALJ’s finding that the employer’s rule violated section 8(a)(1) but held that the Respondent lawfully terminated an employee for Facebook posts.<sup>132</sup> The ALJ found, and the Board agreed, that the Respondent violated section 8(a)(1) by maintaining a rule in its 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.<sup>133</sup>

The Board majority reasoned that an employee would understand this “Courtesy” rule to encompass section 7 activity and that the broad prohibitions did not exclude any section 7-protected activity.<sup>134</sup> The dissent,

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127. *EchoStar Technologies, L.L.C.*, No. 27-CA-066726, 2012 WL 4321039 (NLRB Div. of Judges, Sept. 20, 2012).

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

132. *Karl Knauz Motors, Inc.*, 358 N.L.R.B. No. 164, 1 (2012). In *Karl Knauz Motors, Inc.*, BMW held an event to promote its new car, where it planned on serving hot dogs, Doritos, cookies, and fruit. *Id.* at 11. An employee subsequently posted photographs of the event on his Facebook page, as well as photographs of a car accident at sister-dealership Land Rover. *Id.* Approximately one week later, that employee was fired. *Id.* at 13. The issues before the Board were whether the employee was fired for both postings or only the Land Rover photographs, and whether the postings were protected concerted activities. *Id.* at 16. The postings about the food at the event were deemed concerted activity and fell within section 7’s protection, but the Board found that the Land Rover photographs were neither protected nor concerted activities because there were no discussions, the picture was posted only by the one employee, and it did not concern terms and conditions of employment. *Id.* at 16–18.

133. *Id.* at 1.

134. *Id.*

on the other hand, found that the majority read the word “disrespectful” and the phrase “language which injures the image or reputation of the Dealership” in isolation and based its decision that an employee would reasonably believe it to infringe on section 7 on this isolated reading.<sup>135</sup> The dissent criticized the Board for invalidating “any handbook policy that employees conceivably could construe to prohibit protected activity, regardless of whether they *reasonably* would do so.”<sup>136</sup>

These three decisions shed light on the Board’s approach to social media policy cases but offer employers insufficient guidance on how to draft a lawful policy. Based on a review of the three decisions, it is clear that, in looking at how an employee would interpret a social media policy, the NLRB looks for language that is general (e.g., “demeaning,” or “disrespectful”).<sup>137</sup> Unless there are specific examples that limit the meaning of these general words, the NLRB finds that these words are capable of being interpreted as applying to section 7 rights.<sup>138</sup> In other words, the NLRB finds that an employee would think that the employer would claim that it is “disrespectful,” and therefore a violation of the social media policy, to talk about terms and conditions of employment online.<sup>139</sup>

The NLRB construes general language against the employer since it is the employer who drafts the social media policy.<sup>140</sup> The NLRB has frequently asserted that the words should be understood in the context of the entire social media policy,<sup>141</sup> but in practice the NLRB appears to look at these general words in isolation rather than interpreting them in the context of the entire policy.<sup>142</sup> Therefore, even a statement specifically stating that section 7-protected activities are not prohibited by the policy might not save an otherwise unlawful policy.<sup>143</sup> The problem with this approach is that the NLRB finds social media policies unlawful based on hypothetical interpretations of language that might never either be interpreted by an actual employee as covering protected activity or used to discipline an employee.

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135. *Id.* at 5.

136. *Id.*

137. “[T]he Board has found that an employer violates Section 8(a)(1) of the Act by maintaining rules that are so broad that they would reasonably be construed to limit protected criticism of the employer.” *EchoStar Technologies, L.L.C.*, No. 27-CA-066726, 2012 WL 4321039 (NLRB Div. of Judges, Sept. 20, 2012).

138. *Costco Wholesale Corp.*, 358 N.L.R.B. No. 106, 2 (2012) (“[T]here is nothing in the rule that even arguably suggests that protected communications are excluded from the broad parameters of the rule.”).

139. *Karl Knauz Motors, Inc.*, 358 N.L.R.B. No. 164 at 1.

140. “Any ambiguity in a rule must be construed against the employer who promulgated the rule.” *EchoStar*, 2012 WL 4321039.

141. *Id.*

142. *Karl Knauz Motors, Inc.*, 358 N.L.R.B. No. 164 at 1.

143. MEMORANDUM OM 12-59, *supra* note 87 at 12.

An alternate approach to reviewing workplace rules was proposed by former Board member Peter Hurtgen in his dissent in *Lafayette Park*,<sup>144</sup> and a recent note has argued that the approach urged by Hurtgen sets a more appropriate standard for the review of social media policies than the traditional approach taken by the Board.<sup>145</sup> Under this approach (the Hurtgen approach), if a social media policy 1) does not explicitly target section 7 activities, 2) has not been used to punish section 7 activities, and 3) was not adopted in response to section 7 activities, the NLRB should not speculate that an employee might interpret the social media policy to cover section 7.<sup>146</sup> Instead, under the Hurtgen approach, the NLRB should let the social media policy stand, and if it is used to discipline or terminate an employee, the employee has a remedy (i.e., the NLRB can review the disciplinary action to see if it violated section 7).<sup>147</sup> The problem with the Hurtgen approach is that it potentially chills employee section 7 activity and forces an employee to litigate to vindicate those rights.

Both the NLRB and Hurtgen approaches are seriously flawed. Neither sets forth principles or standards to guide in the drafting or interpretation of a social media policy. Rather, these two approaches are really just different ways to allocate risk. The NLRB approach puts the risk on the employer. If there is any uncertainty or ambiguity, the NLRB reasons that the uncertainty should be resolved against the employer who drafted the policy, and the policy is held to be unlawful.<sup>148</sup> In contrast, the Hurtgen approach puts the risk on the employee.<sup>149</sup> Under the Hurtgen approach, the NLRB would decline to rule on whether the policy could be read as covering section 7 activities; if the policy is in fact used to punish conduct that is arguably protected by section 7, the affected employee could seek review of that action.<sup>150</sup>

#### **IV. TOWARD A MORE BALANCED, PRINCIPLED APPROACH TO SOCIAL MEDIA POLICIES**

What is needed is a more balanced approach—an approach that does not put either the employer or employee at risk; and a more principled approach—an approach that is based on standards of interpretation that will guide the employer in drafting a lawful social media policy and that will then guide the NLRB review of that social media policy. This Note proposes an approach that steers a middle course between Hurtgen's "wait and see what happens" approach and the Board's overly employee-

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144. *Lafayette Park Hotel*, 326 N.L.R.B. 824, 834 (1998) (Hurtgen, Member, dissenting).

145. Rojas, *supra* note 32, at 703.

146. *Lafayette Park Hotel*, 326 N.L.R.B. at 834 (Hurtgen, Member, dissenting).

147. *Id.*

148. *See supra* note 95 and accompanying text.

149. Rojas, *supra* note 32, at 703.

150. *Id.* at 703–04.

protective approach, under which policies are found unlawful if an employee “could” interpret some provision as applying to protected activities. Under the proposed approach, a policy would be found invalid on its face only if the Board determines that it is more likely than not that the policy, read as a whole, would be interpreted by employees as limiting or prohibiting activities protected by the Act.

In applying this standard, the Board should rely on the following traditional principles of interpretation:

- General words (e.g., “disrespectful,” or “demeaning”) should be read in light of and limited by the scope of specific examples that accompany the general words.<sup>151</sup>
- Each part of the policy should be read in the context of the entire document.<sup>152</sup>
- Words should be given their ordinary meaning, unless context clearly indicates a different meaning. (For example, a prohibition on being “disrespectful” should not be understood to prohibit employees from jointly discussing dangerous working conditions.)

This standard and these principles of interpretation will not only guide the Board in deciding facial challenges of social media policies, but will assist employers in drafting policies. The following are some additional recommendations to employers in drafting social media policies that protect employers’ interests while minimizing the risk that a policy will be found to violate the Act.

An introductory section to the policy is essential to set the context for the interpretation of the policy as a whole. This section must make clear what the purpose of the policy is—and what it is not.<sup>153</sup> There are a number of key components of such an introduction.

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151. This principle is based on the canon of construction known as *ejusdem generis*:

Latin for “of the same kind,” used to interpret loosely written statutes. Where a law lists specific classes of persons or things and then refers to them in general, the general statements only apply to the same kind of persons or things specifically listed. Example: if a law refers to automobiles, trucks, tractors, motorcycles and other motor-powered vehicles, “vehicles” would not include airplanes, since the list was of land-based transportation.

*Ejusdem Generis*, THEFREEDICTIONARY, <http://legal-dictionary.thefreedictionary.com/Ejusdem+generis> (last visited Nov. 17, 2013).

152. This principle is based on the canon of construction known as *noscitur a sociis*: “[T]hat the meaning of an unclear word may be known from accompanying words.” *Noscitur a Sociis Legal Definition*, DUHAIME.ORG, <http://www.duhaime.org/LegalDictionary/N/Nosciturasociis.aspx> (last visited Nov. 17, 2013).

153. See *Aroostook Cnty. Reg’l Ophthalmology Ctr. v. NLRB*, 81 F.3d 209, 212–13 (D.C. Cir. 1996) (based on context of rule and its location in the manual, the court concluded that rule was not unlawful on its face).

First, the introduction should frame the policy in relation to core company values. Core company values might include integrity, respect, or honesty. Such a statement sets the context, within which the entire policy is to be read and understood.

Second, the introduction should state that the underlying purpose is to protect both the employer and the employees in light of some of the unique dangers of the Internet. In this regard it is appropriate, and lawful, to remind employees that once a message has been posted on a social media site, the sender may lose control of the distribution and that, due to archiving, the post might be available to a large audience for an indefinite period of time.<sup>154</sup> A clause that cautions employees to think before posting, so long as it is not interpreted as a “veiled threat,” will be lawful.<sup>155</sup>

Third, the introduction should state, in simple, plain language, that the policy is not intended to restrict in any way employee engagement in activities that are protected by section 7.<sup>156</sup> The NLRB in *Costco* stated that there should be a provision “which clarifies the intent of the rule and makes clear to employees that they are free to discuss their terms and conditions of employment with others.”<sup>157</sup> In some cases the Board has criticized the absence of such a disclaimer,<sup>158</sup> while in others the Board has found that the disclaimer is too technical and would not be understood by a typical employee.<sup>159</sup> Therefore, the key is to include a disclaimer that is easily understood by a layperson yet does not undermine the purpose of the policy.

In addition, the policy should include concrete examples to clarify the scope and meaning of general statements. While a social media policy, like any policy that is intended to be distributed to and understood by all company employees, should be as short and simple as possible, the NLRB's approach to social media cases makes that objective virtually impossible. The Board has consistently interpreted simple, broad statements against the employer, finding that, in the absence of clarifying examples, employees

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154. MEMORANDUM OM 12-59, *supra* note 87, at 23.

155. *Id.* at 11–12.

156. *Id.* at 3 (citation omitted) (“Rules that are ambiguous as to their application to Section 7 activity, and contain no limiting language or context that would clarify to employees that the rule does not restrict Section 7 rights, are unlawful. . . . In contrast, rules that clarify and restrict their scope by including examples of clearly illegal or unprotected conduct, such that they would not reasonably be construed to cover protected activity, are not unlawful.”).

157. *Costco Wholesale Corp.*, 358 N.L.R.B. No. 106, 19 (2012).

158. *See, e.g.*, *Karl Knauz Motors, Inc.* 358 N.L.R.B. No. 164, 1 (2012); *Costco Wholesale Corp.*, 358 N.L.R.B. No. 106 at 2.

159. *See, e.g.*, *EchoStar Technologies, L.L.C.*, No. 27-CA-066726, 2012 WL 4321039 (NLRB Div. of Judges, Sept. 20, 2012) (“Should a conflict arise between an EchoStar policy and the law, the appropriate law shall be applied and interpreted so as to make the policy lawful in that particular jurisdiction” was held by the Board to be too technical and did not clarify the intent of the rule.)

would construe the language as prohibiting protected section 7 conduct.<sup>160</sup> Therefore, in drafting the body of the policy it is critical that there is a careful use of examples to provide context for the interpretation of all general or vague terms, such as “confidential information” or “disrespectful.”<sup>161</sup>

Moreover, there are a number of topics and words that should not be included in the policy. Perhaps most obviously (although some social media policies have violated this rule), the policy should not mention the discussion of wages or working conditions.<sup>162</sup> Second, the policy should not state that an employee must obtain prior approval before mentioning the workplace in a social media post.<sup>163</sup> Third, the policy should not require that employees report “unusual” social media activity to management.<sup>164</sup> Finally, any statements regarding the law, or the possible legal consequences of online activity, should be accurate and objective.<sup>165</sup>

## V. PROPOSED SOCIAL MEDIA POLICY

As discussed above, the Board should take a more balanced, less rigid approach to social media policies—an approach that reflects a careful consideration of the unique characteristics of social media. At the same time, employers must take great care in drafting their social media policy so as not to infringe upon their employees’ section 7 rights.

The annotated Model Social Media Policy set forth below, read as a whole, should achieve the typical employer’s objectives in adopting the policy while also minimizing the risk that any provisions will be found unlawful under the NLRA. The policy is based on the principles set forth

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160. See, e.g., *Karl Knauz Motors*, 358 N.L.R.B. No. 164 at 1; *EchoStar*, 2012 WL 4321039.

161. MEMORANDUM OM 12-59, *supra* note 87, at 6–7 (“The term ‘completely accurate and not misleading’ is overbroad because it would reasonably be interpreted to apply to discussions about, or criticism of, the Employer’s labor policies and its treatment of employees that would be protected by the Act so long as they are not maliciously false. Moreover, the policy does not provide any guidance as to the meaning of this term by specific examples or limit the term in any way that would exclude Section 7 activity.”).

162. See *id.* at 7. “Sensitive information such as membership, payroll, confidential financial, credit card numbers, social security number or employee personal health information may not be shared, transmitted, or stored for personal or public use without prior management approval.” *Costco Wholesale Corp.*, 358 N.L.R.B. No. 106 at 1.

163. MEMORANDUM OM 12-59, *supra* note 87, at 7; see also *EchoStar*, 2012 WL 4321039 (“The Handbook’s broad prohibition of all public, private, and media communications about the Respondent without the company’s prior approval clearly runs afoul of these rights.”).

164. MEMORANDUM OM 12-59, *supra* note 87, at 9 (“We . . . found unlawful the policy’s instruction that employees ‘[r]eport any unusual or inappropriate internal social media activity.’ An employer violates the Act by encouraging employees to report to management the union activities of other employees.”).

165. The Board found the following clause to be unlawful: “Should a conflict arise between an EchoStar policy and the law, the appropriate law shall be applied and interpreted so as to make the policy lawful in that particular jurisdiction.” *EchoStar*, 2012 WL 4321039. It reasoned that “a general clause or other language asserting that a document should be applied and interpreted in such a manner that it is legal proper does not save an otherwise invalid rule under the Act.” *Id.*



above. Except as noted and explained in footnotes, this policy is based on the social media policy of Wal-Mart, which was determined to be lawful<sup>166</sup> by the Acting General Counsel of the NLRB in his third report on social media policies.<sup>167</sup>

While the following model policy is a good template, each company should carefully craft its own policy in light of the nature of the business and its particular needs. An online retailer, for example, will need a social media policy that is substantially different from that of a manufacturing plant.

### MODEL SOCIAL MEDIA POLICY

At [Employer], we understand that social media can be a fun and rewarding way to share your life and opinions with family, friends, and co-workers around the world. However, use of social media also presents certain risks and carries with it certain responsibilities. To assist you in making responsible social media decisions, we have established these guidelines for the appropriate use of social media,<sup>168</sup> which are based on our company's core values—Integrity, Accountability and Respect.<sup>169</sup>

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166. The involvement of Lafe Solomon, the NLRB's Acting General Counsel, in the Wal-Mart social policy matter gave rise to an investigation into a violation of the NLRB's ethics rules. Memorandum from David P. Berry, Inspector Gen., NLRB, Investigation No. OIG-I-475 (Sept. 13, 2012) [hereinafter Inspector Gen. Memorandum], available at [http://edworkforce.house.gov/uploadedfiles/09-13-12\\_report\\_of\\_investigation\\_-\\_oig-i-475.pdf](http://edworkforce.house.gov/uploadedfiles/09-13-12_report_of_investigation_-_oig-i-475.pdf). In January 2012, Mr. Solomon was informed that the Division of Advice had decided to issue an Advice Memorandum finding that Wal-Mart's social media policy violated section 8(a)(1). *Id.* at 2. Although he agreed that the Wal-Mart policy was overly broad and therefore unlawful, Mr. Solomon directed that the Division of Advice reach out to Wal-Mart to encourage them to amend the policy, which they did. *Id.* at 3–4. At the time of that meeting, Mr. Solomon owned more than \$15,000 of Wal-Mart stock. *Id.* at 3, 7. Shortly thereafter, Mr. Solomon sought a waiver of the NLRB ethics rule that prohibits an NLRB employee from having “personal and substantial participation” in a matter in which he or she has a financial interest. *Id.* at 3, 8; see 5 C.F.R. § 2640.103(a)(3) (2013). The waiver was never issued. Inspector Gen. Memorandum, *supra* note 166, at 7. In February 2012, Mr. Solomon sold his Wal-Mart stock. *Id.* Mr. Solomon thereafter featured the revised Wal-Mart social media policy in his third memorandum as an example of a lawful policy. MEMORANDUM OM 12-59, *supra* note 87, at 19–24. A subsequent investigation by the NLRB Inspector General concluded that Mr. Solomon had violated the NLRB ethics rules by participating in the meeting regarding an attempt to convince Wal-Mart to amend its policy. See Inspector Gen. Memorandum, *supra* note 166, at 9. See also Ashley Post, *Lafe Solomon Accused of Violating NLRB Ethics Standards*, INSIDE COUNS. (Sept. 17, 2012), <http://www.insidecounsel.com/2012/09/17/lafe-solomon-accused-of-violating-nlr-ethics-stan>. While this episode was undoubtedly embarrassing for Mr. Solomon, there is nothing in the Report of the Inspector General that in any way compromises the conclusion that the Wal-Mart social media policy, as revised, is lawful, and that it is a good model for other employers. Inspector Gen. Memorandum, *supra* note 166, at 11.

167. MEMORANDUM OM 12-59, *supra* note 87, at 22–24.

168. The first paragraph sets the context of the policy by introducing the theme of personal responsibility in the face of the risks posed by social media. See Aroostook Cnty. Reg'l

In the rapidly expanding world of electronic communication, social media can mean many things. Social media includes all means of communicating or posting information or content of any sort on the Internet, including to your own or someone else's web log or blog, journal or diary, personal web site, social networking or affinity web site, web bulletin board or a chat room, whether or not associated or affiliated with [Employer], as well as any other form of electronic communication.<sup>170</sup>

Ultimately, you are solely responsible for what you post online. Before creating online content, consider some of the risks and rewards that are involved. Keep in mind that any of your conduct that adversely affects your job performance, the performance of fellow associates, or otherwise adversely affects members, customers, suppliers, people who work on behalf of [Employer], or [Employer's] legitimate business interests may result in disciplinary action up to and including termination.

Also, keep in mind that once you have posted something on social media, it may not be possible to retract the message, and it may be available on the Internet for a long period of time.<sup>171</sup> The intent of this Policy is not to restrict the flow of useful and appropriate information but to minimize the risk to the Company and its associates.<sup>172</sup>

The National Labor Relations Act and other laws protect the rights of employees to engage in certain activities, including the right to talk about and work together on issues such as wages and other terms and conditions of employment. This policy is not intended to

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Ophthalmology Ctr. v. NLRB, 81 F.3d 209, 212–13 (D.C. Cir. 1996) (concluding that based on the context and location of the rule in the manual, the rule was not unlawful on its face).

169. This statement of values is based on the Wal-Mart policy, but the statement has been moved to the beginning of the policy, where it helps set the context within which the policy is to be interpreted. MEMORANDUM OM 12-59, *supra* note 87, at 19–24. Each company must, of course, tailor such a statement to reflect its own values.

170. Even in the age of Facebook and Twitter, one should not assume that every employee will understand the reach of the policy without a brief statement about the meaning of social media.

171. It is permissible to caution employees that postings on the Internet may be archived and available indefinitely, MEMORANDUM OM 12-59, *supra* note 87, at 23, but the policy should not suggest that the employer will be conducting surveillance to see what employees have posted online. *See* Cowan Hamada, *supra* note 47, at 18.

172. The Division of Advice found this provision from Sears Holdings' social media policy to be lawful. Advice Memorandum from Barry J. Kearney, Assoc. Gen. Counsel, Div. of Advice, NLRB, to Marlin O. Osthus, Reg'l Dir., NLRB, No. 180CA-19081 (Dec. 4, 2009), *available at* <http://mynlrb.nlr.gov/link/document.aspx/09031d45802d802f>.

interfere with or limit the exercise of any such legal rights of employees.<sup>173</sup>

## GUIDELINES

### 1. Know and follow the rules

Carefully read these guidelines, the [Employer] Statement of Ethics Policy, the [Employer] Information Policy and the Discrimination & Harassment Prevention Policy, and ensure your postings are consistent with these policies. Inappropriate postings that may include discriminatory remarks, harassment, and threats of violence or similar inappropriate or unlawful conduct will not be tolerated and may subject you to disciplinary action up to and including termination.<sup>174</sup>

### 2. Be responsible

Use your best judgment and exercise personal responsibility. Take your responsibility as stewards of personal information to heart. As a company, [Employer]

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173. Social media policies often include savings clauses, or disclaimers, stating that the policy is not intended to interfere with rights protected by the NLRA. The Board has frequently held that, where the policy includes “overbroad prohibitions that reasonably would be interpreted to prohibit protected activities, a general disclaimer is insufficient where employees would not understand from the disclaimer that protected activities are in fact permitted.” Advice Memorandum from Barry J. Kearney, Assoc. Gen. Counsel, Div. of Advice, NLRB, to Wayne Gold, Reg’l Dir., NLRB, Nos. 05-CA-064793, 05-CA-065187, 05-CA-064795 (Mar. 21, 2012) [hereinafter *Giant Food Advice Memorandum*], available at <http://mynlrb.nlr.gov/link/document.aspx/09031d458132b26a>. On the other hand, the absence of such a disclaimer is not fatal; in fact, Wal-Mart’s social media policy was found to be fully consistent with section 7 in the absence of any disclaimer. MEMORANDUM OM 12-59, *supra* note 87, at 22–24. Nonetheless, it is advised that a social media policy include a disclaimer. The key is not to use legalese; references to “concerted activities” or to “rights under the NLRA,” without further explanation, have been found to be insufficient because they would not be understood by a “layperson.” *Id.* at 14. For instance, the Board in *EchoStar* examined the following clause in the company’s employee handbook:

One or more of the policies set forth in this Handbook may be affected by the application of law. Should a conflict arise between a [sic] EchoStar policy and the law, the appropriate law shall be applied and interpreted so as to make the policy lawful in that particular jurisdiction.

*EchoStar Technologies, L.L.C.*, No. 27-CA-066726, 2012 WL 4321039 (NLRB Div. of Judges, Sept. 20, 2012). The Board found that the clause did not save an otherwise invalid rule under the NLRA because “a general clause or other language asserting that a document should be applied and interpreted in such a manner that it is legal proper does not save an otherwise invalid rule under the Act.” *Id.*

174. “[R]ules that clarify and restrict their scope by including examples of clearly illegal or unprotected conduct, such that they would not reasonably be construed to cover protected activity, are not unlawful.” MEMORANDUM OM 12-59, *supra* note 87, at 3 (quoting *Tradesmen Int’l, Inc.*, 338 N.L.R.B. 460, 460–62 (2002)).

trusts—and expects—you to exercise personal responsibility whenever you participate in social media or other online activities. Remember that there can be consequences to your actions in the social media world—both internally, if your comments violate [Employer] policies, and with outside individuals and entities. If you're about to publish, respond, or engage in something that makes you even the slightest bit uncomfortable, don't do it.<sup>175</sup>

### 3. Be respectful

Always be fair and courteous to fellow associates, customers, members, suppliers, or people who work on behalf of [Employer]. Also, keep in mind that you are more likely to resolve work-related complaints by speaking directly with your co-workers or utilizing our Open Door Policy than by posting complaints to a social media outlet.<sup>176</sup> Nevertheless, if you decide to post complaints or criticism, avoid using statements, photographs, video, or audio that reasonably could be viewed as malicious, obscene, threatening, or intimidating, that disparage customers, members, associates, or suppliers, or that might constitute harassment or bullying. Examples of such conduct might include offensive posts meant to intentionally harm someone's reputation or posts that could contribute to a hostile work environment on the basis of race, sex, disability, religion, or any other status protected by law or company policy.<sup>177</sup>

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175. This paragraph is based on the social media policy of the McKesson Corporation cited in the NLRB's Third Advice Memorandum. MEMORANDUM OM 12-59, *supra* note 87, at 12 (citing Advice Memorandum from Barry J. Kearney, Assoc. Gen. Counsel, Div. of Advice, NLRB, to Robert W. Chester, Reg'l Dir., NLRB, No. 06-CA-066504 (Mar. 1, 2012) [hereinafter McKesson Corp. Advice Memorandum], available at <http://mynlrb.nlr.gov/link/document.aspx/09031d4580f79116>).

176. The rule that employees "are encouraged to resolve concerns about work by speaking with co-workers, supervisors, or managers" is unlawful.

An employer may reasonably suggest that employees try to work out concerns over working conditions through internal procedures. However, by telling employees that they should use internal resources rather than airing their grievances online, we found that this rule would have the probable effect of precluding or inhibiting employees from the protected activity of seeking redress through alternative forums.

MEMORANDUM OM 12-59, *supra* note 87, at 11.

177. Employers should pay particular attention to drafting provisions that caution against the making of disparaging or disrespectful comments because the Board has frequently found such provisions to be vague and likely to be interpreted by employees as applying to comments about

#### 4. Be honest and accurate

Make sure you are always honest and accurate when posting information or news, and if you make a mistake, correct it quickly. Be open about any previous posts you have altered. Remember that the Internet archives almost everything; therefore, even deleted postings can be searched. Never post any information or rumors that you know to be false about [Employer], fellow associates, members, customers, suppliers, people working on behalf of [Employer], or competitors.

#### 5. Post only appropriate and respectful content

Maintain the confidentiality of [Employer's] trade secrets and private or confidential information. Trade secrets may include information regarding the development of systems, processes, products, know-how, and technology. Do not post internal reports, policies, procedures, or other internal business-related confidential communications.<sup>178</sup>

Respect financial disclosure laws. It is illegal to communicate or give a “tip” on inside information to others so that they may buy or sell stocks or securities. Such online conduct may also violate the Insider Trading Policy.<sup>179</sup>

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wages and working conditions. EchoStar Technologies, L.L.C., No. 27-CA-066726, 2012 WL 4321039 (NLRB Div. of Judges, Sept. 20, 2012). A provision that advises that employees “may not make disparaging or defamatory comments” about the employer or its “employees, officers, directors, vendors, customers, partners, affiliates, or our, or their product/services” has been found to violate section 7 because employees “would reasonably construe this prohibition to apply to protected criticism of the Employer’s labor policies or treatment of employees.” MEMORANDUM OM 12-59, *supra* note 87, at 16–17. In contrast, it is permissible to caution that employees may not “defame or otherwise discredit the Employer’s products or services.” Giant Food Advice Memorandum, *supra* note 173, at 13.

178. The Third Advice Memorandum explains:

Employees have no protected right to disclose trade secrets. Moreover, the Employer’s rule provides sufficient examples of prohibited disclosures (i.e., information regarding the development of systems, processes, products, know-how, technology, internal reports, procedures, or other internal business-related communications) for employees to understand that it does not reach protected communications about working conditions.

MEMORANDUM OM 12-59, *supra* note 87, at 20.

179. This clause provides sufficient examples of prohibited disclosures so that it would not reasonably be interpreted by an employee that disclosure of financial information includes terms of employment. *See id.* at 6–7 (employer’s social media policy that defined non-public information as “[a]ny topic related to the financial performance of the company” is unlawful because it encompasses section 7-protected activity).

Do not create a link from your blog, website, or other social networking site to an [Employer] website without identifying yourself as an [Employer] associate.

Express only your personal opinions. Never represent yourself as a spokesperson for [Employer].<sup>180</sup> If [Employer] is a subject of the content you are creating, be clear and open about the fact that you are an associate, and make it clear that your views do not represent those of [Employer], fellow associates, members, customers, suppliers, or people working on behalf of [Employer]. If you do publish a blog or post online related to the work you do or subjects associated with [Employer], make it clear that you are not speaking on behalf of [Employer].<sup>181</sup> It is best to include a disclaimer such as “The postings on this site are my own and do not necessarily reflect the views of [Employer].”

Do not post anything on the Internet in the name of [Employer] or in a manner that could reasonably be attributed to [Employer] without prior written authorization from the President or the President’s designated agent.<sup>182</sup>

## **6. Respect other’s intellectual property**

Respect all copyright and other intellectual property laws. For [Employer’s] protection as well as your own, it is critical that you show proper respect for the law governing copyrights, fair use of copyrighted materials owned by others, trademarks, and other intellectual property,

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180. The Third Advice Memorandum provides further guidance with regard to acting as a spokesperson for an employer:

A rule that requires an employee to receive prior authorization before posting a message that is either in the Employer’s name or could reasonably be attributed to the Employer cannot reasonably be construed to restrict employees’ exercise of their Section 7 right to communicate about working conditions among themselves and with third parties.

MEMORANDUM OM 12-59, *supra* note 87, at 15.

181. The Acting General Counsel’s guidance continues:

We did not find unlawful, however, the prohibition on representing “any opinion or statement as the policy or view of the [Employer] or of any individual in their capacity as an employee or otherwise on behalf of [Employer].” Employees would not reasonably construe this rule to prohibit them from speaking about their terms and conditions of employment. Instead, this rule is more reasonably construed to prohibit comments that are represented to be made by or on behalf of the Employer.

*Id.* at 17.

182. This paragraph is based on the social media policy of Us Helping Us cited in the NLRB’s Third Advice Memorandum. *Id.* at 15.

including [Employer's] own copyrights, trademarks, and brands. Get permission before reusing [Employer's] content or images.<sup>183</sup>

### **7. Using social media at work**

Do not use social media on equipment we provide unless it is work-related as authorized by your manager or consistent with the Company Equipment Policy.

Do not use social media while on duty. For purposes of these guidelines, "on duty" does not include meal or other break times.<sup>184</sup>

Do not use [Employer] email addresses to register on social networks, blogs, or other online tools utilized for personal use.

### **8. Retaliation is prohibited**

[Employer] prohibits taking negative action against any associate for reporting a possible deviation from this policy or for cooperating in an investigation. Any associate who retaliates against another associate for reporting a possible deviation from this policy or for cooperating in an investigation will be subject to disciplinary action, up to and including termination.

### **9. Media contacts**

Associates should not speak to the media on [Employer's] behalf without contacting the Corporate Affairs Department. All media inquiries should be directed to them.

### **10. For more information**

If you have questions or need further guidance, please contact your HR representative.<sup>185</sup>

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183. This paragraph is based on the social media policy of the McKesson Corporation cited in the NLRB's Third Advice Memorandum. *Id.* at 11 (citing McKesson Corp. Advice Memorandum, *supra* note 175).

184. "[W]e concluded that the prohibition on participating in these activities on Company time is unlawfully overbroad because employees have the right to engage in Section 7 activities on the Employer's premises during non-work time and in non-work areas." MEMORANDUM OM 12-59, *supra* note 87, at 17 (quoting *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 803 n.10 (1945)). Accordingly, it is important to make clear that any such restriction does not apply during lunch or break time.

185. "[A] general admonition that if an employee has questions to talk to human resources does not create a legal loop that an employee must jump through before the force of the rules may be

## CONCLUSION

Gone are the days of having to read the latest headlines in a newspaper. Information, gossip, even photographs are shared at lightning speed, and the Internet and the way in which information spreads is only going to get faster and more efficient. Sixty years ago, it took a month for a movement to catch its stride, and four years to pass legislation; with the assistance of the Internet, a country's president of three decades stepped down in just eighteen days.

In light of the significant potential consequences of online speech, both to employers and employees, it is imperative that employers be able to set forth guidelines for appropriate employee conduct with respect to social media. The current approach of the NLRB to social media policy cases does not take into account the risks employers and employees face when it comes to employee postings. Employers are left in a very difficult position, in which facially neutral policies are held unlawful on the ground that an employee will interpret a policy that urges employees to be “courteous” in their online communications concerning the workplace as prohibiting any discussion of wages and working conditions.<sup>186</sup>

While the Board claims that it reads these policies in context and in their entirety, in fact the Board focuses on words in isolation and utilizes a bright-line test under which policies are found unlawful if they use words such as “disrespect” and “demeaning.” The NLRB should adopt a more balanced and principled approach—an approach that is based on standards of interpretation that will guide the employer in drafting a lawful social media policy and that will then guide the NLRB review of that social media policy.

The approach must be workable in the twenty-first century in order to properly protect both employers and employees. The suggested approach will allow those employers who choose to abide by the law in drafting social media policies to do so and allow those employees who choose to abide by the social media policies to do so as well. Given the high stakes in the online world, there should be no uncertainty when it comes to what is acceptable and what is not.

*Lauren R. Younkins\**

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tested.” EchoStar Technologies, L.L.C., No. 27-CA-066726, 2012 WL 4321039 (NLRB Div. of Judges, Sept. 20, 2012).

186. For example, the NLRB has found unlawful a social media policy that states employees should be “courteous” because employees will reasonably believe it means they cannot talk about terms and conditions of employment. *See* Karl Knauz Motors, Inc., 358 N.L.R.B. No. 164, 1 (2012).

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