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THE NLRB'S SOCIAL MEDIA GUIDELINES A LOSE-LOSE: WHY THE NLRB'S STANCE ON SOCIAL MEDIA FAILS TO FULLY ADDRESS EMPLOYER'S CONCERNS AND DILUTES EMPLOYEE PROTECTIONS

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Introduction

The expanding use of both personal and professional social media sites has resulted in its growing impact in the workplace. Recently, many examples have emerged where an individual's use of social media for communicating frustrations or sharing personal information resulted in significant conflict between the individual and their employer.¹ Employment actions arising from an employee's social media use have become so contentious that a number of employers have been charged with unfair labor practices for overly broad social media policies or implementation of unfair policies.² Following several important Board decisions the NLRB issued guidelines, identifying acceptable employer-initiated social media policies.³ As social media's popularity will likely only continue to grow, it is important to understand how employer policies impact employees' social media use and the potential invasion these policies may have on employees' rights.

This article concludes that the NLRB's issued guidance fails to adequately address social media concerns raised by employers and dilutes employees' rights to communicate workplace concerns. This is because even though the guidance permits employer developed social media policies, the NLRB's stance permits employers to monitor and analyze employees' social media use and does not clarify when an employer can act on social media information.

Social Media in the Workplace

The ubiquitous nature of social media permits it to be a technological tool for both employers and employees. Currently, 79% of Fortune 500 Companies use social media applications or corporate blogs to communicate with customers, stakeholders and the general online community.⁴ A 2007 study showed nearly 45% of employers regularly used questions about applicants' use of social media activities as a method of screening potential job candidates.⁵ Another survey from 2011 revealed 44% of companies track employees' use of social media both in and outside of the workplace.⁶

With the average employee spending between one to two hours each day using the Internet for personal use, employees increasingly use social media at work or during company hours.⁷ A recent study revealed that over fifty percent of social media updates are performed using mobile devices during work hours.⁸ This same study showed that 15% of the social media updates made from mobile devices during work hours were actually from mobile devices provided by the individual's employer.⁹ Visiting social media sites is such a popular activity that social media use is often more prevalent than checking personal email.¹⁰ With such extensive social media use during work hours and

with workplace equipment, it is not surprising that employers have become concerned about social media use and related issues such as content and productivity.

Unlike issues related to productivity, however, social media content is difficult to manage because employees can easily discuss workplace information.¹¹ While comments about the employer or workplace related issues are typically made on an individual's private social media page, potentially anyone can read these postings and the employer's business may be subsequently impacted.

There are numerous examples of how social media has transformed the employment relationship such that comments made on social media about an employer may now factor into employment actions. Several recent examples include: the Philadelphia Eagles' termination of a part-time employee for making critical remarks about the team's management on Facebook; the Associated Press' severe reprimand of a reporter who posted "disparaging remarks" about a fellow reporter; and a North Carolina School District's suspension of a teacher who posted negative comments about her students.¹²

As most employment relationships are governed by the doctrine of "employment-at-will," actions resulting from social media use are generally viewed as acceptable.¹³ An employer's use of social media content as the basis for an employment action, may however, be the basis of a claim for discrimination, retaliation, invasion of privacy, or other employment related claim.¹⁴ Furthermore, employees protected by an individual contractual relationship with the employer or by a collective bargaining agreement¹⁵ may have contractually established expectations of privacy in social media use that, if violated, may constitute a breach of contract by the employer or an unfair labor practice.

Challenges to Employment Related Actions for Employees' Use of Social Media

Presently, no federal laws restrict or prohibit employers from monitoring or using social media activities as the basis for employment related decisions, unless those decisions involve discrimination, retaliation or some other protected form of communication.¹⁶ Only a handful of states have sought to define social media use within the employment relationship through proposed legislative protections.¹⁷ For example, Maryland, Michigan, Illinois, and California have enacted legislation that prevents employers from asking employees to provide social media information when applying for or during their employment.¹⁸ While these legislative enactments demonstrate a concern over social media's use in the workplace, most states have not designed protection for employee statements on social media about employment related issues.¹⁹ Employees seeking to challenge employment decisions based on social media use often have only common-law rights of action because federal and state legislative protection remains limited.²⁰ Therefore, employees primarily challenge employment decisions resulting from social media use through claims for breach of contract or grievances of unfair labor practices under a collective bargaining agreement ("CBA"), or NLRB hearing.

Collective bargaining units have historically ignored social media protection during negotiations with employers, because social media has only recently become ubiquitous in both the workplace and the home. Instead of addressing social media issues directly, most CBAs contain only the standard limitation that employees can only be terminated for "just cause".²¹ Even when social media use is not defined within a CBA,

employees may still be protected if their social media use qualifies as protected activity under Section 7 of the National Labor Relations Act (“NLRA”).²²

Several social media policies and employment decisions have already been successfully challenged by the NLRB as unlawful under the NLRA because the policy explicitly prohibited or restricted employees from engaging in Section 7 activities.²³ The NLRB’s defining decision on social media policies is embodied in *Costco Wholesale Corp.*²⁴ In *Costco Wholesale Corp.*, the employer’s social media policy broadly prohibited employees from posting damaging statements about the company on social networking sites.²⁵ Though originally an administrative law judge had upheld the policy as lawful, on appeal, the NLRB Board disagreed, and struck down the policy.²⁶ The Board reasoned that because a broad prohibition against any statements that could potentially damage the company or an individual’s reputation could encompass employees’ statements made in protest of Costco’s treatment of employees, an employee could infer they were not permitted to engage in protected activity.²⁷ The NLRB therefore held that as employees could interpret Costco’s policy as prohibiting them from engaging in protected communications, Costco’s social media policy violated the NLRA.²⁸

The NLRB’s decision in *Costco Wholesale Corp.*, demonstrates that while the NLRB recognizes an employer’s legitimate interest to preserve its image, protect confidential information, and manage good-will and customer relations, there must be a balance between the employers’ interest and the employees’ rights. Subsequent NLRB decisions also demonstrate that the NLRA protects those social media actions that are related to group activities or pertain to the terms and conditions of employment.²⁹ The NLRA, however, will not protect social media activities when there is no group activity, the activity does not pertain to the conditions or terms of employment or the activity can be viewed as disloyal or disallowed behavior.³⁰

The NLRB’s Issued Guidelines on Social Media Management

To combat employers’ confusion over permissible employment decisions on employees’ social media activities, the NLRB issued specific social media guidelines via three consecutive Operations Management Memorandum.³¹ Reading the NLRB’s issued Memorandum together, employers can develop a fairly comprehensive understanding of the NLRB’s approach to social media issues and what employment actions resulting from social media use are permissible under the NLRA. All three Memorandum emphasize that all employers should very carefully and clearly construct social media policies regardless of whether they are unionized.³² The three Memoranda also highlight that social media issues are an enforcement priority for the NLRB.³³

The Memoranda demonstrate that, in most cases, the Acting General Counsel (AGC) of the NLRB continues to find challenged employer social media policies unlawfully broad under the NLRA, because employees could “reasonably construe” them as restricting an employees’ rights to communicate with each other or third parties regarding wages, hours, and working conditions.³⁴ In the AGC’s review of 20 social media policies, only 4 of the policies were found to be lawful.³⁵ The low passage rate of employer developed social media policies demonstrates that employers struggle with creating social media policies that do not impinge upon an employees’ protected activities.³⁶

The AGC's latest report contains the clearest guidance available to employers on permissible social media policies by requiring that an employer's policy include the following elements: a clearly articulated need for the employer's social media policy; explanation that employees are free to express their own views and opinions on social media but may be held responsible for those statements; concise and detailed definition of the types of information an employee is not permitted to disclose (i.e. confidential information or trade secrets); definition with specific examples of communication that will be prohibited under the company's policy of anti-discrimination, harassment or bullying; and a clearly worded statement that the policy will not be applied in a way that restricts an employee's use of social media to engage in protected activities.³⁷

The Implications of the NLRB's Social Media Policy

While the continual blurring of personal and professional identities from the disappearing boundaries between work and home³⁸ frustrates the analysis of when an individual is engaging in protected activity, some specific employer policies are known to be unlawful.³⁹ The guidelines make it exceedingly clear that social media policies will be found unlawful when they are overly broad, restrict all confidential information, restrict peaceful relations amongst staff (i.e. a policy which prohibits discussing work conditions either verbally or in an online format violates employees §7 rights), or broadly protect an employer's image.⁴⁰ Social media policies consistent with the NLRB's guidelines allow for employees to openly discuss improving working conditions and actively participate in concerted activities on social media sites.⁴¹ The NLRB also allows social media policies to ban negative behavior such as harassment, discrimination, retaliation, and bullying.⁴²

The NLRA's protection of "concerted activity" includes such activities as employee discussions about pay, work conditions, and safety concerns.⁴³ This protection applies regardless of whether employees are organized under a CBA. Therefore, all employers must balance the prohibition of unwanted conduct and preventing undue restriction on protected activities.⁴⁴ At a minimum, "concerted activity" must involve employees' relations with their employers and constitute a labor dispute.⁴⁵ Under the NLRA requirements for a labor dispute, there must be a controversy concerning terms, tenure, or conditions of employment.⁴⁶

Under the NLRB's guidance, employers are equipped with a baseline structure for developing lawful social media policies, but still have no explicit test for determining what constitutes protected social media activity. Even if an employer has a strong and clearly defined social media policy, employees may not fully understand their right to utilize social media to discuss workplace issues.⁴⁷ Employers may also be unable to determine when an employee's disparaging remarks on social media are protected or when they may monitor social media use outside of the workplace; while the NLRB allows termination for inappropriate social media use, the full context for when social media use will be considered inappropriate has not been clearly defined.⁴⁸ The NLRB's guidelines also fail to adequately address employers' main concern in managing social media activities, the disclosure of confidential or protected information, because broadly worded policies aimed at protecting this form of information have largely been interpreted to impinge employees' §7 rights.⁴⁹

Adjusting the NLRB Policy to Ensure Employer's Concerns are Addressed While Ensuring Employee Rights are not diminished

Although the NLRB explicitly recognizes employers' interests in preserving confidential information and managing good will, reputation, and customer relations, current social media guidelines do not adequately balance the rights and interests of both employers and employees in social media use.⁵⁰ For example, many employees do not feel their privacy rights and §7 rights are adequately protected, because the NLRB still permits employers to monitor and base employment related decisions on an employee's social media activities. Similarly, because the NLRA does not protect an employee's right to engage in speech that does not qualify as a concerted activity, many employees engaging in personal and presumed private social media activities are left unprotected.

The difference between an employees' expectation and an employers' expectation of protection with regard to social media use presents an example of the NLRB's gaps in coverage. The gaps in coverage can be analyzed in three important contexts: political speech, speech related to work conditions, and speech intended to remain purely private. While public employees are protected from discharge for political speech under the First Amendment, employees working for private entities will not be protected from discharge unless their political speech is protected by the NLRA or public policy exception.⁵¹ Private employers may therefore discipline employees for a much broader range of speech occurring in social media, regardless of the employee's expectation to privacy for political opinions shared on the Internet.⁵² A private employers' ability to terminate employees because of their political posts on social media sites is a distinctive gap in protection of employee communications, because most employees expect political discussions on social media applications to be private and protected from employer action.⁵³

The next context for consideration is speech related to working conditions. It is often difficult to determine when an individual is discussing workplace conditions verses merely venting frustrations related to the workplace. A common example is a complaint on Facebook about a manager's decisions or actions. To determine if these comments are protected, the NLRB assesses a number of factors related to the context of the communication.⁵⁴ These factors include whether the communication is related to the workplace by mentioning the terms and conditions of employment, the number of employees participating in the conversation, the employee's goal in eliciting conversation or group dialogue, and whether the comments relate to previously raised concerns.⁵⁵ The NLRB also considers whether the conversation is purely personal or group related.⁵⁶ Online comments, which are purely personal, such as personal opinions or individual rants, will less likely be protected.⁵⁷ Viewing the factors critically, it is evident a subjective viewing and manipulation of these factors could result in a drastically different result in terms of protection. No matter what an individual intended to communicate, a small variation in any of these factors may lead to one individual's communication being protected, but not another's.

The last context of consideration is social media communication that is intended to remain private or shared with only a specific group of individuals. The NLRB does not explicitly provide protection for social media use that is intended to be private, because the NLRB assumes the employer has access to the employee's social media information,

because either the information has been posted publically or the employer has been given permission to access such information. This assumption fails to address the tricky situation of when an employee posts information on social media that is only intended for a specific audience, or is intended to be private, but the employer nevertheless obtains access and acts on that information.⁵⁸

Conclusion

Social media is a present, pervasive and complex issue in the workplace that will likely only continue to be used for workplace purposes, during company time, or with company owned equipment. As employers have a legitimate interest in controlling employees' social media use for the purposes of limiting disclosure of company information and protecting the company image, social media policies will also likely continue to be the primary tool for social media. While the NLRB's recent decisions and issued guidance provides clear direction for employers to develop social media policies, the NLRB's stance fails to fully protect employees' §7 and privacy rights. Employers may also find the NLRB's guidance fails to fully address concerns over disclosure of confidential or private information, as the AGC and NLRB have determined broadly-worded policies will likely be found unlawful. The NLRB's guidance offers the best available tool for employers to develop social media policies, but employers should continue to remain cognizant of employee expectations for privacy and changing employment laws to ensure their policies are not overly broad, unlawfully restrictive or intrusive. ¶

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¹ *Jaszczyszyn v. Advantage Health Physician Network*, 2012 U.S. App. LEXIS 23162 (6th Cir. 2012).

² Denise Barton Ward, *Board Approves Code of Conduct Policy*, LABOR MANAGEMENT RELATIONS PRACTICE GROUP, (Mar. 20, 2013), <http://www.laborrelationscounsel.com/unfair-labor-practices/>.

³ See Sheryl Jaffe Halpern and Charles H. Gardner, *NLRB offers long awaited guidance on social media policies*, EMPLOYEE BENEFIT NEWS, (Dec. 21, 2012), <http://ebn.benefitnews.com/news/nlrb-offers-long-awaited-guidance-social-media-policies-2729827-1.html>. See also, Nichole B. Ellison, *Social Network Sites: Definition, History, and Scholarship*, JOURNAL OF COMPUTER MEDIATED COMMUNICATION Vol. 13 Issue 1, p. 210-230 (2007).

⁴ Jatana, *supra* note 13.

⁵ Jatana, *supra* note 13. See also, Scott Brutocao, *Issue Spotting: The Multitude of Ways Social Media Impacts Employment Law and Litigation*, 60 THE ADVOC. 8 (2012).

⁶ Lauren Fisher, *44% of Companies Track Employees Social Media Use in AND out of the Office*, TNW, (Aug. 17, 2011), <http://thenextweb.com/socialmedia/2011/08/17/44-of-companies-track-employees-social-media-use-in-and-out-of-the-office/>.

⁷ Sharon Gaudin, *Study: Facebook use cuts productivity at work*, COMPUTER WORLD, (Jul. 22, 2009), available at http://www.computerworld.com/s/article/9135795/Study_Facebook_use_cuts_productivity_at_work.

⁸ Ethan Zelizer, *Embracing and Controlling Social Media in the Workplace*, YOUNG LAWYERS JOURNAL, (Oct. 2010), available at <http://www.digitaladedge.net/publication/repo27/14625/49921/49921-52.pdf>.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² Alexander Naito, *A Fourth Amendment Status Update: Applying Constitutional Privacy Protection to Employees' Social Media Use*, 14 U. PA. J. CONST. L. 849, 850 (2012). See also, Brutocao, *supra* note 16, at 11; Patricia Sanchez Abril et. al., *Blurred Boundaries: Social Media Privacy and the Twenty-First-Century Employee*, 49 AM. BUS. L.J. 63, 68-69 (2012).

¹³ See generally Charles J. Muhl, *The Employment-at-will doctrine: Three Major Exceptions*, MONTHLY LABOR REVIEW, (Jan. 15, 2001), available at <http://www.bls.gov/opub/mlr/2001/01/art1full.pdf>. See also, 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 (2012).

¹⁴ Brutocao, *supra* note 13, at 8.

¹⁵ Russell, *supra* note 25.

¹⁶ Dylan Scott, *Legislating Social Media in the States*, GOVERNING THE STATES AND LOCALITIES, (July 2012), available at <http://www.governing.com/topics/technology/legislating-social-media.html>.

¹⁷ *Id.*

¹⁸ Philip Gordon, *Michigan's New "Social Media Password Protection" Law Multiplies the Challenges for Employers Seeking to Investigate Employees' Social Media Misconduct*, PRIVACY AND DATA PROTECTION PRACTICE GROUP, (Jan. 2, 2013), <http://privacyblog.littler.com/tags/maryland/>.

¹⁹ Scott, *supra* note 28.

²⁰ *Id.*

²¹ See generally, Patrick R. Westercamp, *Arbitrating Social Media Grievances*, 269 APR N.J. Law. 32 (Apr. 2011) (providing a discussion on the review of social media under the lens of “just cause”). See also e.g., Michael Weiner and Jay Smith, *Employees' Legal Rights to Talk about Work on Social Media*, AMUSEMENT AREA EMPLOYEES UNION LOCAL B-192, (Feb. 19, 2013), available at <http://b192iatse.org/socialmedia%20FAQ.htm>.

²² *Id.* at 32.

²³ *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004).

²⁴ *Costco Wholesale Corp.*, 358 NLRB 106 (Sep. 7, 2012).

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id. Cf. Knauz BMW*, 13-CA-046562 (NLRB Sep. 28, 2012)(NLRB Board found that even though employers have a legitimate interest in ensuring employees behaved professionally in both workplace and public settings, the company’s broadly worded social media policy was nevertheless unlawful because employees would reasonably construe it as covering protected communications, including criticism of working condition); *Hispanics United of Buffalo*, 359 NLRB No. 37 (Dec. 14, 2012)(found that the employer’s termination of non-union employees for social media postings about the employer’s worksite was unlawful because even though the employees were non-union, their speech was protected as “concerted activity.”); *EchoStar Corp.*, 27-CA-066726 (NLRB Sep. 20, 2012)(ALJ determined EchoStar Corp.’s policy impeded employees’ rights under the NLRA, because even when viewed under the best light possible, employees would reasonably construe this rule as one that prohibited §7 activity).

²⁹ See, e.g., *Costco Wholesale Corp.*, 358 NLRB 106 (Sep. 7, 2012) (“statements posted electronically . . . that damage the Company.”); *Knauz BMW*, 13-CA-046562 (NLRB Sep. 28, 2012).

³⁰ See *Laidlaw Transit, Inc.*, 315 NLRB 79, 82 (1994); *Hyundai America Shipping Agency*, 357 NLRB No. 80 (2011); *Norris/O'Bannon*, 307 NLRB 1236, 1245 (1992). *Dish Network Corp.*, S 16-CA-62433, 2012 WL 5564372 (NLRB Nov. 14, 2012).

³¹ See *Operations Memorandum: Report of the Acting General Counsel Concerning Social Media Cases*, NATIONAL LABOR RELATIONS BOARD, (“OM 12-59”)(May 30, 2012), available at [http://www.nlr.gov/reports-guidance/operations-management-memos?memo_number=OM%5C+12](http://www.nlr.gov/reports-guidance/operations-management-memos?memo_number=OM%5C+12;); *Operations Memorandum: Report of the Acting General Counsel Concerning Social Media Cases*, NATIONAL LABOR RELATIONS BOARD, (“OM 12-21”)(Jan. 24, 2012), available at [http://www.nlr.gov/reports-guidance/operations-management-memos?memo_number=OM 12-31](http://www.nlr.gov/reports-guidance/operations-management-memos?memo_number=OM%5C+12-21);

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- Operations Memorandum: Report of the Acting General Counsel Concerning Social Media Cases*, NATIONAL LABOR RELATIONS BOARD, ("OM 11-74")(Aug. 18, 2011), available at http://www.nlr.gov/reports-guidance/operations-management-memos?memo_number=OM 11-74. (Hereinafter "NLRB Operations Memorandums").
- ³² NLRB Operations Memorandum, *supra* note 67.
- ³³ *Id.*
- ³⁴ See NLRB Operations Memorandum, *supra* note 67.
- ³⁵ *Id.*
- ³⁶ *Id.*
- ³⁷ NATIONAL LABOR RELATIONS BOARD, *supra* note 74.
- ³⁸ See Pauline T. Kim, *Electronic Privacy and Employee Speech*, 87 CHI. KENT L. REV. 901, 908 (2012).
- ³⁹ Robert Sprague, *Facebook Meets the NLRB: Employee Online Communications and Unfair Labor Practices*, 14 U. PA. J. BUS. L. 957, 994-96 (2012).
- ⁴⁰ See NLRB Operations Memorandum, *supra* note 67.
- ⁴¹ *Id.*
- ⁴² Operations Management Memorandums, *supra* note 58. See also Sprague, *supra* note 85.
- ⁴³ National Labor Relations Act, 29 U.S.C. § 158(a)(1).
- ⁴⁴ See generally, *Notes and Decisions to the National Labor Relations Act*, 29 U.S.C. § 158(a)(1).
- ⁴⁵ See Washington Aluminum Co., 370 U.S. 9, 16 (1962).
- ⁴⁶ *Id.*
- ⁴⁷ See Sprague, *supra* note 85.
- ⁴⁸ See Alessi, *supra* note 22. See also, *Hispanics United of Buffalo*, 359 NLRB No. 37 (Dec. 14, 2012).
- ⁴⁹ See NLRB Operations Memorandum, *supra* note 67. See generally *Anheuser-Busch*, 237 NLRB 982 (1978); *Fleming*, 332 NLRB 1086 (2000); *Northern Indiana Public Service*, 347 NLRB 210 (2006).
- ⁵⁰ See generally, Russell, *supra* note 25, at 32.
- ⁵¹ Ann C. McGinley et. al, *Beyond the Water Cooler: Speech and the Workplace in an Era of Social Media*, 30 HOFSTRA LAB. & EMP. L.J. 75, 81-82 (2012).
- ⁵² See generally, Kenneth R. Swift, *The Public Policy Exception to Employment At-Will: Time to Retire A Notable Warrior?*, 61 MERCER L. REV. 551 (Winter 2010).
- ⁵³ See generally, Steven D. Zansberg and Janna K. Fisher, *Privacy Expectations in Online Social Media—An Emerging Generational Divide?*, COMMUNICATIONS LAWYER, Vol. 28. No. 3, (Nov. 2011), available at [http://www.lskslaw.com/documents/evolvingprivacyexpectations\(00458267\).pdf](http://www.lskslaw.com/documents/evolvingprivacyexpectations(00458267).pdf).
- ⁵⁴ NLRB Operations Memorandum, *supra* note 67.
- ⁵⁵ *Id.*
- ⁵⁶ NLRB Operations Memorandum, *supra* note 67.
- ⁵⁷ *Id.*
- ⁵⁸ See Susan C. Hudson, et. al., *Drafting and Implementing an Effective Social Media Policy*, 18 TEX. WESLEYAN L. REV. 767, 784 (2012).