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# The NLRA and Social Media: Why the NLRB Can Be "Facebook Friends" With Both Employees and Employers

Nicholas J. Caplin  
*Pepperdine University*

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## THE NLRA AND SOCIAL MEDIA: WHY THE NLRB CAN BE “FACEBOOK FRIENDS” WITH BOTH EMPLOYEES AND EMPLOYERS

### I. INTRODUCTION

The advent of the internet in contemporary life has changed almost all aspects of interaction, and the world of the law, burdened to change by hundreds of years of statutes and case law, is doing its best to stay up to date.<sup>1</sup> The rising tide that is social media has left almost no aspect of the legal field untouched: from first amendment rights<sup>2</sup> to the nature of litigation itself,<sup>3</sup> social media has brought with it rapid change, and the workplace is no exception.<sup>4</sup> Social media websites such as Facebook and Twitter have permeated the workplace,<sup>5</sup> and both use<sup>6</sup> and

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<sup>1</sup>Jeff Hinkeldey, *SOCIAL MEDIA & EMPLOYMENT LAW: NOT JUST A MATTER OF FREE SPEECH* available at <http://www.rctlj.org/2013/02/social-media-employment-law-not-just-a-matter-of-free-speech/> (“Law has generally been thought of as moving slower than technology. As social media use grows, this thought could not be more true.”)

<sup>2</sup> See *Elonis v. United States*, 134 S. Ct. 2819 (2014) (The Supreme Court granted writ on a case in which one of the defendant’s primary arguments is that his First Amendment Rights were violated by a finding that the threatening text messages and social media posts directed at his ex-wife were unprotected speech.)

<sup>3</sup> See Andy Radhakant, Matthew Diskin, *How Social Media Are Transforming Litigation*, LITIGATION (Spring 2013) [http://www.americanbar.org/publications/litigation\\_journal/2012\\_13/spring/social-media-transformation.html](http://www.americanbar.org/publications/litigation_journal/2012_13/spring/social-media-transformation.html) (“Few transformations have affected litigation and litigators as swiftly and as profoundly as social media. In five short years, we’ve seen a sea change in the way people live, connect, and do business across the Internet. “Web 2.0,” a term referring to Internet use that goes beyond merely retrieving information from websites, includes entirely new ways to create content and share information through online social networking. In addition to pervading most of our lives, the social media phenomenon is having a profound effect on every stage of litigation and in virtually every area of practice. Social media have become a big part of the way litigators do business, and they pose problems in the litigation process from the first time lawyers meet with their clients until after judgment is rendered. They affect criminal, civil, and family law litigators alike. They are brimming with potential and fraught with danger for both the unwary lawyer and client.”)

<sup>4</sup>See Micha Kaufman, *The Internet Revolution is the New Industrial Revolution*, FORBES (Oct. 5 2012), <http://www.forbes.com/sites/michakaufman/2012/10/05/the-internet-revolution-is-the-new-industrial-revolution/>. (“The Internet is bringing a revolution along with it . . . Long established workplace conventions – from defined office hours to physical office space – are being tossed out the window.”)

<sup>5</sup> See Nucleus Research Study, *Facebook: Measuring the Cost to Business of Social Networking* (July 2009), available at <http://nucleusresearch.com>. The study suggests that 61 percent of employees in the United States accessed their Facebook accounts during working hours an average of 15 minutes per day. See also Ethan Zelizer, *Embracing and Controlling Social Media in the Workplace*, YOUNG LAWYERS JOURNAL, (Oct. 2010), <http://www.digitaladedge.net/publication/repo27/14625/49921/49921->

employer regulations have proven to be contentious issues.<sup>7</sup> With the number of social media users expanding every year,<sup>8</sup> the National Labor Relations Board (“NLRB” or “the Board”) has had to issue judgments on an astounding number of cases involving social media.<sup>9</sup> Although the NLRB has consistently been hesitant to allow employers much breadth in restricting what employees are allowed to say when utilizing social media,<sup>10</sup> some of these decisions have been inconsistent with precedent, and thus employers were left scratching their heads when deciding what to incorporate into social media policies.<sup>11</sup>

This comment examines the most recent decisions of the NLRB, and the effect of these cases on the modern workplace. Part II of this comment will outline the history and growth of various social media sites. Part III will explain how the National Labor Relations Act (“NLRA” or “the Act”) Sections 7 and 8 have been applied to situations involving employee conduct. Part IV will address the memorandums regarding social media in the workplace issued by the NLRB

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52.pdf. A recent study revealed that over fifty percent of social media updates are performed using mobile devices during work hours.

<sup>6</sup> See Theodora R. Lee, *The Legal and Effective Business Use of Social Media in the Workplace*, CALIFORNIA BUSINESS LAW PRACTITIONER available at <http://www.littler.com/files/press/pdf/Lee-Legal-Effective-Business-Use-Social-Media-Workplace-January-2013.pdf> (“Examples of potential misconduct associated with the use of social networking in the workplace include: Breach of employee privacy; Disclosure of company trade secrets and confidential information; Employee gripe sessions; Harassment and Title VII issues; Defamation; Misuse of intellectual property; Excessive use of social media during working hours; Pornography and obscenity; Union organizing; Unauthorized and deceptive endorsements; and Violations of other employment policies.”)

<sup>7</sup> See Michael J. Eastman, LABOR, IMMIGRATION & EMP. BENEFITS DIV., U.S. CHAMBER OF COMMERCE, A SURVEY OF SOCIAL MEDIA ISSUES BEFORE THE NLRB 1 (2011), <http://www.uschamber.com/reports/survey-social-media-issues-nlr>.

<sup>8</sup> See *Social Networking Reaches Nearly One in Four Around the World* <http://www.emarketer.com/Article/Social-Networking-Reaches-Nearly-One-Four-Around-World/1009976#sthash.FzvDyLO5.dpuf> (last visited Feb. 6, 2015). (“The number of social network users around the world will rise from 1.47 billion in 2012 to 1.73 billion this year, an 18% increase. By 2017, the global social network audience will total 2.55 billion.”)

<sup>9</sup> See Eastman *supra* note 8 (“By 2011 the NLRB had heard over 129 social media cases.”)

<sup>10</sup> See *infra*. discussion Parts IV-V and accompanying notes.

<sup>11</sup> *Id.*

Acting General Counsel (“AGC”). Further it will explore the Board’s landmark decisions regarding social media and the reasons that these memorandums and decisions were insufficient. Finally, Part V will analyze the NLRB’s six most recent decisions regarding social media and explain that while these decisions continue the Board’s trend of expanding employee protection, they also help make a fluctuating issue more navigable for today’s employers.

## II. A BRIEF HISTORY OF SOCIAL MEDIA

Social media websites have become so commonplace that it is hard to imagine a world without them. While many people can track their initial use to MySpace or Facebook, the birth of social websites can be traced to 1991 when a website called FriendsReunited was founded.<sup>12</sup> This website opened the proverbial floodgate, and a string of companies followed suit, launching an array of social media sites in rapid succession.<sup>13</sup>

Social media is a broad category, and within it there are a variety of websites that incorporate different methods of social connectivity.<sup>14</sup> The social media sites that are usually implicated in employer-employee conflicts are social connection and posting sites, namely Facebook and Twitter.<sup>15</sup>

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<sup>12</sup> A HISTORY OF SOCIAL MEDIA, <http://www2.uncp.edu/home/acurtis/NewMedia/SocialMedia/SocialMediaHistory.html>, (last visited Jan. 18, 2014).

<sup>13</sup> *See id.* In 2002 Friendster was opened to the public in the U.S., followed by MySpace in 2003, Facebook in 2004, and Twitter in 2006. *Id.*

<sup>14</sup> Colin M. Leonard, Tyler T. Hendry, *From Peoria to Peru: NLRB Doctrine in A Social Media World*, 63 SYRACUSE L. REV. 199, 201 (2013) “Social media includes publishing platforms for bloggers such as WordPress, Google's Blogger, and Tumblr; social networking sites such as Facebook, Twitter, YouTube, and LinkedIn; and even location-based sites where users can let the world know their exact location, such as Foursquare and Yelp.”

<sup>15</sup> *See infra.* discussion Parts IV-V and accompanying notes.

Facebook allows users to register on the site and create a webpage that functions as an interactive personal profile.<sup>16</sup> Once registered, users can post their photos, personal interests, contact information, employment information, and relationship statuses.<sup>17</sup> They can communicate with their friends, family, and other Facebook users through private messages or through “wall posts,” which are publicly displayed messages on other users walls.<sup>18</sup> People connect by “friending” each other, which is the process of sending a “friend request” to an individual which they may accept or decline.<sup>19</sup> Facebook gives its users different methods of restricting public access to their profile through various privacy settings.<sup>20</sup> As of 2014, Facebook had 1.23 billion monthly active users with an average of 757 million daily active users.<sup>21</sup>

On the other-hand, Twitter is a platform that allows users to send and read messages that are limited to 140 characters.<sup>22</sup> These messages, which are called “tweets” are available to anyone interested in reading them.<sup>23</sup> Like Facebook, Twitter allows its users to modify privacy settings, and put limits on who is able to read their “tweets.”<sup>24</sup> Twitter’s most recent information shows that it currently has 284 million monthly active users, and that 500 million “tweets” are sent per day.

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<sup>16</sup> <https://www.facebook.com/facebook>

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> FACEBOOK REPORTS FOURTH QUARTER AND FULL YEAR 2013 RESULTS, <http://www.prnewswire.com/news-releases/facebook-reports-fourth-quarter-and-full-year-2013-results-242637731.html> (last visited Feb. 5, 2015).

<sup>22</sup> <https://about.twitter.com/what-is-twitter>

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

There can be no doubt that the increasing use of social media is of concern to employers,<sup>25</sup> but it is also of use.<sup>26</sup> Because the average worker maintains a personal cell phone with access to these social media platforms, it is impossible for employers to entirely restrict use, and thus social media policies regulating what employees do during work, and what they say outside of work often bring employers and employees before the NLRB.<sup>27</sup>

### III. The Legal Standards: “Concerted Activity”

The NLRB conducts its examinations of social media policies in the context of NLRA Section 7 which states that “[e]mployees shall have the right . . . to engage in. . . concerted activities.”<sup>28</sup> NLRA Section 8 prohibits employers from interfering with these and other Section

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<sup>25</sup> Shea Holtz, THE DEBATE ABOUT BLOCKING SOCIAL MEDIA IN THE WORKPLACE <http://hiring.monster.com/hr/hr-best-practices/workforce-management/employee-performance-management/blocking-social-media-us.aspx> (last visited Feb. 2, 2015). “Recent trends show that more than half of US employers are blocking social media access at the workplace. A variety of fears have led to the restriction, led by certainty that time spent on Facebook or Twitter is productivity the company can never get back.”

<sup>26</sup>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. Scott Brutocao, *Issue Spotting: The Multitude of Ways Social Media Impacts Employment Law and Litigation*, 60 THE ADVOC. 8 (2012). See also 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/>. Another survey from 2011 revealed 44% of companies track employees’ use of social media both in and outside of the workplace. See also Sara Begley, Joel Barras, Divonne Smoyer, Amanda Haverstick, *Perils and Pitfalls: Social Media in the Workplace*, U.S. CHAMBER INSTITUTE FOR LEGAL REFORM, available at <http://www.reedsmith.com/files/Publication/356cff8f-0d3a-4072-9209-178049af8039/Presentation/PublicationAttachment/c9001845-1061-42c4-ac85-2901b63c9f3c/Perils%20and%20Pitfalls%20Social%20Media%20Law%20and%20the%20Workplace.pdf> (“Branded social media pages on third-party services such as Facebook and Twitter help companies establish a social media presence and gain followers, fans, consumers, and subscribers. Companies can then leverage their social media presence as a platform for promotions, contests, and other events that encourage consumers to submit substantive descriptions and favorable reviews of a company’s products and services. Social media sites also allow for word-of-mouth marketing via blogs, tweets, and chat room comments, all of which can be far more powerful than company sponsored direct marketing programs.”)

<sup>27</sup> See *infra*. discussion Part V and accompanying notes.

<sup>28</sup> National Labor Relations Act, 29 U.S.C. § 157 (2006).

7 rights.<sup>29</sup> Because Section 7 fails to provide a specific definition of “concerted activity,” the Board has been required to give it concrete meaning.<sup>30</sup>

After a series of cases that offered opportunities to flesh out the scope of Section 7 protections,<sup>31</sup> the Board provided a definition for “concerted activities”: “to find an employee's activity to be ‘concerted,’ we shall require that it be engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself.”<sup>32</sup> In a second decision involving *Myers Industries*, the Board took the opportunity to refine its definition when it explained that “concerted activity” “encompasses those circumstances 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.”<sup>33</sup> However, the NLRB noted that these were not exhaustive definitions,<sup>34</sup> and has recently expanded its own definition of “concerted activities.”<sup>35</sup>

Section 7 mandates that these concerted activities be “for the purpose of collective bargaining or other mutual aid or protection.”<sup>36</sup> This clause, deemed the “mutual aid or protection clause” was found by an administrative law judge (“ALJ”) to protect employees who “seek to protect terms and conditions of employment or otherwise improve their lot as employees

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<sup>29</sup> *See Id.* at 158. (“It shall be an unfair labor practice for an employer to to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section [7] of this title.”)

<sup>30</sup> Although the legislative history of Section 7 does not specifically define “concerted activity,” it does reveal that Congress considered the concept in terms of individuals united in pursuit of a common goal. *Myers Indus.*, 268 NLRB 493 (1984)

<sup>31</sup> *Myers Indus.*, 268 NLRB 493, 497 (1984)[hereinafter *Myers I*]; *Myers Indus.*, 882, 887 (1986) [hereinafter *Myers II*].

<sup>32</sup> *Myers I*, 268 NLRB at 497.

<sup>33</sup> *Myers II*, 882, NLRB at 887.

<sup>34</sup> *Myers I* 268 NLRB at 496-97.

<sup>35</sup> *See infra*. Part III.C. and accompanying notes.

<sup>36</sup> National Labor Relations Act, 29 U.S.C. § 157 (2006).

through channels outside the immediate employer-employee relationship.”<sup>37</sup> It is through this clause that Section 7 rights are afforded to social media posts.<sup>38</sup>

A. *The Traditional Atlantic Steel/Jefferson Standard*

Before examining the application of Section 7 to social media, it is important to understand the scope and restrictions of Section 7 generally. The Board has demonstrated that there are circumstances in which an employee may be engaged in otherwise protected activity, yet forfeit the protection of Section 7. In *Atlantic Steel Company*, the Board found that “opprobrious conduct” would cause such a forfeiture, and held that there is a four factor test to determine whether an employee’s conduct is “opprobrious:” “(1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way, provoked by an employer’s unfair labor practice.”<sup>39</sup> These factors are intended to allow employees some freedom and latitude during “concerted activity,” while at the same time recognizing that an employer has a “legitimate need to maintain order.”<sup>40</sup>

The Board also looks negatively on conduct that is openly disloyal.<sup>41</sup> In addition to the *Atlantic Steel Company* test, the Court applies the test it developed in *Jefferson Standard* when evaluating situations where an employee’s behavior may be classified as disloyal.<sup>42</sup> In *Local Union No. 1229, Int’l Bhd. of Elec. Workers (Jefferson Standard)* the Supreme Court was called upon to decide whether the discharge of striking employees who distributed handbills containing

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<sup>37</sup> *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1978).

<sup>38</sup> *See infra*. discussion Part IV and accompanying notes.

<sup>39</sup> *Atl. Steel Co.*, 10-CA-13634, 245 N.L.R.B. 814, 816 (Sept. 28, 1979).

<sup>40</sup> *Id.*

<sup>41</sup> *N.L.R.B. v. Local Union No. 1229, Int’l Bhd. of Elec. Workers*, 346 U.S. 464, 472 (1953). “There is no more elemental cause for discharge of an employee than disloyalty to his employer.” *Id.*

<sup>42</sup> *Id.*

negative information to passersby violated the Act.<sup>43</sup> Finding this conduct to be outside the scope of Section 7 protections,<sup>44</sup> the Board explained that in order to determine whether conduct is disloyal we must see if it constitutes a “sharp, public, disparaging attack upon the quality of a company’s product and its business policies, in a manner reasonably calculated to harm the company’s reputation and reduce its income.”<sup>45</sup>

The Board refined the Supreme Court’s holding in *Jefferson Standard*, and held that “employees may engage in communications with third parties in circumstances where the communication is related to an ongoing labor dispute and when the communication is not so disloyal, reckless, or maliciously untrue to lose the Act’s protection.”<sup>46</sup> The Board also reinforced that the definition of “an ongoing labor dispute,” outlined in the Act as “any controversy concerning terms, tenure or conditions of employment.”<sup>47</sup>

*B. Parexel International: When Non-Concerted Activity Is Concerted Activity*

Although the Board attempted to be as comprehensive as possible, the *Myer*’s definition was not meant to be exhaustive.<sup>48</sup> In *Parexel International, LLC*, The Board significantly lowered the bar for determining when the concerted activity threshold has been met.<sup>49</sup> The Board held that no actual concerted activity was needed to find a violation of Section 8, and that a preemptive strike in this situation qualified as an unfair labor practice.<sup>50</sup>

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<sup>43</sup> *Id.* at 465.

<sup>44</sup> *Id.* at 477-78.

<sup>45</sup> *Id.* at 471.

<sup>46</sup> Emarco, Inc., 284 NLRB 832, 833 (1987).

<sup>47</sup> 29 U.S.C. § 152.

<sup>48</sup> *Id.*

<sup>49</sup> Parexel Int’l, 356 at \*4 NLRB No. 82 (Jan. 28, 2011)

<sup>50</sup> *Id.*

In *Parexel*, the employee had a discussion with a co-worker about wage bias favoring South Africans.<sup>51</sup> The co-worker had left the company and claimed to receive a raise upon his return, which he suggested was based upon his South African origin.<sup>52</sup> The employee went to her supervisor to complain about the perceived wage bias, and suggested that they, and everyone else in the unit, quit in order to force a collective raising of wages.<sup>53</sup> Parexel's management was notified of the complaint, and set up a meeting to address the employee's concerns.<sup>54</sup> During the meeting, the employee expressed her concern that the company was giving higher wages to its South African employees.<sup>55</sup> Shortly after the meeting, the employee was terminated.<sup>56</sup>

The Board took this opportunity to add to the Section 7 doctrine, and held that despite the fact that the employee was not engaged in protected activity, as she was not discussing her concerns with other employees, it was not proper for Parexel to "nip the activity in the bud."<sup>57</sup> Thus, the bar has been substantially lowered, and now employers may be held liable in situations where it appears that employees *may* engage in protected concerted activity in the future.<sup>58</sup> Shortly after this decision, the NLRB began applying this and the other traditional Section 7 standards to the nontraditional social media scenario.<sup>59</sup>

#### IV. THE NLRB AND SOCIAL MEDIA: WHAT ARE THE GUIDELINES?

##### A. *THE 2010 AMERICAN MEDICAL RESPONSE OF CONNECTICUT ADVICE MEMORANDUM*

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<sup>51</sup> *Id.* at \*1.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at \*2.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at \*5.

<sup>58</sup> *See Id.*

<sup>59</sup> *See supra* Part IV discussion and accompanying notes.

On October 10, 2010 the NLRB issued a memorandum that described the first case involving a dismissal based upon Facebook conduct.<sup>60</sup> In *AMR*, a paramedic was dispatched to pick up a woman, the husband of whom filed a complaint against the paramedic for allegedly rude behavior.<sup>61</sup> The employee's supervisor notified the paramedic of the complaint and informed her that she may be subject to discipline.<sup>62</sup> That night, the paramedic made several comments on Facebook regarding the conversation with her supervisor:

Her first post states, "Looks like I'm getting some time off. Love how the company allows a 17 [AMR code for a psychiatric patient] to be a supervisor." An AMR supervisor then responded, "What happened?," and a current AMR employee posted, "What now?" Souza answered, "Frank being a dick." A former AMR employee next wrote "I'm so glad I left there," and the current AMR employee stated, "Ohhh, he's back, huh?" Souza replied, "Yep he's a scumbag as usual."<sup>63</sup>

The Facebook conversation was found to be in violation of AMR's "Blogging and Internet Posting Policy,"<sup>64</sup> and shortly after the post the paramedic was then discharged.<sup>65</sup> The two provisions of the social media policy that the Board analyzed stated:

Employees are prohibited from posting pictures of themselves in any media, including but not limited to the Internet, which depicts the Company in any way, including but not limited to a Company uniform, corporate logo or an ambulance, unless the employee receives written approval from the EMSC Vice President of Corporate Communications in advance of the posting;

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<sup>60</sup> Advice Memorandum, Office of the Gen. Counsel, NLRB, American Medical Response of Connecticut, No. 34-CA-12576, 39 N.L.R.B. A.M.R. 15 (Oct. 5, 2010) [hereinafter Advice Memorandum: AMR], available at <http://www.scribd.com/doc/66219433/American-Medical-Response-of-Connecticut-GC-Advice-Memo-NLRB-2010> (subsequent page numbers refer to the Scribd PDF).

<sup>61</sup> *Id.* at 2.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 3.

<sup>64</sup> *Id.* at 5.

<sup>65</sup> *Id.* at 3.

Employees are prohibited from making disparaging, discriminatory or defamatory comments when discussing the Company or the employee's superiors, co-workers and/or competitors.<sup>66</sup>

The Board concluded that the first rule violated employees' Section 7 rights, as it could reasonably foresee a situation in which the rule would prevent protected activity.<sup>67</sup> The second rule was found to be invalid under the theory that it contained no limiting language that would prevent an employee from believing their Section 7 rights were being chilled.<sup>68</sup>

In addition to finding that the employee had engaged in protected activity, and "Internet and Blogging Policy" invalid,<sup>69</sup> the Board utilized the *Atlantic Steel Company* test in determining whether or not the profane nature of the Facebook post alleviated Section 7 protections.<sup>70</sup>

Applying these factors, the Board found that the employee's statements did not meet "opprobrious conduct" and thus she remained under the protections of Section 7.<sup>71</sup> With this

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<sup>66</sup> *Id.* at 5.

<sup>67</sup> *Id.* at 13. The Board imagined a situation in which the rule would violate Section 7 because the employee would be prohibited from "posting a picture of employees carrying a picket sign depicting the [c]ompany's name, or wearing a t-shirt portraying the company's logo in connection with a protest involving the terms and conditions of employment."

<sup>68</sup> *Id.* at 13-15.

<sup>69</sup> *Id.* at 9. "Souza engaged in protected activity by . . . discussing supervisory actions with coworkers in her Facebook post." *Id.*

<sup>70</sup> *Id.* "The Board considers four factors when determining whether an employee who is engaged in protected, concerted activity has by opprobrious conduct lost the protection of the Act: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way, provoked by an employer's unfair labor practice." *Id.*

<sup>71</sup> *Id.* at 9-10. "Applying these factors here, we conclude that Souza's conduct was not so opprobrious as to lose the protection of the Act. As to the first factor, the Facebook postings did not interrupt the work of any employee because they occurred outside the workplace and during the non-working time of both Souza and her coworkers. As to the second factor, the comments were made during an online employee discussion of supervisory action, which is, as noted above, protected activity. Regarding the third factor, although Souza called Filardo a 'dick,' and 'scumbag,' the name-calling was not accompanied by any verbal or physical threats, and the Board has found more egregious name-calling protected. The fourth factor strongly favors a finding that the conduct was protected; Souza's Facebook postings were provoked by Filardo's unlawful refusal to provide her with a Union representative for the completion of the incident

decision the Board demonstrated that it intended to rely on brick and mortar precedent when evaluating social media cases.<sup>72</sup> It also sparked media interest,<sup>73</sup> and spurred the Board to begin evaluating more social media policies to ensure employer awareness and employee protection.<sup>74</sup>

#### *B. The 2011-2012 NLRB Social Media Memorandums*

Recognizing that the law was not developing fast enough to allow employers a fair chance of regulating social media, the AGC began issuing memorandums meant to make the muddy waters clear.<sup>75</sup> The first report was issued on August 18, 2011, and in it the AGC analyzed fourteen cases.<sup>76</sup> The decisions explained in the memorandum addressed varied situations,<sup>77</sup> and practitioners were quick jump to the aid of their employer-clients and summarize the rules garnered from the cases' outcomes.<sup>78</sup>

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report and by his unlawful threat to discipline her. Considering these factors, we conclude that Souza did not lose the protection of the Act." *Id.*

<sup>72</sup> *See id.*

<sup>73</sup> NLRB'S RECENT ACTION: SEPARATING FACT FROM FICTION--AND UNFOUNDED FEAR, SOC. MEDIA IN ORGS. COMMUNITY (Feb. 8, 2011), *available at* <http://www.sminorgs.net/2010/11/the-nlrbs-recent-action-separating-fact-from-fiction-and-unfounded-fear.html> (stating that AMR created a media storm around the Board and its social media decisions).

<sup>74</sup> *See supra* Parts IV.B. and V discussion and accompanying notes.

<sup>75</sup> Subject: Report of the Acting Gen. Counsel Concerning Soc. Media Cases, MEMORANDUM OM 11-74, 2011 WL 11718018, at \*1 (Aug. 18, 2011).

<sup>76</sup> *Id.*

<sup>77</sup> THE NLRB AND SOCIAL MEDIA, *available at* <http://www.nlr.gov/news-outreach/fact-sheets/nlr-and-social-media> ("In four cases involving employees' use of Facebook, the Office of General Counsel found that the employees were engaged in "protected concerted activity" because they were discussing terms and conditions of employment with fellow employees. In five other cases involving Facebook or Twitter posts, the activity was found to be unprotected. In one case, it was determined that a union engaged in unlawful coercive conduct when it videotaped interviews with employees at a nonunion job-site about their immigration status and posted an edited version on YouTube and the Local Union's Facebook page. In five cases, some provisions of employers' social media policies were found to be overly-broad. A final case involved an employer's lawful policy restricting its employees' contact with the media.")

<sup>78</sup> *See* Theodora R. Lee, *The Legal and Effective Business Use of Social Media in the Workplace*, CALIFORNIA BUSINESS LAW PRACTITIONER. *available at* <http://www.littler.com/files/press/pdf/Lee-Legal-Effective-Business-Use-Social-Media-Workplace-January-2013.pdf> ("The Memorandum also identified social media policy provisions that the General Counsel deemed overbroad and in violation of the NLRA. These provisions included the following commonly used policies: 1. Inappropriate

The AGC then issued a second report on January 25, 2012.<sup>79</sup> This report also explained 14 cases, half involving questions about employer social media policies.<sup>80</sup> Attempting to both find its footing and give employers guidance, the Board found five of the policies to be unlawfully broad, one lawful, and one was found lawful after certain provisions were revised.<sup>81</sup> The second half of cases involved the discharge of employees after they posted comments to Facebook.<sup>82</sup> Six of the discharged employees were favored when their terminations were found to be invalid, because they were sourced from unlawful regulatory policies.<sup>83</sup> However, in one case an employee's termination was upheld despite the existence of too broad a policy, because the employee's Facebook comment was not related to work, and was thus not protected concerted activity.<sup>84</sup> With this report, the NLRB underscored two main points regarding the NLRB and social media:

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Discussions: Prohibition against 'inappropriate discussions about the company, management, and/or coworkers.' 2. Defamation: Prohibition on any social media post that 'constitutes embarrassment, harassment or defamation of the [company] or of any [company] employee, officer, board member, representative, or staff member.' 3. Disparagement: Prohibition against 'employees making disparaging comments when discussing the company or the employee's superiors, coworkers and/or competitors.' 4. Privacy: Prohibition on 'revealing, including through the use of photographs, personal information regarding coworkers, company clients, partners, or customers without their consent.' 5. Confidentiality: Prohibition on 'disclosing inappropriate or sensitive information about the Employer.' 6. Contact Information: Prohibition on 'using the company name, address, or [related] information on [employees'] personal profiles.' 7. Logo: Prohibition on using "the Employer's logos and photographs of the Employer's store, brand, or product, without written authorization.' 8. Photographs: Prohibition against 'employees posting pictures of themselves in any media . . . which depict the Company in any way, including a company uniform [or] corporate logo.' *Id. alterations in original.*

<sup>79</sup> Subject: Report of the Acting Gen. Counsel Concerning Soc. Media Cases, MEMORANDUM OM 12-31, 2012 WL 10739276, at \*1 (Jan. 24, 2012)

<sup>80</sup> *See Id.* \*2-\*28.

<sup>81</sup> *See Id.*

<sup>82</sup> THE NLRB AND SOCIAL MEDIA, available at <http://www.nlr.gov/news-outreach/fact-sheets/nlr-and-social-media>

<sup>83</sup> *See Id.*

<sup>84</sup> *See Id.*

- 1) Employer policies should not be so sweeping that they prohibit the kinds of activity protected by federal labor law, such as the discussion of wages or working conditions among employees.
- 2) An employee's comments on social media are generally not protected if they are mere gripes not made in relation to group activity among employees.<sup>85</sup>

Finally, the AGC issued a third report on May 30, 2012 in which it examined seven employer policies governing the use of social media by employees.<sup>86</sup> This memorandum was less insightful than the previous two, because in six of the cases, the AGC found some, but not all, of the provisions of the employers' social media policies to be lawful and others to be unlawful.<sup>87</sup> In only one case was the entire policy upheld.<sup>88</sup> The third memorandum did little to enlighten employers, as it stressed an already known rule: that provisions of social media policies would violate Section 7 if they interfered with the rights of employees to discuss wages and working conditions with co-workers.<sup>89</sup>

Continuing to apply precedent established in *Lutheran Heritage Village-Livonia*, the AGC reaffirmed that a rule is unlawful if it "reasonably tends to chill employees in the exercise of their Section 7 rights."<sup>90</sup> In assessing these situations, the memorandum applied the two-prong test established in *Lutheran*: 1) a rule violates Section 7 if it explicitly restricts activities that the Act protects; 2) "[i]f the rule does not explicitly restrict activity protected by Section 7," it will

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<sup>85</sup> *See Id.*

<sup>86</sup> Subject: Report of the Acting Gen. Counsel Concerning Soc. Media Cases, MEMORANDUM OM 12-59, 2012 WL 10739277, at \*1 (May 30, 2012)

<sup>87</sup> *See Id.* at \*2-17.

<sup>88</sup> *See Id.* at \*10.

<sup>89</sup> THE NLRB AND SOCIAL MEDIA, available at <http://www.nlr.gov/news-outreach/fact-sheets/nlr-and-social-media>

<sup>90</sup> 343 N.L.R.B. 646 (2004).

still be found unlawful if it meets a three-part subtest.<sup>91</sup> Although these memorandums established some guidelines, but they lacked the force of law, and the Board recognizing their insufficiency, began to issue judicial decisions involving social media policies in the workplace.<sup>92</sup>

### *B. The Initial Application of the Atlantic Steel/ Jefferson Standard to Social Media*

In the Board's first reported decision on the matter, the ALJ's holding was upheld, and it was found that "the respondent auto dealership did not violate the Act by discharging a sales representative for photos and comments that he posted to his Facebook page, because the posts that led to his termination were not protected by the Act."<sup>93</sup> In this case, the issue involved two separate Facebook posts that were made by an auto salesman at a BMW car dealership.<sup>94</sup> The question was focused on whether the salesman was fired exclusively for his second Facebook post, photos of an embarrassing accident at an adjacent Land Rover dealership, or for his first post in which he posted photos with co-workers and made mocking comments about serving hot dogs at a luxury BMW car event.<sup>95</sup> The ALJ found, and the Board upheld a finding that the termination of the salesman was due solely to the second post; if the first post had been involved, it would have fallen under Section 7 protection, as it involved co-workers.<sup>96</sup>

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<sup>91</sup> *Id.* "(1) [E]mployees 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 exercise of Section 7 rights." *Id.* at 647.

<sup>92</sup> *See supra* Part IV.B. and accompanying notes.

<sup>93</sup> Karl Knauz Motors, Inc., 358 at \*1 NLRB No. 164 (Sept. 28, 2012)

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

Although the Board ruled in favor of the employer, it did find that a provision of their employee handbook violated Section 8.<sup>97</sup> The problematic provision of the handbook was the “Courtesy” Provision:

Courtesy: 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>98</sup>

This provision was found problematic for two reasons: 1) there was nothing in the provision or anywhere else in the handbook that would reasonably suggest to employees that employee communications protected by Section 7 of the Act are excluded from the rule's broad reach; 2) an employee reading the rule would reasonably assume that the dealership would regard statements of protest or criticism as “disrespectful” or “injur[ious] [to] the image or reputation of the Dealership.”<sup>99</sup> Here, the Board took its first opportunity to evaluate a Facebook posting scenario, and to show how the traditional Section 7 rules apply in the social media setting, giving employers an important guideline for drafting social media policies; the case suggested that employers needed to specifically state that their handbooks were not restrictions on conduct protected by Section 7.<sup>100</sup>

In its second decision on the matter, the Board found that it was unlawful for a non-profit organization to fire five employees who participated in Facebook postings about a coworker who

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<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *See id.*

intended to complain to management about their work performance.<sup>101</sup> In *Hispanics United of Buffalo, Inc.*, five employees received criticism from a coworker, and took to Facebook to comment on the situation.<sup>102</sup> Three days after the Facebook conversation, the employer met with the employees and fired each of them, asserting that their conversation violated their employee policy.<sup>103</sup> Applying its non-social media precedent,<sup>104</sup> the Board held that it was irrelevant that the terminated employees were not trying to change their working conditions and that they did not communicate their concerns to the employer.<sup>105</sup> Although the communications on Facebook did not explicitly address a particular issue with the terms and conditions of employment, employers were reminded that “[e]mployees have a protected right to discuss matters affecting their employment amongst themselves. Explicit or implicit criticism by a co-worker of the manner in which they are performing their jobs is a subject about which employee discussion is protected by Section 7.”<sup>106</sup>

In *Triple Sports Play Bar and Grille*, the Board continued operating under the pretense of adhering to the standard brick and mortar precedent, holding that “the specific medium in which the discussion takes place is irrelevant to its protected nature.”<sup>107</sup> Here two employees took to Facebook to vent their frustration about the bar’s practice of withholding taxes.<sup>108</sup> The

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<sup>101</sup> *Hispanics United of Buffalo, Inc.*, 3-CA-27872, 2011 WL 3894520 (Sept. 2, 2011)

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *See id.*

<sup>107</sup> *Three d, LLC d/b/a Triple Play Sports Bar & Grille & Jillian Sanzone, an Individual Three d, LLC d/b/a Triple Play Sports Bar & Grille & Vincent Spinella, an Individual*, 34-CA-12915, 2012 WL 76862 (Jan. 3, 2012)

<sup>108</sup> *Id.*

conversation piqued the interest of fellow employees and bar patrons, and the employees were quickly terminated.<sup>109</sup>

In the course of the adjudication, it was undisputed that Section 7 protected the Facebook discussion, so the Board focused its analysis on the *Jefferson Standard* and *Atlantic Steel* standards because one employee called one owner an “asshole,” and the other employee “liked” this status. It was the employer’s contention that these standards applied, and thus the comments lost Section 7 protections as they were disloyal or defamatory.<sup>110</sup>

As a starting point, the Board claimed that it was rejecting the *Atlantic Steel* test, reasoning that social media discussions were outside the purview of the *Atlantic Steel* framework.<sup>111</sup> They justified this by explaining that *Atlantic Steel* was designed to protect Section 7 rights in the context of an in-person discussion with supervisors in the workplace, balanced against an employer’s interest in workplace discipline.<sup>112</sup> The Board then moved onto *Jefferson Standard*, which was claimed to be more fit for social media because it applies to public statements that disparage the employer’s products or services.<sup>113</sup> As explained above, disloyalty may cause an employee to forfeit their Section 7 protections.<sup>114</sup> In its application, however, the Board found that the employee’s conversation did not rise to the level of disparagement necessary to establish disloyalty.<sup>115</sup>

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<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* “Because DelBuono and Respondent’s other owners were not present, there was no direct confrontational challenge to their managerial authority.” *Id.*

<sup>113</sup> *N.L.R.B. v. Local Union No. 1229, Int’l Bhd. of Elec. Workers*, 346 U.S. 464, 472 (1953).

<sup>114</sup> *Triple Play Sports Bar & Grille*, 34-CA-12915, 2012 WL 76862 (Jan. 3, 2012)

<sup>115</sup> *Id.* “As an initial matter, however, I find that the statements made by Sanzone and Spinella here never lost the Act’s protection, in that they were not susceptible to a defamatory meaning under the relevant

Although the Board claimed that it had done away with the *Atlantic Steel* test and was applying *Jefferson Standard*, in reality, the Board was simply referencing both standards, and applying a hybrid test.<sup>116</sup> This demonstrates the Board's initial unpredictability in resolving issues involving social media, as it was quick to claim a strict precedent following interpretation, but was really formulating a new test without knowing it.<sup>117</sup>

The pattern established by the Board in these cases was cause for concern: if the Board was unable to predictably apply its own precedent in social media situations,<sup>118</sup> and was conflicting with the memorandums propagated by the AGC,<sup>119</sup> how were employers to know what was valid under Section 7, and what would be considered an unfair labor practice? The ramifications of these vague decisions led practitioners to proffer their own guidelines for their employer-clients to follow,<sup>120</sup> and legal scholars to write in depth on the unworkability of these decisions.<sup>121</sup> In its most recent cases however, the NLRB has continued to “follow precedent,”

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caselaw. It is axiomatic that prior to considering issues of reckless or knowing falsity, “there must be a false statement of fact.” *Id.*

<sup>116</sup> Leonard *supra* note 11 at 213.

<sup>117</sup> *See id.*

<sup>118</sup> *See supra* discussion Part IV and accompanying notes.

<sup>119</sup> *Id.*

<sup>120</sup> *See* CALIFORNIA BUSINESS LAW PRACTITIONER The Legal and Effective Business Use of Social Media in the Workplace Theodora R. Lee (“Although there are many potential social networking landmines that an employer must navigate, there are several relatively easy steps that every employer can take to decrease potential liability.”)

<sup>121</sup> Alexandra Hemenway, *The NLRB and Social Media: Does the NLRB "Like" Employee Interests?*, 38 J. CORP. L. 607, 623 (2013) “The Board's precedent in social media cases involving disciplinary action taken against an employee due to the content of a social media post is inconsistent and provides little guidance to corporate employers. More specifically, the Board's analysis is especially problematic within two contexts. First, the Board has inconsistently stated whether an employee's attempt to initiate group action when making his social media post is determinative of concerted activity under [S]ection 7. Second, the Board inconsistently stated when it will deem a particular social media post to be evidence of nothing more than an “individual gripe” Taken together, these two ambiguities will likely hinder an employer's ability to understand on the part of the employee. when it may take action against an employee without risking a sanction from the Board.” *Id.* *See also* Leonard *infra*. n.11 at 226. “We realize that

and has begun to develop a predicable and workable framework through which employers may find guidance when drafting social media policies.<sup>122</sup>

V. THE 2014 DECISIONS: EXPANDING EMPLOYEE PROTECTION AND GIVING EMPLOYERS GUIDANCE

During the calendar year of 2014, the NLRB reviewed and decided six cases involving social media in the workplace. These cases demonstrate that the Board has begun to find its ground in the context of social media, and while continuing its practice of giving employees broad leeway in what they may post, it has also begun to carve out definite, and predictable rules for employer regulation.

A. *The Case Summaries: Picking a Fight*

In *Hoot Winc LLC*, an employee was terminated for violating the provisions of the company's social media policy.<sup>123</sup> Faced with what she considered a "rigged bikini contest," the employee, Hanson took to voicing her concerns with co-workers and supervisors.<sup>124</sup> The

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asking the Board to stray far from its "brick and mortar" analysis may be an exercise in scholarly futility. Accordingly, the above suggestions provide minor alterations and additions to supplement and more clearly define the Board's analysis of social media discipline. The Board is faced with the unique opportunity of establishing a meaningful and forward-thinking analysis to analyze a medium to which established standards do not neatly apply. By acknowledging the far-reaching impact of this medium along with the privacy features employees can use to limit this potential impact, the Board has an opportunity to protect employees' interests in protected speech while at the same time protecting the legitimate concerns of employers in establishing and maintaining the reputation of their company. If the Board refuses to recognize this reality and blindly adheres to old standards in developing its analysis, it will only ensure its slumber for another twenty years in the Catskills." *Id.* See e.g., James Glenn, *Can Friendly Go Too Far? Ramifications of the NLRA on Employer Practices in a Digital World*, 2012 U. ILL. J.L. TECH. & POL'Y 219 (2012); Pat Lundvall & Megan Starich, *Employer Social Media Policies and the National Labor Relations Act: Walking the Fine Line Between Prohibited Disparagement and Protected Employee Speech*, 20 NEVADA LAW. 8 (2012); Samantha Barlow Martinez, *Cyber-Insubordination: How an Old Labor Law Protects New Online Conduct*, 49 HOUS. L. REV. 16, (2012).

<sup>122</sup>See *supra* Part V discussion and accompanying notes.

<sup>123</sup> *Hoot Winc, LLC*, 199 L.R.R.M. (BNA) ¶ 1567 (N.L.R.B. Div. of Judges May 19, 2014)

<sup>124</sup> *Id.*

waitresses were required to attend the bikini contest, were unpaid for their attendance, and did not have the opportunity to win the cash prize as the judges of the contest had close relationships with the person in charge of contest, who was also a participant.<sup>125</sup> After the contest had a predictable outcome,<sup>126</sup> the employee was vocal about her dissatisfaction with the way the contest was held, and complained about the result in front of the restaurants patrons.<sup>127</sup> She was subsequently fired, and was told that it was due to her posting tweets that violated the company's social media policy which read:

The unauthorized dispersal of sensitive Company operating materials or information to any unauthorized person or party [might result in discipline up to, and including immediate termination]. This includes, but is not limited to, recipes, policies, procedures, financial information, manuals or any other information in part or in whole as contained in any Company records.<sup>128</sup>

In *Lily Transportation*, the Respondent company was being charged of unfair labor policies stemming from three policies contained in its employee hand book. The company resolved to modify its policies, causing the employee to withdraw his unfair labor charge,<sup>129</sup> but the Office of the General Counsel continued its lawsuit, and argued that provisions in Lily Transportation's employee handbook were invalid. The policies at issue were: 1) The Dress Code Rule which stated:

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<sup>125</sup> *Id.*

<sup>126</sup> *Id.* The alleged cheater walked away with the first place prize, much to the chagrin of Panitch, the terminated employee.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Lily Transp. Corp. & Robert Suchar, an Individual*, 01-CA-108618, 2014 WL 1620731 (Apr. 22, 2014)

Lily Transportation Corp. provides professional services to its clients. It is extremely important that our drivers dress in a manner that reflects Lily's professional image and reputation. Lily Transportation Corp. has instituted a Driver Uniform and Dress Code policy for drivers. Drivers must wear Lily Uniforms where required, and conform to the Dress Code while on the job as set forth below . . . . No lettering, numbering, wording slogans or graphics are allowed on clothing worn by drivers visible to others while on the job except that which is the logo or insignia of the clothing manufacturer (i.e. Nike, Reebok, etc.). No articles of clothing may be worn displaying anything other than the Lily Logo or Insignia unless specifically approved by Lily Transportation Corp.<sup>130</sup>

2) The Confidential Information Rule:

Under the “Inappropriate Conduct” section in the employee handbook, employees are subjected to discipline, including discharge for various violations of company policy . . . One violation which may result in the discharge of an employee states Disclosure of confidential information, including Company, customer information and employee information maintained in confidential personnel files.<sup>131</sup>

and 3) The Information Posting Rule:

Information posted on the internet may be there forever, and employees would be well advised to refrain from posting information or comments about Lily, Lily's clients, Lily's employees or employees' work that have not been approved by Lily on the internet, including but not limited to blogs, message boards, and websites. Lily will use every means available under the law to hold persons accountable for disparaging, negative, false, or misleading information or comments involving Lily or Lily's employees and associates on the internet and may take corrective action up to and including discharge of offending employees.<sup>132</sup>

Similarly, in *Professional Electrical Contractors*, several employee handbook provisions were found to be invalid, most of which involved the relationship between employment and

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<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

social media.<sup>133</sup> The provisions of the handbook at issue were the set of rules relating to confidentiality of customer matter,<sup>134</sup> the information technology policy,<sup>135</sup> a section of the policy that prohibited “[b]oisterous or disruptive activity in the workplace,”<sup>136</sup> and the series of rules prohibiting employees from taking photographs or making recordings at the workplace without prior authorization by management.<sup>137</sup>

The issue in *Laurus Technical Institute* was whether an employee’s termination under the provisions of the company’s “No Gossip Policy” amounted to an unfair labor practice.<sup>138</sup> Although the Respondent company listed a variety of reasons for firing the charging party in their termination letter,<sup>139</sup> they admitted that it was fundamentally due to the breach of the “No Gossip Policy.”<sup>140</sup> The relevant portions of the policy stated:

Gossip is not tolerated at Laurus Technical Institute. Employees that participate in or instigate gossip about the company, an employee, or customer will receive disciplinary action. Gossip is an activity that can drain, corrupt, distract and down-shift the company's productivity, moral, and overall satisfaction. It has the potential to destroy an individual and is counterproductive to an organization. Most people involved in gossip may not intend to do harm, but gossip can have a negative impact as it has the potential to destroy a person's or organization's reputation and credibility. .

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<sup>133</sup>Prof'l Elec. Contractors of Connecticut, Inc., 199 L.R.R.M. (BNA) ¶ 1917 (N.L.R.B. Div. of Judges June 4, 2014)

<sup>134</sup>*Id.* To maintain this professional confidence, no associate shall disclose customer information to outsiders, including other customers or third parties and members of one's own family. *Id.*

<sup>135</sup>*Id.* (“Initiating or participating in distribution of chain letters, sending communications or posting information, on or off duty, or using personal computers in any manner that may adversely affect company business interests or reputation.”) *Id.*

<sup>136</sup>*Id.*

<sup>137</sup>*Id.*

<sup>138</sup>*Laurus Technical Inst. & Joslyn Henderson*, 360 NLRB No. 133 (June 13, 2014)

<sup>139</sup>*Id.*

<sup>140</sup>*Id.*

<sup>141</sup>*Id.*

The policy further defined gossip, and listed potential consequences for the violation of the provision. The language of the provision was found to be “overly broad, ambiguous, and severely restricts employees from discussing or complaining about any terms and conditions of employment.”<sup>142</sup>

Unlike the previous cases, the social media issue in *Durham School Services* was ancillary to the primary litigation.<sup>143</sup> However, the Board took the opportunity to evaluate the social media provision of Durham’s employee handbook.<sup>144</sup> The policy, which was found to be invalid, was articulated by the court:

Under the subheading ‘Social Networking Websites,’ among other language it states that, ‘It is also recommended that the employees of . . . Durham School Services . . . limit contact with parents or school officials, and keep all contact appropriate. Inappropriate communication with students, parents, or school representatives will be grounds for immediate dismissal.’ Further, under the subheading ‘Interaction with Co-workers,’ among other language it states that, ‘communication with coworkers should be kept professional and respectful, even outside of work hours.’ Continuing under the heading of ‘Expectations of Privacy,’ the addendum states that, ‘Employees who publicly share unfavorable written, audio or video information related to the company or any of its employees or customers should not have any expectation of privacy, and may be subject to investigation and possibly discipline.’<sup>145</sup>

Contrary to these decisions, the social media policy analyzed in *Landry’s Inc.*, was found to be valid.<sup>146</sup> While the General Counsel brought the entire social media policy into controversy, it focused on one particular provision:

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<sup>142</sup>*Id.*

<sup>143</sup>*Durham Sch. Servs., L.P. & Freight, Constr. & Gen. Drivers, Warehousemen & Helpers-Teamsters Union Local No. 287, a/w Int’l Bhd. of Teamsters*, 360 NLRB No. 85 (Apr. 25, 2014)

<sup>144</sup>*Id.*

<sup>145</sup>*Id.*

<sup>146</sup>*Landry’s Inc.*, 199 L.R.R.M. (BNA) ¶ 2103 (N.L.R.B. Div. of Judges June 26, 2014)

While your free time is generally not subject to any restriction by the Company, the Company urges all employees not to post information regarding the Company, their jobs, or other employees which could lead to morale issues in the workplace or detrimentally affect the Company's business. This can be accomplished by always thinking before you post, being civil to others and their opinions, and not posting personal information about others unless you have received their permission.<sup>147</sup>

These decisions serve to highlight and refine the NLRB doctrine on social media in the workplace, and from them draw bright line rules on what will, and what will not be tolerated by the Board. They also demonstrate that the NLRB is not passively taking the criticism that it has been slow in developing the doctrine and insufficient in its rule-making. The Board has used these cases, in some of which the social media policy was a secondary issue, to establish useful guidelines.<sup>148</sup>

*B. Limiting an Employer's Ability to Protect Confidential Information*

Like many employers, in *Hoot Winc, LLC* and *Lily Transportation*, the employers had provisions in their employee handbooks that restricted the dispersal of confidential company materials.<sup>149</sup> The Board held these policies invalid for two reasons: first, when reading the policy employees would reasonably believe the policies prohibited participating in protected concerted activity such as discussing wages or other terms and conditions of employment with non-employees, such as union representatives, thus falling within the protections of Section 7.<sup>150</sup>

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<sup>147</sup> *Id.*

<sup>148</sup> *See supra* Part V.F. discussion and accompanying notes.

<sup>149</sup> *Hoot Winc, LLC*, 199 L.R.R.M. (BNA) ¶ 1567 (N.L.R.B. Div. of Judges May 19, 2014). *Lily Transp. Corp. & Robert Suchar, an Individual*, 01-CA-108618, 2014 WL 1620731 (Apr. 22, 2014).

<sup>150</sup> *See Hoot Winc, LLC*, 199 L.R.R.M. (BNA) ¶ 1567 (N.L.R.B. Div. of Judges May 19, 2014); *See also Lily Transp. Corp. & Robert Suchar, an Individual*, 01-CA-108618, 2014 WL 1620731 (Apr. 22, 2014)

Second, without including qualifying language that explicitly exempts protected activities, there was nothing within the rules that limited their scope.<sup>151</sup>

Similarly to many employers, the social media policy provisions that addressed confidentiality in *Lily Transportation* were intended to be summarized versions of more detailed confidentiality policies found in other sections of employee handbook.<sup>152</sup> However, the Board held that this was insufficient.<sup>153</sup> The employer in *Lily Transportation* argued the confidentiality rule found in the social media provision did not violate the Act because when it was read in conjunction with the detailed confidentiality policy, employees would understand that the policy was intended to apply only to proprietary business information and not to things protected by Section 7 such as wages, or the terms and conditions of employment.<sup>154</sup> The ALJ rejected this argument, reasoning that the short policy statement failed to reference the more expansive confidentiality policy and because the more detailed policy was located in a different section of the handbook, employees had no reason to connect the two.<sup>155</sup> *Lily Transportation* demonstrates

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<sup>151</sup> See *Hoot Winc, LLC*, 199 L.R.R.M. (BNA) ¶ 1567 (N.L.R.B. Div. of Judges May 19, 2014); See also *Lily Transp. Corp. & Robert Suchar, an Individual*, 01-CA-108618, 2014 WL 1620731 (Apr. 22, 2014) (“By including non-disclosure of ‘employee information in confidential personnel files,’ in its confidentiality policy, the Respondent leaves to the employees the task of determining what is permissible and ‘...speculate what kind of information disclose may trigger their discharge.’”) *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> *Id.* “Employees would not necessarily understand that the inappropriate conduct statement refers to the confidentiality policy statement. The inappropriate conduct statement does not refer to or reproduces the confidentiality of information policy statement. Employees would reasonably assume that the “disclosure of confidential information, including Company, customer information and employee information maintained in confidential personnel files” standing alone could result in discipline. It is unlikely that employees reading this sentence would also search the handbook and derive a narrower interpretation of the prohibited disclosure of information by reading the two separate provisions together, especially in light of the fact, that the confidentiality statement is located at the front of the handbook while the violation for disclosing of employee information is one of numerous conduct violations printed near the end of the handbook.” *Id.*

that a detailed confidentiality policy that complies fully with the NLRA generally will not save an overly broad summary in the social media policy without an explicit connection between them.<sup>156</sup>

### *C. Further Prohibitions on Broad Restrictions of Social Media Posts*

These decisions also provide rules about how employers should address social media policies that broadly restrict employees' posting about their employer in social media. The outcomes of *Lily Transportation*<sup>157</sup> and *Durham School Services*,<sup>158</sup> demonstrate that employers are prohibited from perpetuating policies that preclude all derogatory comments about the company or establish subjective and nebulous standards of governance that give employers complete discretion in deciding which negative comments will result in discipline.<sup>159</sup>

The policy in *Durham* was rejected for a variety of reasons: 1) it failed to adequately describe what kind of information employees were not allowed to post; 2) it failed to distinguish between prohibited posting and protected speech; and 3) the policy did not offer examples of social media content that would be found acceptable as "appropriate," "professional," "respectful," or, on the wrong side of the line, as "unfavorable."<sup>160</sup> These cases highlight an additional rule for employers: when drafting social media policies, they should be narrowly tailored and contain language that ensures that employees would not reasonably read the policy

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<sup>156</sup> *Id.*

<sup>157</sup> *Lily Transp. Corp. & Robert Suchar, an Individual*, 01-CA-108618, 2014 WL 1620731 (Apr. 22, 2014)

<sup>158</sup> *Durham Sch. Servs., L.P. & Freight, Constr. & Gen. Drivers, Warehousemen & Helpers-Teamsters Union Local No. 287, a/w Int'l Bhd. of Teamsters*, 360 NLRB No. 85 (Apr. 25, 2014)

<sup>159</sup> *Id.* at \*22. ("[W]ithout indicating what the Employer considers appropriate or inappropriate conduct, or what is considered professional and respectful, or what constitutes unfavorable information is, in my view, unreasonably broad and vague. Employees could reasonably interpret this policy language as restraining them in their Section 7 right to communicate freely with fellow employees and others regarding work issues and for their mutual aid and protection.")

<sup>160</sup> *Id.*

as prohibiting discussion about wages, hours and other terms and conditions of employment, however negative.<sup>161</sup>

#### *D. Guidelines for Specific Restrictions on Social Media Posts*

In *Hoot Winc*, *Laurus*, and *Professional Electrical Contractors*, policies that provided specific restrictive language were found to be invalid for varying reasons.<sup>162</sup> These “specific language” policies may be divided into four categories: 1) policies requiring respectful posting; 2) policies prohibiting conduct that may negatively affect the employer; 3) policies restricting the use of profanity; and 4) policies restricting the use of company trademarks.<sup>163</sup> One of the provisions of the social media policy in *Hoot Winc* stated that “posting disparaging comments about coworkers and managers on social media” was a violation of the company’s insubordination rule.<sup>164</sup> Insubordination was defined as “insubordination to a manager or lack of respect and cooperation with fellow employees or guest.”<sup>165</sup>

The rule was found impermissible because it failed to adequately define “insubordination,” “lack of respect” or “cooperation” and thus was subjective.<sup>166</sup> The ALJ further reasoned that the rule did not include any limiting language, such as describing what

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<sup>161</sup> Philip Gordon and Lauren Woon, SIX RECENT NLRB CASES PROVIDE FURTHER INSIGHT ON STRUCTURING EMPLOYERS’ SOCIAL MEDIA POLICIES, (July 23, 2014). *available at* [http://www.littler.com/files/press/pdf/2014\\_7\\_ASAP\\_Six\\_Recent\\_NLRB\\_Cases\\_Provide\\_Further\\_Insight\\_Structuring\\_Employers\\_Social\\_Media\\_Policies\\_1.pdf](http://www.littler.com/files/press/pdf/2014_7_ASAP_Six_Recent_NLRB_Cases_Provide_Further_Insight_Structuring_Employers_Social_Media_Policies_1.pdf)

<sup>162</sup> *See* *Hoot Winc*, LLC, 199 L.R.R.M. (BNA) ¶ 1567 (N.L.R.B. Div. of Judges May 19, 2014); *See also* *Prof'l Elec. Contractors of Connecticut, Inc.*, 199 L.R.R.M. (BNA) ¶ 1917 (N.L.R.B. Div. of Judges June 4, 2014)

<sup>163</sup> *See* accompanying discussion and notes.

<sup>164</sup> *Hoot Winc*, LLC, 199 L.R.R.M. (BNA) ¶ 1567 (N.L.R.B. Div. of Judges May 19, 2014)

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

would constitute uncooperative conduct.<sup>167</sup> Providing an explicit recommendation for employers, the ALJ suggested that the policy might have survived scrutiny if it had been limited to conduct not supporting the company’s “goals and objectives.”<sup>168</sup> This provides employers with a simple rule: when drafting policies that require “respectful posting” it would be wise to limit the language to conduct that directly opposes the organizations’ “goals and objectives.”<sup>169</sup>

A separate provision Hooter’s policy prohibited any social media post that “negatively affects, or would tend to negatively affect, the employee’s ability to perform his or her job, the company’s reputation, or the smooth operation, goodwill or profitability of the Company’s business.”<sup>170</sup> The ALJ determined that this language was insufficient and failed to offer employee’s guidance on the rule’s application and, thus, employees would reasonably conclude it precluded activities protected by the Act.<sup>171</sup>

In *Laurus*, the ALJ found that the company’s “No Gossip” social media policy was in violation of the NLRA for similar reasons as the policy was in Hooters.<sup>172</sup> The “No Gossip” policy prohibited “gossip about the company, an employee, or customer.”<sup>173</sup> Within the policy, gossip was broadly defined to include (1) “[n]egative or untrue or disparaging comments” about others, (2) “repeating information that can injure a person,” and (3) “repeating a rumor about another person.”<sup>174</sup> This language was found to be “overly broad” and “ambiguous.”<sup>175</sup> The ALJ

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<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> *Laurus Technical Inst. & Joslyn Henderson*, 360 NLRB No. 133 (June 13, 2014)

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

also held that it “severely restrict[ed] employees from discussing or complaining about any terms and conditions of employment.”<sup>176</sup> Thus, the Board held that “[the employer] ha[d] not sufficiently narrowed, clarified, or defined the scope of its broad no gossip rule.”<sup>177</sup>

Similarly, in *Professional Electrical Contractors*, the employer maintained a rule that prohibited “using personal computers in any manner that may adversely affect company business interests or reputation.”<sup>178</sup> The Board determined the rule was over-broad because, like the *Hoot Winc*, and *Laurus* policies, it did not include qualifying language that would restrict or limit its application to exclude protected activities.<sup>179</sup> From these cases, employers are taught that narrow language is required; when drafting policies indented to prohibit behavior that may negatively affect the organization, the employer must be incredibly specific, and explicitly exclude any language that would allow an employee to believe that his Section 7 rights were being impinged.<sup>180</sup>

*Professional Electrical Contractors* also demonstrates the challenge of drafting a social media policy that broadly prohibits profanity.<sup>181</sup> Although the policy at issue in this case prohibited “[b]oisterous or disruptive activity in the workplace” as opposed to profanity per se, the judge, in striking down the policy, relied on cases that addressed policies that required employees to work harmoniously and to forego profanity.<sup>182</sup> The NLRB explained that rules that do not define prohibited abusive or profane language are patently ambiguous and would

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<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

<sup>178</sup> Prof'l Elec. Contractors of Connecticut, Inc., 199 L.R.R.M. (BNA) ¶ 1917 (N.L.R.B. Div. of Judges June 4, 2014)

<sup>179</sup> *Id.*

<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

reasonably be interpreted as barring employees' lawful protected activities.<sup>183</sup> In contrast, rules that are directed more clearly at prohibiting unprotected conduct are lawful.<sup>184</sup>

Unlike the policies in former cases, the challenged policy in *Landry's* was found to contain sufficient limiting language.<sup>185</sup> This social media policy "urge[d] all employees not to post information regarding the Company, their jobs, or other employees *which could lead to morale issues in the workplace or detrimentally affect the Company's business.*"<sup>186</sup> In addition to this qualifying language, Landry's policy provided examples conduct that would satisfy the provision, which included: "always thinking before you post, being civil to others and their opinions, and not posting personal information about others unless you have received their permission."<sup>187</sup> The Board reasoned that the qualifying language adequately narrowed the preceding clause by focusing the policy on posts that may incite "morale issues," and articulated that the provision of examples greatly strengthened the validity of the policy as a whole.<sup>188</sup> The ALJ also held that provided examples demonstrated that the employer was not trying to broadly prohibit work-related social media posts, "but rather the manner in which the subject matter is articulated and debated among the employees."<sup>189</sup>

#### *E. Trademark Restrictions*

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<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

<sup>185</sup> Landrys Inc., 199 L.R.R.M. (BNA) ¶ 2103 (N.L.R.B. Div. of Judges June 26, 2014)

<sup>186</sup> *Id.* [emphasis added].

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

The final lesson that the Board provided through these cases involves the use of company logos in the social media sphere.<sup>190</sup> In addition to the previously discussed contentions in Landry, the AGC's complaint alleged that the company's social media policy was in violation of Section 7 because it by restricted the use of the company's logo.<sup>191</sup> The policy in question stated that

Without prior written approval from the Vice President of Marketing, no employee shall use any words, logos, or other marks that would infringe upon the trademark, service mark, certification mark, or other intellectual property rights of the Company or its business partners. All rules that apply to employee activities, including the protection of proprietary and confidential information, apply to all blogs and online activity.<sup>192</sup>

The AGC contended "that an employee without legal training would not be expected to understand the implications of the language," and thus "cannot be expected to have the expertise to examine company rules from a legal standpoint."<sup>193</sup> Thus, the AGC argued that the policy was overbroad as employees would reasonably read it to prohibit protected, non-commercial uses of the company's logo.<sup>194</sup> The NLRB rejected this argument, reasoning that even without a provided definition for "infringement," employees were placed in suitable position in which they may exercise their own judgment.<sup>195</sup>

#### *F. Lessons for the Employer*

These six decisions by the NLRB have achieved two important objectives: 1) they show that the Board has begun to hone its decision-making strategy in the context of social media

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<sup>190</sup> *Id.*

<sup>191</sup> *Id.*

<sup>192</sup> *Id.*

<sup>193</sup> *Id.*

<sup>194</sup> *Id.*

<sup>195</sup> *Id.* "As infringement is not defined, the employee is placed in the position of having to exercise his or her best judgment in determining whether postings that include particular 'words, logos, or other marks' may run afoul of the provision." *Id.*

cases, and 2) they provide employers with important rules to follow insofar as their social media policies are concerned. The most important of these lessons is that the law in this area remains very fluid.<sup>196</sup> We will continue to see expansions and refinements on what kind of policy language will or will not violate Section 7. Thus employers should follow developments in this area regularly.<sup>197</sup> In addition, the submission of social media policies for review by counsel on a more frequent basis will allow modification will reduce the likelihood of litigation.<sup>198</sup>

As for the definitive legal rules that are drawn from these cases, employers should draft social media policies with specific rules that will be easily understandable by employees.<sup>199</sup> Subjective terminology and nebulous standards that put the responsibility of discerning permissible from impermissible social media conduct onto employees should be avoided.<sup>200</sup> In order to achieve policy language that will be in compliance with the NLRA, employers should attempt to view the policy from the lens of the employee and consider whether it may be reasonably understood to prohibit discussions with co-workers on subject matters, such as wages, performance evaluations, workplace safety, discipline, or other Section 7 protected terms and conditions of employment.<sup>201</sup>

When establishing specific, high-level principles for social media conduct, such as the need to “be respectful,” the use of examples becomes important, as well as limiting language that

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<sup>196</sup> See Gordon, *supra* note 163.

<sup>197</sup> *Id.*

<sup>198</sup> *Id.*

<sup>199</sup> See Gordon *supra* note 163.

<sup>200</sup> See Durham Sch. Servs., L.P. & Freight, Constr. & Gen. Drivers, Warehousemen & Helpers-Teamsters Union Local No. 287, a/w Int'l Bhd. of Teamsters, 360 NLRB No. 85 (Apr. 25, 2014)

<sup>201</sup> See Hoot Winc, LLC, 199 L.R.R.M. (BNA) ¶ 1567 (N.L.R.B. Div. of Judges May 19, 2014); Durham Sch., 360 NLRB No. 85 (Apr. 25, 2014); Prof'l Elec. Contractors of Connecticut, Inc., 199 L.R.R.M. (BNA) ¶ 1917 (N.L.R.B. Div. of Judges June 4, 2014); Laurus Technical Inst. & Joslyn Henderson, 360 NLRB No. 133 (June 13, 2014)

narrowly tailors the rules.<sup>202</sup> Otherwise, these policies will serve as red flags for the Board and will be found invalid on the grounds that they are overly broad and thus employees could reasonably understand them to prohibit Section 7 protected activity.<sup>203</sup> When a social media policy constitutes a summary of a more expansive policy that is addressed in more detail elsewhere in the employee handbook, such as non-disclosure of confidential information, it should be made explicitly clear and provide a reference to the more thorough treatment of the subject.<sup>204</sup>

Furthermore, it is important to recognize that social media policy language is not the only developing legal issue involving social media in the workplace. Employers should be aware that other federal statutes<sup>205</sup> and administrative bodies also regulate aspects of the relationship between the workplace and the internet.<sup>206</sup> In addition to following the decisions made by the

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<sup>202</sup> Hoot Winc, LLC, 199 L.R.R.M. (BNA) ¶ 1567 (N.L.R.B. Div. of Judges May 19, 2014)

<sup>203</sup> See Hoot Winc, LLC, 199 L.R.R.M. (BNA) ¶ 1567 (N.L.R.B. Div. of Judges May 19, 2014); Durham Sch., 360 NLRB No. 85 (Apr. 25, 2014); Prof'l Elec. Contractors 199 L.R.R.M. (BNA) ¶ 1917 (N.L.R.B. Div. of Judges June 4, 2014); Laurus Technical Inst., 360 NLRB No. 133 (June 13, 2014)

<sup>204</sup> See Laurus Technical Inst., 360 NLRB No. 133 (June 13, 2014)

<sup>205</sup> See Lee *supra* note (“Relevant federal statutes include . . . the Federal Trade Commission Act [15 USC §§41–58]; the Stored Communications Act [18 USC §§2701–2712]; the Wiretap Act [18 USC §§2510–2522, 2701–2712], and the Fair Credit Reporting Act [15 USC §§1681–1681x]”)

<sup>206</sup> Press Release from the Equal Opportunity Employment Commission, *available at* <http://www.eeoc.gov/eeoc/newsroom/release/3-12-14.cfm> (“The EEOC has addressed some of the issues surrounding the use of social media, Acting Associate Legal Counsel Carol Miaskoff testified. In one reported decision arising from the federal sector, EEOC's Office of Federal Operations found that a claim of racial harassment due to a co-worker's Facebook postings could go forward. Additionally, in response to a letter from Senators Charles Schumer and Richard Blumenthal, the EEOC reiterated its long-standing position that personal information—such as that gleaned from social media postings—may not be used to make employment decisions on prohibited bases, such as race, gender, national origin, color, religion, age, disability or genetic information. Quoting from a 2010 informal discussion letter from the EEOC, Miaskoff noted that ‘the EEO laws do not expressly permit or prohibit use of specified technologies. . . . The key question . . . is how the selection tools are used.’”)

NLRB and other executive agencies, employers should recognize that state legislative bodies have begun to pass laws that may apply to employer social media policies.<sup>207</sup>

## **VI. Conclusion**

The world has been forever changed; neither the workplace nor the law can escape the dramatic and ever-changing consequences of the digital world. Social media becomes more pervasive every day, and the workplace is still adapting. The online revolution is both beneficial and controversial in the context of employment, and employer-employee relationships. The NLRB recognizes the importance developing a workable body of case law in regards to employer regulation of social media use. Although it is still struggling in its application of its brick-and-mortar precedent to social media cases, it has started to find its footing and issue predictable decisions in this area of the law.

There is no doubt that the Board's decision offer expansive protections to employees. However, these protections also provide employers with a definitive set of guidelines to follow when drafting social media policies. Thus, as long as employers stay up to date with developing case law, it is safe to say that the NLRB can be Facebook friends with both employers and employees.

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<sup>207</sup> David Baffa, Erin Foley, Robert Milligan, Michael Wexler, *Social Media Privacy Legislation What Employers Need to Know*, SEYFARTH SHAW LLP PUBLICATIONS (2014), <http://www.seyfarth.com/uploads/siteFiles/practices/131317SocialMediaSurveyM13.pdf> (providing a state by state survey of statutes that regulate social media including Arkansas, California, Colorado, Delaware, Illinois, Maryland, Michigan, Nevada, New Jersey, New Mexico, Oregon, Utah, Vermont, Washington, and Wisconsin.)