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Fire over Facebook? A Primer on Protected Social Media Activity in the Workplace and Best Practice Guide for Managing Employee Social Media Use

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As social media use in the workplace continues to increase, it should come as no surprise that employers are increasingly disciplining employees for their social media activity. Because social media workplace issues continue to be a “hot topic” among practitioners, human resource professionals, media, and the public, this InfoPAK deciphers the concepts in recent National Labor Relations Board social media memoranda by simplifying several key concepts of labor and employment law as it relates to social media activity, analyzes how those concepts are applied to situations involving employee social media activity, and categorizes lawful and unlawful social media policies. The InfoPAK also provides best practices for drafting, implementing, and enforcing an National Labor Relations Act-complaint social media policy.

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Overview

Social media use in the workplace continues to increase.¹ According to an August 2012 national corporate survey, 75 percent of employees access social media on the job from their workplace computers or personal mobile devices at least once a day.² Their primary purpose for using social media at work is to connect with other employees and online friends.³ With so many employees using social media in the workplace, it should come as no surprise that employers are increasingly disciplining employees for their social media activity. A 2010 Proofpoint survey revealed that at least 20 percent of companies had disciplined an employee for social media activity.⁴ Due to the widespread expansion of workplace social media use over the past three years, that number has undoubtedly increased.

In response to increased employee social media activity and discipline, many companies have implemented policies to govern use of social media by employees. Social media policies generally set forth work rules that prohibit certain forms of social media activity and content, and proscribe various requirements concerning confidentiality, privacy, protection of employer information, intellectual property, and contact with the media and government.⁵

Over the past two years, employer disciplinary actions for employee social media use and employer social media policies have come under the scrutiny of the National Labor Relations Board (“NLRB”). The NLRB is the government authority that enforces the National Labor Relations Act (“NLRA”), which is designed to protect the rights of most private-sector employees, unionized or not, to join together in order to improve their wages, working conditions, and other terms of employment.⁶

The NLRB thrust workplace social media issues into the spotlight when it released three memoranda reviewing various NLRB decisions on social media employment cases. In August 2011, the NLRB issued its first “Report of the Acting General Counsel Concerning Social Media Cases” addressing case developments arising from social media use in the workplace.⁷ In that memorandum, the NLRB for the first time addressed emerging issues concerning the protected and/or concerted nature of employees’ Facebook and Twitter postings, and the lawfulness of employers’ social media policies, rules, and disciplinary actions as a result of employee social media activity. This memorandum summarized 14 cases in which the NLRB’s Acting General Counsel issued an opinion in connection with an employer’s action in response to employee social media use, including one case concerning the lawfulness of an employer’s policy restricting employee contacts with the media.

The NLRB published a second memorandum in January 2012 summarizing an additional 14 cases addressing additional social media issues under the NLRA.⁸

In May 2012, the NLRB issued its third memorandum directed exclusively at the lawfulness of employer social media policies.⁹ The NLRB scrutinized seven actual social media policies, and weighed in on the lawfulness of company work rules that impacted employees’ ability to communicate with coworkers, third parties, media, and the government. The NLRB found a litany of provisions within six of the policies to be overbroad or vague, and thus unlawful under the NLRA.

While the NLRB aimed to provide guidance on how it would address issues related to workplace social media activity through those memoranda, they lacked specific guidelines to assist employers

and their counsel in distinguishing the line between protected and unprotected employee social media activity under the NLRA¹⁰. Moreover, aside from deeming certain specific work rules and policies lawful or unlawful, the NLRB's memoranda provide little practical guidance for drafting NLRA-compliant social media policies.

Because social media workplace issues continue to be a "hot topic" among practitioners, human resource professionals, media, and the public, this InfoPAK deciphers the concepts contained in the NLRB memoranda by simplifying several key concepts of labor and employment law as it relates to social media activity, analyzes how those concepts are applied to situations involving employee social media activity, and categorizes lawful and unlawful social media policies. The InfoPAK also provides best practices for drafting, implementing, and enforcing an NLRA-complaint social media policy. This InfoPAK will:

- Identify employers and employees subject to the NLRA;
- Define key labor and employment law concepts of protected activity and concerted activity as applied to social media activity;
- Provide actual examples of protected and unprotected social media activity;
- Demonstrate how protected social media activity can lose protection under the NLRA;
- Illustrate how an employer's disciplinary action in response to certain social media activity violates the NLRA;
- Categorize work rules and social media policies as lawful or unlawful as determined by the NLRB;
- Discuss consequences companies face for a violating the NLRA; and
- Offer best practices for drafting, implementing, and enforcing an NLRA-compliant social media policy.

The goal of this InfoPAK is to provide practical guidance as to how the NLRB examines social media issues, so that in-house counsel and human resource professionals can easily navigate social media issues in the workplace. Readers must be aware that labor and employment cases are very fact-specific, and decisions are made on a case-by-case basis. This InfoPAK is therefore intended to serve as a resource to assist counsel and human resource professionals in analyzing social media employment issues within their jurisdiction; it is not legal advice. Readers are strongly encouraged to review any current state or federal law that applies in all jurisdictions where a company operates, and to seek outside counsel as necessary.

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I. The National Labor Relations Act

Congress enacted the National Labor Relations Act (“NLRA”) in 1935 to protect the rights of employees and employers, to encourage collective bargaining, and to curtail certain private-sector labor and management practices that can harm the general welfare of workers, businesses, and the economy. The NLRA affords certain rights to employees to join together to improve wages and working conditions, and provides that covered employees have the right to engage in union activities, including the right to form, join, assist, and be represented by a union. Importantly, the NLRA applies regardless of whether employees are members of a union. The complete text of the NLRA is available on the National Labor Relations Board (NLRB) website.¹¹

A. Who is Covered Under the NLRA?

Most private-sector employees are covered by the NLRA.¹² Because the NLRB has “statutory authority over private-sector employers whose activity in interstate commerce exceeds a minimal level,”¹³ most employees and private-sector employers are subject to the jurisdiction of the NLRB, including:

- Nonprofits,
- Employee-owned businesses,
- Labor organizations,
- Non-union businesses, and
- Businesses in states with “Right to Work” laws.

Specific examples of employers covered by the NLRA include the following.¹⁴

- Retail employers grossing an annual volume of business of \$500,000 or more. These retail employers include, but are not limited to, the amusement industry, apartments and condominiums, casinos, home construction, hotels/motels, restaurants, and private clubs.
- Shopping centers and office buildings grossing an annual volume of business of \$100,000 or more.
- Non-retailers with an annual inflow or outflow of \$50,000 or more.¹⁵
- Companies providing essential links in the transportation of goods or passengers with a gross annual volume of \$50,000 or more. These companies can include trucking and shipping companies, private bus companies, and warehouses or packing houses.

- Healthcare and child care businesses with a gross annual volume of \$250,000 or more, including hospitals, medical and dental offices, social services organizations, child care centers, and residential care centers.
- Nursing homes and visiting nurses associations with a gross annual volume of \$100,000 or more.
- Law firms and legal services organizations with a gross annual volume of \$250,000 or more.
- Cultural and educational centers with a gross annual volume of \$1 million or more. These centers can include private and nonprofit colleges, universities, art museums, and symphony orchestras.
- Private contractors who work for the federal government.

B. Who is Not Covered Under the NLRA?

Employees are excluded under the NLRA if they are employed:¹⁶

- By federal, state, or local government;
- As agricultural laborers;
- In the domestic service of any person or family in a home;
- By a parent or spouse;
- As an independent contractor;
- As a supervisor (although supervisors who have been discriminated against for refusing to violate the NLRA may be covered);
- By an employer subject to the Railway Labor Act, such as railroads and airlines; and
- By any other person who is not an “employer” as defined in the NLRA.

II. Protected vs. Unprotected Employee Social Media Activity

Certain employee activities are protected against employer retaliation in the United States. Generally speaking, employee activity is protected when two or more employees act together to improve their terms and conditions of employment. These protected activities extend to online employee activity. However, not all employee activity relating to employment is protected under the NLRA. It is therefore necessary for employers to understand the distinction between protected and unprotected employee social media activity prior to disciplining or terminating employees for their online activity.

A. What is Protected Social Media Activity Under the NLRA?

Section 7 of the NLRA affords employees with the right to discuss their wages and other terms and conditions of employment, both among themselves and with non-employees. Employees have a protected right to seek help from third parties regarding their working conditions, including conversations with fellow employees, going to the press, speaking at a union rally, and conferring with the NLRB.¹⁷

The nature of this protected activity does not change if the employees' statements were communicated via the Internet or social media. Section 7 therefore applies equally to traditional "off-line" communications and online conversations alike, including blog posts, tweets, Facebook comments, and other forms of social networking.¹⁸ For example, an employee who sends a Facebook message to her colleagues about the employer's working conditions may be afforded the same protection as a group of employees who discuss corporate wage issues during the workplace lunch hour. Protected activities on social media could include:

- Protest of supervisory activities;¹⁹
- Statements relating to employee staffing levels implicating working conditions;²⁰
- Communications to the public related to an ongoing labor dispute;²¹
- Exchanges with reporters about wages and other terms of employment;²²
- Complaints and criticism about a supervisor's attitude and performance;²³
- Use of an employer's name and logo to communicate with fellow employees or the public about a labor dispute;²⁴ or
- Engagement in protected activities on the employer's premises during non-work time and in non-work areas.²⁵

Applying these principles, the NLRB determined that employees were engaged in protected social media activity in each of the following cases.

An ambulance service company employee engaged in protected activity when she posted negative comments about her supervisor on her personal Facebook profile.²⁶

Facts: After the employee's supervisor refused to provide her with a union representative to assist her in preparing an incident report, the employee posted on Facebook from her home computer that the supervisor was a "scumbag" because of the refusal. Her Facebook post drew responses from her coworkers, which led to a Facebook discussion with her coworkers about supervisory activities. The employee posted additional negative comments about her supervisor, including some name-calling, but did not make any verbal or physical threats. The employee was suspended, and later fired, for her Facebook posts.

Holding: The NLRB determined that the employee's termination was unlawful because she engaged in protected activity by exercising her right to discuss supervisory activities with her coworkers on Facebook. The NLRB reasoned that the comments were made during an online employee discussion of supervisory activities outside of the workplace during non-work hours.²⁷

A nurse engaged in protected activity when he commented on Facebook about an ongoing labor dispute with his hospital employer.²⁸

Facts: The employee made an in-person presentation to his union regarding various labor disputes in connection with the employer's "management style." He asserted that the employer engaged in multiple unfair labor practices; forced policy changes; and engaged in unfair firings, harassments, and workplace bullying. The employee posted the text of this presentation on his Facebook profile. His fellow employees posted many messages in support of his statements, and expressed general encouragement on the employee's Facebook profile, including statements such as "Thank you for having faith in me & helping my voice be heard;" "Keep fighting the good fight;" "Thanks for helping us stay informed;" and "Thank you for speaking for us who do not dare." The hospital terminated the employee for posting the presentation.

Holding: The NLRB determined that the employee's termination was unlawful because the employee engaged in protected activity by exercising his right to communicate to the public about an ongoing labor dispute.²⁹ The NLRB reasoned that virtually all of the subjects covered in the Facebook post involved labor disputes with the employer, and that the employee's statements were widely approved of by fellow employees.³⁰

Veterinary hospital employees engaged in protected activity when they complained on Facebook about their supervisor's selection of another employee for a promotion.³¹

Facts: A disgruntled employee, upset with the way a co-manager position had been filled, had an in-person discussion about the promotion with two separate coworkers. She later posted a message on her Facebook profile reflecting her frustration. Her Facebook message indicated that she had “pretty much been told that all of the work [she] had been doing wasn’t worth anything and that [she] couldn’t do it anymore.” Three coworker Facebook friends responded to the post, resulting in a Facebook conversation in which they complained, among other things, about the woman who received the promotion and about management. The disgruntled employee noted that she had not received a raise or review in three years, that the promoted individual did not do any work, and that the employer did not know how to tell people when they did a good job. One coworker commented that it would be pretty funny if all of the “good” employees quit. The disgruntled employee expressed her appreciation for the support and stated that “this wasn’t over by a long shot.” The employer terminated the disgruntled employee and one of her coworkers, and disciplined the other two coworkers because of their Facebook posts.

Holding: The NLRB determined that the termination was unlawful, as the employees had engaged in protected activity by exercising their right to discuss their shared concerns about terms and conditions of their employment. The NLRB reasoned that discussions dealing with the selection of the co-manager, as well as the shared concerns over the quality of their supervision and the opportunity to be considered for promotion, were protected activity concerning the terms of their employment.³²

B. What Social Media Activity is Not Protected Under the NLRA?

An employee’s social media activity will not be protected under the NLRA if it does not seek to involve other employees, does not relate to the shared terms and conditions of employment, or is an activity that is otherwise carried out in a reckless or malicious manner.³³ Social media activity that is not protected could include:

- Communications unrelated to the terms and conditions of employment;³⁴
- Protests over the quality of services provided by an employer that are only tangentially related to employee terms and conditions of employment;³⁵
- Expressions of an individual gripe;³⁶ and
- Activity that does not seek to involve other employees in issues related to employment.³⁷

Applying these principles, the NLRB determined that the following employee social media activities were not protected under the NLRA.

A public-safety beat reporter for a newspaper did not engage in protected activity when posting unprofessional and inappropriate tweets that were unrelated to the terms of his employment.³⁸

Facts: After establishing a work-related Twitter account at the newspaper's encouragement to promote news stories, the reporter posted a tweet critical of the paper's copy editors regarding the newspaper's sports department headlines. There was no evidence that the reporter discussed his concerns with any of his coworkers. The newspaper reprimanded the reporter for airing his grievances about the newspaper in a public forum. Thereafter, the reporter posted several tweets critical of an area television news station, as well as other tweets with sexual content. The reporter was suspended for three days without pay, and later terminated for disregarding the instruction to refrain from posting derogatory comments to social media forums that could damage the goodwill of the company.

Holding: The NLRB determined that the termination was lawful because the reporter tweeted inappropriate and offensive material that did not relate to the terms and conditions of his employment, and that the reporter did not seek to involve other employees regarding issues related to employment.³⁹ While the NLRB acknowledged that the employer's original reprimand could be interpreted to prohibit the employee from engaging in protected activity, the reprimand was not unlawful because it was made solely to the employee in the context of discipline, and in response to specific inappropriate conduct.⁴⁰

A home improvement store employee's expression of an individual gripe on Facebook was not protected activity.⁴¹

Facts: In response to being reprimanded by her supervisor, the employee updated her Facebook status from her cell phone during her lunch break with a comment that consisted of an expletive and the name of the employer's store. One of her coworkers "liked" her status. The employee posted a second comment stating that the employer did not appreciate its employees. Although several of the employee's Facebook friends and relatives commented on the second post, none of her coworker Facebook friends responded. In the following days, the employee informed her coworkers and a supervisor about the incident that prompted her Facebook posts. While these individuals offered their sympathy, none of them indicated that they viewed the incident as a group concern or desired to take further group action. The employee who "liked" the original Facebook post also expressed sympathy, and generally referenced her displeasure with her own

job, but they discussed no other work-related issues. The employee was later discharged for her Facebook postings.

Holding: The NLRB determined that the termination was lawful because the employee's Facebook postings were merely an expression of an individual gripe. The NLRB reasoned that the employee had no particular audience in mind when she made the posts, the posts contained no language suggesting that she sought to initiate or induce coworkers to engage in group action, and the post did not grow out of a prior discussion about terms and conditions of employment with her coworkers. Although some of her coworkers offered sympathy and indicated some general dissatisfaction with their jobs, the employee's social media activity was not protected since she did not engage in extended discussions over working conditions or suggest taking further action.⁴²

A respiratory therapist's Facebook post about an irritating coworker was not protected activity.⁴³

Facts: While transporting a patient in an ambulance between hospitals, the employee posted a Facebook message from her cell phone stating that her coworker was "driving her nuts" because he was "sucking his teeth." Two of her Facebook friends, who were not employees of the hospital, responded with supporting comments, and the employee responded that she was about to beat the teeth-sucking coworker with a ventilator. On another occasion, the employee expressed frustration on Facebook over the lack of respect a doctor had shown her by posting, "Apparently respiratory therapists didn't know what they were talking about." Based on these threatening and negative comments about her coworkers, the hospital removed the employee from ambulance transport services, suspended her for two days, and eventually terminated her.

Holding: The NLRB determined that the employee's termination was lawful because her Facebook posts did not concern any terms and conditions of her employment.⁴⁴ The NLRB reasoned that the employee was merely complaining about the sounds her coworker made, and did not suggest that the hospital do anything about it. To the extent the employer suspended the employee for her comments arising out of the lack of respect from the doctor, the NLRB explained that there was no evidence to establish that the employee discussed her Facebook post with any of her coworkers, that none of her coworkers responded to the post on Facebook, and that her post was merely a personal complaint about something that happened during her shift.⁴⁵

A bartender's Facebook complaints about her coworkers' and manager's performance were not protected activity because they did not directly implicate the terms and conditions of her employment.⁴⁶

Facts: Upon learning that one of her coworkers was overcharging customers for drinks, the employee posted on Facebook that her coworker was "screwing over customers." In response to

the Facebook status update, a former coworker asked if the other bartender was stealing, to which the employee replied that the other bartender was improperly using a mix instead of premium alcohol. The employee posted a second update to the effect that “dishonest employees, along with management that looks the other way, will be the death of the business.” A coworker posted agreement, but warned the employee to be careful with what she posted on Facebook. Another coworker agreed. The employee replied that she had every right to say how she felt. Upon discovering these posts, the restaurant discharged the employee for engaging in unprofessional communication on Facebook with fellow employees.

Holding: The NLRB determined that the employee’s termination was lawful, as her Facebook posts had only a tenuous connection with the terms and conditions of her employment. The NLRB explained that employees who engage in conduct to address the job performance of their coworkers or supervisor that adversely impacts their working conditions is protected activity; however, protests over the quality of service provided to customers by an employer are not protected where such concerns have only a tangential relationship to the employee’s terms and conditions of employment. The NLRB reasoned that the employee made the posts because she was upset that the bartender was passing off low-grade drinks as premium liquor and management was condoning the action, but she did not reasonably fear that her failure to publicize her coworker’s dishonesty could lead to her own termination. Thus, the link between the subject of her posts and any terms or conditions of employment was too attenuated to constitute protected activity.⁴⁷

C. What is Concerted Social Media Activity Under the NLRA?

An employee generally engages in concerted activity when two or more employees take action for their mutual aid or protection regarding terms and conditions of employment.⁴⁸ The test to determine whether an employee is engaged in concerted activity is whether the activity is engaged with or on the authority of other employees, and not solely for the benefit of the employee himself.⁴⁹ Concerted social media activities may consist of:

- Two or more employees addressing their employer about improving their pay;⁵⁰
- Two or more employees discussing work-related issues beyond pay, such as safety concerns, with each other;⁵¹ or
- Two or more employees discussing shared concerns about terms and conditions of employment.⁵²

Applying these principles, the NLRB determined that the following social media activities were sufficiently concerted to trigger protection under the NLRA.

Nonprofit social service provider employees who posted Facebook comments relating to a coworker's (a victim advocate) accusation of poor job performance in preparation for a meeting with the Executive Director were engaged in concerted activity.⁵³

Facts: A victim's advocate complained to a coworker that a client no longer wanted to seek services from the employer. The advocate had subsequent conversations with other coworkers, in which she criticized the work done by her fellow employees. The advocate also sent text messages to another coworker criticizing the other employees' work performance and complaining about workload issues. One of the advocate's coworkers complained to another employee about the constant barrage of text messages from the advocate criticizing her job performance. That employee recommended that the employee who received the text messages from the advocate meet with the Executive Director about the content of the text messages. In preparation for that meeting, the employee posted the advocate's criticisms on Facebook, and asked the other coworkers how they felt about the advocate's allegations. Four coworkers responded to the Facebook posting. Upon learning of the Facebook posts, the employer fired the employee who made the Facebook post, along with the four other employees who responded.

Holding: The NLRB determined that the terminations were unlawful because the discharged employees' Facebook postings were "a textbook example of concerted activity, even though it transpired on a social network platform." The NLRB explained that the discussion was initiated by one coworker in an appeal to her coworkers for assistance, and that, through Facebook, she surveyed her coworkers on the issue of job performance to prepare for an anticipated meeting with her Executive Director planned at the suggestion of another employee. Therefore, the NLRB reasoned that the resulting conversation among coworkers about job performance and staffing level issues was concerted activity.⁵⁴

A popcorn packaging facility employee engaged in concerted activity by responding to a Facebook discussion with other employees about their shared concerns regarding the terms and conditions of their employment.⁵⁵

Facts: Several employees discussed among themselves the negative attitude and supervision of the employer's operations manager and his effect on the workplace. Several employees expressed these concerns to management officials or to a management consultant hired by the employer. Thereafter, one of the employees posted on Facebook that there had been "so much drama at the plant." A second employee asked for details, and the first employee responded that she had heard another employee was written up for being "a smart ass," that there were still no popcorn bags, and that they were going to have to work on Saturday to make up for another day. The second employee replied that the disciplined employee probably was not "a happy camper." The first employee commented that the employer complains about who goes on break and for how long, and that the employees were not doing what they should be doing. A third employee then posted

various comments, including that she “hated that place and couldn’t wait to get out of there.” She also stated that the operations manager brought on “a lot of the drama,” and that it was the operations manager who made it so bad. The first employee then posted that she wished she could get another job, and that it was hard to get a full-time job. This conversation was not discussed further online or at work by any of the employees involved. Thereafter, the employer discharged the third employee for her Facebook post regarding the employer and operations manager.

Holding: The NLRB determined that the termination was unlawful because the employees engaged in concerted activity for mutual aid and protection – both because it was a continuation of the earlier group action that included employee complaints to management about the employer’s operations manager, as well as because it was part of a discussion of three employees’ shared concerns regarding terms and conditions of employment. The NLRB reasoned that the ongoing conversation between employees, both in person and on Facebook, related to the terms and conditions of their employment, including the discipline of another employee, inadequate supplies, and work scheduling.⁵⁶

D. When Will a Single Employee’s Social Media Activity be Found “Concerted” Under the NLRA?

A single employee may engage in protected concerted activity if she is acting on the authority of other employees, bringing group complaints to the employer’s attention, trying to induce group action, or seeking to prepare for group action.⁵⁷ In certain circumstances, a single employee’s activities could be deemed concerted activity if the activity is an indispensable preliminary step to employee self-organization. This activity may be deemed protected even if the activity does not include a current plan to act to address the employees’ concerns. A single employee’s activity could be deemed concerted when it involves the employee:

- Speaking to an employer on behalf of one or more coworkers about improving workplace conditions;⁵⁸
- Posting a comment expressly including the topic of collective action;⁵⁹ or
- Posting a comment that seeks to initiate or to induce group action.⁶⁰

Applying these principles, the NLRB determined in the following cases that a single employee’s social media activities were sufficiently concerted.

A luxury-car salesperson engaged in concerted activity when he posted photographs and comments on Facebook critical of the dealership's sales event that vocalized the sentiments of his coworkers.⁶¹

Facts: Prior to a luxury-car sales event, the dealership's general sales manager met with salespeople to discuss the event, and explained that the employer would serve hot dogs, cookies, and snacks from a warehouse club. The salespeople remarked about the choice of food, and at least one salesperson asked why the employer was not serving more substantial refreshments. After the meeting, the salespeople continued to discuss their disappointment over the inexpensive food and beverages, as they believed it would send the wrong message to their clients and negatively affect their sales and commissions. During the sales event, one employee took photographs of the food and beverages served alongside a large promotional banner advertising the new car model. The following week, the employee posted on his Facebook page from home the photographs of the food and beverages at the event, along with his remarks that he was happy to see that the employer had "gone all out" at the important car launch by providing chips, inexpensive cookies, and a hot-dog cart where clients could get "overcooked hotdogs and stale buns." The dealership later terminated the employee for his Facebook posts.

Holding: The NLRB determined that the employee's termination was unlawful, as the employee had engaged in concerted activity when he posted the comments and photographs regarding the sales event, which were a direct outgrowth of the earlier discussion among the salespeople that followed the meeting with management. The NLRB explained that, although the employee posted the photographs on Facebook and wrote the comments himself, he was vocalizing the sentiments of his coworkers and continuing the course of concerted activity that began when the salespeople raised their concerns at the staff meeting. Since the employees worked entirely on commission, the NLRB reasoned that this activity was related to the employees' terms and conditions of their employment, because the employer's choice of refreshments could have impact on sales and, in turn, the employees' commissions.⁶²

A collection agency's call-center employee engaged in concerted activity when she posted a comment on Facebook that initiated group action.⁶³

Facts: After learning that she would be transferred to a less lucrative position within the company, a call-center employee approached her supervisor and expressed her frustration with the transfer decision, arguing that given her high performance level, it did not make sense to transfer her. That night, the employee posted a status update on her Facebook page that the employer "messed up," and that she was "done being a good employee." The employee was Facebook friends with approximately 10 coworkers, including her direct supervisor. One coworker indicated that she was angry and "right behind" the employee. Another coworker made a similar comment. Several former employees commented on the post, with one of them commenting that only bad behavior

gets rewarded by the employer, and that honesty, integrity, and commitment are a foreign language to the employer. This coworker also wrote that the employer would rather pay the “\$9-an-hour people” and get rid of higher paid, “smarter” people. The employee responded that the employer could keep the \$9-an-hour people who would get the employer sued. Another former employee called for a class-action lawsuit. When the employee returned to work, she was terminated for her comments on Facebook.

Holding: The NLRB determined that the termination was unlawful because the employee engaged in concerted activity by initiating a Facebook discussion that induced group action amongst her coworkers. The NLRB explained that the employee initiated the Facebook discussion because the employer transferred her to a less lucrative position, that coworkers and former coworkers responded to her Facebook post expressing their frustration with the employer’s treatment of employees, and that one former coworker suggested taking concerted activity through the filing of a class-action lawsuit. The NLRB thus reasoned that the employee’s initial Facebook statement, and the discussion it generated with fellow employees, clearly involved complaints about working conditions and the employer’s treatment of its employees, which fell within the definition of concerted activity.⁶⁴

E. What Social Media Activity is Not Concerted Under the NLRA?

Not all activities related to employment are deemed concerted activity by the NLRB, even when the employee is communicating his concerns with other employees. Where an employee expresses his concerns on social media without seeking to induce group action, the activity may not be protected, even if the activity is published to fellow employees. Social media activities that may not be deemed concerted include:

- A post complaining about the terms and conditions of employment that contained no language suggesting that the employee sought to initiate or induce coworkers to engage in group action;⁶⁵
- A post expressing frustration regarding his individual dispute;⁶⁶ and
- A discussion expressing his individual discontent about his employer where fellow employees “like” the post or comment merely to express their support for the employee’s well-being.⁶⁷

Applying these principles, the NLRB determined that the following employee social media activities were not concerted.

A retail store employee's profane Facebook comments that merely elicited supportive comments from coworkers was not concerted activity.⁶⁸

Facts: After an interaction with an assistant manager, an employee posted a comment on Facebook complaining about the "tyranny" at the store, and suggested that the employer would get a "wake-up call" because lots of employees were about to quit. Several coworkers responded to this comment expressing emotional support and asking why he was so "wound up." The employee responded to his coworkers' postings by asserting that the assistant manager was being a "super mega puta," and complained about being "chewed out" for mispriced or misplaced merchandise. Two other coworkers made supportive comments, one of which replied with a "hang in there" remark. Upon learning of these comments, the employer imposed a one-day paid suspension that precluded promotion opportunities for 12 months.

Holding: The NLRB determined that the employer's action in response to the Facebook postings was lawful because the employee's postings were merely the expression of an individual gripe.⁶⁹ The NLRB explained that the Facebook posts contained no language suggesting that the employee sought to initiate or induce coworkers to engage in group action; rather, the posts expressed only his frustration regarding his individual dispute with the assistant manager over mispriced or misplaced items.⁷⁰ They NLRB reasoned that the other employees' responses merely indicated that they had found the employee's first post humorous and offered emotional support.⁷¹ There was also no evidence that the employee's postings were the "logical outgrowth of prior group activity."⁷²

A warehouse employee did not engage in concerted activity when posting threatening Facebook posts, which posts may have been seen by his coworkers, in response to his employer's attendance policy.⁷³

Facts: After being advised by his supervisor that his request to leave work early due to illness would cost him attendance points, the warehouse employee said he would try to "tough it out" and hope that he did not pass out. After work, the employee drove to a parking lot across the street and accessed his Facebook account from this phone. Using expletives, the employee posted comments to his Facebook account indicating "It was too bad when your boss doesn't care about your health." A Facebook friend, who was not a coworker, responded and asked the employee if he was worried. The employee responded that he was not really worried, but he was just "pissed" because he had been there almost five years, yet was being treated as if he had just started. The employee also said that he thought the employer was just trying to give him a reason to be fired because he was about "a hair away from setting it off." While six of the employee's coworkers were his Facebook friends, none of them responded to these posts. Upon returning to work, the employer's human resource (HR) manager told the employee that she interpreted "setting it off" as bringing a gun to the warehouse and shooting everyone in it. Although the employee explained

that he was “just venting,” he was suspended without pay pending an investigation, and was later discharged for his “inappropriate, threatening, and violent” Facebook comments.

Holding: The NLRB determined that the termination was lawful because the employee’s Facebook posts were not concerted activity, as they simply addressed conditions of his own employment and as he did not seek to initiate or induce coworkers to engage in group action. The NLRB noted that none of the employee’s coworkers responded to the posts with similar concerns, and explained that the postings were neither an outgrowth of prior employee meetings nor attempts to initiate group action with regard to the employer’s sick leave or absenteeism policy. The employee was, as he acknowledged, “just venting.”⁷⁴

A phlebotomist did not engage in concerted activity when ranting about her coworkers on Facebook.⁷⁵

Facts: Following a history of conflict with several coworkers, which the employee unsuccessfully attempted to resolve through her supervisor and employee assistance program, the phlebotomist expressed her frustration through a number of angry, profane comments on her Facebook wall against coworkers and her employer. Her Facebook posts indicated that she hated people at work, that they blamed everything on her, that she had anger problems, and that she wanted to be left alone. One coworker commented that she had gone through the same thing. The employer’s HR director received a complaint regarding the employee’s Facebook posts, and subsequently terminated the employee.

Holding: The NLRB determined that the employee’s termination was lawful because the Facebook postings were made solely on her own behalf, and did not involve the sharing of common concerns.⁷⁶ The NLRB explained that the employee’s Facebook postings merely expressed her personal anger with coworkers and the employer, and contained no language suggesting that the employee sought to initiate or induce coworkers to engage in group action; therefore, the posts were unprotected.⁷⁷

F. How Can Protected Social Media Activity Lose Protection Under the NLRA?

An employee’s protected social media activity can lose its protected status under the NLRA if the employee engages in egregious examples of the following conduct.⁷⁸

- **Disparaging attacks:**⁷⁹
Statements may lose protection if they constitute a sharp, public, disparaging attack upon the quality of the company's product and its business policies in a manner reasonably calculated to harm the company's reputation and reduce its income.⁸⁰
- **Malicious defamation:**
A defamatory statement may lose its protected status if the employer can demonstrate the statement was maliciously false.⁸¹
- **Opprobrious conduct:**
To determine whether an employee's conduct is opprobrious, the NLRB will consider the location and subject matter of the discussion, the nature of the employee's outburst, and whether the outburst was provoked by the employer's unfair labor practices.⁸²

While it is possible for activity to lose protection under these circumstances, the employer shoulders a heavy burden in persuading the NLRB that the employee's conduct was so reprehensible that it should no longer be protected. In fact, the NLRB's three memoranda on social media cases lacked a single instance where an employee's alleged disparaging attack, defamatory statement, or opprobrious conduct lost protection of the NLRA.

Against this backdrop, the NLRB determined in the following cases that potentially disparaging, defamatory, and opprobrious employee social media activity did *not* lose protection under the NLRA.

A nurse's critical statement about his employer did not sufficiently disparage the hospital's product to lose protection of the NLRA.⁸³

Facts: A nurse's online comments criticizing a hospital did not lose protection of the NLRA. He posted social media comments that raised, among other things, sensitive issues regarding a shooting at the hospital. His online posts included statements that the hospital management continued to "attack" and "destroy" employees who stood up to management, and that the hospital committed a "long list of abuses" linking that conduct to the shooting.

Holding: The NLRB determined that the employee's posts did not lose their protected status because all of the claims were "general criticisms of the employer's treatment of its employees and their working conditions...." The NLRB cautioned that "great care" must be taken to distinguish between unprotected "disparagement and the airing of what may be highly sensitive issues." Moreover, the employee's criticisms did not disparage the hospital's product, which was providing healthcare to patients.⁸⁴

A popcorn plant employee's critical comments about her employer did not lose the protection of the NLRA.⁸⁵

Facts: An employee at a popcorn plant posted comments to an original Facebook post from a coworker criticizing the operations manager and the "drama" at the plant. The employee's Facebook comment stated that she "hated the place" and could not wait to get out of there. She also stated that the operations manager brought on "a lot of the drama" and the operations manager was the one who made the work environment so bad. The employee was terminated for those comments. The employer asserted that the employee's comments lost protection of the NLRA because the comments were disparaging of the employer and therefore justified the discharge.

Holding: The NLRB disagreed with the employer's assertion of disparaging conduct, noting that while the employee's comments were critical of the operations manager, they were not so disparaging as to lose protection of the NLRA. The comments were of a nature "routinely found protected" and were in no way critical of the employer's product or business policies.⁸⁶

Sports bar employees' alleged defamatory comments about the bar owner were not maliciously false, nor was the language used so opprobrious as to lose the protection of the NLRA.⁸⁷

Facts: Several current and former employees of a sports bar discovered that they owed state income taxes, and they requested that the matter be discussed at an upcoming management meeting. Thereafter, one former employee posted a statement on her Facebook page (using short-hand expletives) complaining that she now owed taxes because the employer failed to withhold the proper amount and could not do paperwork correctly. One current employee "liked" the post. Another employee stated that she, too, owed money and that the employer's owner was "such an asshole." The employer discharged both the employee who "liked" the post and the employee who stated the owner was "an asshole." The employer also threatened to sue the second employee for defamation. The employer contended that the employees' statements lost protection of the NLRA because they were defamatory and offensive.

Holding: In rejecting the employer's contention, the NLRB explained that an alleged defamatory statement would not lose its protected status unless it was not only false, but maliciously false. The NLRB determined that the Facebook post the first employee "liked," along with the second employee's post about owing money, were both factually correct, since the employees owed taxes as a result of the employer's erroneous paperwork. The NLRB also determined that calling the employer's owner "an asshole" on Facebook was not so offensive as to lose protection of the NLRA because the comments were initiated outside of the workplace during the employee's non-

working time, and because the statement neither disrupted operations nor undermined supervisory authority.⁸⁸

An ambulance service employee's name-calling was not so opprobrious as to lose protection under the NLRA.⁸⁹

Facts: During an online employee discussion of supervisory action on Facebook, an ambulance service employee posted that her supervisor was a "scumbag" for refusing her request for a union representative in connection with preparing an incident report arising out of a customer complaint. The employer contended that the ambulance employee's name-calling caused her to lose protection under the NLRA.

Holding: In rejecting the employer's contention, the NLRB reasoned that the Facebook post did not interrupt the work of other employees because the comments occurred outside the workplace and during non-working time. The NLRB further explained that the name-calling was not accompanied by verbal or physical threats, and was made solely in response to the supervisor's unlawful refusal to provide her with a union representative.⁹⁰

A nonprofit social services employee's Facebook comments were protected under the NLRA despite the sarcasm and swearing contained therein.⁹¹

Facts: A nonprofit social services employee posted on Facebook that another coworker felt that she and four of her coworkers did not help the employer's clients enough. She then asked her coworkers on Facebook how they felt about this in preparation for a meeting she had with the Executive Director the following morning. Some of her fellow employees' responses to her Facebook post were sarcastic and included swearing. Another coworker reported the Facebook conversation to the Executive Director, who subsequently discharged all five employees who engaged in the Facebook discussion. The employer contended that their statements lost protection under the NLRA for being opprobrious or abusive.

Holding: In rejecting the employer's contention, the NLRB reasoned that the swearing and sarcasm contained in the conversation was objectively "quite innocuous" and is of the kind "typically applied to employees disciplined for public outbursts against supervisors."⁹²

G. When Does an Employer’s Disciplinary Action Violate the NLRA?

An employer violates Section 8(a)(1) of the NLRA if it interferes, restrains, or coerces employees in the exercise of their rights guaranteed in Section 7.⁹³ An employer may unlawfully interfere with its employees’ Section 7 rights by:

- Disciplining or terminating an employee for engaging in Section 7 activities;⁹⁴
- Threatening to sue employees for engaging in protected activities;⁹⁵ or
- Discharging an employee to prevent future employee discussions of terms and conditions of employment.⁹⁶

Applying these principles, the NLRB determined that the following employer’s disciplinary action violated the NLRA.

A hospital unlawfully discharged a nurse for encouraging her coworkers to speak up about a frequently absent employee.⁹⁷

Facts: Several nurses were unhappy with a colleague who was frequently absent, creating extra demands on their time and workload. The employee and her coworkers complained to their manager, who failed to rectify the situation. After the frequently absent nurse called in sick again, the employee posted a comment on her own Facebook page complaining about the absence, referring to the colleague’s pattern of calling in sick and noting that colleague had disrupted work again that weekend. The employee concluded the post by asking anyone with other details about the nurse’s absences to contact her. The hospital reprimanded the employee for her Facebook postings, told her that she had “talked badly about the hospital,” and subsequently terminated her.

Holding: The NLRB determined that the hospital’s termination of the employee was unlawful because it punished the employee for exercising her right to engage in protected activity relating to her working conditions. The NLRB reasoned that the employee’s Facebook posts expressing frustration over a colleague’s conduct that resulted in heavier demands on the staff was a protected Section 7 right. Thus, the NLRB concluded that the employee’s termination sent an improper message to other employees that engaging in protected complaints about their working conditions was prohibited.⁹⁸

An employer unlawfully discharged an administrative office assistant to prevent her from engaging in future discussions about other employees' work-related problems.⁹⁹

Facts: The employee was known throughout the office as someone that other employees regularly came to for advice. Following a severe snowstorm, a manager asked the employee whether she had made it into work the prior day. When she said she had not, the manager replied that he "knew the females would not make it in." The employee emailed her supervisor and HR assistant to complain that the manager had made a sexist remark. They did not respond. As she was leaving work, the employee used her personal cell phone to post a message on Facebook, including some profanity, that "she could handle jokes, but she did not want to be told that she was less of a person because she was a female." One coworker, who overheard the remark, engaged in a Facebook conversation with the employee about the manager. During that conversation, the employee made several derogatory remarks about the manager. Another Facebook friend, who was not a coworker, told the employee that "she needed to take it further."

A week later, after a fellow coworker was fired, the employee was upset and cried over the termination with a supervisor. Thereafter, she used her personal cell phone while in the employee restroom to post on Facebook that she "couldn't believe employees were losing their jobs because they asked for help." Later that day, she was called into a meeting with the company president. The company president told the employee that she was upset over something that was none of her business, and that "management did not like that she gives [other employees] her opinion." Thereafter, the employee posted a series of comments on Facebook from her cell phone stating that "it was a very bad day," that "one of her friends had been fired because he had asked for help," and that she had been "scolded for caring." The company president terminated the employee for her Facebook postings about the terminated employee and the earlier Facebook comments about the manager.

Holding: The NLRB determined that employer unlawfully terminated the employee to prevent future employee discussions regarding terms and conditions of employment. The NLRB explained that the employer was concerned about the employee's involvement in her coworkers' work-related problems since employees regularly came to her for advice. Because the employer previously admonished her for providing advice to employees, and because her Facebook posts immediately precipitated her discharge, the NLRB concluded that she was terminated as a "pre-emptive strike" to prohibit her from engaging in further protected concerted activity.¹⁰⁰

H. What Remedies are Afforded by the NLRA for Disciplining Employees for Engaging in Protected Activities?

If an employer terminates or disciplines an employee for engaging in protected social media activity, then the employee may file an unfair labor charge against the employer. The NLRB will expeditiously investigate the charge to determine whether formal action should be taken. If the NLRB believes that the employer may have engaged in an unfair labor practice, then it will file a complaint against the employer and require the employer to respond within 10 days. In response to certain egregious conduct, the NLRB is also authorized to seek an immediate temporary restraining order against the employer from a Federal District Court. The matter is then referred to an administrative judge for determination.¹⁰¹

Upon finding that an employer has committed an unfair labor practice by interfering with an employee's Section 7 rights, the NLRB may impose various statutory remedies.¹⁰²

If an employee was wrongfully terminated for engaging in Section 7 activities, then the NLRB can order that the employer to reinstate the employee. As part of the reinstatement process, the employer may be required to readjust the employee's seniority, benefits, and status within the workplace. The NLRB may order that an employee's file be expunged of any record of the wrongful discipline or termination.

In order to make an employee whole for any loss of pay resulting from a discharge, refusal to reinstate, or other change in employment status, the NLRB may also order that the employer compensate the employee through back pay.¹⁰³

III. Lawfulness of Employer Work Rules and Social Media Policies

Many employers now implement work rules or social media policies that are designed to manage employee social media use and protect the company from legal liability arising out of improper or illegal social media. The purpose of these work rules and policies are to place employees on notice regarding what they can and cannot do when engaging in activity on social media.¹⁰⁴

Ideally, a work rule or social media policy provides specific guidelines that are designed to protect the company's reputation, business relationships, trade secrets, and intellectual property, as well as avoid liability associated with employees that post harassing, confidential, and/or other inappropriate material concerning the company or other employees. An effective policy will provide employers with peace of mind that it has officially communicated what is a punishable or terminable offense in the event an employee misuses social media in violation of the policy. At the same time, employees will have a clear understanding of what they can and cannot do online, and therefore can use social media without fear of repercussion so long as they follow the guidelines set forth in the policy.

In theory, these policies are designed to limit an employer's exposure to social media liability; in practice, however, the rules often create additional exposure to employers. The NLRB has analyzed scores of work rules and corporate social media policies to ensure that employee rights are protected. In particular, the NLRB social media memoranda report numerous instances where it has struck down work rules and policies that it believes pose a threat to employees' right to engage in Section 7 protected activities.

The following section dissects the social media policies analyzed by the NLRB in its three memoranda, distinguishes lawful policies and work rules from ones found to be unlawful by the NLRB, and provides the NLRB's reasoning as to why a policy provision was lawful or unlawful. While each case hinges on the context, language, and specificity of the actual provisions within the policy, the following section illustrates that employers' social media policies are commonly found unlawful if they either explicitly bar or implicitly chill employees' exercise of their Section 7 rights. These same provisions would be considered lawful, however, if the work rule or policy carved out specific protected concerted activity from general social media activity restrictions, if it defined terms, or if it listed specific examples of what activities the company considered restricted.

A. When is a Work Rule Lawful?

As a general rule, the NLRB found work rules and policies lawful when they provided specific examples of what was prohibited under the policy, instead of general prohibitions over certain types of social media activities. The NLRB found that the work rules presented in the following table complied with the NLRA.

Work Rule	Reason NLRB Found Lawful
<p>A rule forbidding social media posts that are “slanderous or detrimental to the company,” which then included a list of prohibited conduct including “sexual or racial harassment” and “sabotage.”</p>	<p>The policy would not be reasonably understood to restrict Section 7 activity based on the list of provided examples.¹⁰⁵</p>
<p>A rule prohibiting employees from publishing any “promotional content.”</p>	<p>The policy was within a section titled “Promotional Content,” and included a preface that “special requirements apply to publishing promotional content online.” The policy then defined “promotional content” and referred to Federal Trade Commission (“FTC”) regulations, and therefore would not reasonably interpret this policy to restrict Section 7 activity.¹⁰⁶</p>
<p>A rule requiring an employee to receive prior authorization before posting a message that is either in the employer’s name or could reasonably be attributed to the employer.</p>	<p>A rule that requires an employee to receive prior authorization before posting a message either in the employer’s name or could reasonably be attributed to the employer cannot be reasonably construed to restrict employees’ exercise of the their Section 7 rights.¹⁰⁷</p>
<p>A rule requiring employees to maintain the confidentiality of the employer’s trade secrets.</p>	<p>Employees have no protected right to disclose trade secrets. This rule is permissible where the employer provides sufficient examples of prohibited disclosures (e.g., information regarding the development of systems, processes, products, know-how, technology, internal reports, procedures, or other internal business-related communications) for employees to understand that it does not reach protected communications about working conditions.¹⁰⁸</p>

Work Rule	Reason NLRB Found Lawful
A rule prohibiting employees from disclosing private and confidential information where the employer’s rule provided examples of prohibited disclosures (including personal health information about its patients and releasing “embargoed [corporate] information”).	The policy, in its context, was specific enough to protect the interests of the employer without restricting employees’ Section 7 rights. ¹⁰⁹
A rule prohibiting employees from pressuring other employees into joining social media platforms.	The rule was sufficiently specific in its prohibition against pressuring coworkers and “clearly applied only to harassing conduct.” The rule could not be reasonably interpreted to apply more broadly to restrict employees from contacting coworkers for the purposes of engaging in protected concerted activity. ¹¹⁰
A rule prohibiting “harassment, bullying, discrimination or retaliation” between coworkers online, even when “done after hours and on home computers.”	The rule could not be reasonably construed to apply to Section 7 activity, as the rule contains a list of “plainly egregious conduct, such as bullying and discrimination.” ¹¹¹

B. When Does a Work Rule Violate the NLRA?

An employer’s work rule violates the NLRA if that rule would reasonably tend to chill employees in the exercise of their Section 7 rights. The NLRB uses a two-step inquiry to determine if a work rule would have such an effect. First, a rule is unlawful if it explicitly restricts Section 7 activities. If the rule does not explicitly restrict protected activities, then it is unlawful only upon a showing that: (1) employees could 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.

Generally speaking, a rule violates the NLRA when it precludes employees from discussing terms and conditions of employment, or sharing information about themselves or their fellow employees with outside parties. A few other common examples in which an employer unlawfully interferes with employees’ Section 7 rights through a work rule include the following.

- An employer maintains a policy or handbook containing policies that restrict, interfere, or tend to chill the ability of employees to discuss their wages, hours, and other protected activities.¹¹²
- An employer discourages employees from engaging activities for their mutual aid or protection.¹¹³

The NLRB determined that the following work rules violated the NLRA.

Work Rule	Reason NLRB Found Unlawful
A rule prohibiting employees from discussing wages and conditions of employment with third parties.	The policy could be reasonably interpreted to preclude employees from discussing terms and conditions of employment. ¹¹⁴
A rule banning solicitation while on company property, on company time, or in work areas.	Rules that ban solicitation in non-work areas during non-work time are “an unreasonable impediment to self-organization” and are “presumptively unlawful.” ¹¹⁵
A rule prohibiting the communication of “confidential information,” without narrowing the scope of confidential information to exempt Section 7 activity.	The policy contains no examples of what the company considers information that is “confidential, sensitive, or non-public information.” The policy could reasonably be interpreted to preclude employees from discussing terms and conditions of employment. ¹¹⁶
A rule prohibiting employee communications to the media, or requiring prior authorization for such communications.	The NLRB has long recognized employees’ rights to communicate labor disputes to the public. ¹¹⁷
A rule forbidding statements that are slanderous or detrimental to the company, without narrowing the scope to exempt Section 7 activity.	The rule could be interpreted to apply to protected criticisms of the employer’s labor policies and treatment of employees. ¹¹⁸
A rule encouraging employees to “report any unusual or inappropriate internal social media activity.”	The rule could reasonably be interpreted to encourage employees to report to management any union activities of other employees, and could discourage employees from engaging in potential protected

Work Rule	Reason NLRB Found Unlawful
	activities. ¹¹⁹
<p>A rule encouraging employees to resolve concerns about work by speaking with coworkers, supervisors, or managers, rather than “posting complaints on the Internet.” The rule further encouraged employees to use “available [company] internal resources [to resolve conflicts], rather than social media or other online forums.”</p>	<p>The rule could have the probable effect of precluding or inhibiting employees from the protected activity of seeking redress through alternative forums.¹²⁰</p>
<p>A rule prohibiting “negative conversations” about managers.</p>	<p>The policy contained no examples or clarification of what activity was prohibited, and could potentially chill employees’ protected activity.¹²¹</p>
<p>A rule prohibiting employees from discussing “material non-public” information.</p>	<p>The policy could reasonably be interpreted to preclude employees from discussing terms and conditions of employment.¹²²</p>
<p>A rule prohibiting the use of the company name or trademarks without prior approval of the law department.</p>	<p>Employees have the right to use the employer’s name or logo in conjunction with protected concerted activity.¹²³</p>
<p>A rule prohibiting employees from posting pictures of themselves in any media or depicting the company in any way, including wearing the company uniform or company logo.</p>	<p>The policy prohibited employees from engaging in protected activity, such as posting a picture of an employee carrying a picket sign with the employer’s name, or wearing a t-shirt portraying the company’s logo in connection with a protest involving terms and conditions of employment.¹²⁴</p>
<p>A rule prohibiting offensive, demeaning, abusive, or inappropriate remarks.</p>	<p>The policy proscribes a broad spectrum of communications that could reasonably include protected activities criticizing the employer’s labor policies and/or treatment of its employees.¹²⁵</p>
<p>A rule prohibiting commenting on company legal matters.</p>	<p>The rule could be interpreted to restrict employees from discussing the protected subject of potential claims against an employer.¹²⁶</p>

Work Rule	Reason NLRB Found Unlawful
A rule prohibiting use of social media platforms on company time.	Employees have the right to engage in protected concerted activities on the employer's premises during non-work time and in non-work areas. ¹²⁷
A rule prohibiting employees from identifying themselves as an employee of the company on a personal profile without seeking prior approval from the employer.	Employees should be able to find and communicate with one another via social media regarding terms and conditions of employment. ¹²⁸
A rule cautioning employees to "think carefully about 'friending' co-workers... on external social media sites."	The rule could reasonably be interpreted to discourage communications among coworkers regarding terms and conditions of employment. ¹²⁹

A Special Note about Savings Clauses

Often, employers insert a "savings clause" at the beginning or end of a social media policy. Such a clause states that no rule in the policy is intended to prohibit protected activity. The NLRB routinely determines that these general savings clauses are insufficient to cure ambiguities or overbroad rules in the employer's social media policies.¹³⁰ That said, it is still a prudent practice to include specific savings clauses to provide content to certain work rules contained in social media policies (see Section IV.A of this InfoPAK, entitled "Best Practices for Drafting Complaint Social Media Policies").

C. What Remedies are Afforded by the NLRA for an Unlawful Work Rule?

An employee may file a charge against the employer for an unfair labor practice if the employer maintains an overly broad or vague policy that restricts employees from discussing the terms and conditions of employment. The NLRB may also review and scrutinize a policy or work rule in conjunction with an employee's unfair labor practice complaint (or employer-raised defense) to ensure compliance under the NLRA.

When an employer's work rules are found to have violated Section 8(a)(1) of the NLRA by interfering, restraining, or coercing employees in the exercise of their Section 7 rights, the NLRB commonly orders the employer to cease and desist the unfair labor practice.¹³¹

A cease and desist order can be issued to cease an NLRA violation at a specific location, or company-wide if the company has more than one site or location. In connection with a cease and desist order concerning an unlawful policy or work rule, the NLRB may order the employer to

rescind or modify the unlawful language, policies, and/or provisions; post a notice of a violation in a conspicuous area reminding employees of their rights under the NLRA; and notify all employees of the rescinded or modified policy. Employers commonly experience widespread negative publicity when found to have maintained an unlawful policy or work rule.

If an employer fails to comply with the cease and desist order, then the NLRB has the authority to have the employer found in contempt of court, and to have civil and/or criminal penalties imposed on the employer.

IV. Best Practices Guide

Developing a social media policy makes business and legal sense.¹³² A social media policy assists companies in managing employee social media in order to limit exposure to costly legal problems. Indeed, employers can be held vicariously liable for legal and regulatory liability arising out of their employee's social media use.¹³³ Employers may be held for an employee's defamatory, discriminatory, or harassing social media message, comment, or tweet. Companies are also exposed to employee leaks of sensitive company or customer information, or the improper use of the employer's intellectual property and trade secrets. These risks exist regardless of whether the employee commits the offense at the office using company-owned computer resources or at home using their personal social media accounts, since they are often identified as an employee of the company in their social media profile.

In addition, a social media policy also serves as a communications guideline that empowers employees with the information they need in order to use social media in a responsible manner. Social media policies should contain a mix of social media objectives, values, guidelines, and best practices; rules on what is considered appropriate and inappropriate use of social media; and the governance procedures that the company follows when the rules are broken.¹³⁴ Social media policies accomplish these goals by providing formal work rules for social media use by employees. Effective rules include provisions addressing both professional and personal use, and also set forth provisions regarding appropriate language and content. Implementing these work rules can help avoid serious public-relations issues that can arise when an employee's inappropriate social media activity goes viral. For these reasons, and many more, it is certainly a best practice to implement a company social media policy.

In light of the recent NLRB memoranda, companies face a serious challenge in drafting lawful social media policies. Companies need to tailor their social media policies and work rules to serve their unique strategic goals while also permitting protected activities provided by the NLRA. Companies have attempted to manage social media risks through the establishment of social media policies, but the NLRB memoranda demonstrate that many companies have run afoul of the NLRA by implementing vague or overbroad policies that interfere with employees' right to engage in protected activities. In order to comply with the NLRA, companies must implement a *compliant* social media policy consistent with the NLRB's recent decisions.

A compliant social media policy limits company liability to costly legal exposure by placing employees on notice of what is prohibited social media activity, while at the same time allowing employees to engage in protected and concerted social media activity. Although NLRB guidance in its three social media memoranda is less than clear – and arguably contradictory at times – the underlying theme of the NLRB decisions in those memoranda is that a compliant policy is one that:

- clearly and specifically communicates organizational, legal, and regulatory rules to employees, executives, independent contractors, and others working on behalf of the company;

- provides employees with a clear understanding of what constitutes appropriate, acceptable, and lawful business behavior; and
- helps employers demonstrate that the company is committed to operating a business environment in a straightforward and compliant manner.

While these lessons can be gleaned from NLRB decisions, the NLRB's memoranda provide little practical guidance for drafting, implementing, and enforcing NLRA-compliant social media policies.

This section will provide best practices distilled from the NLRB decisions on social media cases. By analyzing the differences in lawful work rules and policies from ones found unlawful, and then applying the reasoning behind the NLRB's distinctions, companies may identify and apply certain best practices to drafting effective policies that can minimize the risk of legal liability arising from employee social media activity that also comply with the NLRB's decisions of social media cases under the NLRA.

A. Best Practices for Drafting Compliant Social Media Policies

A compliant social media policy should provide employees with a clear understanding of what constitutes appropriate, acceptable, and lawful business behavior. It should specify what type of content, language, and behavior is considered appropriate, versus that which is deemed offensive and therefore prohibited.

Clear, comprehensive, strategically written policies also will help the company demonstrate to employees and the NLRB that the company is committed to operating an online business environment that is compliant with the NLRA. The mere existence of a compliant policy may provide the company with a defense should it find itself embroiled in a workplace dispute that has potential NLRA implications. This section provides best practices for drafting an NLRA-compliant social media policy.

1. Set forth the goals of the policy.

A social media policy should begin with a statement of the goals that the company is working to achieve through the use of online technologies and social media.¹³⁵ One primary goal of the policy should be to provide employees with a clear understanding of their right to use social media, while also providing specific guidelines setting forth prohibited social media activity.

2. Use specific and clear language.

Employers must draft clear and specific rules that are not open to interpretation.¹³⁶ A plain reading of each work rule should leave employees with no confusion over the permissible and prohibited use of social media. Employers commonly run afoul of the NLRA by incorporating general, broad, or vague prohibitions against certain conduct that could be interpreted to chill protected activities.

For example, a work rule stating “employees may not post inappropriate messages on social media sites” would likely be considered unlawfully vague, as it may be interpreted differently by different people. For instance, a recent college graduate who grew up in the Internet age may have a different idea of what constitutes “appropriate” social media activity than do the company’s senior executives. The NLRB has further determined that employees are reasonably likely to interpret similar clauses as prohibiting them from speaking negatively about their supervisor, and thus serve as an unlawful restriction on protected activities. The ambiguity of this work rule would likely cause it to be found unlawful, and any employee disciplinary action would likely be overturned should either come before the NLRB.

A more appropriate provision could state that “Employees may not post obscene, pornographic, sexually charged, or similar offensive language.” Another effective provision could state that “Employees may not post harassing or discriminating content based on race, color, religion, sex, sexual orientation, national origin, age, disability, or any other status protected by law.” A further example could be as simple as “Employees may not engage in illegal conduct on the Internet.” These work rules provide clear and specific examples regarding the type of content that employees would reasonably understand to violate the policy.

3. Define key concepts and terms.

A trusted method to avoid ambiguity in interpreting work rules is to provide definitions of key terms – either within the text itself, or as part of a glossary of terms at the end of the document.¹³⁷ To ensure the desired interpretation of a given rule within the policy, employers should consider defining important terms such as “confidential data,” “trade secrets,” and “customer information.”

4. Write the policy and work rules in plain English.

Because employees must understand the specific types of activity that is prohibited on social media, employers should avoid confusing legal jargon and sophisticated technical terms. Be careful to avoid acronyms or abbreviations that may not be understood by all employees, or by anyone else viewing the policy.¹³⁸ If acronyms or abbreviations are unavoidable, then add those terms to the glossary.

5. Provide specific examples that demonstrate context.

A work rule’s context provides the key to determining the “reasonableness” of a particular rule’s construction.¹³⁹ Rules that clarify and restrict their scope by including examples of clearly illegal or unprotected conduct, such that they could not reasonably be construed to cover protected activity, generally are not unlawful.¹⁴⁰ By providing a list of specific examples of unacceptable behavior, statements, and activities, an employee can construe a potentially vague work rule and easily delineate between conduct that is prohibited and that which is permitted.

For example, while an employer’s work rule that prohibits “inappropriate postings” may be found unlawfully vague, the NLRB has approved a work rule that prohibits “inappropriate postings that may include discriminatory remarks, harassment and threats of violence or similar inappropriate or unlawful conduct.”¹⁴¹ By providing specific examples of what the employer means by

“inappropriate postings,” the employee would reasonably understand that the work rule is designed to prohibit solely unlawful conduct and not protected activity.

6. Use limiting language to clarify that a rule does not prohibit protected activities.

Rules that are ambiguous as to their application to Section 7 activity and that contain no limiting language to clarify that the rules do not restrict Section 7 rights are unlawful. When in doubt, an employer should use limiting language to disclaim within a particular work rule that the prohibition is not designed to exclude Section 7 activities.

7. Do not restrict more than is necessary.

Overly restricting employee use of social media could not only decrease employee morale, but also could get the employer in “hot water” with the NLRB. In any case, overly broad policies undermine a primary purpose of the policy by potentially exposing the employer to liability for chilling its employees’ Section 7 rights. For example, a work rule that states “Personal use of social media is never permitted on work property” is most likely an overly restrictive policy that would violate an employee’s right to discuss the terms and conditions of employment with other employees on non-work time in non-work areas.

8. Do not prohibit employees from identifying themselves with the company.

Employees have a Section 7 right to utilize the company name and logo while engaging in protected concerted activity, such as on electronic or paper leaflets, cartoons, or picket signs in connection with a protest involving the terms and conditions of employment. Thus, a rule that prohibits employees from “posting pictures of themselves in any online media which depict the company in any way, including a company uniform or logo” would likely violate the NLRA.

9. Tailor the policy to the employer’s business.

No “one size fits all” social media policy has been created. Employers should tailor their policy to the specific needs of the company. In addition to addressing activity under the NLRA, the policy should also address the laws and regulations that regulate the company’s industry. For example, a hospital or medical services company that maintains patient information governed by the Health Insurance Portability and Accountability Act (“HIPAA”) should incorporate those elements into its social media policy: “Employees are prohibited from using or disclosing confidential patient information, including personal health information as defined in HIPAA, outside of employment.”

10. Advise employees of the employer’s right to monitor them.

If the employer's jurisdiction allows the company to monitor employees’ online activities, then the social media policy should advise its employees accordingly. The policy should state that all use of the companies’ computer systems, networks, and related equipment are not private, and that by using the companies’ computer systems, networks, and related equipment, the employees consent to having the employer access, review, monitor, and record all such use.¹⁴² Prior to monitoring

their employees, it is critical for the employer to review the specific privacy laws applicable in their jurisdiction.

11. Identify a company spokesperson.

The policy should specify who within the organization has the authority to represent the company as an official spokesperson across all media.¹⁴³ The NLRB has determined that a policy that restricts who can speak on behalf of the company complies with the NLRA, because employees could not reasonably construe the rule to apply to their communications regarding working conditions. The policy should explicitly state that it does not prevent employees from speaking to the media or any other third party about their own employment concerns, or about the employment concerns of their fellow coworkers.

12. Prohibit the disclosure of company trade secrets.

While employees have the right to discuss the terms and conditions of their employment, employees have no protected right to disclose trade secrets.¹⁴⁴ Thus, the policy may forbid employees from disclosing proprietary information, so long as that information is reasonably defined (e.g., information about unreleased products, sales, market-share information, financial forecasts, customer lists, client lists, and research and development initiatives).¹⁴⁵

13. Prohibit discriminatory and derogatory comments.

A social media policy should prohibit the use of racial or ethnic slurs; pornography; obscenity; or derogatory, discriminatory, and harassing postings or materials. The policy should make clear that employees are prohibited from using online social media to harass, disparage, libel, or discriminate against others in the workplace. That said, the policies should explicitly state that it does not prohibit employees from discussing the terms and conditions of their employment, including employee criticisms of the employer, manager, or supervisors.¹⁴⁶

14. Do not rely on “savings clauses.”

As mentioned, employers commonly insert a “savings clause” at the beginning or end of the social media policy. Such a clause states that no rule in the policy is intended to prohibit protected activity. For example: “This policy is not to be interpreted so as to interfere with employee rights to self-organize, form, join, or to engage in other concerted activities.”

The NLRB routinely determines that these general savings clauses are insufficient to cure ambiguities and overbroad rules in the employer’s social media policies.¹⁴⁷ On the other hand, employers are encouraged to use limiting language within specific work rules to avoid any ambiguity of whether a particular rule would interfere with employees’ right to engage in protected and concerted activities. Although savings clauses have been found to be inadequate to cure overly broad and vague work rules and policies, it remains a best practice to include such clauses, as it will not do any harm to include the clause.

15. Advise employees of potential disciplinary action.

The policy should clearly state the consequences for violating the social media policy. Employers should advise employees that they may face disciplinary action, up to and including termination of employment.¹⁴⁸

16. When in doubt, plagiarize.

What is “good for the goose” is generally “good for the gander.” If the NLRB has upheld a provision of a social media policy, then employers should consider tailoring that provision for the employer’s own social media policy. Employers should be mindful, however, that because there is no one-size-fits-all work rule or policy, they should carefully consider whether the upheld work rule in another company’s policy would be equally applicable for their business. The Sample Form included in this InfoPAK presents a social media policy that has been upheld by the NLRB in its entirety.

B. Best Practices for Implementing Social Media Policies

A compliant social media policy should be implemented in a defensible manner. After the employer is satisfied that it has drafted or revised its social media policy in a compliant manner, it must introduce the policy and any subsequent revisions on a company-wide basis. Employees should also be educated about the policy and offered training to ensure compliance. This section provides best practices for implementing the company’s social media policy in a defensible manner. **Conduct a legal review.**

Before distributing the social media policy to employees, be sure to have the company’s legal counsel review and approve the policy documents.¹⁴⁹ The purpose of a legal review is to ensure that the social media policy addresses and supports compliance with the NLRA as well as the laws of every jurisdiction in which the company operates or litigates, addresses all relevant industry and government regulations, and documents employees’ review and acknowledgement of the policy.

I. Distribute the social media policy to everyone.

The policy should be distributed to the company’s summer interns, upper-level executives, and everyone in between. Employers should also consider whether to distribute the policies to any independent contractors or other persons who may act on behalf of the company.¹⁵⁰ The policy can be distributed at a company-wide meeting, sent by email, posted on the company web site or intranet, and/or included in the employee handbook. The policy should be maintained in the same place and format (i.e., hard copy and/or electronic version) as any other workplace policy. The policy should be read and distributed each and every time a company amends, revises, or makes additions to the policy.

2. Require employee acknowledgment.

The social media policy should be signed by each employee to acknowledge that the employee has read and understood the policy, and agrees to abide by its terms.¹⁵¹ The employer should maintain some type of “signature of receipt,” whether hard-copy or electronic, in order to protect itself in the event that the employee contests that she never received the policy.

3. Maintain records of policy distribution and training.

Based on the regulations within the company’s industry and laws governing the jurisdiction in which the company operates, employers should consider whether to educate and train employees about the restrictions within the policy through a formal training program. Regardless of whether the company provides formal training, employers should maintain and manage comprehensive records related to their company’s social media policy and training programs. Employers should maintain written copies of policies, and any revisions or additions to policies, along with electronic or hard-copy confirmation that each employee received and reviewed the policy and attended company training. This can be accomplished by maintaining training sign-in sheets or attendance records, signed policy acknowledgment forms, or electronic “read” receipts that confirm that the employee has read the policy, understood it, and agreed to adhere to it. These records are critical in the event litigation arises out of employee social media activity.¹⁵²

4. Designate a contact person.

The employer should consider appointing an HR representative, compliance officer, or other employee as the “go to” person for all questions about the social media policy. Designating an employee to handle any questions, comments, and concerns about the policy will ensure that the employer is providing a consistent message concerning the scope and applicability of the social media policy, and will also aid the employer’s transparency and facilitate uniform enforcement of the policy. The employer should advise the appointed representative that, to the extent that they are unsure of a response to a specific question by an employee about the policy, they should first consult with in-house counsel prior to providing an “off-the-cuff” response that may misinterpret the scope of work rules contained within the policy.

C. Best Practices for Enforcing Social Media Policies

The most effective way to enforce the policy is through consistent disciplinary action. Disciplinary action can range from a written warning recorded in the employee’s file to termination of employment. When employees understand that the employer “puts some teeth” into the policy by evenly enforcing it against those who violate its social media-related work rules, employees are more apt to comply with its provisions. This section provides best practices for enforcing the company’s social media policy.

I. Be consistent in enforcing the disciplinary measures.

Be consistent in enforcing disciplinary measures.¹⁵³ Uniform enforcement of the policy will protect the employer in potential litigation, as it gives employees fewer reasons in support of their claim

for retaliatory discipline or discharge. Similar violations of the policy should also result in similar discipline. Consistent enforcement of the policy will dissuade a former employee from alleging that the employer singled out the employee or is otherwise acting in a discriminatory manner.

2. Ensure the basis for discipline or termination is sound.

Employers should not analyze an employee social media activity in a vacuum. Before taking action in response to employee's social media activity, employers should consider the employee's past actions and interactions with other employees and the employer to determine the "intent" behind a social media post that, at first glance, could appear to violate the social media policy. By considering past conduct or the context within which a statement was made, a seemingly offensive post may actually be the outgrowth of an employee's prior protected and concerted activity, or an attempt to organize other employees.

Employers must also be cautious in disciplining an employee for a social media post even if no other employee has responded, as the disciplinary action may be deemed an unlawful pre-emptive strike aimed at chilling future protected employee activity. At a minimum, the following questions should be considered prior to taking action in response to employee social media activity.

- Is the employee attempting to organize other workers?
- Has the employee previously served as a spokesperson or "organizer" for employees?
- Is the employee discussing terms and conditions of employment, or is the employee merely voicing a personal gripe?
- Are other employees responding to the initial post? If so, are the postings merely emotional support (e.g., "cheer up") or support for action (e.g., "go get 'em," "I concur," "We need to do something about this")?
- Is there evidence that the post is a continuation of issues previously raised and/or discussed with management by the employees or their representative(s)?

Employers would be well served in considering these questions prior to quickly reacting to an allegedly offensive social media activity.

3. Take a deep breath.

Before disciplining an employee, the employer should carefully review recent NLRB memoranda to see if the facts of the case – *from a truly objective perspective* – are similar to any recent decisions, and then determine the appropriate course of action. In addition to the NLRB memoranda, employers should also consider:

- Federal and state whistleblower statutes;

- State laws that prohibit employers from regulating employee political activities and affiliations;
- State laws that protect “legal off-duty activity;”
- Whether the employee has a potential discrimination claim; and
- Any recent relevant case law.

If an employee is discharged as a result of a protected concerted activity, then it may qualify as a retaliatory discharge – and thus expose the employer to liability.

An “ounce of prevention” is also worth much more than “a pound of cure.” By carefully analyzing the NLRB’s determinations of other company social media policies and work rules, an employer can (with the assistance of counsel) implement and enforce a compliant social media policy that strikes an appropriate balance between acknowledging employees’ protected rights under the NLRA and protecting the employer from improper and illegal employee social media use.

V. About the Authors

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C. About Meritas

Meritas is an established global alliance of independent, full-service law firms that connects businesses to its carefully selected membership: more than 7,000 lawyers in over 170 law firms worldwide. Business owners, in-house counsel, and others can easily connect with pre-qualified, like-minded, reliable legal expertise worldwide. www.meritas.org

VI. Sample Form - NLRA Compliant Social Media Policy

NLRA-Compliant Social Media Policy

The NLRB has upheld the following social media policy in its entirety.¹⁵⁴ It remedies several deficiencies found in other policies. Notably, the NLRB determined that this policy is neither overbroad nor ambiguous; rather, it provides sufficient examples of prohibited conduct so that, in context, employees would not reasonably read the rules to prohibit Section 7 activity.

Two specific parts should be noted. First, while the “Be Respectful” section could be construed as overly broad regarding the posting of comments and complaints, the section provides examples of plainly egregious conduct, such as posts that “could be viewed as malicious, obscene, threatening or intimidating,” and explains that prohibited “harassment or bullying” would include “offensive posts meant to intentionally harm someone’s reputation” or “contribute to a hostile work environment on the basis of race, sex, disability, religion or any other status protected by law or company policy.”

Second, the rule requiring employees to maintain the confidentiality of the employer’s trade secrets as well as private, confidential information is not unlawful; employees have no protected right to disclose trade secrets to begin with, and the rule provides sufficient examples of disclosures that are prohibited (e.g., information regarding the development of systems, processes, or products). Thus, employees can reasonably read that clause not to prohibit protected communications about working conditions.

In line with these tips, an employer can feel confident adopting this policy in its entirety. If the employer wants coverage more pertinent to its specific business, then the employer should tailor certain phrases to better match the nuances of its business, and should have all policies reviewed by a lawyer.

Social Media Policy¹⁵⁵

Updated: [date]

At [Employer], we understand that social media can be a fun and rewarding way to share your life and opinions with family, friends, and co-workers around the world. However, use of social media also presents certain risks and carries with it certain responsibilities. To assist you in making responsible decisions about your use of social media, we have established these guidelines for appropriate use of social media.

This policy applies to all associates who work for [Employer], or one of its subsidiary companies in the United States ([Employer]).

Managers and supervisors should use the supplemental Social Media Management Guidelines for additional guidance in administering the policy.

GUIDELINES

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

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

Know and follow the rules

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

Be respectful

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

Be honest and accurate

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

Post only appropriate and respectful content

- Maintain the confidentiality of [Employer] trade secrets and private or confidential information. Trades secrets may include information regarding the development of systems, processes, products, know-how, and technology. Do not post internal reports, policies, procedures, or other internal business-related confidential communications.
- Respect financial disclosure laws. It is illegal to communicate or give a "tip" on inside information to others so that they may buy or sell stocks or securities. Such online conduct may also violate the Insider Trading Policy.
- Do not create a link from your blog, website, or other social networking site to a [Employer] website without identifying yourself as a [Employer] associate.
- Express only your personal opinions. Never represent yourself as a spokesperson for [Employer]. If [Employer] is a subject of the content you are creating, be clear and open about the fact that you are an associate and make it clear that your views do not represent those of [Employer], fellow associates, members, customers, suppliers, or people working on behalf of [Employer]. If you do publish a blog or post online related to the work you do or subjects associated with [Employer], make it clear that you are not speaking on behalf of [Employer]. It is best to include a disclaimer such as "The postings on this site are my own and do not necessarily reflect the views of [Employer]."

Using social media at work

Refrain from using social media while on work time or on equipment we provide, unless it is work-related as authorized by your manager or consistent with the Company Equipment Policy. Do not use [Employer] email addresses to register on social networks, blogs or other online tools utilized for personal use.

Retaliation is prohibited

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

Media contacts

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

For more information

If you have questions or need further guidance, please contact your HR representative.

VII. Endnotes

¹ Social media encompasses various online technology tools that enable people to communicate easily via the Internet to share information and resources. Social media can include text, audio, video, images, podcasts, and other multimedia communications. National Labor Relations Board, Office of the General Counsel, Division of Operations-Management, Memorandum OM 11-74, August 18, 2011, p. 2. (hereinafter “NLRB Memo 1”)

² SilkRoad, “Social Media and Workplace Collaboration” (2012), available at pages.silkroad.com/rs/silkroad/images/Social-Media-Workplace-Collaboration-SilkRoad-TalentTalk-Report.pdf.

³ *Id.*

⁴ ProofPoint, “Outbound Email and Data Loss Prevention in Today’s Enterprise, 2010,” available at www.proofpoint.com/downloads/Proofpoint-Outbound-Email-and-Data-Loss-Prevention-2010.pdf.

⁵ National Labor Relations Board, Office of the General Counsel, Division of Operations-Management, Memorandum OM 12-59, May 30, 2012 (hereinafter NLRB Memo 3), p. 2.

⁶ See www.nlr.gov/nlr-process.

⁷ NLRB Memo 1

⁸ National Labor Relations Board, Office of the General Counsel, Division of Operations-Management, Memorandum OM 12-31, January 24, 2012 (hereinafter “NLRB Memo 2”).

⁹ National Labor Relations Board, Office of the General Counsel, Division of Operations-Management, Memorandum OM 12-59, May 30, 2012 (hereinafter “NLRB Memo 3”).

¹⁰ NLRB Memo 1, p. 2

¹¹ See www.nlr.gov/national-labor-relations-act.

¹² *Id.*

¹³ See www.nlr.gov/rights-we-protect/jurisdictional-standards.

¹⁴ *Id.*

¹⁵ “Inflow” is defined as good or services *purchased* by the employer from out of state. “Outflow” is defined as goods or services *provided* by the employer out of state. Both inflow and outflow can be direct or indirectly pass through a third company, such as a supplier.

¹⁶ See www.nlr.gov/rights-we-protect/employee-rights.

¹⁷ See generally www.nlr.gov/concerted-activity.

¹⁸ Nancy Flynn, *The Social Media Handbook: Policies and best practices to effectively manage your organizations social media presence, posts, and potential risks* 70 (2012) (hereinafter “The Social Media Handbook”).

¹⁹ NLRB Memo 1, p. 5.

²⁰ NLRB Memo 1, p. 4.

²¹ NLRB Memo 2, pp. 13, 27; NLRB Memo 3, pp. 9 –10, 15.

²² NLRB Memo 1, p. 23.

²³ NLRB Memo 2, p. 23.

²⁴ NLRB Memo 2, p. 14.

²⁵ NLRB Memo 2, p. 7; NLRB Memo 3, p. 17.

²⁶ NLRB Memo 1, p. 5.

²⁷ *Id.* at 6.

²⁸ NLRB Memo 2, p. 26.

²⁹ *Id.* at 27.

³⁰ *Id.* at 28.

³¹ *Id.* at 20.

³² *Id.* at 21.

³³ See www.nlr.gov/concerted-activity.

³⁴ NLRB Memo 1, p. 12.

³⁵ NLRB Memo 2, p. 9.

³⁶ NLRB Memo 1, p. 17; NLRB Memo 2, pp. 7, 31 – 32, 35.

³⁷ NLRB Memo 1, pp. 14, 17.

³⁸ *Id.* at p. 12.

³⁹ *Id.* at 13.

⁴⁰ *Id.* at 14.

⁴¹ NLRB Memo 2, p. 6.

⁴² *Id.* at 7.

⁴³ *Id.* at 30.

⁴⁴ *Id.* at 31.

⁴⁵ *Id.* at 32.

⁴⁶ *Id.* at 9.

⁴⁷ *Id.* at 11.

⁴⁸ See www.nlr.gov/concerted-activity.

⁴⁹ NLRB Memo 2, p. 20.

⁵⁰ *Id.*

⁵¹ *Id.* at 6.

⁵² *Id.* at 22 – 23.

⁵³ NLRB Memo 1, p. 3.

⁵⁴ *Id.* at 4.

⁵⁵ NLRB Memo 2, p. 22.

⁵⁶ *Id.* at 23

⁵⁷ See www.nlr.gov/concerted-activity.

⁵⁸ NLRB Memo 2, p. 18, 20.

⁵⁹ *Id.* at 18.

⁶⁰ *Id.* at 5.

⁶¹ NLRB Memo 1, p. 6.

⁶² *Id.* at 8.

⁶³ NLRB Memo 2, p. 3.

⁶⁴ *Id.* at 5.

⁶⁵ NLRB Memo 1, p. 17; NLRB Memo 2, p. 34 – 35.

⁶⁶ NLRB Memo 1, p. 14, 17; NLRB Memo 2, p. 11, 34 – 35.

⁶⁷ NLRB Memo 1, p. 17.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.* at 17 – 18.

⁷² *Id.* at 18.

⁷³ NLRB Memo 2, p. 34.

⁷⁴ *Id.* at 35.

⁷⁵ *Id.* at 11.

⁷⁶ *Id.* at 12.

⁷⁷ *Id.* at 13.

⁷⁸ See generally www.nlr.gov/concerted-activity.

⁷⁹ NLRB Memo 2, p. 24, citing *NLRB v. IBEW, Local No. 1229* (Jefferson Standard), 346 U.S. 464 (1953).

⁸⁰ NLRB Memo 2, p. 26.

⁸¹ NLRB Memo 1, p. 9; NLRB Memo 2, p. 29 – 30.

⁸² *Atlantic Steel*, 245 NLRB 814, 816 – 817 (1979).

⁸³ NLRB Memo 2, p. 26.

⁸⁴ *Id.* at 29.

⁸⁵ *Id.* at 22.

⁸⁶ *Id.* at 25.

⁸⁷ NLRB Memo 1, p. 9.

⁸⁸ *Id.* at 11.

⁸⁹ *Id.* at 5.

⁹⁰ *Id.* at 6.

⁹¹ *Id.* at 3.

⁹² *Id.* at 4 – 5.

⁹³ See generally www.nlr.gov/rights-we-protect/employee-rights.

⁹⁴ NLRB Memo 1, pp. 3, 5, 6, 9, 19; NLRB Memo 2, p. 3 – 4, 18 – 20.

⁹⁵ NLRB Memo 1, p. 9.

⁹⁶ NLRB Memo 2, p. 20.

⁹⁷ NLRB Memo 1, p. 19.

⁹⁸ *Id.* at 20,

⁹⁹ NLRB Memo 2, p. 18.

¹⁰⁰ *Id.* at 20.

¹⁰¹ NLRB Unfair Labor Practice Process Chart, www.nlr.gov/node/3947.

¹⁰² *Id.*; see also www.nlr.gov/what-we-do/investigate-charges.

¹⁰³ *Id.*

¹⁰⁴ Heather Melick and Ethan Wall, “Technology: Not too narrow, no too broad. Social media policies must be ‘Just Right,’ *InsideCounsel*, October 12, 2012, available at www.insidecounsel.com/2012/10/12/technology-not-too-narrow-not-too-broad-social-med?t=labor-employment.

¹⁰⁵ NLRB Memo 2, p. 16.

¹⁰⁶ *Id.* at 17 – 18.

¹⁰⁷ NLRB Memo 3, p. 15.

¹⁰⁸ *Id.* at 20.

¹⁰⁹ NLRB Memo 2, p. 17.

¹¹⁰ NLRB Memo 1, p. 22.

¹¹¹ NLRB Memo 3, p. 13 – 14.

¹¹² NLRB Memo 2, pp. 11, 13; NLRB Memo 3, p. 5.

¹¹³ NLRB Memo 3, p. 3.

¹¹⁴ NLRB Memo 2, p. 13.

¹¹⁵ *Id.* at 8.

¹¹⁶ NLRB Memo 3, pp. 4 – 5.

¹¹⁷ NLRB Memo 2, p. 14.

¹¹⁸ *Id.* at 16.

¹¹⁹ NLRB Memo 3, p. 9.

¹²⁰ *Id.* at 11.

¹²¹ *Id.* at 13.

¹²² *Id.* at 12-13.

¹²³ NLRB Memo 2, p. 14.

¹²⁴ NLRB Memo 1, p. 6.

¹²⁵ NLRB Memo 3, p. 8.

¹²⁶ *Id.* at 10.

¹²⁷ *Id.* at 16 – 17.

¹²⁸ NLRB Memo 2, p. 15.

¹²⁹ NLRB Memo 3, p. 8 – 9.

¹³⁰ NLRB Memo 2, p. 8; NLRB Memo 3, pp. 3, 9, 12, 14.

¹³¹ *See generally* www.nlr.gov/what-we-do/investigate-charges; www.nlr.gov/node/3947.

¹³² Robert McHale, *Navigating Social Media Legal Risks* 210 (2012) (“*Navigating Social Media Legal Risks*”).

¹³³ *See* “Online Social Networking: A Brave New World of Liability,” 6 (2010), available at www.advisen.com/downloads/SocialNetworking.pdf.

¹³⁴ *Navigating Social Media Legal Risks* 210.

¹³⁵ *Id.*

¹³⁶ *The Social Media Handbook* 173.

¹³⁷ *Id.* at 174.

¹³⁸ *Id.* at 175.

¹³⁹ NLRB Memo 2, p.16; NLRB Memo 3, p. 13.

¹⁴⁰ NLRB Memo 3, p. 20.

¹⁴¹ *Id.*

¹⁴² *Navigating Social Media Legal Risks* 211.

¹⁴³ *Id.*

¹⁴⁴ NLRB Memo 3, p. 20.

¹⁴⁵ *Navigating Social Media Legal Risks* 212.

¹⁴⁶ *Id.* at 213.

¹⁴⁷ NLRB Memo 2, p. 8; NLRB Memo 3, p. 9, 12, 14.

¹⁴⁸ *Navigating Social Media Legal Risks* 213.

¹⁴⁹ *The Social Media Handbook* 178.

¹⁵⁰ *Id.* at 209 – 10.

¹⁵¹ *Id.* at 179; *Navigating Social Media Legal Risks* 217.

¹⁵² *The Social Media Handbook* 209.

¹⁵³ *Navigating Social Media Legal Risks* 220.

¹⁵⁴ NLRB Memo 3, p. 19 (entire policy reprinted in NLRB Memo 3 starting at p. 22).

¹⁵⁵ *Id.* at 22