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Social Media in the Workplace – Potential Traps for Employers and Employees

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TABLE OF CONTENTS

Page

I. Introduction

Social media is an increasingly prevalent aspect of modern life. Facebook is used by over 1 billion people, Linked-In has 175 million users, and Twitter has 140 million users. With its increasing spread, social media is also impacting the workplace. Social media is used by employees to communicate with each other, and as a source of information about co-workers and supervisors.

In view of the rise of social media, employers should familiarize themselves with laws affecting their employees' use of social media, and an employer's ability to regulate and monitor that use. As the use of social media expands, employers should consider implementing social media policies. Employers with such policies in place need to continually review those policies to ensure that they do not run afoul of rapidly evolving laws pertaining to social media.

This paper is an overview of some of the social media issues that employers should be cognizant of and responsive to. While this paper is not intended to serve as a comprehensive guide to the laws affecting social media use in the workplace, and consultation with an attorney is urged with respect to the review and implementation of workplace policies, it is hoped that the paper will familiarize employers with a sampling of some of the more important legal issues relating to social media in the workplace.

II. Social Media and Hiring

Many people make a significant amount of personal information available through social media. Social media thus provides employers with the possibility of getting a more personal view of applicants than might otherwise be possible. But there are legal

issues that may arise if an employer uses social media to conduct background checks on prospective employees.

Most fundamentally, looking up the social media presence of job applicants or interviewees may implicate employment discrimination laws. Federal and state laws generally bar any hiring decisions that are based on certain protected categories, including race, religion, age, gender, disability, and military status. By viewing a job applicant's Facebook page, an employer may discover that the applicant is a member of a protected class, knowledge the employer would not otherwise have during the application process.

For instance, an employer may receive a job application from "Mary Smith" that (properly) contains no information about Mary's race or whether Mary is disabled. If it decides to look up her Facebook page, the employer may discover that Mary is an African-American who is wheelchair bound. Upon learning Mary's race and disability status, if the employer elects not to offer Mary an interview, it faces liability for making an adverse hiring decision based on the knowledge it obtained from Mary's Facebook page that she is a member of a protected class.

In sum, because social media may reveal information about a person's membership in various protected classes, employers who use social media to conduct background checks on prospective employees face potential liability for using information learned in the course of the "social media" background check in a manner that discriminates on the basis of race, color, religion, sex or national origin. Employers who conduct social media reviews must do so in a legitimate manner.

III. State Laws and Employer Social Media Policies

Developing a social media policy for use in the workplace requires sensitivity to numerous and evolving state and federal laws. This section of the paper discusses some state laws that an employer will want to bear in mind in crafting any social media policy. As noted, this paper does not include a discussion of all potentially applicable state and federal laws; therefore, any employer considering implementing a social media policy, or with an existing policy, should consult with an attorney to ensure that the policy is consistent with all applicable state and federal laws.

A. Off-Duty Conduct Laws

Employers with social media policies, or who may consider implementing social media policies, should be aware of what are commonly referred to as "off-duty conduct laws." These laws, present in some form in at least 29 states, prohibit employers from taking adverse employment actions based on an employee's otherwise lawful actions outside the workplace and off work-hours.[1] It is important to consider off-duty conduct statutes because disciplining an employee for an action learned about from social media that is protected by an off-duty conduct statute may subject an employer to liability.

These statutes vary in scope, but the most comprehensive off-duty conduct laws exist in California, New York, Colorado, and North Dakota.[2] For instance, pursuant to New York's statute, an employer cannot take an adverse employment action based on an

[1] Of the 29 states with off-duty conduct laws, (1) 17 states, including Louisiana, have "smokers' rights" statutes, prohibiting discrimination against tobacco users, (2) 8 states have statutes barring discrimination against an employee for using any lawful "product" outside of the workplace, and (3) 4 states have statutes providing protections to employees who engage in any "lawful activity" outside of the workplace.

[2] *See, e.g.*, CAL. LAB. CODE § 96(K) (2004); N.Y. LAB. LAW § 201-D (2004); Colo. Rev. Stat. § 24-34-402.5 (2004); and N.D. CENT. CODE § 14-02/4- 03 (2003).

employee legally using consumable products or legally participating in recreational activities outside of work hours, off of the employer's premises, and without use of the employer's equipment or other property.[3]

Colorado's off-duty conduct law, known there as a "Lawful Activity Statute," was recently at issue in a case involving an employee's use of medical marijuana. In *Coats v. Dish Network, LLC,* Brandon Coats was fired by Dish Network after testing positive for marijuana in a randomly conducted drug test. Coats, paralyzed in a car accident as a teenager, possessed a medical marijuana license issued by the State of Colorado. There were no allegations that he was impaired while on the job and by all accounts he was a good employee.

After being fired, Coats filed suit alleging that his termination violated Colorado's Lawful Activity Statute prohibiting an employer from discharging an employee for "engaging in any lawful activity off the premises of the employer during non-working hours," subject to certain exceptions.[4] Coats argued that because his use of medical marijuana was legal under Colorado law, his discharge violated the state's Lawful Activities Statute. Dish Network countered that since it remained illegal under federal law, marijuana use did not constitute "lawful" activity protected by the Lawful Activities Statute. The trial court and Colorado Court of Appeals agreed with Dish Network, holding that to be "lawful" under Colorado's Lawful Activities Statute, an activity must be lawful under both federal and state law.

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[3] *See* N.Y. LAB. LAW § 201-D. Courts have applied a narrow definition to "recreational activity." For instance, it has been held that a romantic relationship is not a "recreational activity" that is entitled to protection under the law. *State v. Wal-Mart Stores,* 207 A.D.2d 150 (N.Y. App. Div. 3d Dep't 1995).

[4] *Coats v. Dish Network, LLC*, -- P.3d – 2013 1767846 WL (Colo. App. Apr. 25, 2013).

Employers should take note of *Coats* because of the growing number of states legalizing the use of medical marijuana, or, marijuana generally. To date, state courts addressing the issues raised by *Coats* have sided with employers. At least two states, however, have passed laws prohibiting an employer from firing a user of medical marijuana unless it is shown that the employee was impaired while on the job (Arizona and Delaware).

Texas does not have an off-duty conduct statute. According to the Texas Workforce Commission, it is not unlawful under Texas law for an employer to take an "action against an employee for off-duty conduct if such conduct has the effect of damaging company business or work relationships."[5] Louisiana does have an off-duty conduct statute, but it applies solely to tobacco use, providing that employers cannot make personnel decisions based on an employee's use of tobacco, so long as that use complies with applicable laws and any workplace policy regulating tobacco use.[6]

Employers' social media policies must be crafted to ensure that they are in compliance with applicable state off-duty conduct statutes. Employers should also be aware that certain states have statutes that protect employees for exercising their political beliefs, and that these statutes may include protections for certain social media activities, for instance, blogging.[7]

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[5] *See Social Media Issues*, Tex. Workforce Commission, http://www.twc.state.tx.us/news/efte/social_media_issues.html (last visited Oct. 11, 2012). The Workforce Commission's guidelines do recognize that, as discussed below, an employee's actions may be protected under the NLRA. *See id.*

[6] *See* LA. REV. STAT. § 23.966 (2004)

[7] *See, e.g.*, CAL. LAB. CODE § 1101-02; N.Y. LAB. CODE § 201-d; and CONN. GEN. STAT. ANN. § 31-51q.

B. Social Media Privacy Laws

Employers should also be aware of increasing legislation governing social media privacy. Social media privacy issues, in part, address whether an employer may require an employee to provide log-in information to his personal social media accounts.

In 2012, Maryland became the first state to prohibit employers from requiring employees or job applicants to disclose their personal social media log-in information.[8] The legislation was spurred by reports that the Maryland Department of Corrections asked job applicants to provide their Facebook usernames and passwords. Maryland's law, among other things, prohibits employers who do business in the state of Maryland from requesting a user name, password or any other means of accessing a personal account or service through an electronic communications device, including social media accounts.[9]

Since Maryland's adoption of the first social medial privacy law in 2012, Illinois, California, Michigan, Washington, New Mexico, Nevada, Arkansas, Oregon, and Utah have enacted similar laws. Like Maryland's statute, the laws enacted by other states typically prohibit employers from asking employees or job applicants for the usernames and passwords to their social networking accounts. Several of the statutes also prohibit employers from compelling or coercing an employee or job applicant into adding an employer as a friend or contact on the employee's social networking account and provide that employers may not require an employee or job applicant to alter the privacy settings on their social media accounts so that third parties may view their account's contents.

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[8] Md. S.B. 433, signed into law May 2, 2012 and effective October 1, 2012.

[9] *See id.*

In their own recent legislative sessions, Louisiana and Texas both considered social media privacy legislation. The legislation proposed in Texas would have prohibited an employer from requiring an employee or job applicant to disclose any means of accessing their personal social media accounts. The bill contained certain exceptions, allowing an employer to access personal social media accounts if the employer held a reasonable belief that the employee had violated state or federal law or an employment policy of the employer. In addition, the bill specified that its provisions did not apply to an employer's lawful workplace policies governing employee usage of employer provided electronic communication devices. The bill was passed by the Texas House of Representatives, but failed to make it out of committee in the Senate. Although the bill was not enacted into law, nor was a similar bill in Louisiana, its consideration does further illustrate the growing attention state legislatures are giving to social media privacy laws.

In view of the rapid expansion of state social media privacy laws, employers are well advised to avoid asking for employee or job applicant usernames and passwords to social networking sites. Even in states where social privacy laws do not currently exist, asking an applicant or employee for access to such personal information seems to do more harm than good, especially with respect to an employer's current workforce.

IV. The National Labor Relations Act and Employer Social Media Policies

The National Labor Relations Act ("NLRA") was passed in 1935, long before the development of and widespread use of social media. So it may be surprising to learn that the NLRA is playing an increasingly important role with respect to the legality of

employers' social media policies and actions taken by employers with respect to those policies.

The NLRA applies to most employees in the private sector.[10] It was passed primarily for the purpose of protecting the rights of employees to engage in concerted activity such as unionization and collective bargaining. Section 7 of the NLRA expressly protects employees' rights to undertake concerted activities that are related to improving the terms and conditions of their workplace.[11] Importantly, the NLRA's protections regarding concerted activities extend to both nonunion and unionized private sector employees.

The NLRA is enforced by the National Labor Relations Board ("NLRB" or the "Board"), an independent federal agency whose five-person governing board, and general counsel, are political appointees. According to the NLRB, an employee's actions are "concerted," and thus potentially protected under the NLRA, when the employee acts with the authority of other employees, seeks to initiate or induce group action among employees, or brings employee complaints to the attention of management. Throughout its existence, the NLRB has uniformly found that an employer violates the NLRA if it takes actions that "reasonably tend to chill employees in the exercise of their Section 7 rights." Such actions by employers are considered unfair labor practices under the NLRA

[10] *See* 29 U.S.C. §§ 151-169 (2010). There are exceptions for agricultural workers, independent contractors, and supervisors (with certain limitations).

[11] *See id.* § 157. The NLRA prohibits employers from monitoring or conducting surveillance of employee union activities, whether on or off the job. Monitoring or conducting surveillance of workers' "concerted activity" with respect to their work conditions or terms of employment is also prohibited.

and may subject an employer to make-whole remedies such as reinstatement and back pay for discharged workers.

Recently, the NLRB has heard several unfair labor practice cases involving employer social media policies. Two issues present themselves in the cases: first, whether a disciplinary action taken by an employer because of an employee's use of social media violates the protection of "concerted activity" afforded employees by the NLRA, and second, whether an employer's social media policy itself conflicts with the NLRA. Due to the NLRB's growing activity in the area of social media, it is in the interest of employers, particularly those with social media policies or considering them, to familiarize themselves with the types of policies and actions that are lawful or protected. With this in mind, recent NLRB decisions in the area of social media, and NLRB memoranda on social media, are discussed below.[12]

[12] In *New Process Steel, L.P. v. NLRB*, the United States Supreme Court held that the Board cannot act without a quorum of three members. – U.S. –, 130 S. Ct. 2635, 2642-43 (2010). The significance of *New Process Steel's* holding came to the forefront in *Canning v. NLRB*, a January 25, 2013 decision by the U.S. Court of Appeals for the D.C. Circuit. 705 F.3d 490 (D.C. Cir. 2013). In *Canning*, the D.C. Circuit invalidated three recess appointments to the Board made by President Obama. According to the D.C. Circuit, the appointments exceeded the President's authority under the Recess Appointment Clause of the U.S. Constitution because they were made when Congress continued to hold *pro forma* sessions and not during an "inter-session" recess. Under the holding in *Canning*, the NLRB has not had a proper quorum since January 4, 2012. Therefore, any official action taken by the Board since that time is potentially invalid. An employer who received an adverse decision by the Board after January 4, 2012 may consider filing a petition for review with the D.C. Circuit (any official decision by the NLRB can be appealed to the D.C. Circuit, although the Board can petition for a another circuit court to hear a case). It should be noted, however, that the Board takes the position that *Canning* applies only to the facts of that specific case and contends that the recess appointments in question will ultimately be upheld by the United States Supreme Court which has granted the Board's writ of certiorari and agreed to hear the case. On July 15, 2013, the U.S. Senate reached an agreement that would allow an up or down vote on President Obama's Board nominees. If his nominees are approved, the Board would have a quorum of members approved by the Senate and it is possible that the newly constituted Board could take action to ratify decisions made when, according to *Canning*, no quorum existed. It is likely that legal action against the ratification of past decisions would occur. In addition, as noted, the Board's appeal of *Canning* presently remains to be decided by the U.S. Supreme Court.

A. *Hispanics United of Buffalo, Inc.*—NLRB Orders Reinstatement of Five Employees Discharged for Comments Posted on Facebook

On September 2, 2011, an NLRB administrative law judge issued one of the first ever decisions involving the NLRA and social media, finding that an employer violated the NLRA by discharging five employees for comments made by the employees on their Facebook pages during non-working hours and ordering that the employees be reinstated with back pay.[13] The Board affirmed the administrative law judge's rulings, findings, conclusions, and recommendations in a decision and order issued on December 14, 2012.[14]

An employee of Hispanic United of Buffalo ("HUB"), a non-profit social service company, criticized the job performance of another employee. The criticized employee then went on Facebook, outside of work hours, and posted a message stating that she was fed up with the employee being critical of her and asking other co-workers their opinions. Four co-workers responded to the post, and, using language that included various obscenities, stated that they too were angry at the employee in question.

When the executive director of HUB learned of the five employees' Facebook posts, she discharged the employees, contending that their posts violated HUB's policy of "zero tolerance" policy against bullying and harassment. The discharged employees filed

[13] *Hispanics United of Buffalo, Inc.*, Case No. 3-CA-27872 (Sept. 2, 2011).

[14] *Hispanics United of Buffalo, Inc.*, 359 NLRB No. 37 (2012). Pursuant to the NLRB's procedures, an employee who wishes to allege that an employer committed an unfair labor practice in violation of the NLRA must file a charge with one of the NLRB's regional offices. The charge is then investigated by the regional office who may issue a complaint and notice of hearing. In the event it is not withdrawn or settled, the complaint proceeds to a trial heard by an administrative law judge ("ALM"). The parties to the trial may file exceptions to the ALM's findings; these exceptions are then reviewed by the Board (if no exceptions are filed, the ALM's decision becomes the decision of the Board). The Board will affirm the ALM's findings and adopt the ALM's proposed order, remand the case to the ALM for further action, or dismiss the complaint. Decisions of the Board are subject to enforcement and review by federal appellate courts.

a complaint with the NLRB, and an administrative law judge agreed that the employees' Facebook postings were protected concerted activity under the NLRA, and that HUB had therefore violated the NLRA by discharging the employees. In reaching his holding, the administrative law judge noted that employees' discussions about criticisms of their job performance are protected under the NLRA, even if the criticisms are made by a co-worker as opposed to a supervisor. According to the judge, "the discriminatees herein were taking a first step towards taking group action to defend themselves against accusations they could reasonably believe [their colleague] was going to make to management. By discharging the discriminateees . . . [HUB] prevented them [from] taking any further [concerted action] vis-à-vis [their colleague's] criticisms." In his preliminary order, the administrative law judge ordered that HUB reinstate the discharged employees and to pay them back pay.

The judge in *Hispanics United* noted that the Facebook posts were not made at work and occurred outside working hours. Furthermore, he found that although the postings included obscenities, they were not so extreme as to lose protection under the NLRA, by, for instance, constituting threats. The judge additionally noted that the comments in question did not violate HUB's anti-harassment policy because they had no nexus to any characteristic protected under the policy, such as race or gender.

In its Decision and Order issued on December 14, 2012, the Board, as noted, affirmed the administrative law judge's decision and adopted his recommended order that the employees be reinstated with back pay. The Board noted that that Facebook comments in question could not be construed as bullying and harassment under HUB's policy because that policy expressly referred to race, religion, national origin, age,

disability, or other protected status, and the comments did not fall in those categories. In addition, the Board pointed out that even legitimate managerial concerns to prevent bullying and harassment do not justify policies or actions that discourage the free exercise of employees' Section 7 rights.

The import of *Hispanics United*, at least in part, is that an employer cannot take adverse employment actions against employees who, outside of work hours, post messages to social media that are critical of a co-worker and could reasonably be construed as constituting protected "concerted activity." By comparison, as evidenced in a decision issued by the NLRB shortly after *Hispanics United*, an employee who makes postings on Facebook after work hours in which he alone "rants" about his supervisor will not necessarily constitute protected "concerted activity."[15]

B. Knauz BMW—Board Upholds Discharge of Employee for Social Media Activity but Orders Revisions to Social Media Policy

Like *Hispanics United*, *Knauz BMW* involved an employee who brought a charge with the NLRB claiming that his termination for postings on Facebook constituted unfair labor practices. An administrative law judge issued his decision and recommendations

[15] *Frito Lay, Inc.*, Case No. 36-CA-10882 (Sept. 19, 2011). In *Frito Lay*, the employee, shortly after leaving work, posted profanity laced messages on his Facebook page criticizing his supervisor for not allowing him to leave work early due to illness without being docked time. In part because no other employees responded to his posts, the NLRB concluded that the posts constituted unprotected "ranting" as opposed to "concerted activity." In another example illustrating that run-of-the mill griping is not protected by the NLRA, the Board's Office of General Counsel recently released an Advice Memorandum concluding that an employee was not engaging in protected when she posted comments to a Facebook group including several co-workers taunting her employer to "FIRE ME . . . Make my day." *Tasker Healthcare Group d/b/a Skinsmart Dermatology*, Case No. 04-CA-094222 (May 16, 2013). When one of the co-workers who participated in the Facebook group showed the comments to the employer the worker who posted the comments was fired. She then filed a charge with the NLRB alleging that her termination violated the NLRA. In its Advice Memorandum, the Office of General Counsel concluded that the employee's postings were not "concerted activity," and thus not protected, because they did not involve shared employee concerns over the terms and conditions of employment.

on September 28, 2011 and the Board issued its decision and order in the case on September 28, 2012. Knauz BMW illustrates that not all postings on Facebook constitute "concerted activity" that is protected under the NLRA, but that even if an employees' actions are not protected, an employer's social media policy may nevertheless require revision in order to comply with the NLRA.

Knauz BMW involved a car salesman, Robert Becker, who worked at a BMW dealership owned by Knauz. Knauz also owned a Land Rover dealership adjacent to the BMW dealership where Becker worked. To introduce a redesigned BMW 5 series to its customers, Knauz BMW held an event at the dealership. Becker was not satisfied with the food Knauz provided for the event, and posted comments on his Facebook page reflecting his dissatisfaction and noting that he was "happy to see that Knauz" went "all out" for the event by providing potato chips, hot dogs, and cookies from Sam's Club. Becker also posted pictures of other salespersons at the event appearing to mock the food provided and his co-workers posted comments to Becker's Facebook page also poking fun at the event.

A few days after the event, at the adjacent Land Rover dealership, also owned by Knauz, a salesperson allowed a 13 year old boy to sit behind the wheel of a Land Rover vehicle. The boy stepped on the gas pedal and caused the vehicle to accelerate into a pond. Although no one was seriously injured, the salesperson was ejected from the vehicle into the pond and the vehicle was totaled. Becker took pictures of the incident and posted them on his Facebook page under a caption stating:

> This is what happens when a salesperson sitting in the front seat (former salesperson, actually) allows a 13 year old boy to get behind the wheel of a 6000 lb. truck built and designed to drive over pretty much anything. The kid drives over his father's foot

> and into the pond in all of about 4 seconds and destroys a $50,000 truck. OOOPS!

When his supervisors learned of Becker's Facebook postings regarding the BMW event and Land Rover incident, Becker was terminated. Knauz BMW made clear that it discharged Becker not for his postings about the BMW event, but solely for his postings about the Land Rover accident. Knauz BMW believed that the Land Rover postings reflected a lack of professionalism by Becker in that they made light of a serious incident that resulted in significant property damage and only narrowly missed causing serious personal injury.

Becker filed a charge with NLRB contending that his discharge constituted an unfair labor practice. In his decision in the case, the administrative law judge agreed that Becker's posting regarding the BMW event were protected "concerted activities" because his dissatisfaction with the food was shared by other salespersons and was potentially tied to his compensation in that attendees underwhelmed by the event may be less likely to return to the dealership to purchase a car from Becker. The judge, however, agreed with Knauz that Becker's postings about the Land Rover incident were not "concerted activities," because they did not include discussion with any other employee and did not bear on the terms and conditions of employment.

Concluding that he was fired because of the Land Rover postings, and not the BMW event postings, the judge concluded that Becker's discharge did not violate the NLRA. The judge, did, however, find that a rule in Knauz BMW's employee handbook violated Section 7 of the NLRA and required revision. The rule in question provided as follows:

> Courtesy: Courtesy is the responsibility of every employee. Everyone is expected to be courteous, polite and friendly to customers, vendors, suppliers, as well as to their fellow employees. No one should be disrespectful or use profanity or any other language which injures the image or reputation of the dealership.

In his decision, the administrative law judge found that the "courtesy rule's" prohibition on "disrespectful" conduct and "language which injures the reputation of the Dealership" was unlawful because it could reasonably be construed by employees to encompass statements and actions about the terms and conditions of their employment.

The Board, in its September 28, 2012 decision and order, agreed with the judge's decision, noting that the "courtesy rule" failed to contain language making clear that communications protected by Section 7 were exempt from the rule's broad reach.[16] In addition, the Board's decision stated that ambiguous employer rules that could be construed to prohibit protected concerted activity are construed against the employer. The fact that ambiguous rules are construed against the employer places an even greater premium on the need to carefully draft social media policies.

C. Costco—NLRB Orders Revision of Employer Social Media Policy

Decided by the Board on September 7, 2012, *Costco* is the first NLRB case where the Board found an employer's social media policy violated the NLRA.[17] The case is also important for the insight it provides into how the NLRB determines whether an employer's social media policy comports with the NLRA.

[16] Without comment, the Board adopted the administrative law judge's findings and conclusions regarding Becker's termination.

[17] *Costco Wholesale Corp.*, 358 N.L.R.B. No. 106 (Sept. 7, 2012).

At issue in Costco, in part,[18] was a provision in its employee agreement providing as follows:

> Any communication transmitted, stored or displayed electronically must comply with the policies outlined in the Costco Employee Agreement. Employees should be aware that statements posted electronically (such as to online message boards or discussion groups) that damage the company, defame any individual or damage any person's reputation or violate the policies outlined in the Costco Employment Agreement may be subject to discipline, up to and including termination of employment.

The provision was challenged by a union who sought to organize workers at a Costco site where the policy applied. In its decision and order on the policy, the Board agreed with the union that the policy violated the NLRA. Specifically, the Board found that employees "would reasonably construe" the policy to prohibit protected activity such as complaints about wages, hours, and working conditions. The Board noted that although it did not expressly prohibit employees from complaining about their working conditions, and thus violating the NLRA, the ambiguity created by the policy's broad language could be construed to prohibit protected activity and thus the policy was to be construed against Costco.

In its decision, the Board noted that Costco's policy failed to include language restricting its application to conduct not protected by the NLRA. Additionally, the Board indicated that the inclusion of a provision disclaiming application of the policy to any activity protected by the NLRA may have resulted in the policy being upheld. Interestingly, the NLRB's Office of General Counsel had previously issued memoranda,

[18] In addition to ordering revision of the Costco's electronic posting rules, the Board also ordered Costco to revise certain other rules in its employee agreement, including one that prohibited employees from discussing other employees' "sick calls, leaves of absence, FMLA call outs, ADA accommodations, workers' compensation injuries, and personal health information."

discussed below, suggesting that disclaimers would not save an otherwise overly broad policy. It remains unclear how the Board will treat disclaimer provisions going forward.[19]

D. Recent Memoranda on Social Media Cases by the Office of the General Counsel for the NLRB

In addition to the sampling of Board decisions and orders discussed above, the NLRB's Office of General Counsel previously released three memoranda discussing various instances in which the NLRB has concluded that employer social media policies violate the NLRA.[20] The matters discussed in the memoranda typically involve cases settled prior to a formal decision by an administrative law judge or by the Board. Due to the fact that such decisions are now being promulgated, as evidenced by the cases

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[19] Other recent NLRB decisions involving social media policies include *EchoStar DirecTV*, and *Dish Network*. In *EchoStar*, an administrative law judge found that a provision of the company's social media policy prohibiting employees from making disparaging remarks about it on social media sites violated the NLRA for being overly broad and failing to include exceptions for speech critical of the company but protected by the NLRA. The decision was affirmed by the Board. *EchoStar Techs., LLC*, N.L.R.B. Case No. 27-CA-066726 (A.L.J., Sept. 20, 2012), *aff'd* (N.L.R.B., Nov. 1, 2012, *available at* http://www.nlrb.gov/case/27-CA-066726. In DirecTV, the Board found that a company policy restricting employees from blogging or posting messages about non-public company information was overly broad in that it, for instance, prohibited employees from posting messages about co-workers wages and performance ratings. The decision reflects the fact that restrictions on the ability of employees to discuss wages and working conditions violate the NLRA. *DirecTV Holdings, LLC*, 359 N.L.R.B. No 4 (Jan. 25, 2013). In *Dish Network*, the Board affirmed a decision by an administrative law judge that a provision in the company's employee handbook prohibiting employees from making disparaging or defamatory comments about Dish Network was overbroad because it chilled speech protected by Section 7. The Board also found that a provision in the employee handbook prohibiting employees from posting negative commentary about the company during "Company time" was overbroad because it did not clarify that protected posts could be made during breaks or other nonworking hours while at work. *Dish Network Corp.*, 359 N.L.R.B. No. 108 (Apr. 30, 2013).

[20] *See NLRB Office of the General Counsel, Memorandum OM* 12-59, May 30, 2012; *NLRB Office of the General Counsel, Memorandum OM* 12-31, January 24, 2012; and *NLRB Office of the General Counsel, Memorandum OM* 11-74, August 18, 2011. Lafe Solomon, a career NLRB attorney and 1976 graduate of Tulane University Law School, was named Acting General Counsel by President Obama on June 21, 2011. Solomon's nomination to serve as General Counsel was sent to the Senate on January 5, 2011 and is still pending.

discussed above, the memoranda are perhaps of slightly reduced significance. Nevertheless, employers with social media policies, or considering them, should familiarize themselves with the memoranda, particularly in view of the fact that the memoranda reflect the NLRB's increasing role and vigilance in the area of employer social media policies.

The memoranda are not discussed in detail here, but some examples of the cases outlined in the memoranda are worth noting:

- In one case, the NLRB found a provision of an employer's social media policy unlawful that prohibited employees from making disparaging remarks about the employer on social media because the policy did not expressly state that the policy did not apply to employees' rights to discuss the terms and conditions of their employment on social media.

- In another case, the NLRB determined that a car dealership wrongfully terminated an employee who posted comments on Facebook criticizing a sales event held by the dealership. According to the NLRB, the employee's comments related to the terms and conditions of employment because they discussed the payment of sales commissions.

- The NLRB found that a employer social media policy instructing employees that "offensive, demeaning, abusive or inappropriate remarks are as out of place online as they are offline" was overbroad and unlawful because it could be construed to include protected criticisms of an employer's labor policies or treatment of employees.

- The NLRB found that a provision in an employer social media policy instructing employees "to think carefully about friending co-workers" was overbroad and unlawful because it discouraged communications among workers, and therefore interfered with the ability of employees to engage in protected concerted activity as allowed by Section 7.

In sum, employers with social media policies, or who may be considering them, must be aware of the protections afforded employees under Section 7 of the NLRA. This

is particularly true in view of the NLRB's recent aggressive posture in the area of employer social media policies, and its broad interpretation of the NLRA in the social media context. Generally, employers should be aware that their employees' social media activity will be protected if it concerns wages, hours, benefits, or other terms and conditions of employment. Additionally, any policy that broadly prohibits employees from posting "disparaging" comments about their employer are almost certainly in violation of the NLRA, particularly if the policy does not include express language stating that the concerted activities protected by the NLRA are exempted from the policy.

V. Harassment and Discrimination Issues to Consider with Respect to Employer Social Media Policies

Various state and federal laws protect an employee's right to work in a workplace that is free from discrimination and harassment. Social media, as countless stories in the media illustrate, provides a forum in which much harassment occurs. Therefore, in crafting a social media policy, employers must pay special attention to addressing harassment and discrimination by employees or supervisors through various social media platforms.

The need for employers to be proactive with respect to harassing actions by their employees on social media is directly related to the fact that employers can, in certain circumstances, be liable for their employees' social media postings that occur outside the workplace. For instance, if an employee is harassing a co-worker on Facebook, particularly with respect to race or sex, and the employer knows or should know of the

harassment, the employer could be vicariously liable for the harassment if it fails to take corrective action.[21]

Because of the possibility of vicarious liability for an employee's harassing or discriminatory postings on social media that are directed to other employees, employers' social media policies should include provisions prohibiting such harassment and stating that corrective action will be taken for any online behavior that rises to the level of harassment or discrimination and that is connected to the workplace. In this regard, employers should be aware of state laws directed toward online harassment, and reference such laws in their social media policies. For instance, in 2009, Texas amended its penal code statute to make it a third-degree felony to use a fake name or identity to create a Web page or post messages on a social networking site without consent and "with the intent to harm, defraud, intimidate, or threaten any person."[22]

[21] *See, e.g., Blakey v. Continental Airlines, Inc.*, 751 A.2d 538, 552 (N.J. 2000) (holding employer liable for online harassment by its employees of co-worker when employer was on notice of harassment and took no action to stop it and when harassment was sufficiently connected to the workplace). Employers should also be aware of the possibility of vicarious liability in situations wherein an employee is using the employer's computer system for harassing or illegal purposes. There is some authority that the Communications Decency Act, 47 U.S.C. § 230 provides immunity to employers who provided their employees with Internet access. Immunity may, however, not be afforded in circumstances wherein an employer has a duty to act. *Compare Delfino v. Agilent Technologies*, 145 Cal. App. 4th 790 (2006) (holding that employer was immune from liability pursuant to Communications Decency Act when employee used employer's computer system to send threatening emails, but also noting that employer was unaware of emails and that employee was acting outside scope of employment) *with Doe v. XYC Corp.*, 887 A.2d 1156 (N.J. App. Ct. 2005) (holding that employer could be found liable for negligence when employee was using employer provided computer to view child pornography and rejecting employer's claim that its privacy policy prevented it from investigating the employee's activities).

[22] Tex. Pen. Code Ann. § 33.07 (Vernon 2010).

VI. Social Media and an Employee's Right to Privacy

The relationship between social media and an individual's right to privacy remains an unsettled and undeveloped area of law. With workplace norms regarding social media and other technologies still evolving, clearly defined laws with respect to privacy and social media in the workplace are likely to continue to evolve in the immediate future. Consequently, employers need to tread lightly and cautiously when considering any action that might be construed as infringing on an employee's right to privacy as it relates to social media. The following provides some guidance to employers with respect to navigating the area of social media and privacy in the workplace.

First, one needs to consider the source of an employee's right to privacy (if any). The Fourth Amendment to the United States Constitution prohibits unreasonable *government* searches and seizures; however, the Fourth Amendment does not directly apply to private employers. Certain states, however, recognize the common law tort of invasion of privacy (including Texas) or have adopted their own constitutional or statutory rights to privacy. Although detailed discussion of the laws that may give rise to a right of privacy is beyond the scope of this paper, the touchstone of the laws is generally whether a reasonable expectation of privacy exists. In other words, if one does not have a reasonable expectation of privacy, both objectively and subjectively, then they can have no viable claim that their privacy rights were violated.[23]

[23] In *City of Ontario v. Quon*, the United States Supreme Court held that a public employer's review of an employee's text messages on an employer issued pager was not an unreasonable search under the Fourth Amendment because the search was motivated by a legitimate work purpose and was not excessive in scope. In reaching its holding, the Court assumed, without deciding, that the employee did have a reasonable expectation of privacy with respect to text messages sent to and from his employer issued pager. The Court also stated that search at issue would have been considered reasonable and normal in a private employment setting. — U.S. —, 130 S.Ct. 2619 (2010).

Second, following from the fact that privacy rights are generally contingent on the existence of a reasonable expectation of privacy, employers should take steps to ensure that their actions do not violate one's reasonable expectations of privacy. For instance, written policies informing employees that they have no reasonable expectation of privacy when using employer provided email accounts or browsing the internet on a work computer will generally defeat any claim of such an expectation. Similarly, courts are typically deferential to employers who engage in monitoring of work email accounts and internet use, so long as the employer has disclosed its monitoring policy to employees, and thus diminished any expectation of privacy.[24]

Third, while written policies can ensure that employees have no reasonable expectation of privacy in work email or internet use, the issue is a bit murkier when it comes to social media. As a general rule, if an employee's social media presence is available to anyone who wants to look, it is unlikely that the employee could successfully contend that they had a reasonable expectation of privacy in their postings. Conversely, when an employee's social media is unavailable to the general public, a reasonable expectation of privacy may exist, particularly in those states that have enacted laws

[24] The importance of non-ambiguous, clear policies regarding monitoring of employee communications on employer networks was illustrated recently in a case involving Harvard University. Administrators at Harvard searched the emails of some faculty members and resident deans as part of an investigation into a student cheating scandal. When they learned of the searches the faculty members and resident deans vehemently protested the searches, claiming that they had a reasonable expectation of privacy in their emails and that a university policy provided that faculty members were entitled to advance notice of any search. A law firm hired by Harvard to investigate the matter recently issued a report concluding that the administrators who conducted the searches believed they were acting in compliance with applicable policies but found that Harvard's policies on monitoring communications were inadequate, overlapping, and sometimes contradictory.

preventing employers from asking for or otherwise obtaining an employee's social media username and password.[25]

A recent case from federal district court in Nevada illustrates some of the issues related to social media and expectations of privacy. In *Rosario v. Clark County School Dist.*, Rosario, a student posted several profanity laden tweets about school officials. The school, after learning of the tweets, disciplined Rosario who then brought suit arguing, in part, that the public school district violated his Fourth Amendment rights when it "searched" his Twitter account by reading his tweets, obtained when Rosario's Twitter followers gave the tweets to school administrators. The Court rejected Rosario's claim of a Fourth Amendment violation, holding that Rosario had no reasonable expectation of privacy in the tweets because his Twitter account's privacy settings were set to public. In the Court's view, when a person with a public privacy setting tweets, that person intends that anyone who wants to read the tweet may do so, and thus, no reasonable expectation of privacy exists. The Court further noted that although one may have a more colorable argument of a reasonable expectation of privacy when his privacy settings are set to private, tweets are nevertheless disseminated to the public and not protected by the Fourth Amendment because when one tweets to their private friends, that person takes on

[25] With respect to monitoring, employers must be careful to not run afoul of various laws protecting employees' electronic communications. For instance, the Stored Communications Act ("SCA") prohibits the knowing or intentional unauthorized access to "a facility through which an electronic communication service is provided." *See* 18 U.S.C. §§ 2701, 2707. In addition to the SCA, employers should be aware of the Electronic Communications Privacy Act (commonly known as the "Wiretap Act"). *See* 18 U.S.C. § 2510 et seq. The Wiretap Act bars the intentional interception of electronic communications. The Act, however, has been interpreted to mean that an interception occurs only if it is contemporaneous with the communication itself.

the risk that the recipient of the tweet may turn it over to a third-person, including the government.[26]

VII. Federal Trade Commission Regulations with respect to Postings about an Employer's Products or Services

It has become increasingly common for companies to hire marketers to blog positively or create buzz about their products and services.[27] Many employees also use social media to post favorable reviews or comments about their employer's products and services. Sensitive to the possibility that such practices may mislead consumers and constitute false advertising, the Federal Trade Commission ("FTC") promulgated guidelines concerning the use of social media by employees (or agents of employers) to discuss their employer's products and services.[28] In crafting any social media policy, employers need to be aware of these FTC guidelines.

Basically, the guidelines provide that when an employee endorses his employer's products or services using social media, the employee must reveal that he works for the company whose products or services he is endorsing. Failure to provide such a disclaimer can result in liability for both the employee and employer in the event that the statements in question are false or unsubstantiated.[29] Employers should be aware that the FTC is actively enforcing its regulations regarding the endorsement of products and

[26] *Rosario v. Clark County School Dist.*, No. 2:13-CV-362 JCM (PAL), WL 3679375 (D. Nev. July 3, 2013).

[27] The FTC promulgates regulations applicable to online and mobile advertising that cover social media marketing by marketers and advertisers. These regulations are commonly referred to as the Dot Com Disclosures and were updated in 2013.

[28] 16 C.F.R. § 255 et seq.

[29] The FTC's guidelines do not create a private cause of action; however, the FTC itself may investigate or file suit against offending employees and employers.

services on social media. For instance, Legacy Learning Systems ("LLS") recently agreed to pay a $250,000 fine to settle a lawsuit brought by the FTC alleging that LLC used outside marketing services to post positive reviews on various social media sites of LLS's guitar lesson DVDs without requiring the marketers to disclose that they were receiving commissions from LLS for sales connected to their endorsements.[30]

In its comments to the guidelines, the FTC notes that it will consider an employer's establishment of appropriate procedures in determining whether to seek legal action against an employer because of inappropriate endorsements or testimonials made by employees. The comments further state that the FTC would be "unlikely" to take action against an employer for the conduct of a single "rogue" employee; this comment, however, remains to be tested.

VIII. Recommendations for Employer Social Media Policies

This paper does not present an exhaustive list or discussion of the laws that may be implicated by an employer's social media policy. Considering rapidly evolving social media technology and legislation, any such discussion would risk being outdated. Thus, employers with or considering social media policies should consult an attorney to ensure that their policies are consistent with existing (and rapidly evolving) laws affecting social media. With this caveat in mind, the following non-exhaustive list of guidelines provides a general framework for an effective employer social media policy and its implementation:

- Employers with social media policies must ensure that their policies do not prescribe employee social media use protected by the NLRA. As a general rule, the policy cannot restrict

[30] FTC enforcement actions can also lead to consumer protection lawsuits by state attorneys general and consumer-based class action lawsuits.

employees from using social media to discuss the terms and conditions of their employment. Discussions on social media by employees are considered "concerted activity" and thus a policy restricting such discussions would constitute an unfair labor practice under the NLRA.

- Employers should know that any ambiguity in a social media policy is construed against them. Broad polices are therefore at higher risk of violating the NLRA because they are more likely open to differing interpretations. If an employee could reasonably construe a provision in a social media policy to prohibit using social media to discuss the terms and conditions of employment, the policy does not comport with the NLRA. Policies with blanket prohibitions against certain activities—e.g. talking to the press, talking about co-workers—are likely to violate the NLRA as are policies with language subject to broad interpretation such as treating one's employer with "courtesy." The focus of any employer social media policy should be on restricting the use of social media for purposes that are clearly not protected by the NLRA.

- Although the issue is not settled as to whether such language will protect an employer against a finding that it engaged in an unlawful labor practice, recent Board decisions indicate that employers should include in their social media policies language restricting their application to conduct not protected by the NLRA. Employers' social media policies should also include a provision disclaiming application of the policy to any activity protected by the NLRA.

- Social media policies should include statements barring harassment of co-workers using social media and providing that employees must report any such harassment. Similar statements regarding discrimination should be included.

- Employers should make sure that any policy does not restrict social media activity in a manner that conflicts with off-duty conduct laws. Employers considering taking action against an employee for behavior observed on social media should also be certain that the behavior in question is not protected by an off-duty conduct law. Off-duty conduct laws currently exist in some form in 29 states; Louisiana's off-duty conduct law applies only to the use of tobacco products and prohibits employers from making personnel decisions based on the use of tobacco so long as that use complies with applicable laws and workplace policies.

- Workplace policies networks and equipment should clearly state that employees have no reasonable expectation of privacy when using employer owned networks and equipment. The policies should also state that all communications on company systems may be monitored. The best practice is for employers to have their employees sign the policy to acknowledged their receipt and review of it.

- Any monitoring that does occur must comport with applicable federal and state laws; do not monitor through the use of deception (e.g. a false identity) or by obtaining passwords for an employee's social media accounts from a friend or co-worker of the employee. Employers need to be aware of state social media privacy laws; if an employer is in a state with such a law, that employer cannot ask for an employee or job applicant's social media passwords. Regardless, the best practice is to not ask for these passwords unless a legitimate work-related reason exists for doing so and doing so is permitted by law.

- Do not discipline an employee for any statements or behavior you see in their personal social media profiles without first consulting with legal or human resource professionals.

- Social media policies need to take into account guidelines promulgated by the FTC regarding employee use of social media to endorse employer products or services. The policy should inform employees that if they endorse any of the employer's products or services online, they must identify themselves in the posting as an employee.

- Social media policies should address issues regarding intellectual property by specifying that any use of social media must comply with applicable restrictive covenants and confidentiality agreements.

- In the hiring context, do not conduct social media reviews of job applicants; limit such reviews to background checks on finalists for job openings who have already been interviewed. Additionally, for companies with HR staffs, the best practice is for HR personnel to conduct the social media review.