

Exploring the NLRB's Jurisprudence Concerning Work Rules: Guidance on the Limits of Employer Policy to Regulate Employee Activity on Social Media

By JESSICA A. MAGALDI *and* JONATHAN S. SALES*

Introduction

DESPITE THE PREVALENCE OF SOCIAL MEDIA TODAY, its use as a means of communication and expression is an innovation of the Internet era that developed in the late 1990s.¹ As of 2016, nearly three quarters of adults in the United States use social media.² As the name implies, much of this communication is benign socializing. Regarding employee-employer interests, social media use is more complicated. From the employee perspective, some social media use implicates protected workplace interests, such as union-related communications.

From the outlook of employers, some employee social media activities can damage the firm. For example, the ability of a firm to reach consumers globally through the Internet has modernized the concept of branding. Accordingly, a firm's brand is often one of its most valuable assets.³ To protect such assets, firms draft social media policies that shield their brands, promote workplace discipline, and contribute to their efficiency as commercial entities.

* Jessica A. Magaldi, Assistant Professor, Pace University; J.D., New York University School of Law; and Jonathan S. Sales, Lecturer, Bentley University; J.D., Northeastern School of Law, D.P.S. Candidate, Pace University. The authors would like to thank the Tri-State Academy of Legal Studies in Business for awarding an earlier version of this Article the honor of the *Best Paper Award* at its 2017 conference.

1. Jeff Bercovici, *Who Coined 'Social Media'? Web Pioneers Compete for Credit*, FORBES (Dec. 9, 2010, 3:51 PM), <http://www.forbes.com/sites/jeffbercovici/2010/12/09/who-coined-social-media-web-pioneers-compete-for-credit/2> [<https://perma.cc/R5UD-SSVD>].

2. See Aaron Smith, *Record Shares of Americans Now Own Smartphones, Have Home Broadband*, PEW RES. CTR. (Jan. 12, 2017), <http://www.pewresearch.org/fact-tank/2017/01/12/evolution-of-technology/> [<https://perma.cc/P4ZB-26U3>].

3. LIZ MOOR, *THE RISE OF BRANDS* 4 (Berg 2007).

The National Labor Relations Act (the “NLRA” or “Act”) imposes a duty upon the National Labor Relations Board (the “NLRB” or “Board”) to consider the countervailing interests of employers and employees.⁴ Specifically, the Act requires the NLRB to balance “the undisputed right of self-organization assured to employees” against “the equally undisputed right of employers to maintain discipline,”⁵ and efficient operations in their establishments.⁶

Balancing employer and employee interests in regard to workplace-based social media concerns presents new challenges for the NLRB, administrative law judges (“ALJ”), and the courts. At the time of the NLRA’s enactment in 1935, face-to-face communication was the primary conduit for concerted activities⁷ (i.e., employee association for the “‘purpose’ of ‘collective bargaining’ or ‘other mutual aid or protection.’”).⁸ As might be expected of a regulatory scheme conceived of in 1935, the NLRA failed to contemplate the emergence of an instantaneous, asynchronous, and decentralized form of communication, known today as social media.

Social media platforms are often cost-free and permit employees to stay in touch with essentially all of their coworkers from the comfort of their homes. Coworkers can use social media to express affirmative support for one another by simply electing the “like” function in reaction to a Facebook post or status.⁹ Other social media sites have similar elections. This can allow a message to go viral over the Internet and reach a virtually unlimited number of social media users (employees and non-employees alike).

The permanent and pervasive nature of material posted on social media presents a threat to employers’ interests that did not exist when communications were limited to in-person interactions and traditional ephemeral media such as television, radio, and newspaper publications. As a result, increased reputational risk is another significant consequence of social media proliferation.¹⁰ One rogue employee can engage in a cyber attack on an employer by posting false information

4. Republic Aviation Corp. v. NLRB, 324 U.S. 793, 797–98 (1945).

5. *Id.*

6. Union Carbide Corp. v. NLRB, 714 F.2d 657, 661 (6th Cir. 1983).

7. See Purple Commc’ns, Inc., 361 N.L.R.B. No. 126, slip op. at 11 (Dec. 11, 2014).

8. *Id.* slip op. at 20 n.9.

9. See Steven Musil, *Facebook Turns on its ‘Like’ Button*, CNET (Feb. 10, 2009, 5:23 AM), <https://www.cnet.com/news/facebook-turns-on-its-like-button/> [https://perma.cc/65BN-F57G].

10. See Pekka Aula, *Social Media, Reputation Risk and Ambient Publicity Management*, 38 STRATEGY & LEADERSHIP, no. 6, 2010, at 43, 45.

to social media, which can cause significant damage to a firm's brand value, goodwill, and reputation. Experts note that "one of the most valuable assets that any company has is its reputation . . . [and] a damaged reputation can be irreparable and, in extreme cases, [can] lead to a company's downfall."¹¹

The emergency of cyberslacking provides an example of how social media may interfere with an employer's ability to promote workplace discipline and promote firm efficiencies. Cyberslacking is defined as the use of the Internet or mobile technology during work hours for personal purposes.¹² One study found that the average employee's cyberslacking amounted to an additional and unearned two-week vacation annually.¹³ The same study concluded that cyberslacking cost employers "\$5.8 billion dollars in wages based on the average Australian wage" and "potentially cost[] the country . . . \$22.5 billion" in gross domestic product.¹⁴

The foregoing demonstrates that social media policy issues are distinct from other work rules issues. They are uniquely Internet era concerns, not present when the NLRA was enacted or at the time the majority of decisions interpreting the NLRA were handed down. Analyzing these issues requires properly evaluating the twenty-first century interests of employee and employer. It also requires a correct appraisal of the derivative consequences to employees not directly involved in these cases. Regarding these derivative employees, an important matter is whether the chilling effect of social media restrictions causes improper harm to employees' rights to engage in concerted activity, or whether the potential harm caused by the social media activities of coworkers threatens the commercial viability of employers, and thus the ability of individuals to secure gainful employment.

From 2004 through 2013, the NLRB applied a "reasonable construe" standard first articulated in *Lutheran Heritage-Village Livonia*

11. Morgan O'Rourke, *Protecting Your Reputation*, RISK MANAGEMENT, Apr. 2004, at 14, 14.

12. Thomas A. O'Neill et al., *Prediction of Cyberslacking when Employees are Working Away from the Office*, 34 COMPUTERS HUM. BEHAV. 291, 291 (2014).

13. Chris Hoyniman, *Cyber-Slacking Costs Time and Money*, BBC WORLD SERV. (July 18, 2000), http://www.bbc.co.uk/worldservice/business/story_cmt180700.shtml (the study transpired in Australia) [<https://perma.cc/7EX6-6T3J>]; see also *Cyberslacking Leads to Billions in Loss*, UPI (July 19, 2005, 1:51 PM), <https://www.upi.com/Cyberslacking-leads-to-billions-in-loss/67541121795479/> [<https://perma.cc/PN4V-5K7B>] ("Internet misuse in the workplace costs U.S. corporations more than \$178 billion annually in lost productivity . . .").

14. Hoyniman, *supra* note 13.

(“*Lutheran Heritage*”) to analyze when social media policies were lawful.¹⁵ At the end of 2017, *Lutheran Heritage* was overruled by *The Boeing Company v. Society of Professional Engineering Employees in Aerospace* (“*Boeing*”), which introduced a new balancing test to determine whether workplace rules are lawful.¹⁶

The circumstances surrounding prevailing NLRB decisions on social media rules and the recent standards dispute between *Lutheran Heritage* and *Boeing* raise questions about the efficacy of the NLRA in the digital era. Specifically, whether the NLRA is an obsolete anachronism that produces inconsistent or ambiguous decisions that create diametrically opposed swings in precedent and standards of review while failing to properly balance the countervailing twenty-first century interests of employer social media policies and employee social media activities.¹⁷ Alternatively, did the NLRA’s regulatory scheme evolve through well-reasoned decision making, accounting for dynamic changes in the countervailing interests between employers and employees, or is the NLRA’s decision making process anchored by the contextual facts of each case and a constant reconsideration of the efficacy of precedential rulings? In the end, does the NLRA and its Board delineate unambiguous boundaries as to what social media conduct employers may lawfully proscribe?

In considering these issues, this Article examines recent decisions that govern the application of the NLRA to employer social media policies, attempts to ascertain the parameters of this framework, and provides guidance to employers and employees on the boundaries of lawful workplace social media activities and restrictive policies.

This Article is organized in four sections. Section I reviews circumstances and statistics that illustrate the issues underlying the recent relevant social media. Section II reviews the relevant NLRA regulatory scheme and the standards of review imposed by precedential decisions. Section III analyzes important cases and advice memoranda that apply the NLRA to various employer social media policies and identifies unifying themes among these cases. Section IV summarizes the patterns discussed in this article and the substantial issues raised by the *Boeing* case, both for employers and for the Board itself.

15. 343 N.L.R.B. 646 (2004).

16. 365 N.L.R.B. No. 154 (D.C. Dec. 14, 2017).

17. Purple Commc’ns, Inc., 361 N.L.R.B. No. 126, slip op. at 27 (Dec. 11, 2014) (Member Miscimarra, dissenting) (the majority’s new framework for evaluating restrictions on employee use of employer email systems “will rarely permit employees, unions, and employers to determine whether or when [email use for section 7 activities] will be permissible”).

I. The Concurrent Rise of Branding and the Social Media Phenomena

The NLRA was enacted in 1935, at a time when only 41% of households had telephone service.¹⁸ Furthermore, “face-to-face oral communication . . . was the norm, and . . . the primary form of [concerted activity].”¹⁹ In contrast to then, according to a 2017 Pew Research Center report regarding U.S. adults, 77% own a smartphone, 73% have broadband Internet access at home, 69% use social media, more than 50% own a tablet device, and 88% use the Internet.²⁰ Of all U.S. adults, 68% are Facebook users; of those Facebook users, 76% engage in daily use.²¹

The number of users on prominent social media sites further demonstrates the ascendancy of social media. Facebook, a social networking site where users create a profile, post text and photographs about their lives, and about which an Academy Award-winning movie was made,²² has over two billion active users.²³ LinkedIn, a social media site for professional networking, boasts 530 million users.²⁴ The photo-sharing website Pinterest, which allows users to create theme-based image collections by “pinning” images to a virtual bulletin board, has 150 million users worldwide and 70 million in the United States.²⁵ Twitter claims 330 million active users²⁶ who post 280-

18. *Percentage of Housing Units with Telephones in the United States from 1920 to 2008*, STATISTA, <https://www.statista.com/statistics/189959/housing-units-with-telephones-in-the-united-states-since-1920/> (last visited Feb. 20, 2018) [<https://perma.cc/U26D-X9UH>].

19. *Purple Commc'ns, Inc.*, slip op. at 11.

20. Smith, *supra* note 2.

21. Shannon Greenwood et al., *Social Media Update 2016*, PEW RES. CTR. (Nov. 11, 2016), <http://www.pewinternet.org/2016/11/11/social-media-update-2016/> [<http://perma.cc/XVG8-F43Z>].

22. Chris Taylor, *The Social Network Wins 3, Loses 5 Oscars*, MASHABLE (Feb. 27, 2011), <https://mashable.com/2011/02/27/social-network-oscar-2/#8bDPasjS8qqP> [<https://perma.cc/XY6F-HWW7>].

23. *Most Popular Social Networks Worldwide as of January 2018, Ranked by Number of Active Users (in Millions)*, STATISTA, www.statista.com/statistics/272014/global-social-networks-ranked-by-number-of-users/ (last visited Feb. 13, 2018) [<https://perma.cc/W5DD-S5QE>].

24. *About Us*, LINKEDIN, <https://press.linkedin.com/about-linkedin> (last visited Jan. 23, 2018) [<https://perma.cc/Y5G9-EFZW>].

25. Kathleen Chaykowski, *Pinterest Reaches 150 Million Monthly Users, Boosts Engagement Among Men*, FORBES (Oct. 13, 2016, 2:57 PM), www.forbes.com/sites/kathleenchaykowski/2016/10/13/pinterest-reaches-150-million-monthly-users/#46bf7e43732e [<https://perma.cc/B95S-3L8M>].

26. *Number of Monthly Active Twitter Users Worldwide From 1st Quarter 2010 to 4th Quarter 2017 (in Millions)*, STATISTA, <https://www.statista.com/statistics/282087/number-of-monthly-active-twitter-users/> (last visited Feb. 13, 2018) [<https://perma.cc/4P87-G8FX>].

character text messages known as “tweets.”²⁷ Of the adults in the U.S. who use the Internet, 28% use Instagram, 26% use Pinterest, 25% use LinkedIn, and 21% use Twitter.²⁸

One recent study found that for every hour spent online, sixteen minutes are spent on social networks.²⁹ Another survey disclosed, “Americans spend 27[%] of their time online using social media.”³⁰ According to one report, “people in the U.S. check their Facebook, Twitter, and other social media accounts a staggering 17 times a day, meaning at least once every waking hour, if not more.”³¹

The amount of time that people spend on social media sites, combined with the incredible proliferation of social media outlets that allow communication through text, audio, video, images, podcasts, and other multimedia means, have led employers to devote an increasing amount of attention to the social media activities of their employees. Firms have often responded by promulgating social media policies. These policies have taken several formats, including stand-alone documents, subsections of employee handbooks, and even informal employee communication rules.³²

A significant goal of employer social media policies is to protect firm goodwill, brand value, and reputation. Brand value is easily undervalued based on the fact that these assets are not directly reported on income statements, balance sheets, or profit and loss statements. Goodwill is a traditional intangible asset described as “[t]he value of a company’s brand name, solid customer base, good customer relations, good employee relations and any patents or proprietary technol-

27. Daniel Nations, *What Is a Tweet on Twitter?*, LIFEWIRE, <https://www.lifewire.com/what-is-a-tweet-3486211> (last updated Nov. 8, 2017) [<https://perma.cc/NL7P-4NKR>].

28. Greenwood et al., *supra* note 21.

29. Matt Tatham, *For Every Hour Online Americans Spend 16 Minutes on Social Networks*, EXPERIAN (Apr. 18, 2013), <http://www.experian.com/blogs/marketing-forward/2013/04/18/for-every-hour-online-americans-spend-16-minutes-on-social-networks/> [<http://perma.cc/4AZT-DL9N>].

30. Andrew Beaujon, *Study: Americans Spend More Than a Quarter of Their Time Online on Social Media*, POYNTER (Apr. 17, 2013), <https://www.poynter.org/news/study-americans-spend-more-quarter-their-time-online-social-media> [<https://perma.cc/KSE5-MW6H>].

31. Lulu Chang, *Americans Spend an Alarming Amount of Time Checking Social Media on Their Phones*, DIGITAL TRENDS (June 13, 2015, 6:32 PM), <http://www.digitaltrends.com/mobile/informate-report-social-media-smartphone-use/> [<https://perma.cc/WL4A-E678>].

32. See NLRB Office of Gen. Couns., *Report of the Acting General Counsel Concerning Social Media Cases, Memorandum OM 11-74* (Aug. 18, 2011); see also NLRB Office of Gen. Couns., *Report of the Acting General Counsel Concerning Social Media Cases, Memorandum OM 12-59* (May 30, 2012). These memoranda summarize the position of the NLRB and its counsel regarding certain cases cited in the present article.

ogy.”³³ This essentially amounts to the value of the firm’s customer loyalty.³⁴

Brand value is an increasingly important asset. For example, in 2015 and 2016, Apple was ranked as the most valuable global brand.³⁵ Its brand value was appraised at \$154.1 billion in 2016.³⁶ To put this in context, Apple’s 2016 balance sheet assets were \$321.69 billion; its shareholder equity was only \$128.249 billion.³⁷ Thus, Apple’s brand value exceeded the balance sheet value of its shareholder equity and was equal to roughly one-half of its total balance sheet assets.

The fast food chain Chipotle Mexican Grill (“Chipotle”), was involved in a 2016 NLRB social media case analyzed in this Article.³⁸ At the time of the 2016 case, Chipotle’s brand value was estimated at \$8.031 billion.³⁹ Its total assets in 2016 were \$2.02 billion and its total shareholder equity was \$1.4 billion.⁴⁰ For Chipotle, its brand value exceeded its balance sheet values.⁴¹

Because of the importance of an employer’s brand, employee social media activities pose additional threats to employers. According to the UK Center for the Protection of National Infrastructure:

What your employees do and say online, or how they use digital devices, can make them and your [organization] vulnerable to security threats. Some of the security vulnerabilities can be obvious,

33. *Goodwill*, INVESTOPEDIA, <http://www.investopedia.com/terms/g/goodwill.asp> (last visited Apr. 1, 2017) [<https://perma.cc/AC2X-Y7CT>].

34. Paul Hague, *Measuring Brand Value – How Much Are Brands Worth?*, B2B INT’L, <https://www.b2binternational.com/publications/value-of-brands/> (last visited Mar. 30, 2017) [<https://perma.cc/7EDJ-98UT>].

35. *Global 500 2016*, BRAND FINANCE, http://brandirectory.com/league_tables/table/global-500-2016 (last visited Oct. 23, 2017) [<https://perma.cc/A8EX-8HD5>]; *The World’s Most Valuable Brands 2016*, FORBES, <https://www.forbes.com/pictures/mli45fflem/1-apple/#7bb69fe847d1> (last visited Oct. 23, 2017) [<https://perma.cc/FD76-8LC6>].

36. FORBES, *supra* note 35.

37. Apple Inc., Annual Report (Form 10-K) (Oct. 26, 2016), *available at* <http://investor.apple.com/secfiling.cfm?filingid=1628280-16-20309&cik=320193> [<https://perma.cc/X8V9-JTG3>].

38. *See infra* Section III A.

39. *Value of the Leading Restaurant Brands Worldwide in 2016 (in Million U.S. Dollars)*, STATISTA, <https://www.statista.com/statistics/407892/brand-value-of-the-leading-global-fast-food-brands/> (last visited Feb. 4, 2018) [<https://perma.cc/EA8V-VC4M>] [hereinafter STATISTA, *Brands*]; *see also The 10 Most Valuable Fast Food Brands Worldwide*, FOOD INDUSTRY, <https://www.foodindustry.com/features/facts-stats-charts/10-valuable-fast-food-brands-worldwide/> (last visited Feb. 4, 2018) [<https://perma.cc/7B9X-KRAH>].

40. Chipotle Mexican Grill, Inc., Annual Report (Form 10-K) (Feb. 6, 2017), *available at* <http://phx.corporate-ir.net/External.File?item=UGFyZW50SUQ9NjY1NTQ3fENoaWxkSUQ9MzcMzk3fFR5cGU9MQ==&t=1> [<https://perma.cc/V8W6-86QX>] [hereinafter Chipotle Annual Report].

41. *See id.*

such as posting or sharing confidential [organizational] information that puts staff, processes or assets at risk. Others may be less so, such as search engines storing search history or smart phones logging data which can be exploited by those with malicious intent.⁴²

Additionally, under the NLRA, an employer has a legitimate interest in managing its business and an undisputed right to maintain discipline in its establishments and promote efficiency.⁴³

In summary, employees now use social media as the predominant form of communicating and posting information or opinions, including some that implicate their employers' interests. This has resulted in employers regulating aspects of employee social media activities. In some cases, employers are exercising their legitimate interests in protecting their ability to operate as commercial entities by restricting employee social media activities. In other circumstances, employer social media policies improperly encroach upon employee rights to engage in certain workplace focused social media communications (e.g., communicating about union matters). As set forth in the next section, both employee and employer rights are protected by the NLRA.

II. Employee Protections Guaranteed by the NLRA

The NLRA was enacted to protect employer and employee interests, to curtail certain private sector business practices deemed harmful to the U.S. economy, and to encourage collective bargaining.⁴⁴

The Act guarantees employees the right to organize, to engage in other protected concerted activities, and extends these safeguards to both union and nonunionized employees.⁴⁵ In fact, the Act protects most private sector employees.⁴⁶ It does not, however, regulate public sector employees, agricultural and domestic workers, independent contractors, workers employed by a parent or spouse, employees of air and rail carriers covered by the Railway Labor Act, and supervisors (although supervisors that have been discriminated against for refusing to violate the NLRA may be covered).⁴⁷

42. *Online Social Behaviour*, CTR. FOR PROTECTION NAT'L INFRASTRUCTURE, <https://www.cpni.gov.uk/content/online-social-behaviour> (last visited on Mar. 30, 2017) [<https://perma.cc/E3WD-6MGT>].

43. *See Purple Commc'ns, Inc.*, 361 N.L.R.B. No. 126, slip op. at 11 (Dec. 11, 2014) (citing *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 797-98 (1945)).

44. *See National Labor Relations Act*, NAT'L LAB. REL. BOARD, <https://www.nlr.gov/resources/national-labor-relations-act> (last visited Feb. 11, 2018) [<https://perma.cc/DCX2-H62R>].

45. *Id.*

46. 29 C.F.R. § 104.204 (2012).

47. *Id.*

The NLRA also recognizes employers' legitimate interests in managing their firms, including their undisputed rights to maintain workplace discipline and promote firm efficiency.⁴⁸ The Act also protects employers' rights under at-will employment.⁴⁹

A. Concerted Activity

The relevant regulatory scheme is organized around NLRA Section 7, which defines concerted activity, and Section 8, which prohibits employers from violating any employee rights protected under Section 7.⁵⁰ Section 7 of the Act grants employees:

[T]he right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization⁵¹

Decided in 1984, *Meyers Industries, Inc. v. Kenneth P. Prill* (“*Meyers*”) is the seminal case regarding the standard for protected concerted activity by employees.⁵² In *Meyers*, the NLRB interpreted Section 7 to equate concerted activity with collective activity: “[T]he formation of or assistance to a group, or action as a representative on behalf of a group,” and further required that “[employee] activities in question [must] be ‘concerted’ before they can be ‘protected.’”⁵³ The NLRB held that “to find an employee’s activity to be ‘concerted,’ we shall require that it be engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself.”⁵⁴

Once an activity is determined to be “concerted,” the employer is prohibited by Section 8(a)(1) of the Act from taking an adverse employment action (such as discharging an employee) as a result of an

48. See *Purple Commc’ns, Inc.*, slip op. at 11 (citing *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 797–798 (1945)).

49. See Jessica A. Magaldi & Olha Kolisnyk, *The Unpaid Internship: A Stepping Stone to a Successful Career or the Stumbling Block of an Illegal Enterprise? Finding the Right Balance Between Worker Autonomy and Worker Protection*, 14 NEV. L.J. 184 (2013) (discussing employment at will).

50. See 29 U.S.C. §§ 151–169 (2018). Relevant provisions of the United States Code may be cited interchangeably with the NLRA, e.g., “Section 7” also refers to 29 U.S.C. § 157.

51. 29 U.S.C. § 157 (2018).

52. 268 N.L.R.B. 493 (1984).

53. *Id.* at 494.

54. *Id.* at 497.

employee's concerted activity.⁵⁵ Section 8(a)(1)-(2) of the Act prohibits employers from engaging in any unfair labor practice that would "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [S]ection [7]" or "to dominate or interfere with the formation . . . of any labor organization."⁵⁶

Meyers established the following four-part test to ascertain whether the discipline or discharge of an employee violated Section 8(a)(1):

- (1) The activity engaged in by the employee was "concerted";
- (2) The employer knew of the concerted nature of the employee's activity;
- (3) The concerted activity was protected by the Act; and
- (4) The discipline or discharge was motivated by the employee's protected concerted activity.⁵⁷

The Board further noted that the Act does not protect all concerted activity by employees, such as otherwise unlawful activity in violation of another section of the Act or separate statute, or activity that was not engaged in "for the purpose of collective bargaining or other mutual aid or protection."⁵⁸ For instance, *Meyers* involved an employee's complaints to supervisors and the police regarding his company-issued vehicle.⁵⁹ Based on the factual record, the NLRB determined that these comments were made solely on the employee's own behalf, not for the "mutual aid or protection" of his co-workers, and therefore did not qualify as engaging in a protected concerted activity.⁶⁰ Thus, beginning with *Meyers*, courts have often adopted a narrow interpretation of concerted activity.⁶¹

B. Work Rules

The NLRB and the federal courts have consistently recognized that employers have the right to create work rules to maintain an orderly and effective work environment.⁶² This right must be balanced against, and harmonized with employees' rights to engage in con-

55. *Id.*

56. 29 U.S.C. § 158(a)(1)-(2) (2018).

57. *Meyers*, 268 N.L.R.B. at 497.

58. *Id.* at 494 (quoting another source).

59. *Id.* at 493.

60. *Id.* at 499.

61. Jessica A. Magaldi, Jonathan S. Sales & Elizabeth A. Cameron, *How the NLRB's Decisions in Cases Involving Social Media Have Narrowed the Definition of Concerted Activity . . . Whether Employees "Like" It or Not.*, 49 U. TOL. L. REV. (forthcoming 2018).

62. *See, e.g., Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945).

certed activities.⁶³ In 1945, in *Republic Aviation Corp. v. NLRB* (“*Republic Aviation*”), the Supreme Court noted that the “[o]ppportunity [for employees] to organize and [the right of employers to maintain] proper discipline are both essential elements in a balanced society.”⁶⁴

1. The Lutheran Heritage “Reasonable Construe” Standard

From 2004 through December 2017, *Lutheran Heritage*⁶⁵ was the guiding authority regarding the legality of work rules. In *Lutheran Heritage*, the Board balanced the diverging employer and employee interests by testing whether the disputed work rules “reasonably tend to chill employees in the exercise of their Section 7 rights.”⁶⁶ Work rules that failed this test were deemed unfair labor practices and employers were not permitted to maintain them.⁶⁷

An employer’s work rule produces a chilling effect and is therefore unlawful if it explicitly restricts activities within the scope of Section 7 protections, but if the rule does not explicitly restrict employee activity it may still be prohibited if it restricts such activity in at least one of three ways: (1) employees would reasonably construe the language of a facially neutral work rule to prohibit activity protected by Section 7; (2) “the rule was promulgated in response to union activity”; or (3) as applied, the rule restricts employees from engaging in activities protected by Section 7.⁶⁸

The *Lutheran Heritage* framework required the NLRB, ALJs, and General Counsels to “refrain from reading particular phrases in isolation, and it must not presume improper interference with employee rights.”⁶⁹ Ambiguous rules were construed against the employer.⁷⁰

2. The Boeing Balancing Test

On December 17, 2017, the Board overruled the *Lutheran Heritage* “reasonably construe” standard when it released its decision in *Boeing*.⁷¹ It was determined in *Boeing*, that the employer lawfully maintained a no-camera rule that prohibited employees from using any

63. *Id.* at 797–98.

64. *Id.* at 798.

65. *Lutheran Heritage Vill.-Livonia*, 343 N.L.R.B. 646, 647 (2004).

66. *Lafayette Park Hotel*, 326 N.L.R.B. 824, 825 (1998), *enforced*, 203 F.3rd 52 (D.C. Cir. 1999).

67. *Id.*

68. *Lutheran Heritage Vill.-Livonia*, 343 N.L.R.B. at 647 (2004).

69. *Id.* at 646.

70. *Lafayette Park Hotel*, 326 N.L.R.B. at 824.

71. *Boeing Co.*, 365 N.L.R.B. No. 154, slip op. at 2 (Dec. 14, 2017).

device to capture images at the employer's facilities without a valid business purpose and an approved purpose.⁷²

The *Boeing* decision established the following explicit balancing test to replace the *Lutheran Heritage* standard:

[W]hen evaluating a facially neutral policy, rule or handbook provision that, when reasonably interpreted, would potentially interfere with the exercise of NLRA rights, the Board will evaluate two things: (i) the nature and extent of the potential impact on NLRA rights, and (ii) legitimate justifications associated with the rule.⁷³

Boeing provides that the foregoing evaluation must be conducted consistently with the “‘duty to strike the *proper* balance between . . . asserted business justifications and the invasion of employee rights’ . . . focusing on the perspective of employees,” as required by Section 8(a)(1).⁷⁴

The Board delineated three categories of work rules in which to sort the results produced by the application of the new standard.⁷⁵

Category one is composed of rules that are “designate[d] as lawful to maintain, either because (i) the rule, when reasonably interpreted, does not prohibit or interfere with the exercise of NLRA rights; or (ii) the potential adverse impact on protected rights is outweighed by justifications associated with the rule.”⁷⁶

Category two is populated by “rules that warrant individual scrutiny . . . as to whether the rule would prohibit or interfere with NLRA rights, and if so, whether any adverse impact on NLRA-protected conduct is outweighed by legitimate justifications.”⁷⁷

Category three is the repository of rules that are designated “unlawful to maintain because they would prohibit or limit NLRA-protected conduct, and the adverse impact on NLRA rights is not outweighed by justifications associated with the rule.”⁷⁸

Boeing provides that the “categories are not part of the test itself.”⁷⁹ Rather, future cases will sort their work rules into the proper relevant category. Thereafter, presumably, future rulings will populate the three-category model with adjudicated work rules to help determine why certain rules are lawful or prohibited.

72. *Id.* at 17–18.

73. *Id.* at 4.

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.* (emphasis omitted).

79. *Id.* at 5.

The *Boeing* majority delineates a number of factors or considerations that must be applied when analyzing a work rule's impact on employees' NLRA rights and the legitimate justifications of the employer.⁸⁰ Providing clarity and certainty must be the preeminent consideration.⁸¹

The types of NLRA protected activities and legitimate employer justifications must be categorized—for example, protected activities are differentiated into those central to the Act and those more peripheral (i.e., “instances where the risk of intruding on NLRA rights is ‘comparatively slight’”).⁸² Similarly, employer justifications that have “direct, immediate relevance” to the firm are classified as “substantial justifications,” and are contrasted with those of “more peripheral importance.”⁸³ The case also provides, “[i]n some instances, the impact . . . may be self-evident,” in others the introduction of evidence may be required.⁸⁴

Facially neutral rules that do “not prohibit or interfere with the exercise of NLRA rights” are “lawful without any need to evaluate or balance business justifications.”⁸⁵ In interpreting a “rule’s impact on employees, the focus should . . . be on the employees’ perspective” and whether it “tends to interfere with the free exercise of employee rights under the Act.”⁸⁶ Some possible impact on protected activity will not per se render a rule unlawful. However, such a “rule cannot lawfully be applied against employees who engage in NLRA-protected conduct.”⁸⁷

Boeing held that its standard applies “retroactively to the instant case and to all other pending cases.”⁸⁸ Additionally, *Boeing* overruled cases that found it unlawful to maintain rules “requiring employees to foster ‘harmonious interactions and relationships’ or to maintain basic standards of civility in the workplace.”⁸⁹ No examples of such cases are set forth in *Boeing*.⁹⁰

80. *Id.* at 15–16.

81. *Id.* at 14–15.

82. *Id.* at 16.

83. *Id.*

84. *Id.*

85. *Id.* at 17.

86. *Id.* (emphasis omitted).

87. *Id.* (emphasis omitted).

88. *Id.* at 18.

89. *Id.* at 16 n.76.

90. *Id.*

Importantly, however, *Boeing* does not “pass on the legality of the rules at issue in past Board decisions that have applied the *Lutheran Heritage* ‘reasonably construe’ standard.”⁹¹ Accordingly, the cases analyzed in this article remain precedential or persuasive authority to the extent that they are not within the scope of the cases that contain rules “requiring employees to foster ‘harmonious interactions and relationships’ or to maintain basic standards of civility in the workplace.”⁹²

C. The Procedural Framework Regarding Unfair Labor Practices

The procedure for filing an unfair labor practices (“ULP”) claim is an important factor in the outcome of a labor dispute. An aggrieved party (“complainant” or “charging party”) initiates ULP charges with the appropriate Regional Director.⁹³ The NLRB is headquartered in Washington D.C. and its twenty-six regional offices are located throughout the United States.⁹⁴ There is a six-month statute of limitations for filing a ULP charge.⁹⁵

After a charging party files a claim, the appropriate Regional Director is required to investigate the charge and determine whether there is sufficient evidence to support the claim.⁹⁶ If the evidence is insufficient, the Regional Director dismisses the claim or requests the charging party to withdraw the claim.⁹⁷ More than one-half of all charges are dismissed or withdrawn.⁹⁸ A charging party has the right to appeal an adverse decision to the NLRB General Counsel.⁹⁹

91. *Id.* at 12 n.51.

92. *Id.* at 16 n.76.

93. See *The NLRB Process*, NAT’L LAB. REL. BOARD, <https://www.nlrb.gov/resources/nlrb-process> (last visited Jan. 28, 2018) [<https://perma.cc/V7J2-HAQW>]; 29 C.F.R. § 102.10 (2017).

94. *Regional Offices*, NAT’L LAB. REL. BOARD, <https://www.nlrb.gov/who-we-are/regional-offices> (last visited Mar. 30, 2017) [<https://perma.cc/B7KR-YJ79>].

95. The time period begins to run when the charging party has clear and unequivocal notice of a ULP. Notice may be either actual or constructive. Constructive notice occurs when the charging party would have discovered the ULP in the exercise of reasonable diligence. *CAB Assocs.*, 340 N.L.R.B. 1391, 1392 (2003); *NLRB v. Vitronic Div. of Penn Corp.*, 630 F.2d 561, 563 (8th Cir. 1979) (noting that the six-month time bar is an affirmative defense and is waived if not timely raised).

96. 29 C.F.R. § 102.15 (2017).

97. 29 C.F.R. §§ 101.6, 102.9 (2017).

98. *Charges and Complaints*, NAT’L LAB. REL. BOARD, <http://www.nlrb.gov/news-out-reach/graphs-data/charges-and-complaints/charges-and-complaints> (last visited Jan. 28, 2018) [<https://perma.cc/VQ8Q-X9F8>]. In the fiscal year of 2017, 19,280 ULP allegations were filed with the NLRB, 6,595 settlements were achieved, and 1,263 complaints were issued. *Id.*

99. 29 C.F.R. §§ 101.6, 102.19 (2017).

The NLRB strongly encourages parties to mediate ULP disputes.¹⁰⁰ A settlement becomes more procedural following the filing of a complaint.¹⁰¹ If a charge is settled prior to the filing of a complaint, the settlement requires approval of the Regional Director, but not the Board, and no order, decision, or opinion is issued.¹⁰² Accordingly, at least in theory, cases in which the evidence strongly supports one position are likely settled before the issuance of a complaint and do not become a part of persuasive or precedential authority for review and analysis.

If the parties fail to resolve the matter and it appears to the Regional Director that formal proceedings should be instituted, the Regional Director files a complaint.¹⁰³ Cases involving novel or complex issues are required to be referred to the General Counsel for advice before a complaint is issued.¹⁰⁴ This may result in the publication of an Advice Memorandum.¹⁰⁵

If a complaint is issued, a case then follows the administrative law procedure.¹⁰⁶ An NLRB ALJ presides over the prehearing procedure.¹⁰⁷ A final hearing is eventually conducted in which the ALJ acts as a finder of fact, applies the NLRA to the facts, and hands down a decision.¹⁰⁸ If the finding is against the employer, the decision must also contain a recommended order of affirmative remedial actions that the respondent must undertake.¹⁰⁹ Venue is in the administrative region where the alleged unfair labor practice transpired.¹¹⁰ The pro-

100. See *NLRB Contracts with FMCS to Provide Mediators in Board Alternative Dispute Resolution Program*, NAT'L LAB. REL. BOARD (Oct. 23, 2012), <https://www.nlr.gov/news-outreach/news-story/nlr-contracts-fmcs-provide-mediators-board-alternative-dispute-resolution> [<https://perma.cc/7FZC-8NTM>] ("As part of its ongoing efforts to encourage the settlement of cases, the National Labor Relations Board has contracted with the Federal Mediation and Conciliation Service (FMCS) to provide mediators to parties who participate in the Board's alternative dispute resolution (ADR) program.")

101. See 29 C.F.R. § 101.9(b)(1) (2017).

102. 29 C.F.R. §§ 101.9, 102.51 (2017).

103. See 29 C.F.R. § 102.15 (2017).

104. 29 C.F.R. § 101.8 (2017).

105. *Advice Memos*, NAT'L LAB. REL. BOARD, <https://www.nlr.gov/cases-decisions/advice-memos> (last visited Jan. 20, 2018) [<https://perma.cc/A5KE-EUAB>] ("Two categories of advice memoranda are released to the public: memoranda directing dismissal of the charge that are required to be released pursuant to *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132 (1975), and memoranda in closed cases that are not required by law to be released but are released in the General Counsel's discretion.")

106. 29 C.F.R. §§ 101.8, 101.10 (2017).

107. 29 C.F.R. § 101.10; see also 29 C.F.R. § 102.15 (2017).

108. 29 C.F.R. § 101.10.

109. 29 C.F.R. § 102.45 (2017).

110. 29 C.F.R. § 102.10 (2017).

ceedings are public unless otherwise ordered by the NLRB or the ALJ.¹¹¹

A public proceeding is averted if both parties agree to waive a hearing and submit the case directly to the NLRB. In this case, the parties must file a stipulation that includes a statement of the facts and a short statement by each party setting forth its position on the issues.¹¹²

Either party may file exceptions to the ALJ's decision.¹¹³ The exceptions are due within twenty-eight days of the service of the ALJ's decision.¹¹⁴ The NLRB itself reviews exceptions.¹¹⁵ The order of the ALJ can also be appealed to the five-person Board and General Counsel in Washington, D.C.¹¹⁶ An ALJ decision has no precedential value unless reviewed and adopted by the NLRB. If no exceptions are filed, the ALJ's decision becomes the order of the NLRB.¹¹⁷ NLRB decisions are subject to review by the U.S. Court of Appeals.¹¹⁸

If a violation is found, both the decision and order will include a remedy.¹¹⁹ However, the NLRB is constrained by its statutory authority when creating the remedy.¹²⁰ It cannot compel the employer to agree to contract terms, nor can it order punitive damages.¹²¹ Two common and permissible remedies are the reinstatement of any wrongfully terminated employees and back pay.¹²² Reinstatement is a remedy awarded to wrongfully discharged employees as a means to return

111. 29 C.F.R. § 102.34 (2017).

112. 29 C.F.R. § 102.35(a)(9) (2017).

113. 29 C.F.R. § 102.46 (2017).

114. *Id.*

115. 29 C.F.R. § 102.48 (2017).

116. 29 C.F.R. § 102.46.

117. 29 C.F.R. § 102.48.

118. 29 U.S.C. § 160(f) (2018); *see also What We Do*, NAT'L LAB. REL. BOARD, <https://www.nlr.gov/what-we-do> (last visited Feb. 4, 2018) [<https://perma.cc/8ZFS-XBGK>].

119. *See* *Truck Drivers, Local 705*, 210 N.L.R.B. 210, 214–15 (1974). When a union commits flagrant violations, the remedies include the revocation of a collective bargaining relationship, voidance of contracts, and the repayment of improperly collected initiation fees and dues. *See id.* at 213.

120. *See* 29 U.S.C. § 160(c) (2018) (providing that back pay and reinstatement of an employee are remedies available); *see also Employer Penalties for Violating the National Labor Relations Act*, FINDLAW, <http://corporate.findlaw.com/human-resources/employer-penalties-for-violating-the-national-labor-relations-act.html> (last visited Feb. 5, 2018) [<https://perma.cc/T6K9-GJGC>] (stating the NLRB is limited in its ability to remedy an unfair labor practice, “for example, [it cannot] order an employer to make concessions at the bargaining table, make violating the NLRA a crime or adjudicate issues outside a six-month statute of limitations”).

121. *See* *H.K. Porter Co. v. NLRB*, 397 U.S. 99, 102 (1970).

122. 29 U.S.C. § 160(c).

them to their former employment position, generally without loss of seniority or other benefits.¹²³ Back pay is a remedy that compensates an employee for any remuneration lost due to any such improper discharge, layoff, or other change in employment status.¹²⁴

Typically, the device used to implement an NLRB remedy is a cease and desist order.¹²⁵ Such orders generally redress only the specific action found to be a violation in the case and are limited to the specific location of the violation.¹²⁶ If an employer has committed multiple violations at multiple locations, the order may be firm-wide.¹²⁷ An employer, found to have committed egregious, widespread, or repeated offenses may be subjected to an order requiring the respondent to cease and desist from violating the NLRA in any manner.¹²⁸

Final orders of the NLRB are appealable by any party to the relevant U.S. Circuit Court of Appeals or to the Circuit Court of Appeals for the D.C. Circuit.¹²⁹ This provides the opportunity for limited, but important, forum shopping.¹³⁰ The Circuit Court of Appeals may enforce, modify, or set aside an order in whole or in part.¹³¹

The NLRB may also seek injunctive relief in the relevant U.S. District Court for the region when it is necessary to prevent harm.¹³² NLRB orders are not self-enforcing.¹³³ The Regional Office where the charge originated is responsible for ensuring compliance with the order.¹³⁴

In summary, the procedure provides for orders and decisions from three sources: ALJs, the NLRB (including its General Counsel), and Article III Courts (i.e., the Circuit Courts of Appeals and the Supreme Court). The patterns of such decisions are significant and are reviewed in the following sections of this Article.

123. *See id.*

124. *See id.*

125. *See id.*

126. *Id.* § 160(e).

127. *Id.*

128. Hickmott Foods, Inc., 242 N.L.R.B. 1357, 1357 (1979).

129. 29 U.S.C. § 160(e)–(f) (2018).

130. *See id.* § 160(f).

131. *Id.*

132. 29 U.S.C. § 160(j) (2018).

133. *See* 29 U.S.C. § 160(e) (2018).

134. 29 C.F.R. § 101.13 (2017).

III. The Application of the National Labor Relations Act Protections to Employers' Social Media Policies

Given that the specific details of the issues presented by social media policies are not explicitly considered by the plain language of the NLRA, the scope of permissible and impermissible social media policies must be gleaned from the relevant rulings of the courts, the NLRB, the ALJs, and the General Counsel.

An important aspect of the reviewed NLRB social media case decisions is that the rulings are based on analyzing prospective activities that would be protected by Section 7 of the NLRA (i.e., the possible chilling effect on employees concerted activities).¹³⁵ In other contexts, such claims might be considered unripe.¹³⁶ The cases have often implicitly balanced these prospective damages against employers' interests. The *Boeing* standard requires such consideration to be explicit and determined by its balancing test and three categories.

A review of a several of the important decisions decided under the *Lutheran Heritage* standard helps to delineate what social media workplace rules have been found unlawful. These decisions include the August 18, 2016, NLRB decision in *Chipotle Mexican Grill* ("*Chipotle*"), the 2013 NLRB decision in *Dish Network Corp.* ("*Dish Network*"),¹³⁷ the 2012 NLRB decision in *General Motors, LLC* ("*General Motors*"),¹³⁸ and the Advice Memorandums in *American Medical Response of Connecticut, Inc.* ("*AMR Advice Memo*"),¹³⁹ *Target Corp.* ("*Target Advice Memo*"),¹⁴⁰ *McKesson Corp.* ("*McKesson Advice Memo*"),¹⁴¹ and *Walmart Corp.* ("*Walmart Advice Memo*").¹⁴²

135. See *infra* Section III A–G.

136. *Texas v. United States*, 523 U.S. 296, 300 (1998) ("A claim is not ripe for adjudication if it rests upon 'contingent future events that may not occur as anticipated, or indeed may not occur at all.'").

137. 359 N.L.R.B. No. 108 (D.C., Apr. 30, 2013).

138. *Gen. Motors, LLC*, Case 07-CA-053570 (N.L.R.B., Div. of Judges May 30, 2012) [hereinafter *Gen. Motors*].

139. NLRB Office of Gen. Counsel, *American Medical Response of Connecticut, Inc., Advice Memorandum, Case 34-CA-12576* (Oct. 5, 2010) [hereinafter *AMR*].

140. NLRB Office of Gen. Counsel, *Target Corp., Case 29-CA-30713* (Dec. 16, 2011) [hereinafter *Target*].

141. NLRB Office of Gen. Counsel, *McKesson Corp., Advice Memorandum, Cases 06-CA-066504 & 06-CA-070189* (Mar. 1, 2012) [hereinafter *McKesson*].

142. NLRB Office of Gen. Counsel, *Walmart, Advice Memorandum, Case 11-CA-067171* (May 30, 2012) [hereinafter *Walmart*].

A. The Chipotle Decision

The August 18, 2016, NLRB *Chipotle* decision provides important insight into the balance between employer and employee social media rights under the NLRA.¹⁴³

The case focused on the lawfulness of Chipotle's "Social Media Code of Conduct" and employee handbook.¹⁴⁴ The social media policy included the warning to employees that "[i]f you aren't careful and don't use your head, your online activity can . . . spread incomplete, confidential, or inaccurate information" and the requirement that employees "may not make disparaging, false, misleading, harassing, or discriminatory statements about or relating to Chipotle, our employees, suppliers, customers, competition or investors."¹⁴⁵

Chipotle also maintained a confidential information policy that barred employees from improperly using the employer's "name, trademarks, or other intellectual property."¹⁴⁶ Additionally, the employee handbook restricted employees from soliciting in working areas within the "visual or hearing range of . . . customers," prohibited the improper use of Chipotle's name, precluded "exaggeration . . . guesswork, and derogatory characterizations of people and their motives," and restricted political discussions in the workplace.¹⁴⁷

One view of these policies supports the conclusion that they are designed to protect important assets and interests of the firm, such as its logo, brand value, business goodwill, and its legitimate interest in workplace discipline and efficiency. For example, as previously reviewed, Chipotle's brand value exceeds the value of its balance sheet total assets.¹⁴⁸ None of these factors are explicitly referred to in the *Chipotle* decision.

Instead, the NLRB found that key aspects of Chipotle's social media policies and employee handbook violated the NLRA based on their prospective chilling effect on employees' rights as protected by Sections 7 and 8.¹⁴⁹

143. Chipotle Services LLC d/b/a Chipotle Mexican Grill, 364 N.L.R.B. No. 72 (D.C., Aug. 18, 2016) [hereinafter *Chipotle*].

144. *Id.*; see *infra* Appendix A (showing the complete excerpts of the Social Media and Employee Handbook provisions set forth in the *Chipotle* decision).

145. Chipotle Services LLC d/b/a Chipotle Mexican Grill, 364 N.L.R.B. No. 72, slip op. at 9 (D.C. Aug. 18, 2016).

146. *Id.* slip op. at 13.

147. *Id.* slip op. at 8.

148. See Chipotle Annual Report, *supra* note 40.

149. *Chipotle*, 364 N.L.R.B. No. 72 slip op. at 1.

The underlying dispute focused on an employee's negative comments about Chipotle, posted to his Twitter account.¹⁵⁰ One post (also known as a "tweet") complained that hourly Chipotle employees were required to work on snow days when certain other employees were allowed to stay home.¹⁵¹ The tweet was directed to the employer's communications director. The employee also posted tweets in response to certain customer comments.¹⁵² For example, the employee tweeted that "nothing is free, only cheap #labor. Crew members only make \$8.50/hr how much is that steak bowl really?,"¹⁵³ and commented that Chipotle charges extra for guacamole "not like #Qdoba, enjoy the extra \$2."¹⁵⁴

Chipotle directed the employee to remove the tweets and the employee complied.¹⁵⁵ Nevertheless, the employer eventually terminated the employee.¹⁵⁶ The employer cited the employee's demeanor during a conversation with a manager—not violations of the social media or employee handbook policies—as the basis for the separation.¹⁵⁷

The *Chipotle* decision ruled that the employer's policies did not explicitly prohibit Section 7 activity.¹⁵⁸ Nevertheless, the provisions were found unlawful based on the fact that "employees would reasonably construe portions of these provisions to restrict the exercise of their Section 7 rights," and were applied to restrict the employee's Section 7 rights.¹⁵⁹

One important aspect of the *Chipotle* decision was the ruling that merely false or misleading social media activity remains protected by the NLRA. Social media activity only loses its Section 7 protection if there is sufficient evidence that the employee acted with "a malicious motive."¹⁶⁰ Such a motive is established if the social media comments are "made with knowledge of their falsity or with reckless disregard for their truth or falsity."¹⁶¹ Based on this analysis, Chipotle's rules re-

150. *Id.* slip op. at 6.

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.* slip op. at 7.

157. *Id.* slip op. at 8.

158. *Id.*

159. *Id.* slip op. at 9.

160. *Id.*

161. *Id.*

stricting “misleading, inaccurate, and incomplete statements” were found to be unlawful.¹⁶²

Similarly, Chipotle’s restrictions against the disclosure of “confidential information” were determined to be unlawful because the policy did not adequately define the concept.¹⁶³ For example, the word “confidential” was not defined by the applicable work rules scheme.¹⁶⁴ As a result, an employee could “construe [the word ‘confidential’] as restricting [his] Section 7 rights.”¹⁶⁵ From the perspective of the employer, confidential information could encompass trade secrets or proprietary information that contributes to the firm’s sustainable competitive advantages. Alternatively, if it is not carefully crafted, such a broad restriction could cause employees to refrain from protected concerted activities. Thus, the *Chipotle* case resolved these offsetting interests by requiring supplemental unambiguous definitions and contextual examples.

Chipotle’s prohibitions that direct employees to refrain from posting harassing or discriminatory statements do not violate the NLRA.¹⁶⁶ These terms are not “so amorphous that reasonable employees would be incapable of grasping the expectation that they comport themselves with general notions of civility and decorum in the workplace.”¹⁶⁷ Thus, the phrase “harassing or discriminatory statements” was not considered ambiguous, while the phrase “confidential information” was considered ambiguous.¹⁶⁸ Accordingly, the former was not found to chill employees’ lawful rights, while the latter was interpreted against the employer and found unlawful without further explanation.¹⁶⁹

Additionally, the employer’s anti-solicitation policy was ruled to be overbroad because it did not limit restricted employee conduct to customer selling areas.¹⁷⁰ Instead, the policy extended to areas where customers did not have the right of access (e.g., break rooms) and where employees may engage in protected concerted activities with-

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.* slip op. at 10.

167. *Id.* slip op. at 9.

168. *See id.* slip op. at 9–14.

169. *See id.*

170. *Id.* slip op. at 13.

out improperly interfering with a firm's interface with its customers or clients.¹⁷¹

Chipotle's restrictions against the use of its corporate logo were deemed unlawful.¹⁷² Once again, these restrictions implicate countervailing interests of employers and employees. As to employers, a firm's logo is important and valuable intellectual property.¹⁷³ It is how people recognize the firm and it helps to execute a differentiation strategy.¹⁷⁴ Accordingly, a well-recognized logo is an integral component of brand value.

In contrast, employees would be unable to call attention to unfair working conditions if they could not identify the employer, and a logo is one way to identify a firm for these purposes. This implicates the broad-based rights of workers to organize and secure safe and fair working conditions.

In *Chipotle*, the Board resolved countervailing interests regarding the use of the firm's logo stating that an employer's prohibition on the use of a firm's logo was not an unreasonable restriction on Section 7 activity, "[h]owever, barring employees from using the company name is altogether different."¹⁷⁵ The Board found that Chipotle had "presented no evidence to support the need for such a restriction."¹⁷⁶ It is interesting to note that this reference to employer interests appears to explicitly engage in the *Republic Aviation* balancing and the *Boeing* balancing of employer and employee interests. Accordingly, this distinction between employee use of logos and trademarks through the use of a firm's name may have equal validity under the old *Lutheran Heritage* standard and the new *Boeing* framework.

Additionally, the NLRB found that Chipotle did not violate the law by ordering the employee to delete certain tweets since the communications did not constitute concerted activity.¹⁷⁷

Finally, Chipotle's social media policy included a disclaimer that it does "not restrict any activity that is protected or restricted by the

171. *Id.*

172. *Id.*

173. See Peter Shadbolt, *How Important is it for a Company to Have a Great Logo?*, BBC NEWS (May 7, 2015), <http://www.bbc.com/news/business-32495854> [<https://perma.cc/C6MZ-W6RF>].

174. See *id.*

175. *Chipotle*, 364 N.L.R.B. No. 72, slip op. at 13.

176. *Id.*

177. *Id.* slip op. at 1 n.3 (finding that the employee's tweets were not deemed concerted in nature).

National Labor Relations Act.”¹⁷⁸ The NLRB ruled that such a savings clause cannot “cure the unlawfulness of” an otherwise illegal policy.¹⁷⁹

The underlying ALJ decision, accepted by the Board, cites the balancing framework set forth in *Republic Aviation* for evaluating the countervailing rights of employers and employees in social media cases.¹⁸⁰ The test involves balancing the legitimate interests of the employer against the Section 7 rights of employees.¹⁸¹ “Board law is settled that ambiguous employer rules—rules that reasonably could be read to have a coercive meaning—are construed against the employer.”¹⁸² After citing this balancing requirement, however, the ALJ opinion does not explicitly refer to any legitimate bases for the social media policies at issue. For example, there are no references to the value of Chipotle’s logo or the damage that misuse of the logo may cause to the brand. Accordingly, any balancing of these issues is solely implied by the outcome.

B. The AMR Advice Memorandum

In 2010, the NLRB’s Office of the General Counsel considered the written policies of American Medical Response of Connecticut, Inc. (“AMR”), and found the firm’s restrictions on blogging, email, and other Internet activity were unlawful under the NLRA.¹⁸³ The following provisions of the AMR employee handbook were at issue:

Blogging and Internet Posting Policy

. . . .

Employees are prohibited from posting pictures of themselves in any media, including but not limited to the Internet, which depicts the Company in any way, including but not limited to a Company uniform, corporate logo or an ambulance, unless the employee re-

178. *Id.* slip op. at 9.

179. *Id.*

180. Boeing Co., 365 N.L.R.B. No. 154, slip op. at 4 (D.C. Dec. 14, 2017). *Boeing* also is based on a balancing framework as follows: The Board has a “duty to strike the *proper balance* between . . . asserted business justifications and the invasion of employee rights in light of the Act and its policy.” *Id.* *Boeing* cited, *inter alia*, *Republic Aviation* in support of its balancing requirement. *Id.* slip op. at 4 n.13. *Chipotle* is not cited in the *Boeing* majority opinion, however, the partial dissent of Board Member McFerran cites *Chipotle* in support of the proposition that “our precedent establishes that an employer may maintain rules seeking to prevent disparagement, so long as any such rules are focused on its products or services and do not cover disparaging statements more generally such that employees would reasonably construe the prohibition to include matters protected by Section 7.” *Id.* slip op. at 37 (McFerran, dissenting in part).

181. *Id.* slip op. at 9 (citing *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945)).

182. *Id.* slip op. at 26.

183. *AMR*, *supra* note 139, at 1.

ceives written approval from the EMSC Vice President of Corporate Communications in advance of the posting;

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

• • • •

Solicitation and Distribution Policy

• • • •

It is the policy of the Company to prohibit solicitation and distribution by non-employees on Company premises and through Company mail and e-mail systems, and to permit solicitation and distribution by employees only as outlined below.

Solicitation of others regarding the sale of material goods, contests, donations, [etc.], is to be limited to approved announcements posted on designated break room bulletin boards. Use of the electronic mail system for solicitation is strictly prohibited.¹⁸⁴

AMR is an emergency medical services provider.¹⁸⁵ The employee in question was a paramedic with eleven years of experience;¹⁸⁶ she was also a union member in a unionized workplace.¹⁸⁷ The employee was discharged primarily for conduct that transpired on November 7–8, 2009.¹⁸⁸

Complaints were lodged against the AMR employee in relation to her alleged mistreatment of an individual involved in an automobile accident to which the employee responded as a paramedic.¹⁸⁹ The employee argued with a supervisor about whether she could seek union representation in completing an incident report.¹⁹⁰

Following the disagreement, the employee posted several comments on her Facebook page; the first stated: "Looks like I'm getting some time off. Love how the company allows a 17 [AMR code for a psychiatric patient] to be a supervisor."¹⁹¹ In response to a coworker, the employee posted, "Frank being a dick. . . he's a scumbag as usual."¹⁹²

184. *Id.* at 5–6.

185. *Id.* at 2.

186. *Id.*

187. *See id.* at 7.

188. *Id.* at 4. An incident that transpired on October 27, 2009, was also cited as one of the grounds for discharge. *Id.* at 10. However, this incident did not implicate the social media policies that are the subject of this paper.

189. *Id.* at 3.

190. *Id.*

191. *Id.*

192. *Id.*

The employee was suspended and then terminated.¹⁹³ AMR cited the following social media related reasons for this disciplinary action: “shortly after this incident during [the employee’s] November 7 shift, [the employee] posted derogatory remarks about [her] supervisor on ‘Facebook.’”¹⁹⁴ In its pleadings, AMR stated that these comments violated its “Blogging and Internet Posting Policy,” but did not cite the Solicitation and Distribution Policy (reproduced above) as a reason for the employee’s termination.¹⁹⁵

The restriction against using the employer’s electronic mail system for solicitation was upheld given that a firm “may lawfully bar employees’ non[-]work-related use of its email system, unless the [employer] acts in a manner that discriminates against” activities protected by the NLRA.¹⁹⁶

However, the remainder of AMR’s Solicitation and Distribution Policy was found to be unlawful.¹⁹⁷ This conclusion was based on the fact that limiting such conduct to “approved announcements posted on designated break room bulletin boards,” implicates protected conduct.¹⁹⁸

The *AMR Advice Memo* stated that the AMR Blogging and Internet Policy violated the NLRA because it had a chilling effect on the right of employees to engage in activities protected by Section 7.¹⁹⁹ The component of AMR’s policy that prohibited employees from posting pictures improperly precluded the “posting [of] a picture of employees carrying a picket sign depicting the Company’s name, or wearing a t-shirt portraying the [C]ompany’s logo in connection with a protest involving the terms and conditions of employment.”²⁰⁰ In this way, the Advice Memorandum either fails to consider the value of damage to AMR’s intellectual property or implicitly places a higher value on not chilling employee rights to engage in concerted activities than on the possible collateral devaluation of a firm’s intellectual property or brand value. In either event, the *AMR Advice Memo* ruling is consistent with the ruling in *Chipotle*.

With regard to AMR’s prohibition against “disparaging comments,” the *AMR Advice Memo* stated that it was too ambiguous be-

193. *Id.* at 4.

194. *Id.* at 5.

195. *Id.* at 5–6.

196. *Id.* at 14.

197. *Id.*

198. *Id.*

199. *Id.* at 6.

200. *Id.* at 13.

cause “it contained no limiting language or context that would clarify to employees that the rule did not restrict” activities protected by the NLRA.²⁰¹ In contrast, AMR’s prohibition on discriminatory or defamatory remarks was found to be lawful based on the fact that these restrictions were not ambiguous and could not reasonably be interpreted as “restricting Section 7 activity.”²⁰²

These distinctions suggest that perhaps the most important factors in deciding social media policy cases will be the contextual details that may or may not be set forth in the employer’s written documents.

The *AMR Advice Memo* cites the *Lutheran Heritage* standard without referencing the balancing requirement of *Republic Aviation*. Additionally, the decision contains no explicit balancing analysis that juxtaposes the employer’s legitimate interests in the work rules against the possible negative effect on NLRA protected activities.

C. The Target Advice Memorandum

The *Target Advice Memo*, published on December 16, 2011, offers guidance that expands on prior rulings related to employer social media policies.²⁰³ The Board found that Target’s social media work rules at issue were unlawful.²⁰⁴ The General Counsel reasoned that Target’s rules were “ambiguous as to their application to [protected] activity, and contain no limiting language or context that would clarify to employees that the rule does not restrict [protected] rights.”²⁰⁵ As with the *AMR Advice Memo*, this may suggest that the most important factor in deciding social media policy cases will be the contextual details that may or may not be set forth in the employer’s written documents.

Target’s social media policies were part of the firm’s employee handbook, which was distributed or made available to employees.²⁰⁶ The social media section cautioned employees to refrain from releasing “confidential guest, team member or company information.”²⁰⁷ From one perspective, this implicates certain legitimate interests of the employer. For example, such confidential information could be the proper subject of a non-disclosure agreement or involve valuable intellectual property such as trade secrets.

201. *Id.*

202. *Id.* n.29.

203. *Target*, *supra* note 140.

204. *Id.* at 5.

205. *Id.* at 3.

206. *See id.* at 1.

207. *Id.* at 2.

The *Target Advice Memo* implicitly dismissed such employer-focused considerations by finding that Target's broad policy had a chilling effect on an employee's right to discuss and disclose information regarding the conditions of employment.²⁰⁸ The *Target Advice Memo* held that employees have a right to discuss wages and conditions of employment with third parties and among one another.²⁰⁹ Target's policy would unlawfully interfere with such activity by causing employees to reasonably believe they were restricted from discussing "terms and conditions of employment."²¹⁰

Another section of Target's handbook, entitled "Communicating confidential information," implores employees to refrain from sharing confidential information with other "team member[s]" except on a "need to know" basis to perform their job.²¹¹ Further, and to deter employees from conversing about such confidential information in "the breakroom, at home or in open areas and public places," the handbook directs employees to consult with their supervisors if they are unsure whether a communication violates this aspect of the handbook.²¹²

In this component of the *Target Advice Memo*, as in the *AMR Advice Memo* and *Chipotle*, the employer's potential economic and management considerations were either tacitly rejected or not accounted for.²¹³ In this regard, the *Target Advice Memo* found these restrictions unlawful based on the fact that employees would reasonably interpret the policy as forbidding discussions regarding the terms and conditions of employment.²¹⁴ Focusing on the constraints surrounding communications in break rooms, public places, or at home, the *Target Advice Memo* stated that Target's rules were overbroad because they restricted activities protected by Section 7 which allows communication "virtually everywhere such discussions are most likely to occur."²¹⁵

In contrast, the *Target Advice Memo* upheld the language in the handbook counseling employees to "[d]evelop a healthy suspicion," to avoid "[b]eing tricked into disclosing confidential information," and to "be suspicious if asked to ignore identification procedures."²¹⁶

208. *See id.* at 4.

209. *Id.*

210. *Id.*

211. *Id.* at 2.

212. *Id.* at 4.

213. *See id.*

214. *Id.*

215. *Id.* at 5.

216. *Id.* (internal quotation marks omitted).

The rationale for allowing this language was that it “merely advises employees to be cautious about unwittingly divulging such information and does not proscribe any particular communications.”²¹⁷

This aspect of the decision recognizes the importance of a firm’s trade secrets and general confidentiality and attempts to draw a distinction between a firm broadly constraining employee communication of all confidential information—including between coworkers—and employees carelessly or negligently divulging such information to competitors or in other non-concerted activities. It also provides further evidence that social media cases will be decided on the contextual details of the relevant rules.

D. The McKesson Advice Memorandum

In March 2012 the *McKesson Advice Memo* stated that, although an employee’s conduct was not determined to be protected by Section 7, the employer’s social media guidelines violated the NLRA.²¹⁸

The McKesson Corporation (“McKesson”) is an international healthcare services firm.²¹⁹ The complainant had been employed for around eight years by the time her case was submitted for advice to the NLRB.²²⁰ The employee complained about her wages, her increased workload, and that employees had to purchase their own office supplies.²²¹

McKesson’s social media policy limited the disclosure of corporate employee personal information to authorized individuals within the corporation; proscribed the discussion of any legal disputes; dictated employees to use a friendly tone online; prohibited ethnic slurs, personal insults, political and religious discussions, and defamatory statements; required respect for all intellectual property laws, in order to protect the corporation’s rights; encouraged the resolution of controversy through personal communication rather than posting complaints or discussions on the Internet; and prohibited publishing information that would create an uncomfortable atmosphere.²²²

The complainant became concerned that the employer would outsource her job.²²³ As a result, the complainant posted the follow-

217. *Id.*

218. *McKesson*, *supra* note 141, at 1.

219. *Id.*

220. *Id.*

221. *Id.*

222. *Id.* at 6–9.

223. *Id.* at 1.

ing statement on her Facebook page: “Help! I am being outsourced. . anyone know of a company who is hiring that doesn’t outsource??”²²⁴ The employee did not identify herself, but she was connected to fellow employees through Facebook.²²⁵ She then emailed her manager requesting the employer’s severance policy in the event her work was outsourced.²²⁶

Coworkers felt fearful and threatened by the complainant, and eventually reported the complainant’s Facebook posts to McKesson’s management.²²⁷ Management convened a meeting with the complainant and discussed these issues.²²⁸ The next day, the complainant wore a t-shirt to work bearing the slogan “Trust No One.”²²⁹ A co-worker anonymously accused the complainant of being a bully who threatened coworkers in a cruel, vicious, and intimidating manner.²³⁰ Management subsequently met with the complainant, alleged that she was causing low morale, and ultimately discharged her in September 2011.²³¹

Because the complainant’s coworkers did not share her concerns, and were alienated by her negative behavior, the NLRB concluded that the complainant was not engaged in protected concerted activity.²³² However, the NLRB also ruled that McKesson’s social media rules were unlawful under the NLRA.²³³

The employer’s prohibition against the disclosure of personal information about other employees and contingent workers without supervisory approval violated the NLRA.²³⁴ The NLRB reasoned that employees could reasonably construe that this provision precluded discussions of wages and working conditions,²³⁵ which fall within the scope of Section 7 protection.²³⁶ Similarly, the restriction regarding the discussion of legal matters was found to interfere with employees’

224. *Id.* at 2.

225. *Id.*

226. *Id.*

227. *Id.*

228. *Id.*

229. *Id.*

230. *Id.*

231. *Id.* at 3.

232. *Id.* (“[I]t is apparent that this Charging Party had no allies among her coworkers . . .”).

233. *Id.* at 5.

234. *Id.* at 6–7.

235. *Id.* at 6.

236. *See id.* at 5 n.4.

rights to discuss potential claims against the employer, including Section 7 claims.²³⁷

The “friendly tone” and “professional tone” mandate in McKesson’s employee handbook could reasonably be interpreted to prevent discussions—or complaints—about working conditions and unionism.²³⁸ It bears noting that this provision could fall within the scope of the *Boeing* decision, which overruled any determination that “rules requiring employees to foster ‘harmonious interactions and relationships’ or to main basic standards of civility in workplace” were unlawful.²³⁹ Also, the restrictions against the mention of politics and religion could inhibit discussions about working conditions related to these issues.²⁴⁰

Consider a situation where an employee posts pictures to a social media site depicting employees on strike and holding picket signs with the firm’s trademark, name, or featuring the firm’s headquarters in the background. McKesson’s rules prohibiting this behavior were struck down.²⁴¹ Even the laudatory and timely goal of respecting intellectual property laws was considered too broadly written.²⁴²

Encouraging employees to resolve concerns related to work “by speaking with co-workers, supervisors or managers,” rather than communicating their grievances among themselves online, was also found to inhibit employee protected activity.²⁴³ This policy acted as both a limitation on coworker interaction and an order to discuss grievances with supervisors or managers instead.

Despite these issues with McKesson’s social media policy, there was insufficient evidence to indicate that the employer acted pursuant to those unlawful rules.²⁴⁴

Once again, the *McKesson Advice Memo* contains no citation to *Republic Aviation*, nor does it deploy any explicit balancing analysis. However, aspects of the memorandum do refer to certain legitimate interests of the employer. Thus, if any balancing of employer interests took place in the *McKesson Advice Memo* ruling, it is only implicitly reflected in the decision.

237. *Id.* at 7.

238. *Id.* at 7–8.

239. *Boeing Co.*, 365 N.L.R.B. No. 154, slip op. at 4 n.15 (D.C. Dec. 14, 2017).

240. *McKesson*, *supra* note 141, at 7.

241. *Id.* at 8.

242. *Id.*

243. *Id.*

244. *Id.* at 4 n.3.

E. The General Motors Decision

In the May 2012 *General Motors* case, the ALJ reviewed General Motors' ("GM") social media policy, which required employees to: "Use Good Judgment About What You Share And How You Share . . . [to] be sure that your posts are completely accurate and not misleading and that they do not reveal non-public company information on any public site."²⁴⁵ GM's policy cautioned employees that "[o]ffensive, demeaning, abusive or inappropriate remarks are as out-of[]-place online."²⁴⁶ It also required employees to check with designated firm departments when in doubt as to whether any of their communications might fall within work rules' proscriptions, and to "obtain permission when quoting someone else" or posting content developed by another person, refrain from "incorporat[ing] GM logos [or] trademarks [in] posts," and to report any inappropriate social media conduct to management.²⁴⁷

The ALJ found some aspects of GM's policy lawful and other parts unlawful.²⁴⁸ The "Use Good Judgment" clause, the requirement that employees check with firm officials when in doubt if the information violates the social media policy, and the restrictions against posting content created by others were all found unlawful.²⁴⁹ The ALJ determined that these policies could inhibit concerted activity because they could be interpreted as requiring the employer's permission prior to engaging in Section 7 activities, and by restricting both hand billing activity and the distribution of union literature.²⁵⁰

The ALJ ruled that the restriction on using the GM logo and intellectual property in social media was lawful. Although the *General Motors* decision appears inconsistent with the logo and intellectual property rulings of *Chipotle* and the *Target Advice Memo*, the ALJ distinguished GM's policy on the basis that GM provided testimonial evidence of a bona fide reason for the policy.²⁵¹ Specifically, that the "main concern [implementing the] policy as it pertains to trademarks and copyrights is to protect the public (the consumers) from being confused and mistakenly believing that a posted communication is an official one from GM rather than from some independent entity."²⁵²

245. *Gen. Motors*, *supra* note 138, at 1.

246. *Id.* at 2.

247. *Id.*

248. *Id.* at 4–9.

249. *Id.* at 5–6.

250. *Id.*

251. *Id.* at 4.

252. *Id.*

The ALJ determined that the provisions cautioning employees that “offensive, demeaning, abusive or inappropriate remarks [that] are as out-of-place online as they are offline,” were lawful.²⁵³ The ALJ stated that “the descriptive adjectives used put this language in the category of permissible Further, . . . there is no mention of management or supervisors or any suggestion that employees be discouraged from discussing them.”²⁵⁴

The social media rules imploring employees to “think carefully about ‘friending’ coworkers . . . on external social media sites” were also determined to be lawful.²⁵⁵ The ALJ explained, “the section speaks only of thought, has no reference to possible discipline, and does not require employees to engage in any kind of action. Thus, it is in the nature of advice or of a suggestion rather than a mandate since GM can monitor conduct but not thoughts.”²⁵⁶

As previously discussed in this Article’s consideration of *Chipotle*, a savings or severability clause does not render an otherwise unlawful policy lawful. The same result was reached in the *McKesson Advice Memo*.²⁵⁷

F. The Dish Network Decision

In 2013, the Board, in *Dish Network*,²⁵⁸ adopted the ALJ’s decision finding an employer’s social media policy to be unlawful.²⁵⁹

The Dish Network social media policy at issue was another example of language that restricted employees from making “disparaging or defamatory comments about [their employer], its employees, officers, directors, vendors, customers, partners, affiliates or [*Dish Network’s*] products/services.”²⁶⁰ Employees were further advised that they may not “[p]articipate in these activities with Dish Network resources and/or on Company time.”²⁶¹

As with similar policies previously reviewed, the regulation against disparaging and defamatory comments could be construed as protecting the important essential assets of Dish Network’s reputation and business goodwill. However, citing prior decisions of the NLRB, *Dish*

253. *Id.* at 7–8.

254. *Id.* at 8.

255. *Id.*

256. *Id.*

257. *McKesson*, *supra* note 141, at 9.

258. *Dish Network Corp.*, 359 N.L.R.B. No. 108 (D.C., Apr. 30, 2013).

259. *Id.* slip op. at 1.

260. *Id.* slip op. at 5.

261. *Id.*

Network establishes that such a proscription against “disparaging or defamatory comments” improperly restricts activity under the NLRA.²⁶² Again, this places greater value upon the prospective possibility of chilling concerted activities than the potential damage to a firm’s reputation. Additionally, Dish Network’s restrictions against all social media activities during firm time or with Dish Network resources were ruled “presumptively invalid because they fail to clearly convey that solicitation can still occur during breaks and other nonworking hours at the enterprise.”²⁶³ The decision ignores the cost of cyberslacking.

Two other components of the Dish Network employee handbook are relevant because they have the potential to implicate social media activities. The firm restricted employee communications with the media regarding the firm without “prior authorization” from the Corporate Communications Department.²⁶⁴ The handbook specifically required employees to notify the employer’s General Counsel of any contact with government agencies, notify managers of any written correspondence from the government, refer Government correspondence to the General Counsel, and refrain from responding to Government correspondence unless otherwise directed.²⁶⁵ It also ordered employees to refer all government callers to the General Counsel and immediately notify a supervisor.²⁶⁶

Given that social media has the potential to increase contact with the media and government, such policies are relevant to this Article’s considerations. Restrictions against media contact without prior authorization are unlawful on the grounds that they “unduly interfere with employees’ Section 7 rights to ‘improve terms and conditions of employment’ by seeking assistance ‘outside the immediate employee-employer relationship.’”²⁶⁷ Similarly, the restriction on employees’ independent communications with government actors was found unlawful on the basis that it “could be rationally construed by workers as limiting independent communications with Board agents.”²⁶⁸

262. *Id.*

263. *Id.*

264. *Id.*

265. *Id.*

266. *Id.*

267. *Id.* slip op. at 6.

268. *Id.*

G. The Walmart Advice Memorandum

The May 2012 *Walmart Advice Memo*²⁶⁹ provides an example of an employer's social media policy that the NLRB General Counsel found acceptable (the complete social media policy included in the General Counsel memorandum is set forth in Appendix B).²⁷⁰ The factor that appears to distinguish the Walmart social media policy from those of the previously reviewed cases is the specificity of the rules and the inclusion of "sufficient examples of prohibited conduct so that, in context, employees would not reasonably construe the rules to prohibit Section 7 activity."²⁷¹ By using context, Walmart's social media policy was able to avoid ambiguity and sufficiently guide employees in a way that did not prohibit Section 7 activity.²⁷²

The *Walmart Advice Memo* involved an employee's Facebook account, which was open to the public, including 1,800 friends, five to ten of whom were coworkers.²⁷³ On his Facebook page, the employee stated:

The government needs to step in and set a limit on how many kids people are allowed to have based on their income. If you can't afford to feed them you shouldn't be allowed to have them. . . . Our population needs to be controlled! In my neck of the woods when the whitetail deer get to be too numerous we thin them out! . . . Just go to your nearest big box store and start picking them off. . . . We cater too much to the handicapped nowadays! Hell, if you can't walk, why don't you stay the f@*k home!!!!²⁷⁴

A Walmart customer who read the posting complained to the employer, indicating her fright and stating that she would not patronize the store; the customer referred to a fatal shooting that had occurred the previous year in the same store.²⁷⁵ Walmart investigated the incident and discharged the employee.²⁷⁶

269. *Walmart*, *supra* note 142.

270. In presenting the *Walmart Advice Memo*, full disclosure of the facts requires that it be noted that the NLRB Inspector General issued a report on September 13, 2012, finding that the Acting General Counsel Lafe Solomon's involvement in this case was a violation of ethics rules that prohibit NLRB employees from participating "substantially" in matters in which they have financial interests, such as stock worth \$15,000 or more, if the case "will have a direct and predictable effect on that interest." Melanie Trotman, *NLRB Inspector General Finds Improper Conduct by Top Agency Lawyer*, WALL ST. J., Sept. 16, 2012, available at <https://www.wsj.com/articles/SB10000872396390443816804578001131418043970> [<https://perma.cc/WLL8-HXV8>].

271. *Walmart*, *supra* note 142, at 3.

272. *Id.*

273. *Id.* at 4.

274. *Id.*

275. *Id.*

276. *Id.* at 4–5.

The Advice Memorandum concluded that the employer had not violated the NLRA, because the employee's comments did not address work conditions, nor did they arise out of any concern for work conditions.²⁷⁷ The employee's activities were "wholly distinct from activity that falls within the ambit of Section 7."²⁷⁸

For example, Walmart's social media policy prohibited inappropriate discriminatory, harassing, or violent speech.²⁷⁹ The policy contained a section entitled, "Be Respectful," which stated that employees should avoid malicious, obscene, or threatening language 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."²⁸⁰ The policy spoke of accuracy in posting information about "Walmart, fellow associates, members, customers, suppliers, people working on behalf of Walmart or competitors,"²⁸¹ rather than prohibiting such posting. The policy also referred to posting only "appropriate and respectful content."²⁸² The Walmart policy provided that inappropriate conduct included situations where confidential information, trade secrets, internal reports—including financial insider information—are revealed.²⁸³ Thus, what could have been a potentially problematic policy, had it included working conditions and wages as part of "confidential information," was viewed by the General Counsel as limiting discussion or disclosure of firm data of a competitive nature.

IV. Conclusion

Given the nature of social media, its pervasive reach, and its fast pace of change and innovation, there is considerable uncertainty for employers that promulgate social media policies and for employees with regard to what social media activities may be legitimately restricted. Changes in the prevailing precedent due to the composition of the NLRB also contribute to this uncertainty. The recent *Boeing* decision overruling the *Lutheran Heritage* framework is an example.

The NLRA was enacted in 1935, within the shadow of the great depression.²⁸⁴ This was before the analog era that commenced during

277. *Id.* at 5.

278. *Id.*

279. *See infra* Appendix B.

280. *Id.*

281. *Id.*

282. *Id.*

283. *Id.*

284. *See National Labor Relations Act, supra* note 44.

World War II and continued through the late twentieth century—well before the digital and Internet era. Accordingly, the explicit language of the NLRA did not contemplate the issues raised by social media, including the instant, asynchronous communication, the permanent nature of social media posts, and the sheer magnitude of the power of employees to communicate with a virtually unlimited number of other people internal and external to the firm.

This raises the prospect of new forms of concerted activities such as “liking” another person’s post through Facebook. Alternatively, it provides employees the ability to act as corporate saboteurs by causing great injury to a firm’s brand value, goodwill, reputation, and client relations through false social media posts that go viral. Such damage to a firm also implicates the interests of the firm’s employees whose careers are also threatened by harm caused by such a rogue employee.

Given that the specific details of the issues presented by social media policies are not explicitly considered by the plain language of the NLRA, the scope of permissible and impermissible social media policies must be gleaned from the relevant rulings of the courts, the NLRB, the ALJs, and the General Counsel.

When considering the social media activity of individual employees, the cases tend to impose a narrow interpretation of concerted activities and provide employers with broad discretion to take remedial action against employees whose posts to social media threaten a firm’s legitimate business interests.²⁸⁵ In contrast, when considering the permissible scope of employer social media policies, the adjudicating authorities have imposed a narrow interpretation of what is permissible.

Both circumstances involve the same employer interests: the right to protect brand value, business goodwill, the firm’s reputation, an interest in workplace discipline, and efficiency. The contrast in the treatment of individual employee cases versus employer social media policy cases may be explained by the difference in how non-litigant employees’ interests are implicated. When addressing an individual’s social media activity, the posting employee is directly culpable for acts that may have a negative effect on the firm and any negative derivative consequences on other innocent employees who suffer as a result. Additionally, any remedial action against such a single individual is less likely to be known to and/or influence the concerted activities of other employees.

285. Magaldi, Sales & Cameron, *supra* note 61.

Alternatively, an improper social media policy is likely to be known to most, if not all, of the firm's employees. As a result, an unlawful social media policy has a chilling effect on all employees' concerted activities as protected by the NLRA. Thus, these differing consequences to innocent, non-litigant employees may reconcile the two different considerations imposed by the courts, the NLRB, the ALJs, and the General Counsel.

With regard to the rulings that help establish the scope of permissible and impermissible social media policies, these parameters may be circumscribed by the *Walmart Advice Memo* and *Chipotle* decision under the *Lutheran Heritage* standard.

The *Boeing* majority alleges that the cases heretofore decided under the *Lutheran Heritage* framework have not sufficiently accounted for an employer's preferred justifications for a work rule.²⁸⁶ This suggests that a wider array of social media work rules will be found lawful as long as *Boeing* remains the standard of review. Notwithstanding this possible expansion, the cases decided under *Lutheran Heritage* are not overruled and continue to inform on the scope of permissible and impermissible social media policies. This article's analysis of the changing landscape of permissible social media policies offers the below guidance to employers.

Employers may not completely prohibit their employees from engaging with or participating in social media either at work or using workplace resources.

Employers may not impose broad-based restrictions on the use of confidential or private information on social media because it could restrict protected conversations regarding wages, union activity, unfair treatment by the employer, or work conditions.

Employers must make clear that restrictions on dissemination of confidential information do not impact its employees' right to discuss working conditions, wages, and the like. Only if a policy contains sufficient specificity and contextual examples will such prohibitions against the dissemination of firm confidential information withstand scrutiny, and only as it pertains specifically to trade secrets, such as secret formulas, product features, launch dates, customer lists, and similar topics or items of a competitive nature.

286. *Boeing Co.*, 365 N.L.R.B. No. 154, slip op. at 2 (D.C. Dec. 14, 2017) ("The 'reasonably construe' standard entails a single-minded consideration of NLRA-protected rights, without taking into account any legitimate justifications associated with policies, rules and handbook provisions.").

Employers may not generally restrict employees from using the firm's name, or posting or displaying firm logos, facilities, or uniforms on social media sites. This is unlawful because it prevents employees from exercising their rights to comment on work conditions and interferes with their ability to act in concert as protected by the NLRA. One example is posting a photograph on social media of an employee dressed in a t-shirt that comments on the employer's work conditions by referencing its logo. The use of such information by employees may also allow coworkers to locate each other and discuss unfair treatment by the employer, terms of employment, and other protected communications. Employers may restrict employees' commercial use of firm trademarks or false associations or prevent posts that confuse unofficial and official firm communications.

Employers may prohibit employees from ranting about a firm on social media, but only insofar as the communication is not in and of itself a part of, or related to concerted action. In considering this issue, restrictions on employee disparagement of the employer or broad restrictions regarding confidential information have proven difficult for the employer to defend based on their prospective chilling effect on an employee's right to comment upon working conditions and pay. Employers must provide explicit contextual examples when establishing social media policy (e.g., refrain from disparaging product features online or denigrating the employer's customers).

Prohibiting employees from communicating with the media through social media (or otherwise) without prior employer approval has been ruled unlawful since it has a chilling effect upon workers' rights to comment on improper treatment by the employer, unfair wages, or other protected concerted activities protected by the NLRA.

Restricting employees from communicating about legal matters, litigation, disputes, or lawsuits has been found to be unlawful under the NLRA because this could have a chilling effect upon workers' rights to discuss claims against the employer or unfair conditions maintained by the employer. Social media policies that require employees to report unusual or inappropriate social activities of other employees to the firm have been ruled unlawful.

There are fewer issues regarding limitations as to where and when employees may use social media. Content-neutral prohibitions on posting during the workday or on work equipment have a much lower chance of being interpreted as violations of the NLRA. However, employees have the right to engage in protected activities on the

employer's properties during non-work time and in non-work areas, such as break rooms.

As determined by contrasting the *Walmart Advice Memo* with the *Chipotle* decision, specificity along with contextual examples regarding social media restrictions and permitted activities are important and may make the difference between a lawful and unlawful social media policy.

Broad savings clauses that state social media policy restrictions are not intended to apply to protected activities and will not bring an otherwise unlawful social media policy in compliance with the NLRA. The question is whether specific clauses with contextual examples of protected and unprotected activities are more likely to be found lawful.

Appendix A

The following are the Social Media Policy and excerpts of the employee handbook referenced in the *Chipotle* decision.²⁸⁷

Chipotle Social Media Code of Conduct

We are dedicated to our Food With Integrity mission and take pride in our commitment to using ingredients that are sustainably grown and naturally raised. One way to share our mission is through social networking sites, blogs, and other online outlets (social media). Chipotle's social media team is solely responsible for the company's social media activity. You may not speak or write on Chipotle's behalf.

Social media is also a quick way for you to connect with friends and share information and personal opinions. If you aren't careful and don't use your head, your online activity can also damage Chipotle or spread incomplete, confidential, or inaccurate information. To avoid this, our Social Media Code of Conduct applies to you. Chipotle will take all steps to stop unlawful and unethical acts and behavior and may take disciplinary action, up to and including termination, against you if you violate this code or any other company policy, including Chipotle's Code of Conduct.

Outside the workplace and on your own personal time when you are not working, you may participate in social media linked to your personal email address (not your Chipotle email address) and publish personal opinions and comments online. Do be courteous and protect yourself and your privacy. What you publish online is easy to find and will exist for a long time. Think before posting.

Your social media activities are outside the course and scope of your employment with Chipotle. This means that you may not use Chipotle's computers, telephones and equipment for social media when you are working. You may not make any statements about Chipotle's business results, financial condition, or any other matters that are confidential. You must keep confidential information confidential and you may not share it online or anywhere else. For the safety of our employees and property, you may not post online pictures or video of any non-public area of our restaurants. You may not make disparag-

²⁸⁷ Appendix A reproduces in part the Chipotle Social Media Policy and employee handbook. Chipotle Services LLC d/b/a Chipotle Mexican Grill, 364 N.L.R.B. No. 72, slip op. at 6-7 (D.C., Aug. 18, 2016).

ing, false, misleading, harassing or discriminatory statements about or relating to Chipotle, our employees, suppliers, customers, competition, or investors. You alone are personally responsible for your online activity.

Please do report any complaints or concerns you have about Chipotle's business by talking with your supervisor or contacting Chipotle Confidential any time at 1-866-755-4449 or www.chipotleconfidential.com.

This code does not restrict any activity that is protected or restricted by the National Labor Relations Act, whistleblower laws, or other privacy rights.

Excerpts from Chipotle Employee Handbook

The following are excerpts from the Chipotle handbook referenced in the *Chipotle* decision.²⁸⁸

Solicitation Policy

Employees are not to solicit or be solicited during their working time anywhere on company property, nor are they to solicit during non-working time in working areas if the solicitation would be within visual or hearing range of our customers.

Chipotle's Confidential Information

The improper use of Chipotle's name, trademarks, or other intellectual property is prohibited.

Ethical Communications

As an aspect of good judgment and adherence to this policy, it is always appropriate to raise questions and issues, even if they are difficult. Likewise, avoid exaggeration, colorful language, guesswork, and derogatory characterizations of people and their motives. Whether in your everyday work conversations, in your exchange of e-mail, or otherwise, your communications should be thoughtful and ethical. Think before you speak and write. Be clear and objective.

288. *Id.* slip op. at 8.

Political/Religious Activity and Contributions

While any political or religious affiliation you may have is up to you, any activity in those areas needs to remain outside of the work environment. It is said that to avoid arguments, one should never discuss politics or religion in public—and in this case at work. . . .

It is strictly prohibited to use Chipotle's name, funds, assets, or property for political or religious purposes or endorsement, whether directly or indirectly.

Appendix B

The following is Walmart's Social Media Policy, appended in the *Walmart Advice Memo*.²⁸⁹

Social Media Policy

Updated: May 4, 2012

At Walmart, 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 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 Wal-Mart Stores, Inc., or one of its subsidiary companies in the United States (Walmart).

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 Walmart, as well as any other form of electronic communication.

The same principles and guidelines found in Walmart 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 be-

289. *Walmart*, *supra* note 142, at 6–7 (the Policy page numbers and headers that appeared in the *Walmart Advice Memo* have been omitted).

half of Walmart or Walmart's legitimate business interests may result in disciplinary action up to and including termination.

Know and follow the rules

Carefully read these guidelines, the Walmart Statement of Ethics Policy, the Walmart 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 Walmart. 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 Walmart, fellow associates, members, customers, suppliers, people working on behalf of Walmart or competitors.

Post only appropriate and respectful content

- Maintain the confidentiality of Walmart trade secrets and private or confidential information. Trade secrets may include information regarding the development of systems, processes,

products, know-how and technology. Do not post internal reports, policies, procedures or other internal business-related confidential communications.

- 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 Walmart website without identifying yourself as a Walmart associate.
- Express only your personal opinions. Never represent yourself as a spokesperson for Walmart. If Walmart 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 Walmart, fellow associates, members, customers, suppliers or people working on behalf of Walmart. If you do publish a blog or post online related to the work you do or subjects associated with Walmart, make it clear that you are not speaking on behalf of Walmart. 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 Walmart.”

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 Walmart email addresses to register on social networks, blogs or other online tools utilized for personal use.

Retaliation is prohibited

Walmart 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 Walmart'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.