

manatt

# New Rules for Social Media in the Workplace

Presenter:

**Esra A. Hudson, Esq.**

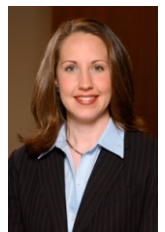
**Manatt, Phelps & Phillips, LLP**

September 27, 2011



# Facebook Isn't Just for Fun

- Numerous “landmines” for employers:
  - Deceptive trade practices;
  - Background checks;
  - References;
  - National Labor Relations Board (“NLRB”)

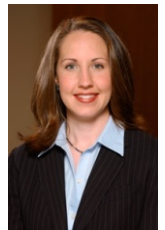


# What does the NLRB do?

- “The National Labor Relations Board is an independent federal agency vested with the power to safeguard employees’ rights to organize and to determine whether to have unions as their bargaining representative. The agency also acts to prevent and remedy unfair labor practices committed by private sector employers and unions.”
- Under the authority of the National Labor Relations Act (“NLRA”), the NLRB:
  - Conducts elections;
  - Investigates charges;
  - Facilitates settlements;
  - Decides cases;
  - Enforces orders.



NATIONAL LABOR  
RELATIONS BOARD



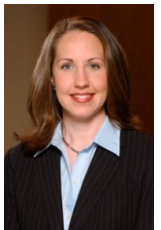
# Why is the NLRB Involved in Social Media Policies?

- **True or False:**

- My workforce isn't unionized, so the NLRB's decisions do not affect me.

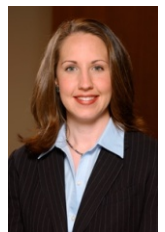
***False!***

- “Protected concerted activity” – Section 7 of the NLRA invests employees with the right to engage in “concerted activities for the purpose of collective bargaining or other mutual aid or protection.”
- Most of the NLRB's social media cases arise in *non-union* workplaces.



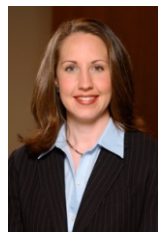
# How Active has the NLRB been on Social Media Issues in the Workplace?

- According to a report issued by the U.S. Chamber of Commerce, the NLRB has reviewed more than 129 cases involving social media in some way.
- On August 28, 2011, the NLRB's Acting General Counsel issued a report summarizing the outcome and investigations into 14 cases, with the intent of assisting "practitioners and human resources personnel."



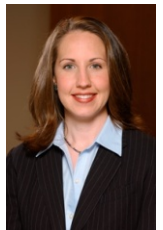
# What is the NLRA?

- The primary purpose of the NLRA is to promote and protect employees' rights to organize and take collective action. It is an unfair labor practice for employers to:
  - interfere with, restrain, or coerce employees in the exercise of their Section 7 rights to engage in protected concerted activities;
  - interfere with and dominate a labor organization;
  - discriminate against an employee because the employee engaged in union activities or refrained from engaging in union activities;
  - discriminate against an employee because the employee filed charges or gave testimony under the National Labor Relations Act;
  - refuse to bargain in good faith with a union that is the exclusive representative of its employees.



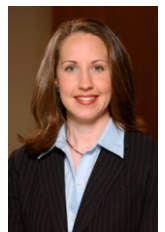
# What is a “Protected Concerted Activity?”

- A few examples of protected concerted activities identified by the NLRB:
  - Two or more employees addressing their employer about improving their pay;
  - Two or more employees discussing work-related issues beyond pay, such as safety concerns, with each other;
  - An employee speaking to an employer on behalf of one or more co-workers about improving workplace conditions.



# What is the NLRB's Process for Dealing with Social Media Issues in the Workplace?

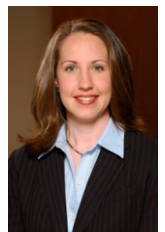
- Charges
  - Complaints
  - ALJ Decisions
  - Board Opinions
  - Advice Memoranda
  - General Counsel Memoranda
  - Operations-Management Memoranda
- Note: In 2009, of the 22,943 charges filed, only 36.6% were found to have merit.





# Categories of Social Media Issues Reviewed by NLRB

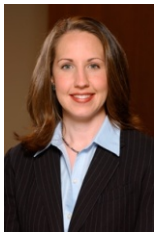
1. **Overbroad employer policies** that restrict employees' use of social media.
2. **Unlawful discharge or discipline** of employees over contents of social media posts.



# Everything Old is New Again

---

- First social media case before the NLRB arose in December 2009 against Sears, but most cases have been in 2010 and 2011.
- But, NLRB's decisions are based on NLRA precedent, not new law or standards.

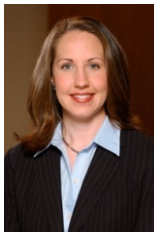


# How Does the NLRB Analyze Employer Social Media Policies?

11

- Two step analysis under *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 647 (2004):
  1. Does the policy explicitly restrict Section 7 concerted activities; OR
  2. If the policy does not explicitly restrict, then:
    - a) would employees reasonably construe the language to prohibit Section 7 activity,
    - b) was the rule promulgated in response to union activity, or
    - c) has the rule been applied to restrict the exercise of Section 7 rights?

*See also Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), enfd. 203 F.3d 52 (D.C. Cir. 1999)



# How Does the NLRB Analyze Whether an Employee has been Unlawfully Discharged or Disciplined for Social Media Use?

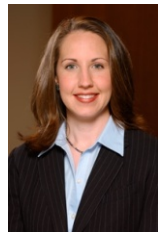
12

- Was the employee acting “with or on the authority of other employees, and not solely by and on behalf of the employee himself?”  
*Meyers cases.*
- Was the employee making statements where it was clear from the context of the statements that they implicated working conditions?  
*Valley Hospital Medical Center.*
- Were the statements in protest of supervisory actions?  
*Daetwylr Rubber and Plastics, Inc., 350 NLRB 669 (2007).*



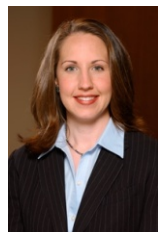
# What Employer Defenses has the NLRB Considered in Social Media Cases?

- Can the employer demonstrate that it would have discharged the employee, even in the absence of protected activity? *Wright Line* burden shifting test.
- Did the employee's activity lose protection under the NLRA?
  1. Were the employee's actions so "opprobrious" and egregious as to render him or her "unfit for further service." *Atlantic Steel Co.*, 245 N.L.R.B. 814 (1979).
  2. Were the employee's actions so disloyal that the employee is not entitled to protection under the NLRA (the "Jefferson Standard")? *NLRB v. Electrical Workers Local 1229*, 346 U.S. 464 (1953).



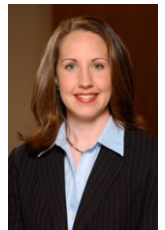
# The Great Hot Dog Caper at the BMW Dealership: The Facts

- Someone accidentally drove a car from the dealership into a pond in front of the dealership. Employee, a salesperson, took pictures.
- Later in the week, the dealership hosted an all-day event for clients to introduce a new BMW model.
- The General Sales Manager told salespeople the dealership would serve hot dogs, cookies and pre-made Costco snacks at the event.
- Employee and other salespeople horrified at cheap refreshments, and the negative affect they thought it would have on clients.
- Employee took mocking photos of co-workers posing with the food during the event, later posted those photos and the photos of the car in the pond on his Facebook page, accompanied by snarky comments.



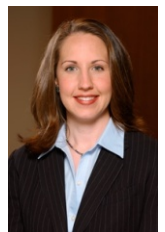
# The Great Hot Dog Caper at the BMW Dealership: The Facts (cont.)

- General Sales Manager informed of Facebook posts by another dealer, as well as a co-worker.
- The General Sales Manager called Employee at home and told him to remove the photos and comments, and Employee immediately complied.
- Employee was later terminated for embarrassing the dealership and its CEO.
- Question: Did the NLRB determine that this termination violated the NLRA?



# The Great Hot Dog Caper at the BMW Dealership: The NLRB's Response

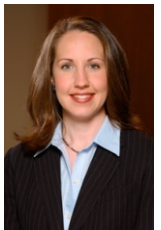
- Termination did violate the NLRA because:
  - “Concerted” conduct related to employees’ concerns over commissions.
    - Employees talked among each other about their frustration over the food choices and documented their concerns;
    - Facebook posts expressed sentiment of the group;
    - “Clearly related to the employees’ terms and conditions of employment” because they worked entirely on commission.
  - Employer “knew of the concerted nature” of the conduct and could not meet its burden of showing it would have terminated absent the “protected activity.”
  - Employee’s conduct did not lose protection under the NLRA because not “opprobrious” enough under *Atlantic Steel* and not disparaging or disloyal enough under the *Jefferson Standard*.





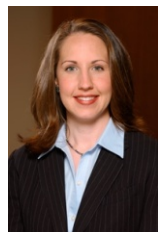
# The Disgruntled Bartender: The Facts

- Restaurant/bar had unwritten policy that waitresses do not share tips with bartenders.
- Employee and fellow bartender had conversation about how the policy “sucked.”
- Six months later, Employee posted complaint on Facebook in response to a relative’s question about work, saying:
  - Hadn’t had a raise in five years and he was doing waitresses’ work without tips.
  - Customers were “rednecks” and that he “hoped they choked on glass as they drove home drunk.”
- Later, Employee fired because of the postings.
- Question: Did the NLRB determine that this termination violated the NLRA?



# The Disgruntled Bartender: The NLRB's Response

- Termination did not violate the NLRA because:
  - *Not concerted activity*
    - Although Employee complained about terms and conditions of employment, “he did not discuss the posting with his coworkers, and none of them responded to the posting.”
    - No employee meetings about the tipping policy, except for the one 6 months ago, which the NLRB summarily concluded didn't have anything to do with these posts.



# The Overtaxed Sports Bar Employees: The Facts

- Employer's internet/blogging policy prohibited "inappropriate discussions."
- Several current and former employees discovered they owed state income taxes for the prior year because their income tax had not been properly withheld.
- At least one employee brought the issue to the Employer's attention and asked that it be made an agenda item at the next staff meeting.
- Later, a former employee posted a "short-hand expletive" on her Facebook page complaining about the tax withholding and asserted that the Employer's owners could not even do paperwork correctly.
  - A current employee responded to this post by clicking "Like."
  - Two customers joined the conversation, as did another employee, who asserted she was also owed money and said one of the owners was "such an a\*\*hole."
- Both current employees who participated in the Facebook conversation fired and threatened with legal action.
- Question: Did the NLRB determine that the terminations and/or policy violated the NLRA?



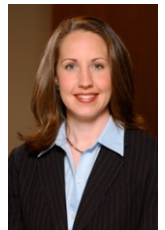
# The Overtaxed Sports Bar Employees: The NLRB's Response

- Terminations did violate the NLRA because:
  - Concerted conduct related to income tax withholding brought to management's attention;
  - Employee's conduct – even the one who called the owner an “a\*\*hole” – did not lose protection under the NLRA because not defamatory and not “opprobrious” enough under *Atlantic Steel*;
  - Employer's threat to sue also violated NLRA because it reasonably tended to interfere with exercise of Section 7 rights.
- Policy did violate the NLRA because:
  - Rule limiting “inappropriate discussions” overly broad and, absent limitations as to Section 7 activity, employees “would reasonably interpret” the rule to prohibit discussions about their terms and conditions of employment.



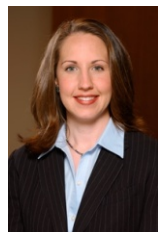
# The Senator's Confidant: The Facts

- Employee was a dispatcher for nonemergency medical transport and fire protection services company that provided services to local government and other customers.
- U.S. Senator announced on Facebook that four fire departments in the state had received federal grants.
- Employee wrote comments on Senator's "wall" complaining about her company and how emergency medical services handled in her state:
  - Said Employer had contracts with several fire departments because cheapest in town and paid employees \$2 less than national average;
  - Complained that state was looking for more cheap companies to farm work to;
  - Said her company had only two trucks for entire county and that crew did not know CPR on a service call.



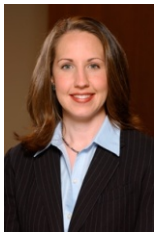
# The Senator's Confidant: The Facts (cont.)

- Ten days later, Employer terminated Employee for disparaging Employer and revealing confidential info about a service call.
- Question: Did the NLRB determine that the termination violated the NLRA?



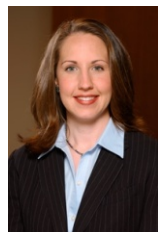
# The Senator's Confidant: The NLRB's Response

- Termination did not violate the NLRA because:
  - *Not* concerted activity
  - Employee did not discuss postings with any other employee.
    - No employee meetings or any attempt to initiate group action.
    - Not trying to take complaints to management and did not expect the Senator to help her.
  - “Merely trying to make a public official aware of the condition of emergency medical services in her state.”



# The Tyrannical Boss: The Facts

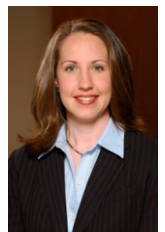
- Employee posted on Facebook about the “tyranny” of the new Assistant Store Manager, suggesting that employees were about the quit in droves.
  - Several workers responded, asking why he was so “wound up.”
  - Employee responded that Assistant Manager was being a “super mega puta.”
  - Co-workers made supportive comments, told him to “hang in there.”
- Another co-worker printed out the Facebook conversation and gave it to the Store Manager.
- Employee written up, received one day paid suspension and precluded from promotion for 12 mos.
- Question: Did the NLRB determine that the discipline violated the NLRA?





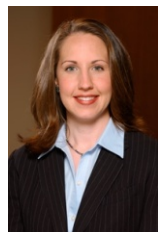
# The Tyrannical Boss: The NLRB's Response

- Discipline did not violate the NLRA because merely “individual gripes” expressing frustration and not concerted activity.



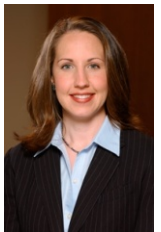
# The Cyber-Bullies: The Facts

- Co-workers at a non-profit social services agency each accuse the other of not doing enough to help Employer's clients. Decide to settle differences in meeting they plan to have later with Executive Director.
- One of the co-workers posts her complaints about the other co-workers on Facebook. Four other employees join in and also complain about the other co-worker.
  - Many of the comments were sarcastic and included swearing.
- The co-worker that was the subject of the Facebook conversation complains that she is being “cyber-bullied.”
- Employer fires all of the Employees involved in Facebook conversation.
- Question: Did the NLRB determine that the terminations violated the NLRA?



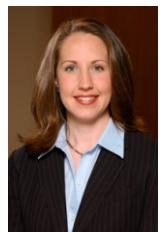
# The Cyber-Bullies: The NLRB's Response

- Termination did violate the NLRA because:
  - “Textbook” example of concerted activity. Conversation related to employee performance and responsibilities that the employees planned to raise with management.
  - Employees did not lose the NLRA’s protection, even though statements were sarcastic and included swearing



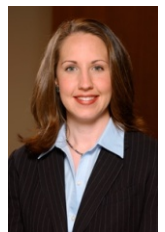
# Atwitter Over a Tweeter: The Facts

- Newspaper reporter opened Twitter account after encouraged by Employer to get stories out through Twitter. Listed Employer in his account bio. Paper did not have a social media policy.
- Reporter posted various tweets that management deemed inappropriate:
  - You stay homicidal, Tucson, See Star Net for the bloody deets.
  - What?!?!? No overnight homicide? WTF? You're slacking Tuscon.
  - I'd root for daily death if it always happened in close proximity to Gus Balon's.
- Reporter told to “stop airing his grievances or commenting about the employer in any public forum” or “damaging the goodwill of the company.” Reporter continued to tweet and was later terminated.
- Question: Did the NLRB determine that the termination violated the NLRA?



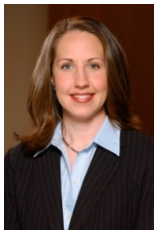
# Atwitter Over a Tweeter: The NLRB's Response

- Termination did not violate the NLRA because:
  - *Not* concerted activity
  - Tweets did not relate to the terms and conditions of Reporter's employment, nor did they seek to involve other employees in issues related to employment.
- What about fact that Employer told employee not to air grievances in "any public forum"? Overbroad policy?
  - No. Although some of Employer's statements came close to the line, they were not "orally promulgated" overbroad rules.
  - Instead, made in context of individual discipline, so not a violation.



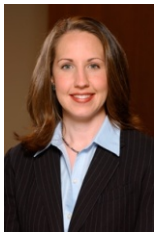
# The Scumbag Supervisor: The Facts

- Employee at ambulance company criticized supervisor on Facebook after supervisor denied her request for a union rep for an issue related to a customer complaint.
  - Called supervisor a “dick” and “scumbag” and also said “Love how the company allows a 17 to be a supervisor.” The number “17” was the company’s code for a psychiatric patient. Several co-workers responded with supportive posts.
- Employer had a policy that prohibited employees from posting any pictures of themselves that depicted the company in any way and prohibited them from making disparaging, discriminatory, or defamatory comments about the company or its employees.
- After seeing Employee’s posts, Employer terminated employment.
- Question: Did the NLRB determine that the termination and/or policy violated the NLRA?



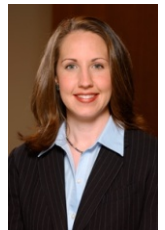
# The Scumbag Supervisor: The Facts

- Termination did violate the NLRA – concerted activity because discussing supervisory activity.
- Policy did violate the NLRA because:
  - Policy prohibited a broad spectrum of conduct and did not contain “limiting language to inform employees that it did not apply to Section 7 activity.”



# Musings at Midnight: The Facts

- Employee was a full-time recovery specialist working with mentally disabled clients at a homeless shelter.
- While working overnight shift, had conversation with friend on her Facebook wall:
  - Said it was spooky alone overnight in a mental institution.
  - One client “cracking me up . . . I don’t know whether he’s laughing at me, with me, or at his own voices.”
- Employer learned about posts and terminated Employee: “We are invested in protecting people we serve from stigma” and it is not “recovery oriented” to use client’s illness for personal amusement. Plus, she was posting when she should have been working.
- Question: Did the NLRB determine that the termination violated the NLRA?





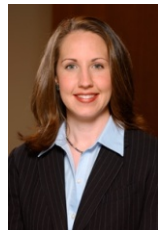
# Musings at Midnight: The NLRB's Response

- Termination did not violate the NLRA because:
- *Not* concerted activity:
  - Posts not discussed with other employees, no co-workers responded, and not seeking group action.
  - Posts did not relate to the terms and conditions of employment.



# The “Be Nice, Private And Respectful” Policy

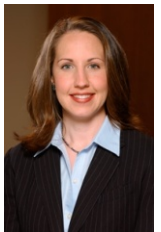
- Employer’s Rule 1: No posts that may violate, compromise, or disregard the rights and reasonable expectations as to privacy or confidentiality of any person or entity.
- Employer’s Rule 2: No posts that embarrass, harass, or defame employer or any employee, officer, board member, representative or staff member.
- Employer’s Rule 3: No posts that lack truthfulness or that might damage the reputation or goodwill of the employer, its staff or employees.



# The “Be Nice, Private And Respectful” Policy: The NLRB’s Response

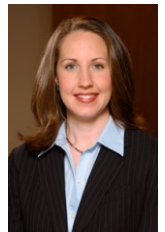
---

- Policy does violate the NLRA because:
  - Rule 1 lacks definition and Rules 2 and 3 are overly broad
  - Absent limitations as to Section 7 activity, employees “would reasonably interpret” the rules to prohibit discussions about their terms and conditions of employment.



# The “Don’t Post Anything You Wouldn’t Want Your Boss To See” Policy

- Do not:
  - Post anything you would not want your manager or supervisor to see or that would put job in jeopardy;
  - Disclose inappropriate or sensitive information about the Employer;
  - Post any pictures or comments involving Employer or employees that could be construed as inappropriate;
    - Cautioned that one inappropriate picture or comment taken out of context could fall into the wrong hands and cost an employee his or her job.



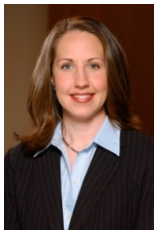
# The “Don’t Post Anything You Wouldn’t Want Your Boss To See” Policy

- Policy does violate the NLRA because:
  - Broad terms that would commonly apply to protected discussion about employment terms and conditions.
  - No definitions or guidance about what is covered and “absent such limitations or examples” it would be reasonable for employees to believe protected activities covered.



# The “Don’t Force Me To Be Your Friend” Policy

- Do not:
  1. Pressure co-workers to “friend” you.
  2. Reveal personal information about co-workers, company clients, partner or customers without their consent.
  3. Use Employer’s logos and photographs of Employer’s worksite, brand, or products without written authorization.
- NLRB found that two of these three policies violate the NLRA. Which ones?
  - #2 and #3.
  - “Absent any limitations or examples” of what is covered, it would be reasonable for employees to believe protected activities covered.

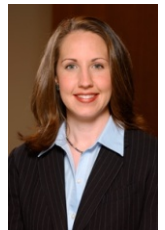


- Employer's media relations and press interviews policy:
  - Purpose of the policy is to ensure that one person speak for the company to deliver an appropriate message and avoid giving misinformation to the media.
  - Communications with the media through public affairs office only.
  - No cameras in the store or parking lot without prior approval.
  - All media questions must be responded to by stating not authorized to comment and refer to public affairs office.
- Policy did not violate NLRA:
  - Cannot have policy that limits employees' right to speak to media about wage and other terms and conditions of employment.
  - But, “a media policy that simply seeks to ensure a consistent, controlled company message” cannot be “reasonably interpreted to restrict Section 7 communications.”



# ALJ Decision: Hispanics United of Buffalo

- First ALJ ruling of its kind, issued September 2, 2011
- Facts very similar to “Cyber-bullies” case:
  - A group of co-workers engaged in a lively, obscenities-laced discussion on Facebook about another co-worker who had disparaged their productivity;
  - The subject of the discussion printed out the posts and complained to management.
  - All five employees who participated in the Facebook discussion were terminated.
- ALJ in New York found that the co-workers were engaged in concerted activity under Section 7 because the discussion involved terms and conditions of employment, including job performance and staffing levels.
  - Nature of the comments not so “opprobrious” as to lose protection of the NLRA.
- All five employees ordered reinstated and awarded back pay.





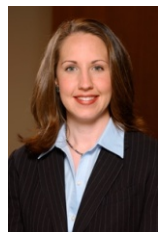
# NLRB Issues New Posting Requirement

- Beginning November 14, 2011, most private sector employers must post a notice re: employees rights under the NLRA.
  - Exceptions
  - Consequences for failing to post
- Posters can be downloaded from the NLRB website: [www.nlrb.gov](http://www.nlrb.gov).



# Recommendations for Drafting Social Media Policies

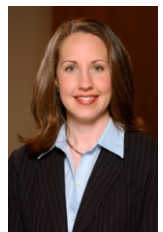
- Recommendations for drafting social media policies:
  - Avoid overbroad policy announcements. NLRB has taken issue with policies that completely prohibit:
    - Postings of pictures of the company or with company logos or uniforms;
    - Employees from making “disparaging” comments about company/employees;
    - Disrespectful or offensive posts;
    - Posts that disregard employee or company privacy/confidentiality;
    - Statements that are untruthful or hurt the company’s goodwill or reputation;
    - Employees from using company name, address or other info in profiles;
  - Policies that refer to respectful or disparaging comments in social media posts should be drafted in the form of recommendations/advice and should avoid references to disciplinary action.
  - If policy has a clear purpose that is unrelated to Section 7 rights, then say so clearly in the policy.



# Recommendations for Drafting Social Media Policies (cont.)

43

- Use examples and include limiting language to make it clear that the policy does not apply to Section 7 protected concerted activities:
  - “Nothing in this policy prohibits employees from discussing wages, working conditions, or terms of employment with each other.”
  - “Notwithstanding anything herein, this policy does not restrict employees from engaging in any conduct that is protected by local, state or federal law, including but not limited to the National Labor Relations Act.”
- If you don’t have a written policy, avoid orally promulgating broad policies.



# Recommendations for Disciplining Employees Who Engage in Social Media Misconduct

- Factors to consider in disciplining employees:
  - Could the employees' communication/post reasonably be construed as relating to the terms and conditions of employment?
  - With whom did the employee communicate in the post? Were co-workers involved or did they comment?
  - If co-workers did not participate in the communication/post, had the employee previously discussed the issue with co-workers?
  - Has the employee raised the subject at issue with management, or indicated an intent to do so?



# Thank you for your participation

---

- Questions?
- Contact information: Esra Hudson - (310) 312-4381, [ehudson@manatt.com](mailto:ehudson@manatt.com)

