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## Post *Quon*: An Analysis of the Evolution of New Media and the Employment Relationship

### I. INTRODUCTION

NEW MEDIA<sup>1</sup> AND THE EMPLOYMENT RELATIONSHIP intersect on several fronts: the initial hiring process, maintenance and termination of an employment relationship, intraoffice communication, contacts with clients and customers, supply chain exchanges, governmental agency relationships, and public relations.<sup>2</sup> In each scenario, both the employer and employee use New Media platforms to communicate with each other and with contingent parties to the employment relationship.<sup>3</sup> Such New Media usage is integral to the employer-employee relationship.

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1. The term "New Media" has evolved to mean modes of communication and interaction incepted during the digital era. Modes included under the "New Media" umbrella are typically digital, interactive, hypertextual, virtual, networked, and simulated. MARTIN LISTER ET AL., *NEW MEDIA: A CRITICAL INTRODUCTION* 13 (2d ed. 2009). See also Vincent Miller, *New Media, Networking and Phatic Culture*, 14 *CONVERGENCE: INT'L J. RES. INTO NEW MEDIA TECHS.* 387, 387-88 (2008) (noting that blogs and social media websites are examples of new media).

2. See, e.g., *Purple Commc'ns, Inc.*, 361 N.L.R.B. No. 126 (Dec. 11, 2014) (settling a dispute over use of an email system, mutually accessible by employer and employee, during nonworking time as permitted); *Hispanics United of Buffalo, Inc.*, 359 N.L.R.B. No. 37 (Dec. 14, 2012) (holding that an employer's termination of five employees—after finding Facebook comments responding to criticisms of their job performance—was a violation of the National Labor Relations Act); *Gen. Motors, LLC*, No. 07-CA-53570, 2012 WL 1951391 (N.L.R.B. Div. of Judges May 30, 2012) (finding that an employer's social media policy to be overbroad and prohibitive of employees' exercise of rights).

3. See *supra* note 2; Memorandum OM 12-31 from Lafe E. Solomon, Acting Gen. Counsel, Nat'l Labor Relations Bd. 2 (Jan. 24, 2012), <http://apps.nlr.gov/link/document.aspx/09031d45807d6567>.

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In 2010, the United States Supreme Court, citing *O'Connor v. Ortega*,<sup>4</sup> held in *City of Ontario v. Quon*<sup>5</sup> that “a court must consider ‘[t]he operational realities of the workplace’ in order to determine whether an employee’s Fourth Amendment rights are implicated.”<sup>6</sup> Since the *Quon* decision, questions remain as to the extent of an employee’s protected privacy rights regarding content posted on New Media platforms that exceed the physical boundaries of the workplace under the Fourth Amendment<sup>7</sup> and an employee’s protected speech and assembly rights under the First Amendment.<sup>8</sup>

In today’s workplace, there is a conflict between employees’ personal use and employees’ professional use of New Media communication tools such as “blogs, wikis, RSS feeds, instant messaging (IM), e-newsletters, Twitter (micro-blogging), YouTube, Facebook, cloud computing, podcasting, tagging, and Web 2.0 tools.”<sup>9</sup> Employers use many of these New Media tools and technologies. Some employers provide their employees with hardware and access.<sup>10</sup> Other employers shift the financial burden associated with keeping current technology to the employee, offering to reimburse employees who use their own hardware devices—often at a savings to the employer.<sup>11</sup> New Media platforms present unique difficulties for employers in the sense that the platforms and material posted by employees are digital, not physical.<sup>12</sup> Employees are not constrained by physical brick-and-mortar,

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4. 480 U.S. 709 (1987). The case involved an employer-initiated physical search of an employee-physician’s office without his consent while he was on administrative leave pending investigation. *Id.* at 712–14. In addressing the Fourth Amendment interplay, the Court noted “[t]he operational realities of the workplace, however, may make *some* employees’ expectations of privacy unreasonable when an intrusion is by a supervisor rather than a law enforcement official.” (emphasis in original). *Id.* at 717.

5. 560 U.S. 746, 750 (2010) (addressing employees’ expectation of privacy in digital communications that occurred during and after work hours on an employer-provided device).

6. *Id.* at 756. (quoting *O’Connor*, 480 U.S. at 717).

7. See, e.g., Saby Ghoshray, *The Emerging Reality of Social Media: Erosion of Individual Privacy Through Cyber-Vetting and Law’s Inability to Catch Up*, 12 J. MARSHALL REV. INTELL. PROP. L. 551, 566, 572–73 (2013).

8. See, e.g., Patricia Sánchez Abril, Avner Levin & Alissa Del Riego, *Blurred Boundaries: Social Media Privacy and the Twenty-First-Century Employee*, 49 AM. BUS. L.J. 63, 90–93 (2012).

9. Susan A. O’Sullivan-Gavin & John H. Shannon, *Managing the Impact of New Media on the Employment Relationship*, 4 J. BUS. ENTREPRENEURSHIP & L. 451, 451 (2011).

10. See, e.g., Michael S. Dicke & Catherine Kevane, FENWICK WEST LLP, *Game of Phones: Employer-Issued Smartphones and Employee Fifth Amendment Protections*, SEC. LITIG. AND ENFORCEMENT NEWSL. (Nov. 19, 2015), [http://www.fenwick.com/publications/Pages/Securities-Litigation-and-Enforcement-Newsletter-November-2015.aspx#article3?utm\\_source=Mondaq&utm\\_medium=syndication&utm\\_campaign=View-Original](http://www.fenwick.com/publications/Pages/Securities-Litigation-and-Enforcement-Newsletter-November-2015.aspx#article3?utm_source=Mondaq&utm_medium=syndication&utm_campaign=View-Original); (discussing an SEC insider trading action where Capital One issued smartphones to its employees to conduct company business); Rachel King, *New Smartphone Laws Could Mean Headaches for Employers*, WALL ST. J.: CIO JOURNAL (Aug. 26, 2014, 6:43 PM), <http://blogs.wsj.com/cio/2014/08/26/new-smartphone-laws-could-mean-headaches-for-employers/>; Karla L. Miller, *@Work Advice: When Your Employer Gives You a Smartphone* . . . , WASH. POST (Jan. 23, 2015), [https://www.washingtonpost.com/lifestyle/magazine/atwork-advice-when-your-employer-gives-you-a-smartphone-/2015/01/09/ad289b80-8ae8-11e4-a085-34e9b9f09a58\\_story.html](https://www.washingtonpost.com/lifestyle/magazine/atwork-advice-when-your-employer-gives-you-a-smartphone-/2015/01/09/ad289b80-8ae8-11e4-a085-34e9b9f09a58_story.html).

11. See, e.g., Elise Ackerman, *Calculating the True Cost of BYOD*, FORBES (May 28, 2013, 1:23 AM), <http://www.forbes.com/sites/eliseackerman/2013/05/28/calculating-the-true-cost-of-byod/#1bd576c3685d>.

12. O’Sullivan-Gavin & Shannon, *supra* note 9, at 453, 465.

traditional notions of “9 to 5” workdays, or past generations’ attitudes of loyalty to employers or organizations.<sup>13</sup> Employees can post content and information—both fact and opinion based—on these new digital platforms from anywhere and at any time.<sup>14</sup> Information and content can be posted prior to employment with a company, during employment, or during employment but when employees are not physically at work.<sup>15</sup> Today, employers who search, review, store, and act upon applicant and employee digital information (with or without the knowledge of the individual) can create myriad legal issues for both the employer and the employee.<sup>16</sup>

Employers must be aware of the legal implications of access to and ownership of digital information and material, and the potential legal repercussions that arise when utilizing employees’ information or material during both the hiring process and the ongoing employment relationship.<sup>17</sup> Current trends in the business world—such as “BYOD” (Bring Your Own Devices), the pervasive nature of social media platforms, and the ability to instantly access an individual’s private information on the Internet—have exacerbated conflicts between employers and employees relative to expectations of privacy in content and information, both personal and work related, on New Media communication platforms.<sup>18</sup>

This paper examines the development of regulatory rulings and memoranda relative to the impact of New Media on the employer-employee relationship since the seminal *Quon* decision in 2010. The analysis explores employer obligations and employee rights that expand from a narrow Fourth Amendment privacy

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13. *Id.* at 451 (noting that employee interactions now occur in “off-site internet connections, Wi-Fi access, or hot-spots”); *id.* at 459-60 (“Employees might not take the time to consider that a post to a blog or a social network could harm the reputation of the company. . . .”), *id.* at 465 (“Courts are now confronted with expectations of both employers and employees relative to intangible ‘spaces’ and information obtained, stored, and accessed beyond the brick and mortar of the workplace.”); See also *Latest Telecommunication Statistics*, GLOBAL WORKPLACE ANALYTICS.COM (Jan. 2016), <http://globalworkplaceanalytics.com/telecommuting-statistics> (noting that the “non-self-employed population” that works at home has increased 103% since 2005, and 3.7 million employees now work from home at least half of the time) (last update Jan. 2016).

14. O’Sullivan-Gavin & Shannon, *supra* note 9, at 451.

15. See *id.*; Nicky Jatana, Cynthia Sandoval & Leslie Glycer, *Advising Employers on the Use of Social Media in the Workplace*, 34 L.A. LAW., no. 11, Feb. 2012, at 12.

16. See O’Sullivan-Gavin & Shannon, *supra* note 9, at 451-52 (“Employers and businesses that do not understand the importance and ramifications of these new communication tools may find that they have inadvertently opened the door to litigation and liability . . . .”). See generally, Memorandum OM 12-31 from Lafe E. Solomon, *supra* note 3 (summarizing numerous legal disputes arising from employer misuse of employee digital information).

17. Teresa A. Daniel, *Managing and Leveraging Workplace Use of Social Media*, SOC’Y FOR HUM. RESOURCE MGMT. (Dec. 5, 2012), <http://www.shrm.org/templatestools/toolkits/pages/managingsocialmedia.aspx>.

18. *E.g.*, *City of Ontario v. Quon*, 560 U.S. 746 (2010) (where city police officer had no expectation of privacy to text messages sent and received on his work pager); MICHAEL J. EASTMAN, U.S. CHAMBER OF COMMERCE, A SURVEY OF SOCIAL MEDIA ISSUES BEFORE THE NLRB 5, 7 (2011), <https://www.uschamber.com/sites/default/files/legacy/reports/NLRB%20Social%20Media%20Survey.pdf> (examining instances where employers discharge or take improper action against employees because of their social media posts).

application<sup>19</sup> to a broader perspective that encompasses First Amendment privacy, speech, and assembly protections in various workplace contexts.<sup>20</sup> As modern workplaces adapt to evolving New Media technology and platforms, employers seeking to avoid contentious litigation, marring publicity, and damaging morale must monitor and be poised to respond to current developments that are shaping legal obligations at state and federal levels. Guidance from case law and regulatory agencies, such as the Equal Employment Opportunity Commission (EEOC), the Federal Trade Commission (FTC), and the National Labor Relations Board (NLRB), helps employers understand their new obligations in the evolving employment relationship.

## II. PRIVACY RIGHTS

Individual privacy is the driving force behind the conflict between employers' and employees' use of New Media platforms and access to individuals' social media. Whereas historically, employees' expectations of privacy were limited in the physical sense (an office, plant, company vehicle, or other physical location), employees maintained their individual privacy rights relative to their lives outside of the workplace.<sup>21</sup> However, technological developments such as laptops, tablets, and mobile telephones create an artificial expectation of a 24/7, on-demand employee with no tangible or intangible boundaries between workplaces and private lives.<sup>22</sup> Correspondingly, employees are experiencing decreased levels of privacy in their lives outside the workplace as employers monitor the Internet and social media platforms for information relative to company name, products, proprietary information, and in particular, employee behavior.<sup>23</sup>

In this respect, there are often three competing interests relative to the employee's claims of privacy: the employee, employer, and the companies gathering the public information (Figure 1).

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19. See *infra* Part II.

20. See *infra* Parts III, IV, V.

21. See Stephen E. Henderson, *Expectations of Privacy in Social Media*, 31 *MISS. C. L. REV.* 227, 233, 238–39 (2012) (explaining the inextricable connection between information privacy and personhood and the right to maintain privacy in different areas of life); Lewis Maltby, *Employment Privacy: Is There Anything Left?*, 39 *A.B.A. HUM. RTS. MAG.*, no. 3, 2013, [http://www.americanbar.org/publications/human\\_rights\\_magazine\\_home/2013\\_vol\\_39/may\\_2013\\_n2\\_privacy/employment\\_privacy.html](http://www.americanbar.org/publications/human_rights_magazine_home/2013_vol_39/may_2013_n2_privacy/employment_privacy.html) (describing avenues for employers to measure off-duty employee behavior that did not exist prior to the digital age).

22. See Abril, Levin & Riego, *supra* note 8, at 64.

23. See, e.g., PROSKAUER ROSE LLP, *SOCIAL MEDIA IN THE WORKPLACE AROUND THE WORLD 3.0*, at 1–2 (2014), <http://www.proskauer.com/files/uploads/Documents/Survey-Social-Networks-in-the-Workplace-Around-the-World.pdf>.

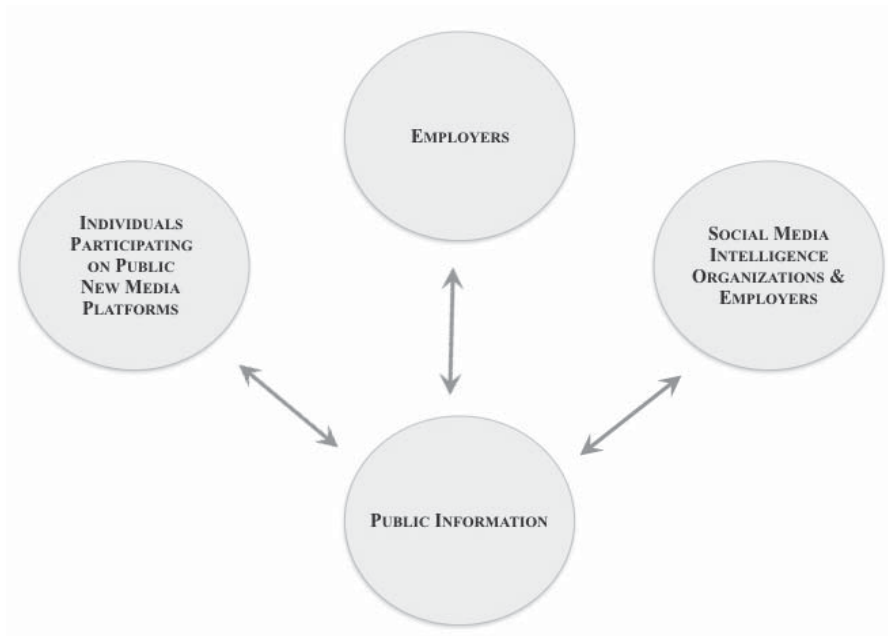


Figure 1: Information Access in the Era of New Media

This intersection of opposing concerns can result in violations of individuals’ private information.<sup>24</sup> According to the Equal Employment Opportunity Commission (EEOC) Chair, Jacqueline A. Berrien, “[t]he increasing use of social media in the 21st century workplace presents new opportunities as well as questions and concerns.”<sup>25</sup> Employers use different types of social media<sup>26</sup> for several different reasons: employee engagement and knowledge-sharing, such as having a corporate Facebook page or blog to keep employees in far-flung offices aware of new programs or policies; marketing to clients, potential customers, and crisis management; and recruitment and hiring of new employees.<sup>27</sup> The Society for

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24. See O’Sullivan-Gavin & Shannon, *supra* note 9, at 455; Press Release, U.S. Equal Emp’t Opportunity Comm’n, Social Media Is Part of Today’s Workplace but Its Use May Raise Employment Discrimination Concerns (Mar. 12, 2014) [hereinafter EEOC Press Release], <http://www.eeoc.gov/eeoc/newsroom/release/3-12-14.cfm>.

25. See EEOC Press Release, *supra* note 24.

26. Corporate intranets are not social media platforms since they are generally accessible only to employees with approved corporate passwords or credentials.

27. See EEOC Press Release, *supra* note 24.

Human Resource Management (SHRM) surveyed its members over several years, and found that 77 percent of companies surveyed reported in 2013 that they used social networking sites to recruit candidates.<sup>28</sup> This was a 34 percent increase from 2008.<sup>29</sup> According to Melissa Goemann, the American Civil Liberty Union's (ACLU) Legislative Director for Maryland, these issues represent a "huge emerging field of law, . . . and with the explosion of social media . . . it's inevitable that this is going to become a really big issue."<sup>30</sup> In the employment relationship, these emerging issues begin with the recruitment and hiring process. Employers can learn how to successfully manage these issues and avoid adverse legal actions by taking direction from recent decisions and legal memorandum that federal agencies have issued on these matters.

### III. THE EEOC AND THE IMPACT OF NEW MEDIA ON THE HIRING OF INDIVIDUALS

A major concern regarding an employer's use of New Media involves the recruitment and hiring process. Employer access to information relative to a potential candidate via various New Media platforms could potentially result in allegations of discriminatory hiring actions based upon an employee's status in protected classes, such as race, sex, color, religion, national origin,<sup>31</sup> age,<sup>32</sup> pregnancy,<sup>33</sup> and genetic disposition.<sup>34</sup> In addition, employers could face legal actions for allegations of illegal discrimination against additional protected classes at the state level, such as marital status, gender orientation and gender identity.<sup>35</sup>

Employers should be cautious and follow best practices when incorporating social media in employment screening. Jonathan Segal, a partner at Duane Morris LLP, recommends employers follow four best practices when using social media to screen job candidates to help employers achieve the benefits of social media, while minimizing legal risks.<sup>36</sup> They include:

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28. *Id.*

29. *Id.*

30. Mike Bock & Josh Cooper, *Legislators Concerned About Monitoring of Employee, Student Social Media*, SOUTHERN MD. ONLINE (Feb. 24, 2012), <http://smd.com/news/headlines/2012/15138.shtml>.

31. *See* Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 2 U.S.C., 28 U.S.C., and 42 U.S.C.).

32. *See* Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, 81 Stat. 602 (codified as amended at 29 U.S.C. §§ 621-634 (2012)).

33. *See* Pregnancy Discrimination Act of 1978, Pub. L. 95-555, 92 Stat. 2076 (codified as amended at 42 U.S.C. § 2000e (2012)).

34. *See* Genetic Information Nondiscrimination Act of 2008, Pub. L. 110-233, 122 Stat. 881 (codified as amended at 42 U.S.C. §§ 2000ff-2000ff-11 (2012) and in scattered sections of 26 U.S.C., 29 U.S.C., and 42 U.S.C.).

35. *See, e.g.*, MD. CODE ANN., STATE GOV'T § 20-606 (West 2015); N.J. STAT. ANN. § 10:5-12 (West 2013).

36. Michael Bologna, *Social Media Strategies in Recruiting, Hiring Pose Legal Risks for Employers*, BLOOMBERG BNA (Apr. 21, 2014), <http://www.bna.com/social-media-strategies-n17179889714/>.

- Social media checks should be conducted at the end of the hiring process, together with any required background checks.
- Social media screenings should examine only “public profile” information. Employers should not demand an applicant’s passwords for social media accounts.
- Employers should develop policies for determining when social media screenings are appropriate and perform such checks on a consistent basis.
- Employers should document any adverse actions. Employers are entitled to disqualify applicants exhibiting dangerous, harassing or illegal conduct on their public social media sites. Employers should document and store such information in case an applicant later asserts discrimination.<sup>37</sup>

In addition to employers avoiding legal issues in the screening process, employers must also be aware of issues that may arise once information is obtained from various New Media sources, stored and, perhaps, acted upon.<sup>38</sup>

The EEOC suggests employers monitor hiring practices for misuse of social media information.<sup>39</sup> In 2014, EEOC Acting Associate Legal Counsel, Carol Miaskoff, testified that the EEOC addressed some of the issues surrounding the use of social media:

*In one reported decision arising from the federal sector, EEOC’s Office of Federal Operations found that a claim of racial harassment due to a co-worker’s Facebook postings could go forward. Additionally, in response to a letter from Senators Charles Schumer and Richard Blumenthal, the EEOC reiterated its long-standing position that personal information - such as that gleaned from social media postings may not be used to make employment decisions on prohibited bases, such as race, gender, national origin, color, religion, age, disability or genetic information.*<sup>40</sup>

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37. *Id.*

38. *Id.*

39. See EEOC Press Release, *supra* note 24; Written Testimony of Carol R. Miaskoff, Acting Assoc. Legal Counsel, U.S. Equal Emp’t Opportunity Comm’n (Mar. 12, 2014), <http://www.eeoc.gov/eeoc/meetings/3-12-14/miaskoff.cfm#fn34> (citing Letter from Todd A. Cox, Director, Office of Commc’ns & Legislative Affairs, U.S. Equal Emp’t Opportunity Comm’n, to Senator Charles E. Schumer, U.S. Senate (May 15, 2012) (on file with the U.S. Equal Emp’t Opportunity Comm’n)).

40. EEOC Press Release, *supra* note 24. See also Written Testimony of Lynne Bernabei, Esq., Bernabei & Wachtel, PLLC (Mar. 12, 2014), <http://www.eeoc.gov/eeoc/meetings/3-12-14/bernabei.cfm>. Various courts have grappled with New Media in the employment context. *E.g.*, *Amira-Jabbar v. Travel Services, Inc.*, 726 F. Supp. 2d 77, 81, 83, 87, 90, 94 (D.P.R. 2010) (granting motion for summary judgment to employer-defendant after



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Quoting from a 2010 informal discussion letter from the EEOC, Miaskoff noted that “the [Equal Employment Opportunity] laws do not expressly permit or prohibit use of specified technologies . . . . The key question . . . is how the selection tools are used.”<sup>41</sup> Specifically, relative to employers’ utilization of New Media to obtain information about job candidates and current employees, the EEOC recommends employers do the following to avoid legal claims/actions by employees: develop clear policies that prohibit use of an applicant’s social media postings in hiring decisions.<sup>42</sup> These policies may assist employers defending against discrimination claims in hiring. Moreover, the EEOC should:

- Define situations in which it would be appropriate for employers to discipline an employee based on the employee’s social media postings.
- Articulate that an employee’s use of social media to support a discrimination claim of another employee, or to advocate for changes in the work environment to eliminate discrimination, are clearly protected activities, and cannot serve as a basis for discipline.
- Develop guidance on the extent to which an employee’s outside-of-work social media activities can be used as evidence of discrimination or a hostile work environment for which the employer may be held liable.<sup>43</sup>

The Federal Trade Commission (FTC) addressed many of the same concerns voiced by the EEOC regarding employers’ access to, and storage of, employees’ private information via New Media.<sup>44</sup>

### IV. THE FTC AND THE IMPACT OF NEW MEDIA ON THE HIRING OF INDIVIDUALS

Often during the recruitment and hiring process, employers will conduct extensive background checks, including credit checks, on employee candidates as part of the

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finding it appropriate took action to block Facebook access for office computers, and thus did not create a Title VII hostile as plaintiff had alleged); *Nieman v. Grange Mutual Ins. Co.*, No. 11-3404, 2013 WL 1332198, at \*1, \*6–\*7, \*23 (C.D. Ill. Apr. 2, 2013) (noting there was no evidence that hiring manager ever had a LinkedIn account or even used LinkedIn to allegedly determine pro se plaintiff’s age, which was the basis of his age discrimination claims); *Complaint Class Action Civil Rights Conspiracy at 4–8, Guardian Civic League, Inc. v. Phila. Police Dep’t*, No. 2:09-cv-03148-CMR (E.D. Pa. July 15, 2009) (alleging employer police department created a hostile work environment under 42 U.S.C. § 1983 by allowing white police officers to operate a racist website and to post racially offensive comments while on and off duty).

41. EEOC Press Release, *supra* note 24.

42. Written Testimony of Lynne Bernabei, *supra* note 40.

43. *Id.*

44. *See infra* Part IV.

process to ascertain applicants’ fit for a particular position within the company.<sup>45</sup> The Fair Credit Reporting Act (FCRA) requires that

*[C]onsumer reporting agencies adopt reasonable procedures for meeting the needs of commerce for consumer credit, personnel, insurance, and other information in a manner which is fair and equitable to the consumer, with regard to the confidentiality, accuracy, relevancy, and proper utilization of such information in accordance with the requirements of [Subchapter III].<sup>46</sup>*

The Federal Trade Commission (FTC) is the federal enforcement agency charged with enforcing FCRA.<sup>47</sup> As part of the hiring process, employers often review the credit history of applicants, particularly where the job position involves financial responsibility or access to company finances, inventory, or other proprietary financial information.<sup>48</sup>

Employers who conduct financial or credit background checks must be careful to avoid actions that result in discriminatory outcomes. Both the FTC and the EEOC recognize that employers are conducting financial background checks on potential employees, and have issued a joint publication discussing employers’ conduct before reports are received (from a consumer report agency), the use of such information, and the maintenance and secured disposal of the information.<sup>49</sup> The FTC also reminds employers and credit-reporting agencies that information

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45. See, e.g., Written Testimony of Barbara Arnwine, President, Lawyer’s Comm. for Civil Rights Under Law, U.S. Equal Emp’t Opportunity Comm’n (Apr. 15, 2015), <http://www.eeoc.gov/eeoc/meetings/4-15-15/arnwine.cfm#fn8>.

46. Fair Credit Reporting Act, 15 U.S.C. § 1681 (2012).

47. *Id.* § 1681s.

48. See, e.g., SOC’Y FOR HUMAN RES. MGMT., BACKGROUND CHECKING—THE USE OF CREDIT BACKGROUND CHECKS IN HIRING DECISIONS 3 (2012), <http://www.shrm.org/research/surveyfindings/articles/pages/creditbackgroundchecks.aspx> (finding that of surveyed organizations that conduct background checks on select job candidates, 87% conduct credit checks on candidates applying for positions with financial responsibilities). The top two reasons for conducting background checks are to prevent theft and embezzlement and reduce of liability from negligent hiring. *Id.* at 2. In terms of credit history, the Fair Credit Reporting Act provides:

(1) IN GENERAL.—The term “consumer report” means any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer’s credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer’s eligibility for—

(A) credit or insurance to be used primarily for personal, family, or household purposes;

(B) employment purposes; or

(C) any other purpose authorized under section 1681b of this title.

15 U.S.C. § 1681a(d).

49. EQUAL EMP’T OPPORTUNITY COMM’N & FED. TRADE COMM’N, BACKGROUND CHECKS: WHAT EMPLOYERS NEED TO KNOW [hereinafter BACKGROUND CHECKS: WHAT EMPLOYERS NEED TO KNOW], [http://www.eeoc.gov/eeoc/publications/background\\_checks\\_employers.cfm](http://www.eeoc.gov/eeoc/publications/background_checks_employers.cfm) (last visited Feb. 25, 2016).

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gathered via social media must comply with the FCRA.<sup>50</sup> Employers must take several steps prior to obtaining a background or credit check on a possible employee. They must: give written notice to the applicant; describe the nature and scope of any investigative report; obtain the applicant's written permission; and certify to the consumer report agency that the company gave notice to, and obtained, the applicant's permission, has complied with FCRA, and "won't discriminate against the applicant or employee, or otherwise misuse the information in violation of federal or state equal opportunity laws or regulations."<sup>51</sup>

It is not only employers, but also credit report agencies, that must comply with the FCRA.<sup>52</sup> When amassing online information, credit report agencies in violation of FCRA face fines, such as in *United States v. Spokeo, Inc.*<sup>53</sup> In *Spokeo*, the data collection company entered into a consent decree (without admitting liability) to pay an \$800,000 penalty after the FTC alleged that it violated the FCRA by failing to give notice to consumers, marketing consumer profiles, and failing to assure the accuracy of those profiles.<sup>54</sup> The *Spokeo*<sup>55</sup> case was "the FTC's first Fair Credit Reporting Act case addressing the collection of online info[rmation] – including data from social networking sites – when used in the context of employment screening."<sup>56</sup> Employers utilizing New Media platforms and/or information gathering companies must ascertain that their own actions, and the actions of any retained information gathering company, comport with the requirements of the FCRA, or face potential legal action from candidates and employees, and enforcement actions from agencies at both the state and federal levels.<sup>57</sup>

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50. Lesley Fair, *The Fair Credit Reporting Act & Social Media: What Businesses Should Know*, FED. TRADE COMMISSION: BUS. BLOG (Jun. 23, 2011, 10:23 AM), <https://www.ftc.gov/news-events/blogs/business-blog/2011/06/fair-credit-reporting-act-social-media-what-businesses>.

51. BACKGROUND CHECKS: WHAT EMPLOYERS NEED TO KNOW, *supra* note 49.

52. Fair Credit Reporting Act, 15 U.S.C. § 1681 (2012).

53. Consent Decree & Order for Civil Penalties, Junction & Other Relief at 4, *United States v. Spokeo, Inc.*, No. cv12-05001 (C.D. Cal. 2012 June 19, 2012).

54. *Id.* at 1–2, 4; Edward Wyatt, *U.S. Penalizes Online Company in Sale of Personal Data*, N.Y. TIMES, June 12, 2012, at B2.

55. Consent Decree, *Spokeo*, No. cv12-05001, *supra* note 53, at 4 ("In its marketing and advertising, the company has promoted the use of its profiles as a factor in deciding whether to interview a job candidate or whether to hire a candidate after a job interview. Spokeo purchased thousands of online advertising keywords including terms targeting employment background checks, applicant screening, and recruiting. Spokeo ran online advertisements with taglines to attract recruiters and encourage HR professionals to use Spokeo to obtain information about job candidates' online activities. . . . Spokeo has affirmatively targeted companies operating in the human resources, background screening, and recruiting industries. It created a portion of its website intended specifically for recruiters, which was available through a dedicated click tab labeled 'recruiters' that was prominently displayed at the top of the Spokeo home page. Recruiters were encouraged to 'Explore Beyond the Resume.' In addition, Defendant promoted the Spokeo.com/HR URL to recruiters in the media and in marketing to third parties, and offered special subscription plans for its HR customers.").

56. Lesley Fair, *Speaking of Spokeo: Part 2—The Company's Allegedly Bogus Endorsements*, FED. TRADE COMMISSION: BUS. BLOG (Jun. 13, 2012, 12:25 PM), <https://www.ftc.gov/news-events/blogs/business-blog/2012/06/speaking-spokeo-part-2-companys-allegedly-bogus-endorsements>.

57. See *supra* notes 45–56 and accompanying text.

Conversely, employees who participate in the use of New Media platforms, such as Facebook or LinkedIn, should be aware that employer access to voluntarily provided financial or contact information on public platforms is not private, legally protected information, as held in *Sweet v. LinkedIn Corporation*.<sup>58</sup> In *Sweet*, plaintiffs claimed they were not hired by potential employers due to reference information available on their LinkedIn profiles.<sup>59</sup> The District Court held that, “LinkedIn’s publications of employment histories of the consumers who are the subjects of the Reference Searches are not consumer reports because the information contained in these histories came solely from LinkedIn’s transactions or experiences with these same consumers.”<sup>60</sup> The FCRA excludes from the definition of consumer report any “report containing information solely as to transactions or experiences between the consumer and the person making the report.”<sup>61</sup> The plaintiffs gave LinkedIn the information with the express intention it be published on the LinkedIn website.<sup>62</sup> The Court also found LinkedIn was not a consumer report agency as defined in the FCRA.<sup>63</sup> The Court concluded, “[p]laintiffs’ allegations are insufficient to state a claim that the list of names and other information about the references included in the Reference Search bears on the ‘character, general reputation, mode of living’ and other relevant characteristics of the consumers who are the subjects of these searches.”<sup>64</sup> Most importantly, the Court noted that

*Plaintiffs do not state a claim that the Reference Search results are used or intended to be used as a factor in determining whether the subjects of the searches are eligible for employment. A communication must be “used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer’s eligibility for . . . employment purposes . . .” in order to be a consumer report.*<sup>65</sup>

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58. *Sweet v. LinkedIn Corp.*, No. 5:14-cv-04531-PSG, 2015 WL 1744254, at \*6, \*9 (N.D. Cal. Apr. 14, 2015) (indicating that LinkedIn did not qualify as a “consumer reporting agency” within the meaning of the Fair Credit Reporting Act, especially when plaintiffs voluntarily provided their names and employment histories for the purpose of publication, and that search results from LinkedIn are not “consumer reports” even if they are used for employment purposes).

59. *Id.* at \*3–\*4.

60. *Id.* at \*4.

61. 15 U.S.C. § 1681a(d)(2)(A)(i) (2012).

62. *Sweet*, 2015 WL 1744254, at \*6.

63. *Id.* at \*6.

64. *Id.* at \*7. The Court also noted that “LinkedIn markets the Reference Search results a [sic] way to ‘locate[] people’ who might be able to communicate bearing on information about the consumer-subjects of these results, not that these results themselves convey bearing on information.” *Id.* at \*8.

65. *Id.* at \*8. Per the FCRA, “[t]he term ‘employment purposes’ when used in connection with a consumer report means a report used for the purpose of evaluating a consumer for employment, promotion, reassignment or retention as an employee.” 15 U.S.C. § 1681a(h).

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The Court further noted “LinkedIn markets the Reference Search results—and therefore expects them to be used—as a way for potential employers to locate people who can provide reliable feedback about job candidates and does not market the results themselves as a source of reliable feedback about job candidates.”<sup>66</sup> The information relative to the references did not bear on the “character, general reputation, mode of living” and other relevant characteristics of the consumers who are the subjects of these searches.<sup>67</sup> Instead, the court found that the results from Reference Searches are those in the search initiator’s network (the potential employer) and not in the target’s network (the Plaintiffs).<sup>68</sup> Therefore, the results only communicate whether the search initiator, and not the target, has the characteristics protected under the FCRA, e.g., character, general reputation, or mode of living.<sup>69</sup> As a result, credit report agencies and employers can use information gathered from LinkedIn or other social media platforms<sup>70</sup> as part of their background check because employees have voluntarily placed such information on public communication platforms.<sup>71</sup>

### V. THE NLRB AND THE IMPACT OF NEW MEDIA ON INDIVIDUALS IN THE WORKPLACE

Once an employer hires an employee, the employee gains additional federal protection from employer access, misuse, and retention of private information obtained via New Media communication platforms.<sup>72</sup> Employees who use New Media platforms to communicate about various issues in the workplace have, since the *Quon* decision in 2010, gained the attention of and the protection of the

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66. *Sweet*, 2015 WL 1744254, at \*8.

67. *Id.* at \*7. *See also* 15 U.S.C. § 1681a(e) (2012).

68. *Sweet*, 2015 WL 1744254, at \*7.

69. *Id.* In essence, the search conducted by the initiator (a potential employer or search company) would result in matches—information and people—between the initiator’s data and the references who were provided by the Plaintiffs. It would not result in matches in information between the initiator and the Plaintiffs themselves. *See also* Tina A. Syring, *Reference Searches Through Social Media Do Not Create FCRA Claims*, NAT’L L. REV. (May 1, 2015), <http://www.natlawreview.com/article/reference-searches-through-social-media-do-not-create-fcra-claims>.

70. *See, e.g.*, Lesley Fair, *Speaking of Spokeo: Part 3*, FED. TRADE COMMISSION: BUS. BLOG (Jun. 15, 2012 11:02 AM), <https://www.ftc.gov/news-events/blogs/business-blog/2012/06/speaking-spokeo-part-3> (reminding social media users that information on social media platforms can be used by credit reporting agencies when performing background checks for purposes of hiring: “Recent grads. We hate to break the news, but what happens in Vegas doesn’t necessarily stay in Vegas. When you’re looking for a job, applying for insurance, or trying to get an apartment, know that companies may be checking your report and may look for other information about you. And these days, a prime source of data is online, including social networking sites.”).

71. *See supra* text accompanying note 58; Nathan J. Ebnet, *It Can Do More Than Protect Your Credit Score: Regulating Social Media Pre-Employment Screening with the Fair Credit Reporting Act*, 97 MINN. L. REV. 306, 308 (Nov. 2012) (proposing that if all employers “hire third-party companies to perform social media research and submit to the FCRA, employers will obtain reliable applicant information and respect candidate privacy”).

72. *See generally* National Labor Relations Act, 29 U.S.C. §§ 151–169 (2012).

National Labor Relations Board (NLRB or “Board”).<sup>73</sup> The NLRB is actively shaping the legal framework of social media use by employees and employer use of information obtained via social and other New Media platforms.<sup>74</sup> In several cases, the NLRB found employer social media policies overly broad, and thus unlawful, because the policies discouraged “protected concerted activity.”<sup>75</sup> According to the NLRB, “the mere existence of an overly broad social media policy exposes the employer to an unfair labor practice charge, even if no disciplinary action is taken against an employee.”<sup>76</sup>

The privacy implications of employer New Media policies are significant. The use of social media and personal devices in the workplace “remains a key target for NLRB enforcement.”<sup>77</sup> Indeed, the Board “certainly appears to be looking to remain relevant in the digital age.”<sup>78</sup> The NLRB deems policies that could be “reasonably interpreted” to prohibit the use of personal equipment, such as cameras or recording devices, as “illegally broad” because “they could be seen as prohibiting legally protected uses,” like documenting health and safety violations or unfair labor practices.<sup>79</sup> The NLRB has reviewed cases that address both employer and employee concerns.<sup>80</sup>

Since *Quon*, the NLRB has stepped into the arena of New Media usage and its impact on the employment relationship.<sup>81</sup> The NLRB has addressed several cases where employees were either disciplined or terminated after utilizing New Media to

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73. See Kenneth G. Dau-Schmidt, *Labor Law 2.0: The Impact of New Information Technology on the Employment Relationship and the Relevance of the NLRA*, 64 EMORY L.J. 1583, 1585 (2015) (noting that “the rise of new information technology has changed the nature of the employment relationship, complicating the relationships of production and requiring new interpretations of the language of the NLRA”).

74. See *supra* note 17.

75. *Id.* E.g., *Novelis Corp.*, No. 03-CA-121293, 2015 N.L.R.B. LEXIS at \*161–\*162 (N.L.R.B. Jan. 30, 2015).

76. See *supra* note 17. See also *Lutheran Heritage Village-Livonia*, 343 N.L.R.B. 646 (2004) (explaining that the “Board has held that an employer violates Section 8(a)(1) when it maintains a work rule that reasonably tends to chill employees in the exercise of their Section 7 rights”).

77. Neal I. Korval, *Employer Policies Still in the Crosshairs: NLRB General Counsel Issues Report on Employee Handbooks*, NAT’L L. REV. (June 10, 2015), <http://www.natlawreview.com/article/employer-policies-still-crosshairs-nlr-general-counsel-issues-report-employee-handb>.

78. *Id.*

79. *Id.*

80. *Id.* (explaining that “the [March 18, 2015] report contains a number of instructive and, in some cases, alarming examples of handbook rules the Board has found to be both legal and illegal” and discussing “[s]ome key takeaways for employers, both unionized and non-union alike”). See also Memorandum from Richard F. Griffin, Jr., Gen. Counsel, Nat’l Labor Relations Bd. (Mar. 18, 2015), at 2, <http://apps.nlr.gov/link/document.aspx/09031d4581b37135> (“I am publishing this report . . . with the hope that it will help employers to review their handbooks and other rules, and conform them, if necessary, to ensure that they are lawful.”)

81. See Memorandum from Richard F. Griffin, Jr., Gen. Counsel, Nat’l Labor Relations Bd. (Mar. 18, 2015), at 8, 14, 16, 20–21, <http://apps.nlr.gov/link/document.aspx/09031d4581b37135> (discussing unlawful employer policies that regulated employee conduct with regards to social media).

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discuss, vent, or denigrate their employer or their employment position.<sup>82</sup> In doing so, the NLRB has relied upon Section 7 of the National Labor Relations Act (NLRA), which states that employees may “engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.”<sup>83</sup> The NLRB determined that the protection of concerted activities under the NLRA applies to employees<sup>84</sup> relative to concerted discussion about terms and conditions of employment, whether or not they belong to a union at their place of business.<sup>85</sup> The NLRB defines terms and conditions of employment to mean performance, staffing or workload issues, supervisory issues, and pay, to name a few.<sup>86</sup>

The NLRB has issued three memoranda relative to New Media and the employment arena since 2010—in August 2011, January 2012, and May 2012<sup>87</sup>— “[t]o help provide further guidance to practitioners and human resource

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82. See generally Memorandum OM 11-74 from Lafe E. Solomon, Acting Gen. Counsel, Nat'l Labor Relations Bd. (Aug. 18, 2011), at 3, 5–7, 9, <http://apps.nlr.gov/link/document.aspx/09031d458056e743> (explaining NLRB decisions involving protected concerted conduct and unlawful employee discharges following social media-based activity). E.g., *Hispanics United of Buffalo, Inc.* 359 N.L.R.B. No. 37 (Dec. 14, 2012) (holding that an employer “violated Section 8(a)(1) of the [National Labor Relations] Act by discharging five employees for Facebook comments they wrote in response to a coworker’s criticisms of their job performance”).

83. National Labor Relations Act (NLRA) § 7, 29 U.S.C. § 157 (2012). In full, section 7 of the NLRA provides:

Employees shall have the 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 organization as a condition of employment as authorized in section 158(a)(3) [section 8(a)(3)] of this title. *Id.*

84. See 29 U.S.C. § 152(3) (“The term ‘employee’ shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.”).

85. See *N.L.R.B. v. Columbia Univ.*, 541 F.2d 922, 931 (2d Cir. 1976) (“[T]here can be little doubt that the protection afforded to concerted activities under the NLRA applies equally to workers in unionized or in non-unionized firms.”); Rita Gail Smith & Richard A. Parr II, *Protection of Individual Action as Concerted Activity Under the National Labor Relations Act*, 68 CORNELL L. REV. 369, 371–73 (1983) (“Section 7 protects employees engaged in concerted activity in a wide variety of circumstances. . . .”)

86. See *Employee Rights*, NAT'L LAB. REL. BOARD, <https://www.nlr.gov/rights-we-protect/employee-rights> (last visited Feb. 26, 2016); Memorandum OM 11-74 from Lafe E. Solomon, *supra* note 82, at 4–5, 21; Mischa Gaus, *How to Deal With Social Media at Work*, ALTERNET (Mar. 9, 2012), [http://www.alternet.org/story/154493/how\\_to\\_deal\\_with\\_social\\_media\\_at\\_work](http://www.alternet.org/story/154493/how_to_deal_with_social_media_at_work) (including “workload, job performance, wage issues, [and] staffing levels” as “terms and conditions of employment”).

87. *The NLRB and Social Media*, NAT'L LAB. REL. BOARD, <https://www.nlr.gov/news-outreach/fact-sheets/nlr-and-social-media> (last visited Jan. 22, 2016).

professionals.”<sup>88</sup> More specifically, the NLRB’s approach to the nature of New Media in the employment arena has resulted in a division of current issues into two separate topic areas: First is an examination of employees’ use of New Media platforms, the context of employee posts, and the legality of their subsequent discipline or termination.<sup>89</sup> Second is the scope and nature of the company’s social media policy when applied to employee disciplinary or termination actions.<sup>90</sup> Given the new and evolving nature of social media cases, the Acting General Counsel for the NLRB, Lafe Solomon, directed that all cases believed to be meritorious are to be directed from NLRB regional offices to the agency’s Division of Advice in Washington, D.C., “in the interest of tracking them and devising a consistent approach.”<sup>91</sup> A January 2012 NLRB Press Release noted that the second memorandum “represents the Acting General Counsel’s interpretation of the National Labor Relations Act as it applies to forms of communication that did not exist when the Act was written.”<sup>92</sup> The Acting General Counsel defined social media as “includ[ing] various online technology tools that enable people to communicate easily via the internet to share information and resources. These tools can encompass text, audio, video, images, podcasts, and other multimedia communications.”<sup>93</sup>

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88. Press Release, Nat’l Labor Relations Bd., Acting General Counsel Issues Second Social Media Report (Jan. 25, 2012) [hereinafter Second Social Media Report Press Release], <https://www.nlr.gov/news-outreach/news-story/acting-general-counsel-issues-second-social-media-report>.

89. See *The NLRB and Social Media*, *supra* note 87. The first memorandum issued in August 2011 discussed various cases involving employees’ use of social media in unprotected versus protected concerted activity and overly-broad employer social media policies. *E.g.*, Memorandum OM 11-74 from Lafe E. Solomon, *supra* note 82, at 5–6, (discussing a case in which an employee was unlawfully terminated after posting negative remarks about her supervisor on her personal Facebook page). The second memorandum issued in January 2012 examined several cases involving unlawful versus lawful and discharges of employees for Facebook posts. *E.g.*, Memorandum OM 12-31 from Lafe E. Solomon, *supra* note 3, at 5, (discussing a case in which an employer clearly terminated an employee in retaliation for initiating a Facebook discussion about adverse working conditions in violation of Section 8(a)(1) of the NLRA).

90. See *The NLRB and Social Media*, *supra* note 87. The second memorandum issued in January 2012 looked at cases involving questions about employer policy scope as being unlawfully broad versus lawful. *E.g.*, Memorandum OM 12-31 from Lafe E. Solomon, *supra* note 3, at 8, (discussing an unlawfully broad solicitation rule that “prohibit[ed] employee solicitation on company property during non-work time”). The third memorandum issued in May 2012 summarized seven employer policies specifically governing use of social media by employees. *E.g.*, Memorandum OM 12-59 from Lafe E. Solomon, Acting Gen. Counsel, Nat’l Labor Relations Bd., at 5, (May 30, 2012), <http://apps.nlr.gov/link/document.aspx/09031d4580a375cd> (finding unlawful “provisions that threaten employees with discharge or criminal prosecution for failing to report unauthorized access to or misuse of confidential information,” but finding lawful a portion of a handbook section “that admonishes employees to ‘[d]evelop a healthy suspicion[,]’ cautions against being tricked into disclosing confidential information, and urges employees to ‘[b]e suspicious if asked to ignore identification procedures”).

91. Second Social Media Report Press Release, *supra* note 88.

92. *Id.*

93. Memorandum OM 11-74 from Lafe E. Solomon, *supra* note 82, at 2. See also O’Sullivan-Gavin & Shannon, *supra* note 9, at 452.



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It is up to employers to stay current on NLRB determinations of what constitutes “overly broad” in terms of the company policy. Such “overly broad” language will be found to be an unfair labor practice under Section 8 of the NLRA because it interferes with an employee’s rights to concerted activities under Section 7 of the NLRA.<sup>94</sup> Mischa Gaus, a former editor of *Labor Notes*, noted “[a]ny communication by a worker (spoken or written) that was protected before Facebook is still protected.”<sup>95</sup> These messages have to be among co-workers and relate to the “terms and conditions” of employment: workload, job performance, wage issues, staffing levels.<sup>96</sup> However, employees also need to be aware that not all posts will be protected. Posts that “violate an employer’s privacy policy, disparage the employer or its products, or are ‘so disloyal, reckless, or maliciously untrue’ as to lose the law’s protection” can result in discipline.<sup>97</sup> Health care employees must also be careful not to violate any patient privacy protections online.<sup>98</sup>

The NLRB applies several tests in determining whether or not a policy is overly broad. First, the Board examines whether or not the language of the policy interferes under Section 8 of the NLRA with employees’ rights to concerted activities under Section 7 of the NLRA.<sup>99</sup> Policies that unreasonably restrict employee rights to discuss terms and conditions of employment will be found to be overly broad and not upheld.<sup>100</sup> An employer violates Section 8(a)(1) of the Act through the maintenance of a work rule if that rule would “reasonably tend to chill employees in the exercise of their Section 7 rights.”<sup>101</sup>

The Board uses a two-step inquiry to determine if a work rule would have such a chilling effect.<sup>102</sup> First, a rule is unlawful if it explicitly restricts Section 7 activities.<sup>103</sup> If the rule does not explicitly restrict protected activities, it is unlawful only upon a showing that: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3)

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94. 29 U.S.C. § 158(a)(1) (2012).

95. Gaus, *supra* note 86.

96. *Id.*

97. *Id.* (citing *Emarco, Inc.*, 284 N.L.R.B. 832, 833 (1987)).

98. *Id.*

99. *See, e.g., Lafayette Park Hotel*, 326 N.L.R.B. 824, 825–26, 828 (1998) (stipulating that employer-hotel violated section 8(a)(1) of the NLRA by maintaining certain unacceptable conducts—such as prohibiting false, profane, or malicious statements about the hotel or its employees—which would tend to chill employees in the exercise of section 7 rights, but holding that other standards of conduct—like prohibiting uncooperative behavior that is contrary to the hotel’s goals and objectives—were not in violation of section 8(a)(1)).

100. *See id.* at 831, 833 (Board precedent holds that mere maintenance of an overly broad rule is unlawful, even if not enforced, because it tends to restrain employees’ from engaging in otherwise protected activity); *Ingram Book Co., Div. of Ingram Indus., Inc.*, 315 N.L.R.B. 515, 516 (1994) (explaining that a rule is overly broad, and thus invalid, when the mere maintenance of the rule restricts employees from protected activity).

101. *Lafayette Park Hotel*, 326 N.L.R.B. at 825.

102. *Martin Luther Mem’l Home, Inc.*, 343 N.L.R.B. 646, 646–47 (2004).

103. *Id.* at 646.

the rule has been applied to restrict the exercise of Section 7 rights.<sup>104</sup> Second, when reviewing the discharge of an employee, the Board applies the standards from the *Meyers* cases.<sup>105</sup> In the *Meyers* cases, the Board explained that an activity is concerted when an employee acts “with or on the authority of other employees and not solely by and on behalf of the employee himself.”<sup>106</sup> The definition of concerted activity “encompasses those circumstances where individual employees seek to initiate or to induce or to prepare for group action.”<sup>107</sup>

Finally, when the statements of the employee are posted online, and are rude, profane or offensive, the Board determines whether the employee has lost the protection of the NLRA.<sup>108</sup> Employers and employees should both be aware that rude, disparaging comments or communications (e.g., employee “rants”) are not protected under the NLRA<sup>109</sup> nor as free speech under the First Amendment.<sup>110</sup> However, similar comments may be afforded protection under the NLRA as “concerted activity” if made in the context of a labor dispute between the employer and the employee, and not so “not so disloyal, reckless, or maliciously untrue as to lose the Act’s protection.”<sup>111</sup> In 2011, the United States Chamber of Commerce published a survey of social media issues before the NLRB and identified cases

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104. *Id.* at 647. See also Memorandum OM 11-74 from Lafe E. Solomon, *supra* note 82, at 12.

105. See *Meyers Indus.*, 268 N.L.R.B. 493, 497 (1984) [hereinafter *Meyers I*] (holding that discharge of employee was not unfair labor practice, in violation of Section 8(a)(1), because an employee’s actions may be concerted for the purposes of the NLRA only if the employee engages in the action with or on the authority of other employees, and not solely on behalf of the employee himself), *rev’d sub nom.* Prill v. NLRB, 755 F.2d 941, 942 (D.C. Cir. 1985) (finding that the Board erred in rejecting employee’s unfair labor practice charge by believing a narrow definition of “concerted activity” was mandated by the NLRA), *on remand*, *Meyers Indus.*, 281 N.L.R.B. 882, 882, 889 (1986) [hereinafter *Meyers II*] (upholding the *Meyers I* definition of concerted activity as reasonable construction of section 7 of the NLRA), *aff’d sub nom.* Prill v. N.L.R.B., 835 F.2d 1481, 1482 (D.C. Cir. 1987) (affirming the Board’s decision in *Meyers II*).

106. *Meyers I*, 268 N.L.R.B. at 497.

107. *Meyers II*, 281 N.L.R.B. at 887. See also Memorandum OM 11-74 from Lafe E. Solomon, *supra* note 82, at 5.

108. See, e.g., *Atlantic Steel Co.*, 245 N.L.R.B. 814, 814, 816–17(1979) (employee’s obscene reaction to supervisor was unwarranted insubordination, not during a grievance meeting, and therefore a reasonable basis for discharge); *N.L.R.B. v. Local Union No. 1229, Int’l Bhd. of Elec. Workers*, 346 U.S. 464, 471, 474–75, 477–78 (1955) (discharge for cause may be proper on the basis of employee conduct that is separable from concerted activities, and thus does not come within protection of Section 7 of the NLRA, e.g., publicly disparaging employer and harming company reputation).

109. See *supra* text accompanying note 108.

110. See *Graziosi v. City of Greenville*, 775 F.3d 731, 733, 741 (5th Cir. 2015) (holding that the city’s substantial interests in maintaining discipline and preventing insubordination within its police department outweighed a terminated sergeant’s criticism of her superior officer on the Mayor’s public Facebook page, which was only minimal interest in speaking on a matter of public concern).

111. *Emarco, Inc.*, 284 N.L.R.B. 832, 833 (1987). See also Memorandum OM 11-74 from Lafe E. Solomon, *supra* note 82, at 9. The Board differentiates *Atlantic Steel* as applying to “an employee who has made public outbursts against a supervisor,” while *Jefferson Standard* is usually applied “where an employee has made allegedly disparaging comments about an employer or its product in the context of appeals to outside or third parties.” *Id.* Under *Jefferson Standard*, the inquiry is whether the “communication is related to an ongoing labor dispute and whether it is not so disloyal, reckless, or maliciously untrue as to lose the Act’s protection.” *Id.*

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alleged to have overbroad policies that violated employee rights to protected concerted activities under the NLRA.<sup>112</sup> The Chamber of Commerce noted cases in which employers had adopted restrictive company policies on employee complaint procedures, New Media policies that limited or prohibited employees from discussing terms and conditions of employment via different New Media tools, and policies that restricted employees from using New Media tools to express opinions of employers.<sup>113</sup>

From 2010 through 2012, the focus of the NLRB decisions was the scope and limitations in employer New Media policies.<sup>114</sup> The commonality in the cases is the attempt by the employer to limit employees “concerted activities” under the NLRA.<sup>115</sup> Beginning in 2012, the NLRB has extended the scope of review beyond

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112. See MICHAEL J. EASTMAN, *supra* note 18, at 26–27. The U.S. Chamber of Commerce survey identified the following cases where the employer allegedly promulgated, maintained, and/or enforced overbroad social media policies:

- The Court at South Park, Case No. 11-CA-22900. Overbroad policy related to confidentiality, unacceptable conduct, complaint procedures, use of communication systems, and employee participation in investigations.
- Flagler Hospital, Case No. 12-CA-27031. Overbroad social media, blogging, and social networking policy.
- The H Group, BBT Inc., Case No. 14-CA-30313. Overbroad rules restricting section 7 rights with respect to use of external web logs and social networking sites.
- Sears Holding (Roebucks), Case No. 18-CA-19440. Overly broad social media policy which inhibits section 7 rights.
- Lowes Home Improvement, Case No. 19-CA-32951. Overbroad social networking media policy.
- Lee Enterprises, Case No. 28-CA-23267. Overbroad rules prohibiting employees from engaging in concerted activities, including: not allowing employees to air grievances over social media, not allowing employees to post derogatory comments that would damage the company via social media, and requiring employees to observe rules regarding professional courtesy.
- ER Solutions, Inc., Case No. 19-CA-32943. Overly broad policy prohibiting employees from making disparaging remarks about the company.
- BaySys Technologies, LLC, Case No. 05-CA-36314. Manager sent an email stating that employees had breached their nondisclosure agreement.
- Innovation Ventures, Case No. 25-CA-031722. Employer required employees to sign confidentiality agreements prohibiting employees from discussing terms and conditions of employment, including discharge, with anyone, including co-workers.
- MET Inc., Case No. 16-CA-27778. An employer policy that forbade employees from discussing workplace issues with anyone, including coworkers.
- BaySys Technologies, LLC, Case No. 05-CA-36314. Employer sent an email expressing disappointment that employees took things to a newspaper rather than handling internally.
- Sodexo, Inc., Case No. 09-CA-46032. Employer maintained a policy that the employer “speak with one voice.”
- Cox Communications, Case No. 05-CA-36476. Employer orally promulgated an overbroad non-solicitation rule by telling employees they violated a code of ethics by using a company computer to post to a website.
- Golden Living Center, Case No. 09-CA-046173. Employer orally promulgated and maintained an overbroad social media policy.

113. *Id.*

114. *Id.* at 5–8.

115. *Id.*

corporate New Media policies to include consideration of corporate and employee activity and disciplinary consequences.<sup>116</sup> This broader focus includes analysis that recognizes employees’ freedom of speech and assembly rights grounded in the First Amendment, and employees’ rights to “concerted activities” provided in the NLRA.<sup>117</sup>

## CONCLUSION

Currently, both employers and employees are forced to reexamine their policies and behaviors in light of rapid technology updates, developing federal case law, and administrative law decisions. Similar challenges arise every time a new technology provides a platform that disrupts the status quo.<sup>118</sup> New Media platforms create opportunities and situations where employers and social media intelligence organizations have access to an unprecedented amount of information that was previously maintained using traditional, more private means.<sup>119</sup> Without a uniform legal standard, agencies such as the EEOC, FTC, and NLRB are left to respond to these new technologies on a case by case basis. The post *Quon* environment is slowly evolving to address the legal challenges faced in a workplace without walls or time constraints, where employers are able to examine employees’ public and private communications.<sup>120</sup> Employers must monitor emerging state and federal case law developments and developing administrative law. Federal agencies have

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116. See *World Color (USA) Corp. v. NLRB*, 776 F.3d 17, 20–21 (D.C. Cir. 2015) (remanding to the Board a dispute over an employer’s hat policy that prohibited employees from wearing baseball caps except for caps bearing the company logo); *Landry’s Inc.*, 362 N.L.R.B. No. 69 (Apr. 16, 2015) (finding no violation of section 8(a)(1) of the NLRA by employer’s 2012 social media policy, which urged, but did not explicitly prohibit, employees not to post information regarding the company that could lead to morale issues in the workplace or detrimentally affect the company’s business); *Dish Network Corp.*, 359 N.L.R.B. No. 108 (Apr. 30, 2013) (ordering company to cease and desist maintenances of policies that prohibited employees from electronically posting critical comments about the company on or outside of work hours; required employees to obtain authorization from management before speaking about the company to news media outlets or at public meetings; banned employees from communicating with government agencies about the organization without prior approval; and interfering with, restraining, or coercing employees in the exercise of their section 7 rights); *Boch Imports, Inc.*, No. 01-CA-071499, 2013 WL 435035 (N.L.R.B. Div. of Judges Feb. 1, 2013) (determining that statements made during an employee’s annual review did not violate section 8(a)(1) because they could not reasonably be construed as a warning of disciplinary action that would “chill” the employee’s ability to engage in union or protected concerted activity); *Karl Knauz Motors, Inc.*, 358 N.L.R.B. No. 164 (Sept. 28, 2012) (holding that a “courtesy” rule from car dealership’s employee handbook was unlawful because employees would reasonably construe the language to encompass section 7 activity).

117. See *supra* text accompanying note 116.

118. See, e.g., *Graziosi v. City of Greenville*, 775 F.3d 731, 733–35 (5th Cir. 2015) (exemplifying how Facebook creates a public platform for private conversations that can drastically alter one’s life); *Sweet v. LinkedIn Corp.*, No. 5:14-cv-04531-PSG, 2015 WL 1744254, at \*2–\*3 (N.D. Cal. Apr. 14, 2015) (illustrating how LinkedIn connects employers to potential job candidates and how the information that one shares on their profile can impact an employer’s decision to hire).

119. See *Ebnet*, *supra* note 71, at 306 (illustrating the rise of social media profiles has made previously private information, such as pictures and politically charged remarks, more accessible to employers to review when hiring candidates).

120. See *supra* Parts III–V.

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provided guidance in this arena in the past, and will continue to do so moving forward.<sup>121</sup> The resultant risks for employers who fail to do so have increased, as agency regulations increasingly recognize the reality of a changing workplace.

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121. See *supra* Parts III–V.