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ONLINE POSTS, LIKES, & TWEETS AND SECTION 7 CONCERCTED ACTIVITIES

By

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Introduction

In the five years leading up to the passage of the Wagner Act, also known as the National Labor Relations Act\(^1\) (NLRA), the nation had endured the harshest economic times in its history. By the time the NLRA was passed in 1935 one in four Americans were unemployed.\(^2\) Senator Wagner saw the NLRA as not only a way to promote industrial peace, but also as a weapon against the depression.\(^3\) Wagner believed collective bargaining and full freedom of association among workers would restore fairness and democracy to the workplace, and help redistribute the wealth that in turn would reinvigorate the national economy.\(^4\)

The NLRA’s declaration of policy states the freedom to collectively associate and bargain against the corporate and ownership associations is necessary to prevent the depression of “wage rates and the purchasing power of wage earners in industry” and encourage the “stabilization of competitive wage rates and working conditions within and between industries.”\(^5\) Additionally, the Act created the National Labor Relations Board (NLRB) to enforce the act, provided the NLRB with remedial powers, and provided for judicial enforcement and review of Board

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4 Id. at 10. Wagner believed the core cause of the depression was an unequal distribution of wealth, which resulted in workers who were powerless against the downward push of wages by industrialist. Id.
orders.\(^6\) Section 7 of the NLRA creates a protected right of employees to “act together to better their working conditions.”\(^7\) Section 7 establishes that “[e]mployees shall have the right to self-organization…and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.”\(^8\)

Early Section 7 cases frequently involved the posting of union messages and informational leaflets on to company bulletin boards or passing out handbills inside and outside a plant. With technological advancements workers now communicate and interact electronically, providing a whole new forum for discussions and the expression of opinions, which might be protected under Section 7. As a result of the explosion in popularity of Facebook and other online social media and messaging applications, employers have instituted policies restricting what employees can post online. Further, employers are discipline employees for posts the employer felt were inappropriate. The Section 7 rights of the employee and the employers desire to limit and restrict their employees online communications often will be at odds with each other.

**Section 7 Protected Concerted Activity**

The NLRB has recognized that the concept of concerted activity is a very fact specific determination, and the myriad of factual situations in which protected concerted activity could be found will continue to develop.\(^9\) The traditional concept of Section 7 concerted activity is a group of employees discussing wages, benefits, hours of work, work policies, and collective action.\(^10\) Section 7 protection exists regardless whether an employee is represented by a union, or

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\(^10\) *To What Extent Can Employers Lawfully Limit Employee Social Media Commentary*, CCH HUMAN RESOURCES COMPLIANCE LIBRARY, CCH-HRCL P 92, 935, 2012 WL 5467923 (2014). See also *Double Eagle Hotel & Casino*,
not, and regardless whether an employee is engaging in collective organizing, or not.\textsuperscript{11} When one worker speaks “solely by and on behalf of the employee himself” his actions are not concerted activity.\textsuperscript{12} Thus, Section 7 does not protect when a worker expresses a personal complaint and is speaking only for himself.\textsuperscript{13}

However, the speech or actions of one worker can be protected concerted activity when the individual acts “with or on the authority of other employees, and not solely by and on behalf of the employee himself.”\textsuperscript{14} The NLRB states that the “guarantees of Section 7 of the Act extend to concerted activity which in its inception involves only a speaker and a listener, for such activity is an indispensable preliminary step to employee self-organization.”\textsuperscript{15} Individual activities that are the “logical outgrowth of concerns expressed by the employees collectively” are protected concerted Section 7 activity.\textsuperscript{16} Including actions where individual employees seek to “initiate or to induce or to prepare for group action” and where individual employees bring “truly group complaints” to management's attention.\textsuperscript{17} Therefore, Section 7 protects the speech of an


\textsuperscript{12} Meyers Indus., 268 NLRB at 496 (citing Ontario Knife Co. v. NLRB; 637 F.2d 840, 845 (2d Cir. 1980) and Pacific Electricord Co. v. NLRB, 361 F.2d 310 (9th Cir. 1966)).

\textsuperscript{13} Id.

\textsuperscript{14} Id. at 497 (citing Ontario Knife Co. v. NLRB, 637 F.2d 840, 845 (2d Cir. 1980)).

\textsuperscript{15} Root-Carlin, Inc., 92 NLRB 1313, 1314 (N.L.R.B. 1951).

\textsuperscript{16} Advice Memorandum from the NLRB Office of the Gen. Counsel to Cornele A. Overstreet, Regional Director of Region 28, Sagepoint Financial, Inc., No. 28-CA-23441, 2011 WL 3793672, at *2 (Aug. 9, 2011). Associate General Counsel Kearney cites Five Star Transportation, Inc., 349 NLRB 42, 43-44, 59 (2007), enforced, 522 F.3d 46 (1st Cir. 2008) (drivers' letters to school committee raising individual concerns over a change in bus contractors were logical outgrowth of concerns expressed at a group meeting).

\textsuperscript{17} Meyers Indus., 281 NLRB at 887.
individual when it is related to shared concerns about the terms and conditions of employment even if no specific group action is contemplated.\textsuperscript{18}

The enforcement mechanism of Section 7 is provided under Section 8(a)(1) of the NLRA, which makes it an unfair labor practice for an employer to “interfere with, restrain, or coerce employees in the exercise of the rights guaranteed” under Section 7.\textsuperscript{19} A workplace rule is considered to violate Section 8(a)(1) when it is found to “reasonably tend to chill employees in the exercise of their Section 7 rights.”\textsuperscript{20} When making a determination of validity of a rule, NLRB must give the challenged rule a reasonable reading, refrain from reading particular phrases in isolation, and it must not presume improper interference with employee rights.\textsuperscript{21}

An analysis of a challenged rule under 8(a)(1) begins with the issue of whether the rule explicitly restricts activities protected by Section 7.\textsuperscript{22} Additionally, if the rule does not explicitly restrict protected concerted activity, a workplace rule can be found to be an unlawful restriction of Section 7 activities if one of three conditions is met: “(1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights.”\textsuperscript{23}

\textsuperscript{18} Advice Memorandum from the NLRB Office of the Gen. Counsel to Cornele A. Overstreet, Regional Director of Region 28, Sagepoint Financial, Inc., No. 28-CA-23441, 2011 WL 3793672, at *2 (Aug. 9, 2011) (citing St. Margaret Mercy Healthcare Centers, 350 NLRB 203, 212 (N.L.R.B. 2007) (employee discussions about the effect of a new performance evaluation policy on wages held concerted, despite lack of evidence that employees contemplated group action), enforced, 519 F.3d 373 (7th Cir. 2008)).


\textsuperscript{20} Lafayette Park Hotel v. NLRB, 203 F.3d 52, 53 (D.C. Cir. 1999).

\textsuperscript{21} Id.

\textsuperscript{22} Martin Luther Meml. Home, Inc., 343 NLRB 646, 646 (N.L.R.B. 2004).

\textsuperscript{23} Id. at 647.
A rule prohibiting “abusive or profane language” on its face is will not be a violation of 8(a)(1). An employer has a legitimate right to establish a “civil and decent work place.” However, if an employer typically tolerates such profanity, but then applies the rule to profanity in a Section 7 context, such disparity may then make the rule unlawful. The question of whether particular employee activity involving “abusive or profane language” is protected concerted action will be determined on the individual facts of each case. Further, even though the abusive or profane language might occur during the context of Section 7 activity, the employee “can, by opprobrious conduct, lose the protection of the Act.” The NLRB may not ignore the egregious conduct, but rather is required to consider whether the conduct remain protected despite the language.

Lastly, a rule that prohibits false or malicious statements about the employer or co-workers typically is an unlawful restriction of Section 7 activity, even if it does not specifically reference Section 7 activity. The NLRB has stated that a rule or policy of disciplining employees for

25 Id. The D.C. Circuit Courts of Appeals stated that even though abusive and profane language can be an inherent part of Section 7 activity, as long as the rule does not expressly cover Section 7 activity it will not be unlawful. Id.
26 Martin Luther Meml. Home, Inc., 343 NLRB at 658; see also Atlantic Steel, 245 NLRB 814, 816 (N.L.R.B. 1979) (employee's use of abusive language may be unprotected depending on circumstances of case including nature of outburst).
27 Martin Luther Meml. Home, Inc., 343 NLRB at 647.
28 A. Steel Co., 245 NLRB at 816.
29 Adtranz ABB Daimler-Benz Transp, 253 F.3d at 26. The NLRB balances four factors when looking at whether a loss of protection is warranted by the abusive or profane language of the employee: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way, provoked by an employer's unfair labor practice. A. Steel Co., 245 NLRB at 816.
30 Flamingo Hilton-Laughlin, 330 NLRB 287, 294 (N.L.R.B. 1999); see also Beverly Health & Rehabilitation Services, 332 NLRB 347, 348 (N.L.R.B. 2000), enf'd. 297 F.3d 468 (6th Cir. 2002) (rule that prohibited “[m]aking false or misleading work-related statements concerning the company, the facility or fellow associates” found unlawful). The Fourth Circuit has stated an employer that tries to restrain protected Section 7 activity when it promulgates a workplace rule “permitting the punishment of employees for speaking badly about [other]…personnel” because the employer has failed to allow for statements which made by made in effort of
distributing “any false information or statements” is a violation of 8(a)(1) because it fails to clearly carve out an exception for protected concerted activity.\(^{31}\) In summary, a rule, which does not contain language that would restrict its application against an employee who engages in protected activity and thus allows employees to reasonably assume it restricts protected concerted activities, will be found by the NLRB to reasonably chill employees' protected activity and violate Section 8(a)(1).\(^{32}\)

**NLRB Guidance on Social Media and Online Activity\(^{33}\)**

Recent technological advancements have extended the boundaries of the workplace. Workers now do larger amounts of work online. Most businesses have an online presence or personality through Facebook, Twitter, email, and ratings websites such as Angie’s List or Yelp. The online presence allows companies to attract new customers, provides a channel to receive customer feedback, and a platform to gauge consumer satisfaction. It also can serve as a means for employees to voice their displeasure over their working terms and conditions, or other acts the employee feels are unethical or wrongful.

Many recent Board decisions have found the online activity of an employee to fall under the protection of Section 7.\(^{34}\) In 2011, as a response to the proliferation of social media cases, collective mutual aid or protection. *NLRB v. Southern Maryland Hospital Center*, 916 F.2d 932, 940 (4th Cir. 1990) (stating “the values of free speech and union expression outweigh employer tranquility in this instance).


\(^{32}\) *Costco Wholesale Corp.*, 358 NLRB 106 (N.L.R.B. 2012) (finding a handbook rule that “statements posted electronically (such as [to]online message boards or discussion groups) that damage the Company… may be subject to discipline, up to and including termination of employment” to be an unlawful prohibition of Section 7 activity).

\(^{33}\) In January 2013 the D.C. Circuit ruled in *Noel Canning v. N.L.R.B.* that President Obama's January 2012 appointment of three new members to the NLRB was improper and therefore the board did not have a quorum to issue rulings in 2012. 705 F.3d 490 (C.A.D.C. 2013). The court invalidated the NLRB decision at issue in that case, but more significantly, it calls into question the validity of all of the NLRB's rulings in 2012. The Supreme Court granted *certiorari* on June 24, 2103 to answer whether the President's recess-appointment power may be exercised when the Senate is convening every three days in *pro forma* sessions. It is possible a judgment by the court could invalidate all 2012 decisions by the NLRB. Oral arguments were held in front of the Court in January 2014 and a decision is expected sometime before the end of June 2014.
NLRB’s General Counsel (G.C.) issued a report detailing fourteen cases involving employers' social media policies. The report provided some insight into employees' use of Facebook and Twitter, including whether such use may be a protected concerted activity. The G.C. released a second report of cases in early 2012, which again attempted to provide a clearer picture about what types of rules might be valid or invalid. Although the reports contained a mix cases that were and were not violations of the NLRA, the report did not provide any specific guidance as to what should, or should not be, in a legal social media policy.

G.C. Solomon followed with a third memo in May of 2012, which provided some analysis of the cases from the first two reports and included an entire revised social media policy, which the G.C. had concluded was valid. The G.C. stated the most common problems is that polices are to broad by either restricting all activity that is negative, or requiring activity that is only positive. Both of these requirements include such a broad universe of acts that it will reasonably

34 Mitch Danzig and Brandon T. Willenberg discuss in Attack of the NLRB: Social Media Policies and Beyond an 18-month period from August 2011 to May 2013 in which the NLRB weighed in repeatedly regarding employers online policies and application of Section 7. 2013 WL 1828901 (WJEMP), 1. The Board found numerous rules to have impeded an employees right to discuss terms and conditions and take part in concerted online activity. Id.


be construed to restrict protected concerted acts.\textsuperscript{40} The first suggestion was to include examples of clearly illegal or unprotected conduct that are restricted by the rule and not protected by Section 7.\textsuperscript{41} The example policy included in the memo was considered valid, although it contained broad requirements such as “respectful”, and “fair and courteous,” because it provided sufficient specific examples of plainly egregious conduct so that employees would not reasonably construe the rule to prohibit Section 7 activity.\textsuperscript{42} For example, even though it contained a broad restriction of “offensive online posts,” it provided specific references that limited it to “offensive posts meant to intentionally harm someone's reputation” or “posts that could contribute to a hostile work environment on the basis of race, sex, disability, religion or any other status protected by law or company policy.”\textsuperscript{43}

**Recent Board Decisions**

In addition to the guidance of the General Counsel opinions, some Board decisions following Solomon’s memos begin to put some of the puzzle pieces into place. The decision reveal some factors that weigh into a determination of what types of rules would be found valid and activities that would be found protected.

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

In one of its first decisions involving an employers social media rule, the NLRB invalidated a Costco “electronic posting” rule in its employee handbook that prohibited employees from posting electronic statements using company computers that “damage the company, defame any

\textsuperscript{40} Id.

\textsuperscript{41} NLRB, Off. of the Gen. Coun., (3d) Rpt. of the Acting Gen. Coun. Concerning Social Media Cases, Mem., OM 12-759 (2012) (stating that wording a rule so that it restricts the scope of prohibited activity and clarify specific acts that would violate it, would further support the finding of the rule valid). Id.

\textsuperscript{42} Id.

\textsuperscript{43} Id.
individual or damage any person's reputation." The Board citing Lutheran Heritage Village-Livonia, stated that if the rule does not explicitly restrict Section 7 rights “the violation is dependent upon a showing” that “employees would reasonably construe the language to prohibit Section 7 activity.” The Board held was violation of 8((a)(1) because the was rule overly broad. It concluded “the rule would reasonably tend to chill employees in the exercise of their Section 7 rights,” since employees would “reasonably construe the language to prohibit Section 7 activity.” The Board determined that because the policy had no “accompanying language that would tend to restrict its application,” and “nothing in the rule that even arguably suggests that protected communications are excluded from the broad parameters of the rule”, it was reasonable to conclude the rule included activity which is protected. Finally, the Board stated that because it over broad the rule had a reasonable tendency to inhibit concerted acts and chill the employees exercise of Section 7 rights.


This case involved the discharge of five employees for Facebook comments they wrote in response to a coworker's criticisms of their job performance. The employer stated that the Facebook posts constituted “bullying and harassment” of a coworker and violated the company’s

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47 Id. at *2.
48 Id. at *3. The board, in FN 6 while contrasting the rule with one which prohibits use of the employer's email for “non-job related solicitations,” explains that where a rule is “reasonably understood to prohibit the expression of certain protected viewpoints”...“the rule serves to inhibit certain kinds of Sec. 7 activity while permitting others and, for this reason, violates Sec. 8(a)(1).”
“zero tolerance” policy prohibiting such conduct.\textsuperscript{50} Citing Myers \textit{I},\textsuperscript{51} that concerted activity “is not solely by and on behalf of the employee himself,” and Myers \textit{II},\textsuperscript{52} that concerted activity “bring[s]… truly group complaints to the attention of management,” the Board held that the Facebook posts of the five employees were protected Section 7 acts.\textsuperscript{53} The Board found that the “zero tolerance” policy referred to harassment based upon “race, color, sex, religion, national origin, age, disability, veteran status, or other prohibited basis,” and as such did not apply to this situation.\textsuperscript{54} So even though the policy had limiting language restricting its application to activity that would not fall under Section 7, the Board determined it had been applied improperly to protected concerted acts.

\textit{Hills and Dales General Hospital, NLRB No. 70 (NLRB April 1, 2014)}

Hills and Dales Hospital asked employees to voluntarily sign poster-sized copies of its new Values and Standards of Behavior Policy (VSBP).\textsuperscript{55} Additionally, the hospital asked employees to sign individual copies, which were placed into their employee files.\textsuperscript{56} The VSBP was also included into its human resource policy manual.\textsuperscript{57} Paragraph 16 of the VSBP stated employees “will represent Hills & Dales in the community in a \textit{positive and professional manner} in every

\begin{itemize}
\item \textsuperscript{50} Id. at *2.
\item \textsuperscript{51} 268 NLRB 497.
\item \textsuperscript{52} 281 NLRB 887.
\item \textsuperscript{53} Hispanics United of Buffalo, Inc., 359 NLRB No. 37, *2.
\item \textsuperscript{54} Hispanics United of Buffalo, Inc., 359 NLRB No. 37, *4. Additionally, the Board found the employer used a subjective determination that the employee the posts were about felt harassed instead of whether an objective observed would determine the posts to be harassment. Id.
\item \textsuperscript{55} Hills and Dales Gen. Hosp. and Danielle Corlis, 360 NLRB No. 70, *7 (N.L.R.B. Apr. 1, 2014).
\item \textsuperscript{56} Id.
\item \textsuperscript{57} Id.
\end{itemize}
opportunity.” Relying on Paragraph 16 of the VSBP the hospital disciplined an employee for a post the employee had made on a former co-workers Facebook wall. The Board discussed *Claremont Resort & Spa* where a rule was unlawful because its “prohibition of ‘negative conversations' about managers would reasonably be construed by employees to bar them from discussing with their coworkers complaints about their managers that affect working conditions, thereby causing employees to refrain from engaging in protected activities.” The Board determined that the requirement of *positive and professional manner* was just as overbroad and ambiguous as the prohibition of damaging statement that were found to be a violation in *Costco Wholesale Corp.* The Board held that because the language in paragraph 16 could be reasonably viewed as proscribing employees from engaging in any public activity or making any public statements that are not perceived as *positive* towards the hospital, it could be reasonably construed by employees as discouraging them from “engaging in protected public protests of unfair labor practices, or from making statements to third parties protesting their terms and conditions of employment.” Thus Board held the rule was a violation of 8(a)(1) due to finding the rule restricted activity that may not be *positive* towards the hospital, but is clearly protected Section 7 activity.

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58 *Id.* at *1.

59 *Id.* at *7. The former worker had been fired for, as she describes it, “playfully throwing a yogurt cup at [her] boss.” *Id.* The disciplined employee wrote, “Holy shit rock on...! Way to talk about the douchebags you used to work with. I LOVE IT!!” *Id.*


61 *Id.* at *2. *Costco Wholesale* is discussed in text accompanying supra notes 45-49.

62 *Id.*

63 *Id.*
Price Edwards & Company, Case 17-CA-92794

Although this case was settled, an advice memo to the Region 14 Director provides insight as to when an employer’s denial of access to social media might be a violation of 8(a)(1).64 In its advice memo, the G.C.’s office concludes that the employee’s posts on Facebook were likely not protected concerted activity.65 However, the memo concludes the employer’s prohibition of accessing Facebook or posting online commentary at any time was a likely an unlawful restriction of protected concerted activity.66 The G.C. distinguishes the matter at hand from Register Guard where the employer had a draw a Section 7-neutral line.67 In Register Guard, the Board held, based upon its decisions regarding employer-owned equipment, that employees have no statutory right to use an employer's email system for Section 7 matters, and therefore that employer prohibitions on employee nonbusiness use of the employer's e-mail system are lawful.68 The Board defined discrimination in the Section 8(a)(1) context, concluding that unlawful discrimination requires disparate treatment of activities or communications of a “similar character” because of their union or other Section 7-protected status.69 It further

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66 Id. The employer forbade the employee from “accessing Facebook at work or posting similar online commentary at any time.” Id.

67 Id.

68 In Re the Guard Publg. Co., 351 NLRB 1110 (N.L.R.B. 2007).

69 Id. at 1118.
explained that an employer does not violate the Act if it distinguishes between personal postings on a board and group or organizational postings.  

In the advice memo, the G.C. argued that because the employer permitted the incidental personal use of its electronic communication systems and the prohibition of Facebook was not made in regard to any distinction between a personal posting or one of a group or organization it was an unlawful restriction. Extrapolating the argument of the G.C., any restriction of employee use of social media or online message boards for purposes of discussing wages, terms and conditions or employment, or union organization activity, while allowing others to like a friends picture of the grandchild, discuss a new restaurant in town, or post about a current event will likely be a discriminatory restriction violating 8(a)(1). As was also discussed in the advice memo, given the two-way communication of the Internet, the Register Guard distinction of personal and group posting will likely not apply easily to the functionality of social media. However, compare this with the decision in Henkel Corp., in which the division of judges determined that in the absence of evidence of disparate treatment, a rule prohibiting “non-job-

70 Id. (basing its decision on the Seventh Circuit cases of Fleming Co., 336 NLRB 192 (2001), enf. denied 349 F.3d 968 (7th Cir. 2003) (finding that because the employer had never allowed postings of any outside group or clubs but had only allowed posting for weddings, birthday and advertisements for personal items such as cars and electronics for sale they did not discriminate by removing union literature), and Guardian Industries, 313 NLRB 1275 (1994), enf. denied 49 F.3d 317 (7th Cir. 1995) (holding that because the employer permitted posting of “swap and shop” notices advertising personal items for sale and banned all group posting including the Red Cross and an anti-union worker group, there was no discrimination involving the unequal treatment of equals).

71 Advice Mem. from the NLRB Off. of the Gen. Coun. to Daniel L. Hubbel, Reg. Dir. of Reg. 14, Price Edwards & Co., No. 17-CA-92794 (May 7, 2013) (stating [i]n sum, the Region should argue that if an employer permits (or does not prohibit) nonwork communications in policy or practice, but regulates the content of those communications--that is, their viewpoint, subject matter, manner of speech, or otherwise--those content-based restrictions violate the Act if they tend to interfere with, restrain, or coerce Section 7 communications in a discriminatory manner). Additionally, the G.C. argues the Region Director should use the Prince Edwards case to argue that Register Guard should be overturned, and that employees have a Section 7 right to use their employer's electronic communications systems.

72 In addition, in this era where most people have a computer in their pocket in the form of a phone, the issue of access to social media, online message boards, and email might likely be an outdated issue.
related [e-]solicitation” using the employers email system in its entirety, whether an employee is on break, lunch, or working was not a prohibition of any Section 7 rights.\textsuperscript{73}

3. Conclusion

New technologies are changing the face of our communication in the workplace. Sixty-one percent of Americans have a social media account and the average American Facebook user spent almost 15.5 hours in 2013 checking out their friends’ status updates and likes. A Business News Daily poll in July of 2013 revealed the average online user spends 23 hours a week emailing, texting and using social media and other forms of online communication. In response to this steady increase in online activity, employers have attempted to restrict activity, and restrict use to things they deem appropriate or work friendly.

As seen with Costco Wholesale Corp., a restriction that creates a prohibition on statements that the employer determines are negative, damaging, or defame likely is a 8(a)(1) violation as a result of chilling Section 7 rights. Additionally, by applying Hills and Dales, any requirement of only positive or professional statements and conduct also likely will violate 8(a)(1).

As explained in Costco Wholesale Corp. and OM 12-759, any broad restriction prohibiting negative statements or requiring positive statement must be accompanied by specific clear examples. The purpose of the examples is to provide the employee with plainly egregious conduct that violates the rule, but also allows the employee to clearly and reasonably understand that their Section 7 rights are not implicated by the rule. Therefore any employer establishing or providing a rule restricting online or social media use can use a broad terms of restriction, such as no demeaning, derogatory, disparaging, insulting or offensive postings if accompanying

language is included. The rule must include language providing specific narrow examples, which allow the employee to reasonably construe that the rule does not prohibit any posting that could be considered a discussion of wages, management, terms and condition of employment, or other protected concerted activity.

As for employer restriction of access to online messaging or social media, any distinction that isolates and makes broad restriction that would inevitably include Section 7 activity likely violate 8(a)(1). Any distinctions made to types of posting or access allowed for only group postings, with this current Board, may also likely violate 8(a)(1) as such a distinction of personal and group activity as established by Register Guard are difficult to ascertain with modern social media applications. Although as seen in Henkel Corp., a broad rule prohibiting all personal postings is likely not discriminatory unless specific evidence can be shown. Though given the proliferation of smart phones, access to email and social media might be an antiquated point of contention. Likely, the new contention will be regarding the restriction of access to personal mobile devices during all working hours.