

## V. Social Media and the National Labor Relations Act

---

# Protected Activity and the NLRA in the Age of Social Media

WESLEY KENNEDY  
ANGIE COWAN HAMADA  
*Allison, Slutsky & Kennedy, P.C.*

A complete paper on this topic was not available at press time, but the authors provided the following outline of case law and legislation pertaining to the issue of social media as a protected activity under the NLRA.

### I. The Basics of the NLRA

#### *A. The Right to Engage in Protected Activity*

NLRA Section 7, 29 U.S.C. § 157:

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 such activities ...

#### *B. Application of Section 7 in Light of the Public Policy Declared in the Act Supporting Collective Bargaining as in the Public Interest*

NLRA Section 1, 29 U.S.C. § 151:

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

---

<sup>1</sup> Author's address: Suite 2600, 230 W. Monroe St., Chicago, IL 60606

It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise of workers full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

[ ... ]

“The Act ... is primarily designed to promote industrial peace and stability by encouraging the practice and procedure of collective bargaining.” *International Harvester Co.*, 138 NLRB 923, 925-926 (1962), *quoted in Carey v. Westinghouse Electric Corp.*, 375 U.S. 261, 271 (1964) (emphasis added). “[A]ny balancing of [employee and employer rights] must take into account the economic dependence of the employees on their employers ...” *NLRB v. Gissell Packing Co.*, 395 U.S. 575, 617 (1969).

### C. *The Importance of Communication in the Exercise of Section 7 Rights*

See, e.g.:

1. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945) (An employer may enforce “reasonable rules” covering employee conduct on working time, but “time outside working hours ... is an employee’s time to use as he wishes without unreasonable restraint, although he is on company property;” rule banning solicitation during nonworking hours presumptively invalid as “an unreasonable impediment to self-organization ... in the absence of evidence that special circumstances make the rule necessary in order to maintain production or discipline”).
2. *NLRB v. Servette, Inc.*, 377 U.S. 46 (1964) (employees may appeal directly to management of secondary employer not to do business with primary employer).
3. *NLRB v. Fruit & Vegetable Packers Local 760 (Tree Fruits)*, 377 U.S. 58 (1964) (union's secondary picketing of retail stores confined to persuading customers to cease buying the product of primary employer not an unlawful secondary boycott).
4. *Linn v. Plant Guard Workers*, 383 U.S. 53 (1966) (“Labor disputes are ordinarily heated affairs; the language that is commonplace there might well be deemed actionable per se in some state jurisdictions. Indeed, representation campaigns are frequently characterized by bitter and extreme charges, countercharges, unfounded rumors, vituperations, personal accusations, misrepresentations and distortions. Both labor and management often speak bluntly and recklessly, embellishing their respective positions with imprecatory language;” *New York Times v. Sullivan* standard applied to defamation actions in labor disputes).
5. *Beth Israel Hospital v. NLRB*, 437 U.S. 483 (1978) (limitations on communication should not be “more restrictive than necessary” to protect the employer’s legitimate interests).
6. *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978) (Section 7 protects public communications regarding workplace issues “through channels outside the immediate employer-employee relationship” such as political activity).
7. *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building Trades Council*, 485 U.S. 568, 578-580 (1988) (“more than mere persuasion is necessary to prove a violation of §8(b) (4) (ii) (B) ... The loss of customers because they read a handbill urging them not to patronize a business, and not because they are intimidated by a line of picketers, is the result of mere persuasion, and the neutral who reacts is doing no more than what its customers honestly want it to do”).

#### D. *The First Amendment Implications of Interpreting and Applying Section 7*

See, e.g.:

1. *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building Trades Council*, 485 U.S. 568, 577 (1988) (avoidance of conflict with First Amendment through inquiry “whether there is another interpretation, not raising these serious constitutional concerns, that may be fairly ascribed to” statute).
2. *NLRB v. Fruit & Vegetable Packers Local 760 (Tree Fruits)*, 377 U.S. 58 (1964) (avoiding constitutional conflict by holding that not all forms of peaceful consumer picketing are covered by Section 8(b) (4) (ii) (B)).

Compare the First Amendment treatment of non-labor-related communication. See, e.g.:

1. *Snyder v. Phelps*, 562 U.S. \_\_\_, 131 S.Ct.1207 (2011) (picketing of military funeral by anti-gay protesters); *Virginia v. Black*, 538 U.S. 343 (2003) (cross burning).
2. *Texas v. Johnson*, 491 U.S. 397 (1989) (flag burning).
3. *Madsen v. Women’s Health Center, Inc.*, 512 U.S. 753 (1994) (protests at medical clinic).
4. *NAACP v. Claiborne Hardware*, 458 U.S. 886 (1982) (picketing and boycott of employer organized by civil rights organization). *Cf., e.g.*, Kennedy & Cowan, “A Touch of ‘Class’ – Immigration and the Intersection of Politics and Protected Section 7 Activity,” 23.
5. *The Labor Lawyer*, 99, 114 (2007) (heavy regulation of form and content of union secondary appeals constitute “nakedly content-based restrictions on speech that would never pass muster under conventional First Amendment analysis”) (collecting scholarly authorities).

#### E. *The Board’s Duty to Act in the Face of Changing Realities*

“The responsibility to adapt the Act to changing patterns of industrial life is entrusted to the Board.” *NLRB v. J. Weingarten*, 420 U.S. 251, 266 (1975).

## II. THE CHANGING TIMES

### A. *Evolving Technology*

1. “Even employees who report to fixed work locations every day have seen their work environments evolve to a point where they interact to an ever-increasing degree electronically, rather than face-to-face. The discussion by the water cooler is in the process of being replaced by the discussion via email.” Malin & Perritt, “The National Labor Relations Act in Cyberspace: Union Organizing in Electronic Workplaces,” 49 *Kan.L.Rev.* 1, 17 (2000).
2. Email, the internet, and mail listing services “constitute a unique medium – known to its users as ‘cyberspace’ – located in no particular geographic location but available to anyone, anywhere in the world, with access to the Internet.” *Reno v. ACLU*, 521 U.S. 844, 850 (1997).
3. See Barker, “Facebook, Twitter, and MySpace as the New Water Coolers,” 4 *NLRB Region 13 Chicago Newsletter*, No. 2 (2010).

### B. *The Evolving Workforce*

1. Workers increasingly communicate through social media. This is particularly true of female and younger workers, who represent an increasing share of the workforce, and who statistically use social media more extensively. Labor Project for Working Families, Cornell ILR Labor Programs, UC Berkeley Labor Center, *New Approaches to Organizing Women and Young Workers: Social Media & Work Family Issues* (July 2010).
2. Study found at: <http://www.working-families.org/learnmore/pdf/NewApproachestoOrganizingWomenandYoungWorkers.pdf>

### III. EMPLOYEES' USE OF SOCIAL MEDIA AS PROTECTED CONCERTED ACTIVITY

#### A. Increasing Interest in the Application of the Act to Social Media

1. The Acting General Counsel has made social media a "hot topic."
  - OM 11-11 (April 2011) - Mandatory submissions to Division of Advice.
  - OM 11-74 (August 2011) - Summarizes several Advice memoranda.
  - OM-12-17 (NexGen) (December 2011) - Tracking "Hot Topic" Cases
2. FOIA Requests by AFL-CIO and U.S. Chamber of Commerce. Eastman, "A Survey of Social Media Issues Before the NLRB," at 19-25 (U.S. Chamber of Commerce 2011), <http://www.uschamber.com/reports/survey-social-media-issues-nlr>
3. Interestingly, the majority of the unfair labor practice charges filed are by unrepresented employees of non-union employers. *E.g.*, "Workers Claim Right to Rant on Facebook," *Wall Street Journal*, December 2, 2011.

#### B. The Definition of Protected Concerted Activity

1. Conduct is "concerted" when the employee acts "with or on the authority of other employees, and not solely by or on behalf of the employee himself." *Meyers Industries (Meyers I)*, 268 NLRB 493 (1984), *rev'd sub nom*, *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), *cert. denied*, 474 U.S. 948 (1985), *on remand*, *Meyers Industries (Meyers II)*, 281 NLRB 882 (1986), *aff'd sub nom*, *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), *cert. denied*, 487 U.S. 1205 (1988).
2. To be protected, the employee's conduct must be related to wages, hours, and/or other terms and conditions of employment. *Veeder-Route*, 237 NLRB 1175 (1978).
3. An employer's treatment of an employee can be an unlawful "preemptive strike" to restrain and coerce concerted activity in violation of Section 8(a) (1), even if the worker has not yet engaged in concerted activity. *Parexel International, LLC*, 356 NLRB No. 82 (2011).
4. The employee's conduct does not lose its protection when the employee expresses himself outside the boundaries of the employment relationship. The NLRA protects public communications regarding workplace issues "through channels outside the immediate employer-employee relationship." *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1978).
5. In particular, Section 7 protects employee communications through email and/or other internet channels. *Timekeeping Systems, Inc.*, 323 NLRB 244 (1997).
6. So long as they are related to a dispute over terms and conditions of employment, employee statements critical of the employer do not lose their Section 7 protection unless they are so extreme as to breach the employee's duty of loyalty. *NLRB v. Electrical Workers Local 1229 (Jefferson Standard)*, 346 U.S. 464 (1953).
7. The conduct does not lose its protection based on its abusive character unless it is "flagrant," "egregious," or "outrageous." The inquiry takes into account the place of the discussion, its subject matter, the nature of the employee's outburst, and whether the outburst was in any way provoked by an employer unfair labor practice. *Atlantic Steel Co.*, 245 NLRB 814 (1979).

#### C. The Emerging Application of These Principles to Social Media

1. Board Decisions
  - *Foxwoods Resort Casino*, 356 NLRB No. 111 (2011) (Statements made by Union on Facebook during a representation election simply emphasized that the casino has a policy of granting seniority preference to tribal members, and the statement was not inflammatory).
  - *Baysys Technologies, LLC*, 357 NLRB No. 28 (2011) (Employees discussed on Facebook their complaints about the employer issuing their paychecks late. A newspaper published the Facebook discussions. The employer sent an email to employees asserting that the employees violated their nondisclosure agreements, threatened the employees with legal action, implied the

employees would be discharged unless they issued written explanations to other employees and the newspaper, and threatened that their facebook posts would be taken into account in performance reviews. One employee was terminated. The Board held that the Employer violated the Act and the employees' engaged in protected concerted activity).

## 2. Administrative Law Judge Decisions

- *Hispanics United of Buffalo, Inc.* No. JD-55-11 (2011) (Employer violated the Act by discharging five employees for complaining on Facebook about their working conditions. The posts by employees defended their job performance and criticized working conditions).
- *Karl Knauz Motors, Inc.*, No. JD(NY)-37-11 (2011) (Sales person was terminated after posting on Facebook a criticism that his employer was serving mediocre food at a sales event, which impacts sales and thus his salary. That Facebook comment was considered protected concerted activity, because the sales person was complaining about the same with coworkers and told them that he was going to post about it on Facebook. The employer stated that it terminated him for another Facebook post that included a photo of an accident of a coworker on a test drive. The ALJ held that the car-accident posting was not protected or concerted activity and that the employer did not violate the Act).
- *Ashland Nursing & Rehabilitation Center*, Case No. 5-RC-16580 (ALJ Decision 2011) (ALJ disregarded testimony that an employee who passed out authorization cards for the Union posted on Facebook that the employer was “firing all the sisters” because the employer did not show that the employee was an agent of the union).
- *Metropolitan Regional Council of Carpenters (Forcine Concrete & Construction, Co., Inc.)*, Case No. 4-CB-10520 (ALJ Decision 2011) (Union's postings on YouTube and Facebook were not evidence that employees were being coerced or restrained regarding supporting the union).

## 3. Activity in the Regions and Division of Advice

a. See General Counsel Memoranda, *supra*.

b. Conduct Alleged to be Protected

- *American Medical Response of Connecticut, Inc.*, No. 34-CA12576 (Div.Advice 2011) (Complaint alleged, *inter alia*, that an employee was terminated for criticizing her supervisor on Facebook. The employee posted on Facebook that her supervisor was a “dick” and “scumbag” and also posted “Love how the company allows a 17 to be a supervisor” [Code “17” is AMR's code for a psychiatric patient]. Advice found that the employee engaged in protected activity “by discussing supervisory actions with coworkers in her Facebook post.” The employee's name-calling in this case was not so egregious to make it unprotected. The employee and company reached a private settlement).
- *Ingham Regional Medical Center*, Case Nos. 07-CA-52070, 07-CA52232 (settlement agreement approved 11/4/09) (Complaint issued alleging that two employees were terminated after engaging in protected concerted activity by electronically discussing with fellow employees terms and conditions of their employment for the purpose of their mutual aid and protection. Per the settlement agreement, both employees were reinstated and made whole).
- NLRB Press Release, “Complaint alleges Jimmy John's employees threatened, terminated for union related activities,” November 9, 2011, <http://nrlb.gov/news/complaint-alleges-jimmy-johnE28099employees-threatened-terminated-union-related-activities>.

c. Found Unprotected

- *MONOC*, Cases 22-CA-29008 *et al.*, (Div.Advice 2010) (employee in an acute health care facility posted that employees might withhold care if they were personally offended by the patients; statement found unprotected).
- *Arizona Daily Star*, Case No. 28-CA-23267 (Div.Advice 2011) (Advice found Twitter posts by a newspaper reporter such as “You stay homicidal, Tuscon, See Star Net for the bloody deets?”; “What?!?!? No overnight homicide? WTF? You're slacking Tuscon.”; and “I'd root

for daily death if it always happened in close proximity to Gus Balon's." did not relate to terms and conditions of employment and was not protected).

- *Rural Metro*, Case No. 25-CA-31802 (Div.Advice 2011) (Employee discharged after posting on a Senator's facebook wall the following comments: "Rural Metro has contracts w/ several fire departments to provide EMS. The reason they contract out to us? BECAUSE WE'RE THE CHEAPEST SERVICE IN TOWN! How do we manage that? BY PAYING OUR EMPLOYEES \$2 LESS THAN THE NATIONAL AVERAGE! . . . the fact that we're employees of a cheap contract company instead of government employees hurts us. . . ." Advice observed that the employee did not discuss her Facebook comments with other employees prior to or immediately after posting them. Advice found the employee did not engage in concerted activity).
  - *JT's Porch Saloon & Eatery, Ltd.*, Case No. 13-CA-46689 (Div.Advice 2011) (Employee discharged after posting to facebook, in response to a post from his step-sister asking how his night at work went, "that he hadn't had a raise in five years and that he was doing the waitresses' work without tips. He also called the employer's customers 'rednecks' and stated that he hoped they choked on glass as they drove home drunk." Advice concluded that even though the post related to terms and conditions of employment, there was no evidence of concerted activity and therefore it was unprotected).
  - *Wal-Mart*, Case No. 17-CA-25030 (Div.Advice 2011) (Advice concluded that employee's facebook comments, such as "Wuck Falmart! I swear if this tyranny doesn't end in this store they are about to get a wakeup call because lots are about to quit!" were more akin to griping, which is not protected activity).
  - *Martin House*, Case No. 34-CA-12950 (Div.Advice 2011) (Employee working at a residential facility for homeless people with mental health issues was terminated for making Facebook posts such as "My dear client ms 1 is cracking up at my post, I don't know if shes laughing at me, with me or at her voices, not that it matters, good to laugh." Advice found no evidence of protected concerted activity and the posts did not discuss terms and conditions of employment).
  - *Wal-Mart Distribution Center 6018*, Case No. 26-CA-24000 (charge dismissed 6/30/11) (Charge dismissed where Facebook comments "expressing your desire for the building to collapse while certain members of management were inside" were considered disloyal and unrelated to working conditions).
- d. Additional Charges Pending
- *North River Home Care*, Case No. 01-CA-046702 (posting something negative about employer and a manager).
  - *Sunshop Sunoco*, Case No. 08-CA-39229 (termination based on employee posting work-related comments on Facebook).
  - *Rittenhouse Senior Living of Middletown*, Case No. 09-CA-46202 (discharge for discussing terms and conditions of employment on Facebook).
  - *Grand Isle Emergency Medical Services*, Case No. 15-CA-19855 (posting complaints about terms and conditions of employment).
  - *Citronelle Police Department*, Case No. 15-CA-19894 (discharge for being on Facebook while at work).
  - *He's R Block*, Case No. 16-CA-27774 (discharge for discussing workplace issues on Facebook).
  - *National Enzyme Company (NEC)*, Case No. 17-CA-24883 (Blocking personal email addresses from sending to company email addresses to interfere with Section 7 rights).
  - *Teletech Holdings, Inc.*, Case No. 19-CA-33041 (discharge of an employee for private Facebook emails exchanged with coworkers that complained about working conditions).

- *Living Essentials, LLC*, Case No. 25-CA-031722 (Ordering employee to remove Facebook comments and asking him to sign a confidentiality agreement regarding termination).
- *Reggie White Sleep Disorder Center - Desoto*, Case No. 26-CA023896 (discharge of an employee for posting information regarding medical insurance on coworker's Facebook page).
- *Marvo Transportation*, Case No. 22-CA-21850 (discharge of an employee after posting on Facebook a complaint that the employer failed to pay employees on time).
- *Advance Publications Inc.*, Case No. 29-CA-30532 (discharge of employee after posting on Facebook to a co-worker "I don't want to be here anymore. They don't pay me enough and I don't give a shit.").
- *FedEx Ground*, Case No. 33-CA-16212 (discharge of an employee for engaging in protected concerted activities by posting about employer on Facebook).
- *Inter-Con Security Systems, Inc.*, Case No. 10-CA-38688 (discharge of employee for discussing her and other employees' work-related concerns).
- *Triple Play Sports Bar*, Case No. 34-CA-12915 (discharge of an employee for engaging in protected concerted activity on a coworker's Facebook page).

#### D. *The Problem of Drawing Lines Based on the Content of Employee Communications*

1. Workers do not think or compartmentalize their conversations based on the Board's categories—work-related or non-work-related, concerted or unconcerted; etc.
2. The General Counsel, ALJs and the Board end up parsing communications based on the content of the communications to determine whether they are protected. The inevitable result is gamesmanship and a premium on clever lawyering. Unions and their counsel can assure that their constituents say the right "magic words" to connect a work stoppage to the particular employment relationship. By the same token, savvy employers and their counsel can just as easily assure that they say the right "magic words" in disciplining and discharging employees. *See, e.g., Five Star Transportation*, 349 N.L.R.B. 42 (2007).
3. This leaves the Board—not to mention counsel and their clients—in the position of parsing the minutiae of employees' language, and determining whether speech is protected on the basis of the content of the speech. This uncertainty can also have a potential chilling effect on both employees and employers.

## IV. EMPLOYER POLICIES

### A. *The Emerging Board Standard With Respect to Employer Policies*

1. An employer policy which explicitly restricts activities protected by Section 7 is unlawful *per se*. A facially valid employer policy violates the Act if it would reasonably tend to chill employees in the exercise of their Section 7 rights, e.g., if the employees would reasonably construe the language to prohibit Section 7 activity; if the rule was promulgated in response to union activity; or the rule has been applied to restrict the exercise of Section 7 rights. *Lafayette Park Hotel*, 326 NLRB 824 (1998); *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004).
2. To what extent can an employer escape such a "chilling effect" by including a disclaimer with respect to Section 7 rights, and/or examples of conduct that remains permissible?
3. Discrimination in Enforcement. *Register Guard*, 351 NLRB 1110 (2007), *enf. granted in part, denied in part*, 571 F.3d 53 (D.C. Cir. 2008), *on remand*, 357 NLRB No. 27 (2011). The D.C. Circuit held, *inter alia*, that discipline for union-related email solicitations was unlawfully discriminatory. Without reaching the facial validity of the employer's policy, 571 F.3d at 58, the Court found that "[t]he evidence shows that the [employer] tolerated personal employee e-mail messages," including solicitations for "sports tickets or other similar personal items," *id.*, at 60 (quoting Board decision), and that the rationale for "barring access based on organizational status" was "a post hoc invention;

the company never invoked it before the General Counsel filed his complaint.” *Id.* The Court remanded to the Board on that issue, and the Board accepted the D.C. Circuit’s decision as the law of the case. *See St. Margaret Mery Healthcare Centers v. NLRB*, 519 F.3d 373 (7th Cir. 2008).

#### B. The Board Standard as Applied to Social Media Policies

##### 1. Policies Alleged to Be Unlawful:

- *Ingham Regional Medical Center*, Case Nos. 07-CA-52070, 07-CA-52232 (Settlement agreement approved 11/4/09) (Complaint alleged that the employer applied its cell phone and personal communications equipment policy in an overly broad manner which barred employee solicitations while employees were off duty. The settlement agreement required, *inter alia*, that the employer post a notice stating that it will not apply the policies at issue in an overbroad manner that would prohibit employees from discussing terms and conditions of employment with fellow employees while off duty).
- *Healthcare Ventures of Ohio, LLC*, Case No. 08-CA-38825 (Settlement agreement signed 9/14/10) (Complaint alleges that employer policy on confidentiality and proprietary information is over broad, where the policy includes restrictions on discussing “medical information, corrective actions, wages, performance evaluations, etc.” The complaint alleged that the employer terminated two employees for violating the over broad policy, and interrogated an employee about union duties and internet discussions regarding the termination of co-workers. The settlement agreement required the employer to make two employees whole and to post a notice stating that it will not maintain “an overly broad confidentiality rule prohibiting employees from discussing corrective actions, wages, performance evaluations, and other terms and conditions of employment.”).
- *Sodexo*, Case No. 09-CA-46032 (Settlement agreement approved 12/29/10) (Charge alleges that the employer rules, including one prohibiting statements and comments to the media and required that the employer “speak with one voice”, chilled Section 7 rights).
- *The Fitzgerald’s Casino and Hotel*, Case No. 26-CA-23847 (Settlement agreement approved 1/25/11) (employer implemented non-solicitation and social media policy chilled Section 7 rights).
- *Qualitest Pharmaceuticals*, Case No. 10-CA-38757 (2011) (Complaint issued 2/23/11) (Complaint alleges the employer maintains over broad rules which prohibit conduct such as the “carrying of tales, gossip, and discussion regarding company business and employees.” Complaint also alleges that an employee was terminated for discussing his or her disciplinary warning on Facebook).
- *Arizona Daily Star*, Case No. 28-CA-23267 (Div.Advice 2011) (employer maintained over broad rules, including not allowing employees to discuss grievances over social media, prohibited employees from engaging in protected activity).

##### 2. Policies Found to be Valid

- *Sears Holdings (Roebucks)*, Case No. 18-CA-19081 (Div.Advice 2009) (Employer’s social media policy listing several prohibited subjects, including, “disparagement of company’s or competitor’s products, services, executive leadership, employees, strategy, and business products,” as well as, *inter alia*, disparagement of any race, religion, gender, and sexual orientation. The policy was considered “reasonable” given its context. Advice noted that while prohibiting “[d]isparagement of company’s . . . executive leadership, employees [or] strategy’ could chill the exercise of section 7 rights if read in isolation, the Policy as a whole provides sufficient context to preclude a reasonable employee from construing the rule as a limitation on section 7 conduct.”).
- *Salon/Spa at Boro, Inc.*, 356 NLRB No. 69 (2010) (ALJ found that employer’s warning that employees be careful with their use of social media was not coercive; ALJ’s finding that the employer violated 8(a) (1) did not rest on the social media allegations).



### 3. Additional Charges Pending

- *The Court at South Park*, Case No. 11-CA-22900 (the employer promulgated, maintained, or enforced an over broad policy related to confidentiality, unacceptable conduct, complaint procedures, use of communication systems, and employee participation in investigations).
- *Flagler Hospital*, Case No. 12-CA-27031 (the employer promulgated, maintained, and enforced an over broad social media, blogging, and social networking policy).
- *The H Group, BBT Inc.*, Case No. 14-CA-30313 (the employer promulgated and maintained over broad 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 (employer promulgated, implemented and maintained an over broad social media policy restricting Section 7 rights).
- *Lowes Home Improvement*, Case No. 19-CA-32951 (employer promulgated, maintained or enforced an over broad social networking policy).
- *ER Solutions, Inc.*, Case No. 19-CA-32943 (employer maintained and enforced an over broad policy prohibiting employees from making disparaging remarks about the employer).
- *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 over broad social media policy).

## V. EMPLOYER “SURVEILLANCE” AND RELATED ISSUES

### A. The Board’s Surveillance Standards

1. In *Flexsteel Industries*, 311 NLRB 257 (1993), the Board stated that employees should be able to engage in Union activities without the fear that management is “peering over their shoulders.” Flexsteel held that in determining whether an employer’s statement has created an unlawful impression of surveillance, the test is “whether employees would reasonably assume from that statement that their union activities had been placed under surveillance.” *Id.*
2. Employer efforts to monitor employee use of internet and social media should be subject to the Board’s general standards on surveillance, including the relative “openness” of the protected activity and the extent to which the surveillance is “out of the ordinary.” See, e.g., *Sprain Brook Manner Nursing Home, LLC*, 351 NLRB No. 75 (2007); *Hialeah Hospital*, 343 NLRB 391 (2004); *Alle-Hiski Medical Center*, 339 NLRB 361 (2003); *Carry Cos. of Illinois*, 311 NLRB 1058 (1993). *Cf. Colgate Palmolive Co.*, 323 NLRB 515 (1997) (installation and use of hidden surveillance equipment a mandatory subject of bargaining).
3. The Board has applied these standards in the context of technological advances. See, e.g., *Northeast Iowa Telephone Co.*, 346 NLRB 465 (2006) (employer created unlawful impression of surveillance by telling employees he reviewed cell phone charges and saw calls being made to union); *Frontier Telephone of Rochester*, 344 NLRB 1270 (2005), *enfd.*, 181 Fed. Appx. 85 (2d Cir. 2006) (no violation where supervisor told employees that he knew of restricted Yahoo group being used for union activity).

### B. The Surveillance Standards Applied to Social Media

1. *MONOC*, Cases 22-CA-29008 *et al.* (Div.Advice 2010) (Charge based on employer obtaining employee’s Facebook page dismissed where employer did not actively seek out Facebook postings).
2. The following charges include allegations regarding unlawful surveillance:

- *Buel, Inc.*, Case No. 11-CA-22936 (Employer’s monitoring of Facebook constituted unlawful surveillance).
- *St. Joseph’s Hospital*, Case No. 06-CA-37254 (Coworker shared with management a Facebook conversation resulting in the termination of two employees).
- *Charley Creek Inn*, Case No. 25-CA-031741 (Employer discharged an employee after coworker printed out his comments on Facebook and gave them to a supervisor).

*C. Other Employer Attempts to Access Employees’ Private Internet Postings*

1. Through employer policies. See, e.g., the “Acknowledgment: form on one employer Social Media Policy:

By signing below I hereby acknowledge receipt of [Employer’s] Social Media Policy. I understand that failure to comply with this policy may result in disciplinary action up to and including termination.

I further acknowledge that if the Company determines that my conduct may violate any of the Company’s policies or if a complaint is brought to the Company’s attention regarding my activities on social networking media, the Company is entitled to investigate that conduct. I agree in such circumstances that I will grant access to the Company to view the blog postings or websites, even if the blog is viewed by subscription only or requires a password to view the website. I further agree that my failure to comply with the Company’s request to view the blog postings may result in discipline up to and including termination.

2. Through Board subpoena, discovery or other legal process. Such attempts to obtain information from employees may be improper. See, e.g., *Guess?, Inc.*, 339 NLRB 432 (2003) (discovery in court proceeding); *Wright Electric, Inc.*, 327 NLRB 1194 (1999), *enf’d*, 200 F.3d 1162 (8th Cir. 2000) (discovery in state court lawsuit); *National Telephone Directory Corp.*, 319 NLRB 420 (1995) (cross examination of union organizer at ALJ hearing); *John Dory Boat Works*, 229 NLRB 844 (1977) (Board subpoena); *Certified Industries, Inc.*, No. 29-CA-9097 (Div. of Advice 1981) (citing previous Advice Memorandum permitting employer subpoena because “the material sought was arguably relevant to the employer’s defenses”). See generally *Johnnie’s Poultry*, 146 NLRB 770 (1964), *enf. denied on other grounds*, 344 F.2d 617 (8th Cir. 1965).