TRI-STATE ACADEMY OF LEGAL STUDIES IN BUSINESS

2017 Conference Proceedings

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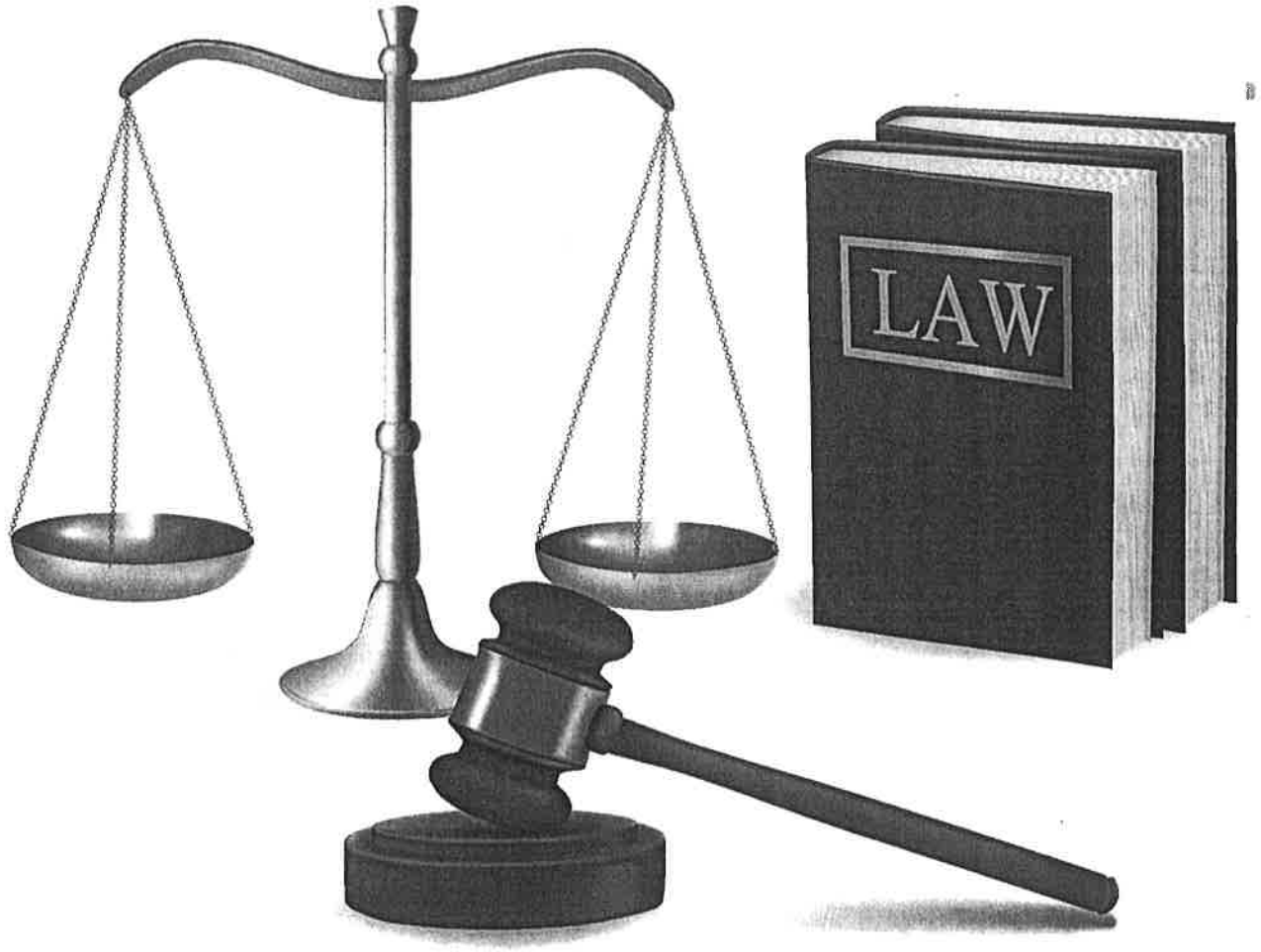

TRI-STATE ACADEMY OF LEGAL STUDIES IN BUSINESS - 2017 CONFERENCE

Host: University of Cincinnati – UC Blue Ash College
Embassy Suites, Blue Ash, OH
October 20, 2017

Conference Agenda

8:00 - 9:00 a.m.	Registration (and Full Breakfast Buffet in the Open Dining Area at Embassy Suites)
9:00 - 9:10 a.m.	Welcome
9:10 - 9:30 a.m.	Prof. Brian Hunter and Prof. Annette E. Redmon, University of Cincinnati - UC Blue Ash College; *Active Learning in Undergraduate Legal & Other Courses: Integrating Innovative and Interactive Technology in the Classroom*
9:30 - 9:45 a.m.	Dr. Elizabeth A. Cameron and Prof. Tom Ealey, Alma College; *Patient Safety and Modesty: Policy and Compliance*
9:45 - 10:00 a.m.	Dr. Jessica A. Magaldi, Pace University, *Employers' Rights to Use Employment Policies to Regulate Employee Activity on Social Media: Exploring the Limits in the Age of Facebook and Twitter*
10:00 - 10:15 a.m.	Dr. Thomas H. Anthony and Dr. Jill Lauderman, Central Michigan University; *Religious Discrimination in Employment*
10:15 - 10:30 a.m.	Prof. Adam Epstein, JD, MBA, Central Michigan University, *Kentucky and Sports Law*
10:30 - 10:45 a.m.	Prof. Stacy Hickox, Michigan State University, *Accommodation as a Means to Address Harassment & Bullying in the Workplace*
10:45 - 11:00 a.m.	Break
11:00-11:15 a.m.	Prof. Peter Prescott and Prof. Jennifer Rice, Butler University, *Impact of State Taxes on States' Resilience Entering the Great Recession*
11:15-11:30 a.m.	Prof. Amy L. Hendrickson, Saginaw Valley State University; *Hacking the System: An Examination of the FCC Attempt to Modernize Emergency Warning Messages*

11:30-11:45 a.m.	Prof. Jennifer Cordon Thor, JD, Oakland University; *Economic, Legal and Ethical Perspectives on Electronic Word of Mouth Marketing*
11:45-Noon	Nancy J. White, J.D., Department of Finance and Law, Central Michigan University and Christopher A. Bailey, Ph.D., Department of Economics, Central Michigan University; *Interpreting Union Contracts: Good Faith*
Noon - 1 p.m.	**Luncheon** (Open Dining Area - Embassy Suites), **sponsored by McGraw Hill Education; Glen Hammersmith**
1:00-1:15 p.m.	Prof. Kathleen McGarvey Hidy, JD, Xavier University, *Business Disputes over Social Media Accounts: Legal Rights, Judicial Rationales, and the Resultant Business Risks*
1:15-1:30 p.m.	Prof. Joseph Galante, JD, MBA, MA, CFE, Millersville University; T*he Veil-Piercing Theory: An Analysis of Selected Federal Court Cases*
1:30-1:45 p.m.	Cheyenne Fisher, B.S. in Business Administration - Marketing Option Candidate, Millersville University; *Deceptive and Misleading Advertising: Poor Business Strategy for Limited Gains*
1:45-2:00 p.m.	Prof. Peter Prescott and Prof. Jennifer Rice, Butler University, *Analyzing the Academic Costs of College Internships*
2:00-2:15 p.m.	Legislative Updates
2:15-2:45 p.m.	Break
2:45-3:30 p.m.	**Business Meeting**

2017 Tristate ALSB Officers:

Jennifer Cordon Thor, President
Annette E. Redmon, Vice President
Amy Hendrickson, Secretary
Joseph Galante, Executive Secretary

Active Learning in Undergraduate Legal & Other Courses: Integrating Innovative and Interactive Technology in the Classroom

Brian Hunter, Assistant Professor & Annette E. Redmon, Assistant Professor
University of Cincinnati – UC Blue Ash College

This presentation will highlight teaching and learning innovations by using interactive technology activities in the classroom, including active learning. We will explore the use of Wheel Decide, Infographics (Vengage), WeVideo, Padlet, Kahoot, Plickers and many others.

We will demonstrate how these techniques can effectively promote active learning and increase student engagement across diverse academic disciplines, including undergraduate business law courses. Moreover, ALSB conference participants will experience a sample of these technologies, followed by discussion and the exchange of ideas for expanding and refining of these assignments in the classroom. This presentation will illustrate methods to incorporate technologies in teaching across respective disciplines and highlight characteristics of successful teaching innovations in higher education. We will provide an opportunity for questions and discussion following the presentation of the technological techniques. Conference participants will be encouraged to share their own classroom experiences, ideas and concerns regarding the use of technology in classroom activities.

This presentation will demonstrate several technologies used in the classroom along with ideas for assignments, student instructions and rubrics for grading. The presentation will include displays of student work product (with students' permission and release) for conference participants to view and discuss. Our goal is acquire feedback from conference participants to continuously improve our teaching in the classroom.

*Handout included for conference attendees

Patient Safety and Modesty: Policy and Compliance

Dr. Elizabeth A. Cameron, Alma College
Professor Tom Ealey, Alma College

Abstract:

In the Fall of 2016, a tsunami of litigation and criminal investigation hit a prominent Midwestern university involving alleged inappropriate physician contact with patients. Healthcare services, by necessity, involve personal and intimate contact with patients. Providers and their employing organizations have an ethical, professional, and risk management duty to protect the privacy, modesty, and physical security of patients. This presentation addresses the following: failures in protecting patient modesty and safety which creates large risks, that risks can be both financial and reputational, that "failure to supervise" is a common theme in negligence litigation, that proper informed consent is critical to protect the organization, and that constant monitoring, supervision, and discipline are critical to compliance.

Employers' Rights to Use Employment Policies to Regulate Employee Activity on Social Media: Exploring the Limits in the Age of Facebook and Twitter

Dr. Jessica A. Magaldi
Assistant Professor, Legal Studies and Taxation
Director, Business Honors Program
Chapter Advisor, Pace University Chapter of Beta Gamma Sigma
Lubin School of Business, Pace University

Abstract:

As ubiquitous as social media is today, these means of expression and communication are an innovation of the Internet era that rose to prominence only in the late 1990s. As of 2016, nearly three quarters of U.S. adults use social media. From an employment perspective, much of this communication is benign socializing, as its name implies, however, some employee social media interaction implicates important workplace interests. Where these interests include union-related and organizing activities, the workplace interests may be legally protected as well.

During the timeframe of the ascendency of social media, the modern phenomenon of branding was developing and increasing in importance and to many firms its brand has become one of its most valuable assets. As a result, firms have drafted social media policies to protect these valuable assets, to promote workplace discipline, and contribute to their efficiency as commercial entities.

The National Labor Relations Act imposes a duty upon the National Labor Relations Board to consider these countervailing interests of employers and workers. Specifically, the Act requires the board to balance "the undisputed right of self-organization assured to employees" against "the equally undisputed right of employers to maintain discipline in their establishments" and firms' "legitimate interest[s] in maintaining ... efficient operation[s] ...."

This Article examines the most recent decisions that have ruled on the application of the NLRA to employers' social media policies and attempts to explain the parameters of any framework that might guide employers and employees with regard to the boundaries of lawful workplace social media activities and restrictive policies. Section I explores the intersection of social media and branding the last two decades. Section II reviews the rights granted to employees by the NLRA and the relevant NLRB regulatory scheme. Section III analyzes important precedents applying the NLRA to employers' various social media policies to determine their lawfulness and extracts unifying themes to find the permissible boundaries of employees' social media activities that implicate workplace interests and the employers' social media policies.

Religious Discrimination in Employment

Dr. Thomas H. Anthony and Dr. Jill Lauderman, Central Michigan University

Abstract:

Religious discrimination in employment decisions is usually barred by the Federal Civil Rights Act, the American with Disabilities Act, the Age Discrimination in Employment Act, Title VII of the Civil Rights Act of 1964, the 1991 Civil Rights Act, numerous state statutes such as the Elliott-Larsen Civil Rights Act (ELCRA) in Michigan, and various common-law claims. One of the primary purposes of these laws is to eradicate and preclude particular forms of discrimination in the workplace.

However, an interesting dilemma arises when these particular laws conflict with the First Amendment of the United States Constitution. The First Amendment provides, in pertinent part, that Congress "shall make no law respecting the establishment of religion, of prohibiting the free exercise thereof." The First Amendment is applicable to the actions by the various states via the Fourteenth Amendment. Consequently, the Courts have recognized the creations of the "**ministerial exception**" to permit religious discrimination in making employment decisions.

This discussion will focus on the development, application, and limitations of the "ministerial exception" in the areas of employment discrimination and as evidenced by the impact of various state and federal Court decisions, such as the Hobby Lobby decision by the United States Supreme Court in 2014.

Kentucky and Sports Law

Prof. Adam Epstein, J.D./M.B.A., Central Michigan University

Abstract:

The purpose of this presentation is to offer a few sports law related cases, claims, and issues that have emanated from Kentucky. Though the state, found in the Sixth Circuit along with Michigan, Ohio and Tennessee, does not have a major professional franchise, two of its most prominent universities (University of Louisville and University of Kentucky) provide a rich opportunity for students, law professors and practitioners to see how sport and law have been forced to resolve disputes over the years. Part I explores examples and incidents at the collegiate level offering, inter alia, some significant examples of contract disputes involving college coaches and their employer-institutions. It also demonstrates how Kentucky-institutions have been at the heart of National Collegiate Athletic Association (NCAA) investigations and bylaw interpretations as well, thereby providing readers with considerable pause as to lessons that can be learned from the examples. Part II offers several legal cases and issues that have emanated from the interscholastic (high school) level, some of which received noteworthy national attention including a case in which a high school football coach was charged with a crime for the death of one of his football players during a hot summer practice session. Additionally, the article explores numerous court cases involving interpretations of rules established by the Kentucky High School Athletic Association (KHSAA). Part III addresses a grab bag of other sport-related cases and concerns that have weaved their way into Kentucky statutes or jurisprudence and have had strong Kentucky ties demonstrating that Kentucky offers much more than a discussion of horse racing when it comes to sports law. In sum, Kentucky provides a rich realm of examples for sports law enthusiasts and others even though the state's population of 4.3 million places it as the least populous in the Sixth Circuit and 26th overall in the United States.

Accommodation as a Means to Address Harassment & Bullying in the Workplace

Prof. Stacy Hickox and Prof. Michelle Kaminski, Michigan State University

Abstract:

Both workplace harassment and bullying is related to higher incidences and aggravation of post-traumatic stress, depression, and other health issues, as well as the loss of self-esteem. Bullying and harassment are also costly to employers in terms of higher absenteeism, health care usage, and turnover, as well as loss of productivity. Despite these actual and significant costs, employers may choose to respond to harassment or bullying by doing as little as possible, which can make the situation worse. Most of the litigation under non-discrimination laws focuses on whether a hostile environment has been created by the harassment and whether the employer is liable, with less attention given to remedies to prevent harassment and remedy the harm it caused. Rather than focusing on what is a hostile environment or how an employer can avoid liability, this research will focus on how employers could be compelled to address harassment to avoid the above-referenced costs of allowing such a work environment to continue. This paper will consider which responses from employers prove the most effective to address harassment and bullying. Specifically, we will explore the obligation to address harassment as an accommodation under the Americans with Disabilities Act as well as Title VII of the Civil Rights Act. This approach should suggest an alternative path to reducing both harassment and bullying in the workplace that will benefit both the victim and the employer. The use of restorative practices to address incivility in the workplace will also be explored.

Impact of State Taxes on States' Resilience Entering the Great Recession

Kathy Paulson Gjerde, Associate Professor of Economics, Peter Prescott, Associate Professor of Business Law, Jennifer Rice, Assistant Professor of Economics, Butler University Lacy School of Business

Abstract:

The U.S. economy entered the Great Recession in December 2007 and exited in June 2009. That national statistic obscures a wealth of state-level data that can shed light on the policies and conditions that help states withstand shocks like the Great Recession. A state's economic resilience measures its ability to resist and recover from an economic shock. Although numerous studies explore the relationship between taxation and economic performance, taxation's impact on economic resilience is not well understood. We use a proportional hazards model to estimate the effect that tax policy had on the states' ability to resist the Great Recession.

Hacking the System: An Examination of the FCC Attempt to Modernize Emergency Warning Messages

Amy Hendrickson, JD, MBA, Assistant Professor of Law,
Saginaw Valley State University

Abstract:

The Emergency Alert System (EAS) was created by the Federal Communications Commission to provide the President with an outlet to communicate with the nation during times of crisis. The federal government requires local broadcasters to be prepared to disseminate those messages. The system was called the Emergency Broadcast System until 1997, when it was replaced with the EAS. It is supplemented by messages sent to mobile devices under the Wireless Emergency Alert System (WEA) regulated by the FCC in conjunction with FEMA.

Although the regulations begin at the federal level, the operation of the systems occur at the state level. Those systems are used regularly for everything from storm warnings to amber alerts depending on the local infrastructure and state rules. The functionality of those systems differs dramatically from one region to another, limited by outdated technology and a largely volunteer workforce. There are also serious concerns about the coordination of activities between state and federal authorities, between competing federal agencies, and between different states. As if those concerns were not enough to keep you awake at night, the system is also vulnerable to hacking. So far, the intrusions have been more like childish pranks than coordinated attacks but the vulnerability exists. With advances in technology changing the broadcast universe and a growing number of scenarios that might require warnings, FCC attempts at modernization are wholly inadequate.

Economic, Legal and Ethical Perspectives on Electronic Word of Mouth Marketing

Jennifer Cordon Thor, J.D., Associate Professor and Pre-Law Adviser
Oakland University, School of Business Administration

Abstract:

Given the increasingly competitive business environment, companies are seeking innovative ways to reach consumers. With the growing popularity of social networks, companies are developing digital media strategies. The foundation of a digital media strategy is managing the user generated content (UGC) shared with others via electronic word-of-mouth (eWOM). UGC can be managed by asking consumers to share their positive recommendation. Some companies are following a proactive strategy. They are incentivizing consumers to provide eWOM. Three types of incentives: paying consumers for reviews, providing free product and providing social currency, are analyzed and discussed from an economic, legal and ethical perspective.

Interpreting Union Contracts: Good Faith

Nancy J. White, J.D., Department of Finance and Law, Central Michigan University and
Christopher A. Bailey, Ph.D., Department of Economics, Central Michigan University.

Abstract:

This paper will explore the applicability of the implied covenant of good faith, recognized by all states to a varying degree, as a tool to bridge the gap between unions and administration when contract disputes arise. In many situations, the law requires parties to contracts to act in good faith when disagreements about what the contract means arise. Good faith has not been broadly recognized as existing in interactions between unions and administrators when disputes arise. However, it could be a tool to help the parties reach an understanding of disputed contract terms or meanings.

Business Disputes over Social Media Accounts: Legal Rights, Judicial Rationales, and the Resultant Business Risks

Kathleen McGarvey Hidy, J.D., Assistant Professor - Legal Studies and Ethics, Xavier University

Abstract:

This article examines the risk exposure of business organizations involved in disputes over rights in social media accounts. The complexity of both the legal rights asserted in these disputes and the judicial rationales used to adjudicate these rights triggers unique risks to business organizations. Part I of this article examines the increasing reliance by business organizations on social media outreach to perform core business operations such as advertising, marketing, marketing intelligence, and sales. Part II of this article reviews the judicial precedent and identifies the legal theories used by courts to define and delineate the legal rights arising in social media account business disputes. Part III of this article explores the conflicting and unresolved legal issues resulting from the analytical frameworks used by litigants and courts to adjudicate these disputes. Part IV of this article investigates the risks posed to business organizations operating in this legal environment and proposes risk mitigation strategies.

The author has informed Tri-State ALSB that the paper associated with this presentation has been accepted for publication.* *"Forthcoming ___ Colum. Bus. L. Rev. ___ (2018)".***

The Veil-Piercing Theory: An Analysis of Selected Federal Court Cases

Joseph J. Galante, JD, MBA, MA, CFE, Professor of Taxation and Law
Department of Accounting and Finance, Millersville University of Pennsylvania

Abstract:

Veil-piercing can be a powerful tool for litigants who seek to reach the puppeteers behind sham businesses. This article analyzes certain essential elements of the veil-piercing argument, as interpreted by the United States Supreme Court, as well as other federal courts in the Third Circuit Court within the Commonwealth of Pennsylvania. On point analysis and insights are offered to bolster the chances of successfully using the veil-piercing theory.

The doctrine provides that a court may disregard the protections of a corporation or a limited liability company ("LLC") and impute its liabilities to its directors, officers, members, managers, or owners. Litigants seeking relief via the veil-piercing theory will face uphill battles when they petition courts to disregard limited liability protections and hold directors, officers, members, managers, or owners accountable for the actions of their companies. The challenges will be equally pronounced when they seek to impute liability from a subsidiary to its parent company.

Fortunately, the federal courts have provided guide posts for parties who seek to pierce the corporate veil. By following this guidance, litigants should increase their odds of surviving the pleadings stage and improve their chances of prevailing on the merits.

Some of the guide posts provided by the federal courts from the United States District Courts to the United States Supreme Court include pleading veil-piercing as a theory that supports a valid and preexisting cause of action over which the district court has jurisdiction. The United States Supreme Court held that piercing the veil "is not itself an independent ERISA cause of action, but rather is a means of imposing liability on an underlying cause of action.[1]

Another guide post comes from the United States Court of Appeals for the Third Circuit. In *Insurance Co. of North America v. Cohn*, the court considered whether it could hold a parent company liable for the fraudulent acts of a subsidiary company, and it determined that any such imputation was possible only if the court pierced the veil of the parent company.[2] Here, legal counsel may draw upon fundamental agency principles in their adjudication of veil-piercing arguments. Additionally, holding an individual(s) and/or related parties liable for acts of a company, a party can invoke the veil-piercing theory to impute liability from one company to another. An effective route is to bolster their

[1] *Peacock v. Thomas*, 516 U.S. 349, 351-54 (1996).
[2] 54 F.3d 1108, 1115-17 (3d Cir. 1995).

argument by citing cases that interpret either variation of the veil-piercing theory and not limit their legal search scope to veil-piercing cases that fit their precise fact pattern.

In *Morelia Consultants, LLC v. RCMP Enterprises, LLC*, the plaintiffs sought to pierce the veil of the LLC defendant by arguing, among other things, that: (1) the LLC was chronically undercapitalized; and (2) the individual defendants commingled their personal funds with the funds of the LLC.[3]

A key item in this case from the Middle District of Pennsylvania is that if attorneys assert the veil-piercing theory in support of a cause of action, they should not intermingle other doctrines or concepts in their analysis. In arguing one or more alternative theories alongside veil-piercing averments, counsel should clearly delineate where the first argument ends and the next argument begins. Otherwise, counsel will frustrate the judge and diminish the persuasiveness of their arguments.

In this scenario, counsel should be aggressive in using well-established legal principles in conjunction with forensic accounting tools to establish an undercapitalization argument. Chronic undercapitalization and/or thin or inadequate capitalization combined with commingling of funds are telltale signs of potential fraud - both civilly and criminally.

Lastly, from the Western District of Pennsylvania comes a case where the court considered the requirements for pleading a veil-piercing theory on the basis of fraud.[4] The court explained that a piercing may be appropriate when "it is clear that there has been a fraudulent conveyance or the corporation itself has been created as a mere sham or fraud."[5] In this context, a conveyance is fraudulent if it is "made with the actual intent to hinder, delay, or defraud present or future creditors."

As the court noted, a fraudulent conveyance may constitute adequate grounds for a veil-piercing when: (1) a parent corporation or a sole shareholder owns multiple subsidiary corporations; (2) one of those subsidiaries becomes exposed to a liability that it cannot satisfy; and (3) in an effort to defeat to the liability, the parent corporation or the sole shareholder transfers the assets of the subsidiary to another subsidiary or to the parent corporation.

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[3] 2011 U.S. Dist. LEXIS 101793, at 22-23 (M.D. Pa. Sept. 9, 2011).

[4] Grejda v. Medicine Shoppe International, Inc., 2007 U.S. Dist. LEXIS 70044, at *19-*34 (W.D. Pa, Sept. 21, 2007).

[5] *Id.* at *25 (internal citation omitted). ("Every conveyance or transaction made with the actual intent to hinder, delay, or defraud present or future creditors is fraudulent. Fraudulent conveyances of this nature generally can occur where a parent corporation or sole shareholder owns multiple corporations. If one of these subsidiary corporations becomes exposed to a liability it cannot afford to satisfy, a way to defeat the liability is to transfer the assets of the exposed subsidiary to another subsidiary or the parent corporation. Under these circumstances, without the remedy of piercing the corporate veil, the creditor would be left without a remedy and would have no way to recoup what is otherwise rightfully owed to it. The doctrine thus allows an existing creditor to defeat the limited liability protection a shareholder usually enjoys when a fraudulent act has been committed by the shareholder specifically to prevent the creditor from recovering.")

However, a party must plead fraud with particularity,[6] and if the case proceeds to trial, the party must prove fraud by clear and convincing evidence.[7] In *Gredja,* the party that sought to pierce the veil could not satisfy this heightened standard.[8]

If the facts of the case do not support a veil-piercing argument on the basis of undercapitalization, commingling of funds, or any other factor that the court will consider, then counsel should ponder whether the facts support a veil-piercing argument on the basis of fraud. If they proceed under a fraud-based veil-piercing theory, they should be prepared for a heightened pleading standard and a heavy evidentiary burden.

CONCLUSION

In assessing the merits of a veil-piercing argument, courts consider whether the individuals or related companies in question engaged in fraudulent activities, failed to observe corporate or other organizational formalities, commingled their funds with those of the entity, or failed to ensure that the company was adequately capitalized, among other things. However, in light of the draconian consequences that ensue when they set aside the limited liability protections, courts are reluctant to pierce the veil. Faced with this hurdle, litigants should ensure that they plead the theory in a manner that comports with the requirements of current federal case law. In doing so, they may avoid pitfalls that otherwise could lead to a dismissal of their action, and they will maximize their chance of success in pleading the veil piercing theory.

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[6] Fed, R. Civ. P. 9(b).
[7] *Grejda,* 2007 U.S. Dist. LEXIS 70044, at *29.
[8] *Id.* at *30.

Deceptive and Misleading Advertising: Poor Business Strategy for Limited Gains.

Cheyenne Fisher, B.S. in Business Administration – Marketing Option Candidate,
Department of Management and Marketing, Millersville University of Pennsylvania

Abstract:

Deceptive advertising, also known as false advertising, is defined by consumer.laws.com as "a manufacturer's use of confusing, misleading, or blatantly untrue statements when promoting a product" (*Deceptive Advertising Definition,* April 19, 2017). There are many ways that consumers can be unknowingly deceived by a company or by a specific product(s). Often, consumers do not know that they are being deceived until they spend the money on a product, and after trying it, discover the product's advertised characteristics barely resembles the product's true performance. The key factors in investigating, and policing these claims are the Federal Trade Commission ("FTC") and the Food and Drug Administration ("FDA").

When a company engages in deceptive advertising, the FTC becomes involved. The FTC is a bipartisan federal agency with two distinct and specific goals: (1) protect the consumer, and (2) promote competition among companies. The first goal is via regulating advertising in order to protect the consumer from fraudulent, deceitful, or unfair behavior to the consumer. The second goal is accomplished by enforcing federal antitrust laws. They will challenge business practices that they believe could be detrimental to the consumer. These detrimental practices can include a company unconscionably raising prices, providing extremely low quality items, or limited market options for consumers to choose.

The FDA's mission is to protect "the public health by ensuring the safety, efficacy, and security of human and veterinary drugs, biological products, and medical devices; and by ensuring the safety of our nation's food supply, cosmetics, and products that emit radiation." They are tasked with regulating items that include, but are not limited to: supplements, prescription and non-prescription drugs. Additionally, they regulate the sale of over-the-counter drugs, name brand and generic drugs. This includes vaccines, allergenic items, surgical implants, prosthetics, x-ray and diagnostic imaging devices, nail polish, pet foods, cigarettes, and livestock feeds.

One of the most common and widely known forms of deceptive and misleading advertising is the "outlandish product claims." Here we can examine, for example, claims surrounding the clean automotive diesel emissions level versus the true emissions level – see Volkswagen of America, Inc. / Volkswagen A.G. diesel scandal (Volkswagen, Audi, Porsche). Now Volkswagen has stopped production of its diesel engines and has started offering an industry-best 6 year/72,000 mile bumper-to-bumper vehicle warranty on its new Atlas SUV as a strategy to regain market share and trust. This is after the

assessment of fines and penalties by various entities – the amount is a dynamic amount nearly 20 billion euros for the United States and Canadian markets. Further, there are pending lawsuits alleging economic harm against VW's now infamous "Clean Diesel" marketing campaign and the half-million cars under EPA violation.

There are other instances of companies undertaking extraordinary measures in the form of unsubstantiated claims in order to boost sales and profits. The end result was damaging and tarnishing their reputation. A prime example of this is Lumosity claiming its product is designed to improve and enhance the consumer's brain functions. These claims were made without substantive testing. Consequently, the Federal Trade Commission initiated legal action which resulted in Lumosity required to pay $2 million to consumers that were deceived by their claims and Lumosity was also ordered by the FTC to inform consumers that their claims were untrue. Their marketing strategy was to prey on consumers' fears concerning Alzheimer's disease, and dementia while promising consumers better mental performance in their daily lives.

Another example illustrating how a company can ruin their reputation and breach consumer trust in their products is the Kellogg Company and their 2009 false advertising campaign claiming that their Frosted Mini-Wheat and Rice Krispies cereals was clinically tested to increase a child's attentiveness by upwards to 20 percent. When the FTC conducted their own product testing it was discovered that half of those participants tested had an increased attentiveness factor, while only one in nine children were able to achieve Kellogg's claimed 20 percent rate. Kellogg's was instructed to pay $5 for each box of Frosted Mini-Wheats cereal that was purchased, up to $15 per customer. Should Kellogg violate the terms of the FTC order in any way, there is a potential they will be fined $16,000 per incident.

There are plenty of examples to show how companies push their product with inflated claims, unsubstantiated claims, and outright lies in order to generate sales. These range from health care products, beauty products, sports and other performance-related products and so on.

All these companies have one underlying theme: short-sighted and possible illegal actions with one goal: increase sales and profits. It is easy for a company to create an advertising campaign to induce consumers to buy their respective products. But how can a company engaging in such behavior expect to sustain that strategic level of deceit and not be labeled unethical, amoral, greedy, and crooked?

Regaining consumer confidence is paramount to a business entity – perhaps, not losing it in the first place is the strategy to pursue!

Analyzing the Academic Costs of College Internships

Kathy Paulson Gjerde, Associate Professor of Economics, Peter Prescott, Associate Professor of Business Law, Jennifer Rice, Assistant Professor of Economics, Butler University Lacy School of Business

Abstract:

Universities and students increasingly view internships as valuable learning experiences that complement and augment academic classroom learning. Students benefit from the opportunity to apply recently acquired knowledge in the "real world," to identify knowledge gaps that they should address in future coursework, and to secure a post-graduation job. But, benefits beget costs because nothing is free in life—including internships. Our econometric analysis attempts to measure the academic cost students at our institution incur when they complete a mandatory internship while concurrently taking academic courses. We use panel data compiled from student transcripts and our institution's career placement office.

Legislative Updates & Discussion

Agenda
Annual Meeting
Tri-State Academy of Legal Studies in Business
University of Cincinnati – UC Blue Ash College
Embassy Suites, Blue Ash, Ohio
October 20, 2017

1. Review of the minutes from 2016 Meeting

2. Financial Report

3. Elections and 2018 Meeting

    a. President: Annette E. Redmon (University of Cincinnati – UC Blue Ash College)
    b. Vice President: Amy Hendrickson (Saginaw Valley State University)
    c. Secretary:
    d. Tri-State National ALSB Representative:

4. Other

Tri-State ALSB 2018

Date & Location: *TBD*

More details to follow.

Submitted Papers for 20 i 7 Tri-State ALSB Proceedings

Employers' Rights to Use Employment Policies to Regulate Employee Activity on Social Media: Exploring the Limits in the Age of Facebook and Twitter

Jessica A. Magaldi*
Jonathan S. Sales**

INTRODUCTION

As ubiquitous as social media is today, these means of expression and communication are an innovation of the Internet era that rose to prominence only in the late 1990s.[1] As of 2016, nearly three quarters of U.S. adults use social media.[2] From an employment perspective, much of this communication is benign socializing, as its name implies, however, some employee social media interaction implicates important workplace interests. Where these interests include union-related and organizing activities, the workplace interests may be legally protected as well.

During the timeframe of the ascendency of social media, the modern phenomenon of branding was developing and increasing in importance and to many firms its brand has become one of its most valuable assets.[3] As a result, firms have drafted social media policies to protect these valuable assets, to promote workplace discipline, and contribute to their efficiency as commercial entities.

The National Labor Relations Act (hereinafter "NLRA") imposes a duty upon the National Labor Relations Board (hereinafter "NLRB") to consider these countervailing interests of employers and workers. Specifically, the Act requires the board to balance "the undisputed right of self-organization assured to employees" against "the equally undisputed right of employers to maintain discipline in their establishments"[4] and firms' "legitimate interest[s] in maintaining … efficient operation[s] …."[5]

Discharging this balancing duty with regard to workplace based social media issues creates new challenges for Board, ALJs, and the Courts. In this regard, the NLRA was enacted in 1935. At the time, face-to-face communication was the norm and such conversations were the

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* Assistant Professor, Pace University.
** Lecturer, Bentley University.
[1] Jeff Bercovici, *Who Coined 'Social Media'?: Web Pioneers Compete for Credit*, Forbes Magazine (June 27, 2013), available at http://www.forbes.com/sites/jeffbercovici/2010/12/09/who-coined-social-media-web-pioneers-compete-for-credit/2 (last visited March 30, 2017).
[2] Aaron Smith, *Record Shares of Americans now own smartphones, have home broadband,* Fact Tank News in the Numbers, Pew Research Center (January 12, 2017), *available at* http://www.pewresearch.org/fact-tank/2017/01/12/evolution-of-technology/ (last visited March 30, 2017).
[3] Liz Moor, *The Rise of Brands*, (Berg, 2007), p. 4.
[4] *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 797-798 (1945).
[5] *Union Carbide Corp. v. NLRB*, 714 F.2d 657, 663-664 (6th Cir. 1983).

primary conduit for concerted activities.[6] Accordingly, the Act did not contemplate such the instantaneous, asynchronous, decentralized form of communication as provided social media.

For example, social media permits employees to be in touch with essentially every co-worker from the comfort of their home; it provides a means for co-workers support one another by simply electing "like" status on Facebook; and it allows one message to go viral over the Internet to employees and non-employees alike - and reach a virtually unlimited number social media users. Another important characteristic of social media is that such communication is essentially financially and temporally cost free.

The permanent nature of social media posts also presents threats to employers' interests that were not present when communications were limited to paper publications, in-person meetings, telephone communications, and traditional ephemeral media such as the television, radio, and newspapers. For example, Increased reputational risk is another consequence of social media proliferation.[7] In this regard, one rogue employee can engage in a cyber attack on an employer by posting false information to social media, which can cause significant damage in perpetuity to firm's brand value, good will, and reputation. An article in Risk Management Magazine provides that "one of the most valuable assets that any company has is its reputation .... [and] a damaged reputation can be irreparable and, in extreme cases, can lead to a company's downfall."[8]

Furthermore, social media interferes with an employer's ability to promote workplace discipline and promote firm efficiencies. For example, one study found that cyberslacking amounted to the average employee taking an additional and unearned two-week vacation annually.[9] The same study concluded that cyberslacking cost employers "$5.8 billion dollars in wages based on the average Australian wage" and "potentially cost[] the country ... $22.4 billion" in GDP.[10]

These are uniquely Internet era issues, not present when the NLRA was enacted or at the time the majority of the body of decisions interpreting the NLRA were handed-down. This requires properly evaluating the 21st century interests of employees and employers that are litigants in disputes presented to the NLRB. It also requires a correct appraisal of the derivative consequences to employees not directly involved in the cases. With regard to these derivative employees, an important matter is whether the chilling effect of social media restrictions causes improper harm to their right to engage in concerted activities, or the does the potential harm caused by the social media activities of their co-workers threaten the commercial viability of their employers and thereby gainful employment.

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[6] *Purple Communications, Inc. and Communications Workers of America, AFL-CIO*, 361 NLRB No. 126 (December 11, 2014) at p. 11

[7] *See* Aula, P. (2010). Social media, reputation risk and ambient publicity management. *Strategy and Leadership*, 38(6): 43-49.

[8] O'Rourke, M. (2004). "Protecting your reputation." *Risk Management*, 51:4.

[9] Hoyniman, C. (2000). "Cyberlacking Costs Time and Money." *BBC World Business Analysis*, available at http://www.bbc.co.uk/worldservice/business/story_cmt180700.shtml (accessed 11/1/15). The study transpired in Australia, which is a developed nation.

[10] *Id.*

These circumstances raise the issue as to whether the NLRA is an obsolete anachronism that produces inconsistent and/or ambiguous decisions that fail to properly balance the offsetting 21st centuries interests of employers' social media policies and employees' social media activities.[11] Alternatively, has the NLRA a regulatory scheme evolved through well-reasoned decisions that account for the countervailing interests of workers and employers in cyberspace, and thereby provide unambiguous boundaries as to what social media conduct that employers may lawfully proscribe.

This Article examines the most recent decisions that have ruled on the application of the NLRA to employers' social media policies and attempts to explain the parameters of any framework that might guide employers and employees with regard to the boundaries of lawful workplace social media activities and restrictive policies. Section I explores the intersection of social media and branding the last two decades. Section II reviews the rights granted to employees by the NLRA and the relevant NLRB regulatory scheme. Section III analyzes some of the important precedent applying the NLRA to employers' various social media policies to determine their lawfulness and extracts unifying themes to find the permissible boundaries of employees' social media activities that implicate workplace interests and the employers' social media policies.

I. THE CONCURRENT RISE OF THE PHENOMENA OF SOCIAL MEDIA AND BRANDING IN THE 1990s

Both social media and the phenomena of branding rose to prominence in the 1990s. An examination of some statistics on both subjects helps to illustrate their importance in the 21st century U.S. economy.

At the time the NLRA was enacted in 1935, only 32 percent of households had telephone service.[12] At that time, "face-to-face oral communication … was the norm … [and] the primary form of [concerted activity]."[13] In contrast, according to a 2017 Pew Research Center report regarding U.S. adults, 77% own a smartphone, 73% have broadband Internet access at home, 69% use social media, more than 50% own a tablet device, and 88% use the Internet.[14] Out of these individuals, 68% are Facebook users; out of Facebook users, 76% engage in daily use.[15]

The numbers of users on prominent sites further demonstrates the ascendancy of social media. Facebook, a social networking site where users create a profile, post updates and photos

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[11] *Cf. Communications*, 361 NLRB No. 126 (December 11, 2014) at p. 27 (dissenting opinion of Miscimarra) (commenting on the ambiguity of the majorities new framework for evaluating restrictions on employee use of employer email systems: [It] "will rarely permit employees, unions, and employers to determine whether or when it will be permissible ….").

[12] U.S. Census Data, https://docs.google.com/spreadsheets/d/123Tz4ljvfq4feFglKGZc66wZDsD2YEPnZoA4gj9U/pub?hl=en&gid=1&output=html (last visited March 30, 2017).

[13] *Purple Communications*, 361 NLRB No. 126 at 11.

[14] Aaron Smith, *Record Shares of Americans now own smartphones, have home broadband,* Fact Tank News in the Numbers, Pew Research Center (January 12, 2017), *available at* http://www.pewresearch.org/fact-tank/2017/01/12/evolution-of-technology/ (last visited March 30, 2017).

[15] 2016 Pew Research Social Media Update 2016, *available at* www.pewinternet.org/2016/11/11/social-media-update-2016/ (last visited March 30, 2017).

about their lives, and about which an Academy Award-winning movie was made,[16] has over 1.97 billion active users.[17] LinkedIn, a social media site for professional networking, boasts 467 million users.[18] The photo-sharing website Pinterest, which allows users to create theme-based image collections by "pinning" images to a virtual pin board, has 150 million users worldwide and 70 million in the United States.[19] Twitter claims 313 million active users[20] who to send 140-character text messages known as "tweets."[21] With regard to United States adults, 28 percent use Instagram, 26 percent use Pinterest, 25 percent use LinkedIn, and 21 percent use Twitter.[22]

Recent studies have found that for every hour spent online, between 16[23] and 20[24] minutes are spent on social networks. According to one report, "people in the U.S. check their Facebook, Twitter, and other social media accounts a staggering 17 times a day, meaning at least once every waking hour, if not more."[25]

The amount of time that people spend on social media sites, combined with the incredible proliferation of social media outlets that allow communication through text, audio, video, images, podcasts and other multimedia means, have led employers to devote an increasing amount of attention to the social media activities of their employees. Firms have often responded by promulgating social media policies. These policies have taken several formats, including stand-alone documents, subsections of employee handbooks, and even as informal employee communication rules.[26]

A significant goal of employers' social media policies is the protection of firms' goodwill, brand value, and reputation. Brand value is easily undervalued based on the fact that these assets are not directly reported income statements, balance sheets, or profit and loss statements. Goodwill is a traditional intangible asset described as "The value of a company's

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[16] *Winners and Nominees for the 83rd Academy Awards, available at* Oscars, http://www.oscars.org/awards/academyawards/83/ nominees.html (last visited March 30, 2017).
[17] *Leading Social Networks Worldwide as of April 2017*, Statista, www.statista.com/statistics/272014/global-social-networks-ranked-by-number-of-users/ (last visited April 20, 2017).
[18] Linkedin, *About us*, https://press.linkedin.com/about-linkedin.
[19] Kathleen Chaykowski, *Pinterest Reaches 150 Million Monthly Users* .... , Forbes On Line (October 13, 2016), *available at* www.forbes.com/sites/kathleenchaykowski/2016/10/13/pinterest-reaches-150-million-monthly-users/#46bf7e43732e (last visited March 30, 2017).
[20] Twitter Website, *Twitter Usage/Company Facts, https://about.twitter.com/company* (last visited March 30, 2017).
[21] *Id.*
[22] 2016 Pew Research Social Media Update 2016, available at http://www.pewinternet.org/2016/11/11/social-media-update-2016/ (last visited March 30, 2017).
[23] Experian Marketing Services, *citing "The 2013 Digital Marketer Report"* at p.135, *available at* http://www.experian.com/blogs/marketing-forward/2013/04/18/for-every-hour-online-americans-spend-16-minutes-on-social-networks/ (last visited March 30, 2017).
[24] Andrew Beaujon, *Study: Americans spend more than a quarter of their time online on social media,* Poynter (July 1, 2013), *available at* http://www.poynter.org/latest-news/mediawire/210593/study-americans-spend-nearly-one-third-of-their-time-online-on-social-media/ (last visited March 30, 2017).
[25] Lulu Chang, *Americans Spend an Alarming Amount of Time Checking Social Media on Their Phones*, Digital Trends (June 13, 2015), http://www.digitaltrends.com/mobile/informate-report-social-media-smartphone-use/ (last visited April 1, 2017) (*citing* Informate Mobile Intelligence).
[26] *See* Memoranda OM 11-74 (8-18-2011) and OM 12-59 (5-30-2012) from the National Labor Relations Board office of the General Counsel. These Memoranda summarize the position of the NLRB and its counsel regarding certain cases cited in the present article.

brand name, solid customer base, good customer relations, good employee relations and any patents or proprietary technology."[27] This essentially amounts to the value of the loyalty of the firm's customers.[28]

Brand value is an increasingly important asset. For example, in 2015 and 2016, Apple was ranked as the most valuable global brand.[29] Its brand value was appraised at $154.1 billion in 2016.[30] To place this in context, Apple's 2016 balance sheet assets were $321.69 billion and its shareholders' equity was only $128.29 billion. Thus, Apple's brand value exceeded the balance sheet value of its shareholder equity, and was equal to roughly one-half of its total balance sheet assets.

Fast food chain Chipotle Mexican Grill, which is the subject of a recent NLRB social media case that is analyzed in this article, *infra,* at p. 12, had a 2016 brand value estimated at $8.031 billion.[31] Its 2016 total assets were $2.6 billion and total shareholder equity was $1.04 billion. For Chipotle, its brand value appears to exceed its balance sheet values.

Employees' social media use poses additional threats to employers. According to the UK Center for the Protection of National Infrastructure ("CPNI"), "What your employees do and say online, or how they use digital devices, can make them and your organization vulnerable to security threats. Some of the security vulnerabilities can be obvious, such as posting or sharing confidential organizational information that puts staff, processes or assets at risk. Others may be less so, such as search engines storing search history or smart phones logging data which can be exploited by those with malicious intent."[32]

Additionally, under the NLRA, an employer has a legitimate interest in managing its business, an undisputed right to maintain discipline in their establishments, and to promote efficiency.[33]

In summary, employees now use social media as a predominant form of communicating and posting information and opinions, including some that implicate their employers' interests. This has resulted in employers regulating aspects of employees' social media activities. In some

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[27] Goodwill, Investopedia, http://www.investopedia.com/terms/g/goodwill.asp (last visited April 1, 2017).
[28] Paul Hague, *Measuring Brand Value – How Much are Brands Worth*? B2B International, https://www.b2binternational.com/publications/value-of-brands/ (last visited March 30, 2017).
[29] *Brand Directory, Global 500 2016*, Brand Finance, http://brandirectory.com/league_tables/table/global-500-2016; Forbes Online, https://www.forbes.com/pictures/mli45fflem/1-apple/#7bb69fe847d1 (last visited March 30, 2017).
[30] *Id.*
[31] *Brand value of the 10 most valuable fast food brands worldwide in 2016*, Statista, https://www.statista.com/statistics/273057/value-of-the-most-valuable-fast-food-brands-worldwide/ (last visited March 30, 2017).
[32] *Report on Online Social Behavior*, Centre for the Protection of National Infrastructure (CPNI), *available at* https://www.cpni.gov.uk/content/online-social-behaviour (last visited on March 30, 2017). *N.B.* CPNI states that it "is the government authority for protective security advice to the UK national infrastructure. Our role is to protect national security by helping to reduce the vulnerability of the national infrastructure to terrorism and other threats. We are accountable to the Director General of MI5." Available at https://www.cpni.gov.uk/about-cpni (last visited on March 30, 2017). *Also N.B.* UK spellings of "organisation" have been transposed to "organization."
[33] *Cf. Purple Communications*, 361 NLRB No. 126 (December 11, 2014) at 11; *Beth Israel Hospital v. NLRB*, 437 U.S. 483, 492 (1973); *Republic Aviation*, 324 U.S. 793 (1945).

cases, employers are exercising their legitimate interests in protecting their ability to operate as commercial entities by restricting employees' social media activities. In other circumstances, employer's social media policies improperly encroach upon employees' rights to engage in certain workplace focused social media communications (e.g. communicating about union matters). As set forth in the next section, employees' and employer's rights are both protected by the NLRA.

II. EMPLOYEE PROTECTIONS GUARANTEED BY THE NATIONAL LABOR RELATIONS ACT

The NLRA was enacted to protect the interests of both employers and employees, to curtail certain private sector business practices deemed harmful to the U.S. economy, and to encourage collective bargaining. The Act guarantees employees the right to organize and to engage in other protected concerted activity, and extends these safeguards to both unionized employees and employees who union members. In fact, most private sector employees are protected by the Act.[34] However, the NLRA does not regulate public-sector employees, agricultural and domestic workers, independent contractors, workers employed by a parent or spouse and employees of air and rail carriers covered by the Railway Labor Act.[35]

The NLRA provides employers with legitimate interests in managing their firms, undisputed rights to maintain discipline in their establishments, and the ability to promote efficiency.[36] Additionally, the Act also recognizes employers' rights under employment at will[37].

The relevant regulatory scheme is organized around NLRA Section 7, which defines concerted activity, and Section 8, which prohibits employers from violating any rights granted to employees under section 7. A significant issue confronting firms that draft and implement social media policies to protect their assets and commercial viability is how they avoid violating Sections 7 and 8(a)(1)(2) of the NLRA,[38] which provides employees with the right to engage in concerted activities and address workplace conditions.

A. Concerted Activity

Section 7 of the Act grants employees:

> . . . 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

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[34] *EMPLOYEE RIGHTS UNDER THE NATIONAL LABOR RELATIONS ACT*, NLRB, https://www.dol.gov/OLMS/regs/compliance/EmployeeRightsPoster11x17_Final.pdf (last visited July 1, 2013).
[35] *Id.*
[36] *Cf. Purple Communications*, 361 NLRB No. 126 (December 11, 2014) at 11; *Beth Israel Hospital v. NLRB*, 437 U.S. 483, 492 (1973); *Republic Aviation*, 324 U.S. 793 (1945).
[37] For a detailed discussion of employment at will, *see* Jessica A. Magaldi and Olha Kolisnyk, *The Unpaid Internship: A Stepping Stone to a Successful Career or the Stumbling Block of an Illegal Enterprise? Finding the Right Balance between Worker Autonomy and Worker Protection*, 14 NEV. L.J. 184,185 (2013).
[38] 29 U.S.C. §§ 151-169.

> and other mutual aid or protection and shall have the right to refrain from any and all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization . . . .[39]

The 1984 case of *Meyers Industries, Inc. v. Kenneth P. Prill*[40] (hereinafter "*Meyers I*") is the seminal case presenting the standard of protected concerted activity by employees. In *Myers I*, the NLRB interpreted Section 7 to equate concerted activity with collective activity: "the formation of or assistance to a group, or action as a representative on behalf of a group," and further required that the employee "activities in question [must] be 'concerted' before they can be 'protected.' "[41] The NLRB held that "to find an employee's activity to be 'concerted,' we shall require that it be engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself."[42]

Once an activity is found to be "concerted," the employer is prohibited by Section 8(a)(1) of the Act from taking adverse employment action, such as discharge, as a result of the concerted activity.[43] Section 8(a)(1)(2) of the Act prohibits employers from any unfair labor practice which would "interfere with, restrain or coerce employees in the exercise of the rights guaranteed in Section 7" or "to dominate or interfere with the formation ... of any labor organization"[44]

The NLRB established the following four-part test for finding that the discipline or discharge of an employee violated Section 8(a)(1):

(1) the activity engaged in by the employee was "concerted";

(2) the employer knew of the concerted nature of the employee's activity;

(3) the concerted activity was protected by the Act; and

(4) the discipline or discharge was motivated by the employee's protected, concerted activity.[45]

In *Meyers I*, the NLRB noted that the Act does not protect all concerted activity by employees, such as otherwise unlawful activity in violation of another section of the Act or separate statute, or activity that was not engaged in "for the purpose of collective bargaining or other mutual aid or protection."[46] For instance, in *Meyers I,* the NLRB held that an employee who complained to his supervisors and the police about poor working conditions relating to the

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[39] 29 U.S.C. 157.
[40] *Meyers Industries, Inc. v. Kenneth P. Prill*, 268 NLRB 493 (1984) ("*Meyers I*"), *rev'd. sub nom*, Prill v. NLRB, 755 F.S2 941 (D.C. Cir. 1985), *cert. denied*, 474 U.S. 948 (1985), *on remand*, Meyers Industries, 281 NLRB 882 (1986) ("*Meyers II*"), *aff'd. sub nom,* Prill v. NLRB, 835 F.2d 1481 (D.C. Cir. 1987), *cert. denied*, 487 U.S. 1205 (1988).
[41] *Id.* at 494.
[42] *Id.* at 497.
[43] *Id.*
[44] 29 U.S.C. 158(a)(1)(2).
[45] *Meyers I*, 268 NLRB at 497.
[46] *Id.* at 494, n. 6 (internal citations omitted).

defective breaks on his company-issued vehicle, and who was then terminated for his complaints to the police, did not engage in protected concerted activity. Based on the factual record, the NLRB determined that the employee's complaints about his vehicle were made solely on his own behalf and not for the "mutual aid or protection" of his co-workers.[47] This suggests that Courts have adopted a narrow interpretation of concerted activity.[48]

B. Work Rules

The NLRB and the Federal courts have consistently recognized that employers have the right to create work rules to maintain an orderly and effective work environment.[49] This right must be a balanced against and harmonize with employees' rights to engage in concerted activities.[50] In 1945, in *Republic Aviation v. NLRB*, the Supreme Court noted that the "[o]pportunity [for employees] to organize and [the right of employers to maintain] proper discipline are both essential elements in a balanced society."[51] Accordingly, the NLRB and the Federal courts have viewed work rules through this lens and thereby evaluated whether such work rules "reasonably tend to chill employees in the exercise of their Section 7 rights."[52] Work rules that fail this test constitute an unfair labor practice and employers will not be permitted to maintain them.[53]

The Board uses a two-tier inquiry to determine if a work rule imposed by an employer produces such an effect:

1. A rule is unlawful if it explicitly restricts activities with the scope of Section 7 protections;
2. "If the rule does not explicitly restrict activity protected by Section 7," it is still prohibited if it inhibits such activity in one or more of three ways:
    a. Facially, employees would reasonably construe the language of the rule to prohibit activity protected by Section 7;
    b. The rule was promulgated in response to union activity; or
    c. As applied, the rule restricts employees from engaging in activities protected by Section 7.[54]

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[47] *Id.* at 499.
[48] Jessica A. Magaldi, et. al, *How the NLRB's Decisions in Cases Involving Social Media Have Narrowed the Definition of Concerted Activity . . . Whether Employees "Like" It or Not.*, __ U. TOL. L. REV. __ (2018).
[49] *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945).
[50] *Id.*
[51] *Id.* at 797–98.
[52] *Lafayette Park Hotel*, 326 NLRB 824 at 825 (1998), enforced, 203 F.3rd 52 (D.C. Cir. 1999).
[53] *Id.*
[54] *Lutheran Heritage Village – Livonia*, 343 NLRB 646 at 647.

In applying the foregoing inquiry, the Board "must refrain from reading particular phrases in isolation, and it must not presume improper interference with employee rights."[55] Ambiguous rules are construed against the employer.[56]

C. The Procedural Framework Regarding Unfair Labor Practices

The procedure for filing an unfair labor practices (ULP) claim is often an important factor in the outcome of such a case. An aggrieved party initiates ULP charges with the appropriate Regional Director. There are 26 regions located throughout the U.S. and the headquarters is located in Washington D.C.[57] There is 6-month statute of limitations for filing an ULP charge.[58]

After filing, the Regional Director is required to investigate the charge and determine whether there is sufficient evidence to support the claim. If the evidence is insufficient, the Regional Director dismisses the claim or requests the charging party to withdraw the claim. According to the NLRB, more than one half of all charges are dismissed or withdrawn.[59] The charging party has the right to appeal an adverse decision to the General Counsel.[60]

The Board strongly encourages parties to mediate ULP disputes. Pre-complaint settlements are subject to the approval of the Regional Director.[61] After a complaint has been filed, a settlement must be approved by the NLRB (not simply the Regional Director). After a hearing has commenced, the ALJ must approve the settlement.[62] When the parties resolve the claim in this manner, no order, decision, or opinion is issued. Accordingly, at least in theory, cases in which the evidence strongly supports one position are not available for analysis and do not become part of the body of persuasive or precedential authorities.

If the parties fail to resolve the matter and if it appears to the Regional Director that formal proceedings should be instituted, the Regional Director files a complaint.[63] Cases involving novel or complex issues are required to be referred to the General Counsel for advice before a complaint is issued.[64] This may result in the publication of an Advice Memorandum.

If a complaint is issued, a case then follows the administrative law procedure. An NLRB Administrative Law Judge presides over the prehearing procedure. A final hearing is eventually

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[55] *Id.* at 646.
[56] *Lafayette Park Hotel*, 326 NLRB 824 (1998), *enf'd*, 203 F.3d 52 (D.C. Cir. 1999).
[57] NLRB website, https://www.nlrb.gov/who-we-are/regional-offices (last visited March 30, 2017).
[58] The time period begins to run when the charging party has clear and unequivocal notice of the ULP. Notice may be either actual or constructive. Constructive notice occurs when the charging party would have discovered the ULP in the exercise of reasonable diligence. *CAB Assocs.*, 340 NLRB 1391 (2003). The 6-month time bar is an affirmative defense and is waived if not timely raised. *NLRB v. Vitronic Div. of Penn Corp.*, 630 F.2d 561 (8th Cir. 1979).
[59] *Charges and Complaints*, www.nlrb.gov, http://www.nlrb.gov/news-outreach/graphs-data/charges-and-complaints/charges-and-complaints (last visited March 30, 2017). In Fiscal Year 2016, 21326 ULP allegations were filed with the Board, 6010 Settlements were achieved, and 1272 complaints were issued.
[60] 29 C.F.R. §§ 101.5, 101.6, 102.19.
[61] 29 C.F.R. §§ 101.7, 101.9.
[62] 29 C.F.R. § 101.9.
[63] 29 C.F.R. § 102.15.
[64] 29 C.F.R. § 101.8.

conducted in which the ALJ acts as a finder of fact, applies the NLRA to the facts, and hands down a decision. If the finding is against the employer, the decision must also contain a recommended order of affirmative remedial actions that the respondent must undertake.[65] Venue is in the administrative region where the alleged unfair labor practice transpired. The proceedings are public unless otherwise ordered by the NLRB or the ALJ.[66]

A public proceeding is averted if both parties agree to waive a hearing and submit the case directly to the NLRB. In this case, the parties must file a stipulation, which includes a statement of the facts and a short statement by each party of its position on the issues.[67] Either party may file exceptions to the ALJ's decision. The exceptions are due within twenty-eight days of the service of the ALJ's decision.[68] The NLRB itself reviews exceptions. A decision of an ALJ has no precedential value unless reviewed and adopted by the NLRB. If no exceptions are filed, the Administrative Law Judge's decision becomes the order of the NLRB. The order of the Administrative Law Judge can also be appealed to the five person Board and General Counsel in Washington, D.C. An Administrative Law judge's decision is not binding legal precedent as to other cases unless it is adopted by the Board. Board decisions are subject to review by the United States Court of Appeals.[69]

When a violation is found, the decision and order will include a remedy.[70] However, the NLRB is constrained by its statutory authority when creating the remedy. It cannot compel the employer to agree to contract terms, nor can it order punitive damages.[71] Two remedies common and permissible remedies are the reinstatement of any wrongfully terminated employees and back pay. Reinstatement involves the restoring an employee to their former employment position who was discharged, subject to layoff, on a leave of absence, or on strike to her former position, generally without loss of seniority or other benefits. Back pay is a remedy used by the NLRB to make an employee whole for any remuneration lost as a result of any such discharge, layoff, refusal to reinstate, or other change in employment status.

Typically, the device used to implement an NLRB remedy is a cease and desist order.[72] Such orders redress only the specific action found to be a violation in the case and are limited to the specific location of the violation.[73] If an employer has committed multiple violations at multiple locations, the order may be company-wide. An employer found to have committed egregious, widespread, or repeated offenses may be subjected to an order requiring the respondent to cease and desist from violating the Act - in any other manner.[74]

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[65] 29 C.F.R. § 102.45.
[66] 29 C.F.R. § 102.34.
[67] 29 C.F.R. § 102.35(a)(9).
[68] 29 C.F.R. § 102.46.
[69] www.NLRB.gov, https://www.nlrb.gov/who-we-are & https://www.google.com/search?q=https%3A%2F%2Fwww.nlrb.gov+what+we+do&oq=https%3A%2F%2Fwww.nlrb.gov+what+we+do&aqs=chrome..69i57j69i58.5102j0j4&sourceid=chrome&ie=UTF-8 (last visited March 30, 2017)
[70] When a union commits flagrant violations, the remedies include the revocation of a collective bargaining relationship, voidance of contracts, and the repayment of improperly collected initiation fees and dues. *Teamsters Local* 705, 210 NLRB. 210 (1974).
[71] *H.K. Porter Co. v. NLRB*, 397 U.S. 99 (1970).
[72] 29 U.S.C. § 160(c).
[73] *Id.*
[74] *Hickmott Foods Inc.*, 242 NLRB 1357 (1979).

Final orders of the NLRB are subject to appeal to by any party to the relevant United States Circuit Court of Appeals or to the Circuit Court of Appeals for the D.C. Circuit. This provides the opportunity for limited, but important, forum shopping.[75] The Circuit Court of Appeals may enforce, modify, or set aside an order in whole or in part.[76]

The NLRB may also seek injunctive relief in the relevant U.S. District Court for the region if that is necessary to prevent harm.[77] NLRB orders are not self-enforcing. The Regional Office where the charge originated is responsible for ensuring compliance with the order.[78]

In summary, the procedure provides for orders and decisions from three sources, ALJs, the Board (including its General Counsel), and Article 3 Courts (i.e., the Circuit Courts of Appeals and the Supreme Court). The patterns of such decisions are significant and are reviewed in the following sections of this article.

III. THE APPLICATION OF THE NATIONAL LABOR RELATIONS ACT PROTECTIONS TO EMPLOYERS' SOCIAL MEDIA POLICIES

An important aspect of the cases that define boundaries of permissible of employers' social media polices is that they base their rulings on prospective or unproven burdens on activities that would be protected by Section 7 of the Act (i.e. the possible chilling effect on employees concerted activities). In other contexts, such claims might be considered unripe.[79] The relevant cases often implicitly ascribe greater weight to these prospective or unproven constraints on employees' protected activities appears that to employers' otherwise legitimate considerations such as the injury to brand value, the compromise of trade secrets, or discipline in the workplace.

Given that the majority of the precedent regarding the NLRA predates the Internet era, the 2012 *Costco Wholesale Corporation and United Food and Commercial Workers Union, Local 371* decision [hereinafter "Costco"] connects the social media decisions with analogous situations in offline interaction.[80]

A. *The Costco Decision*

The reasoning of the Costco case addresses how such an employment policy, though not specifically targeting or referring to social media, implicates employers' and employees' rights surround social media as previously considered by this article. The case involved a Costco warehouse located in Milford, Connecticut. At issue was the Costco Employee Agreement,

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[75] 29 U.S.C. § 160(e)-(f).
[76] 29 C.F.R. § 101.15.
[77] 29 U.S.C. § 160(j).
[78] 29 C.F.R. § 101.13.
[79] *Texas v. United States*, 523 U.S. 296 (1998) (inner citations and quotations omitted) ("a claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all.").
[80] *Costco Wholesale Corporation and United Food and Commercial Workers Union, Local 371,* Case 34-CA-012421, 358 NLRB No. 106.

which listed a series of employee comportment rules and contained a provision that applied the Employee Agreement to online activities.[81] In particular:

> *Rule 11.3 – Rule 11.7* " [U]nauthorized posting, distribution, removal or alteration of any material on Company property" is prohibited;
>
> *Rule 11.7* " [E]mployees are prohibited from discussing 'private matters of members and other employees . . . includ[ing] topics such as, but not limited to, sick calls, leaves of absence, FMLA call-outs, ADA accommodations, workers' compensation injuries, personal health information, etc.;
>
> *Rule 11.7* "[E]mployees are prohibited from sharing "confidential" information such as employees' names, addresses, telephone numbers, and email addresses.
>
> *Rule 11.9* "Sensitive information such as membership, payroll, confidential financial, credit card numbers, social security number or employee personal health information may not be shared, transmitted, or stored for personal or public use without prior management approval";
> *Rule 11.9* [E]mployees are required to use "appropriate business decorum" in communicating with others;

The following further excerpt of the Costco Rule 11.9 is analogous to important aspects of the social media policies previously considered in this article:

> Rule 11.9 - "Any communication transmitted, stored or displayed electronically must comply with the policies outlined in the Costco Employee Agreement. Employees should be aware that statements posted electronically (such as [to] online message boards or discussion groups) that damage the Company, defame any individual or damage any person's reputation, or violate the policies outlined in the Costco Employee Agreement, may be subject to discipline, up to and including termination of employment."

The NLRB's concern was that the statements in the Costco Employee Handbook were written so broadly that they could reasonably be interpreted to restrict employee efforts to unionize in accord with their Section 7 rights.[82] Indeed, many organizing activities or conversations about working conditions, wages and the like could reasonably be considered by an employee to fall into the category of "damage[ing] the company" or otherwise violating the employer's rules for employees.

The Costco Employee Handbook rules corresponds to the formal and informal employer rules found in any number of controversial situations where the rules, directly or indirectly applicable to social media use. The NLRB, for the most part, agreed with the findings and conclusions of law originally penned by the Administrative Law Judge. The following sections

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[81] *Id.* at pp. 7-8. These rules can be found in the Costco Employee Handbook Sections 11.3, 11.7 and 11.9.
[82] *Id. For the underlying legal principal, see Lafayette Park Hotel*, 326 NLRB 824 (1998), *enf'd*, 203 F.3rd 52 (D.C. Cir. 1999).

of the agreement were discussed, which are instructive for social media:

Section 11.3 prohibits posting and distribution of material on company property and could include electronic posting. The ALJ and the NLRB both agree that this rule has a chilling effect upon concerted employee action. Because of its broad statement, any employee electronic or other conversations would be prohibited.[83]

Section 11.7, contained two related rules prohibiting conversations, and by incorporation, electronic conversations of certain "private matters of members and other employees" including: sick leaves, workers compensation matters and employee names, addresses and other contact information. Once again, these broad rules inhibit concerted employee action as protected by the NLRA.[84] The employees, in fact, could reasonably conclude that the rules prohibited them from discussing these matters with each other or with a union.[85]

Section 11.9, entitled "Electronic Communications and Technology Policy," explicitly prohibits the electronic sharing of three items – (a)"sensitive information," including some of the personal matters already mentioned in Section 11.7, namely, salary and personal health matters; (b) inappropriate business decorum and (c) defamatory statements that would damage the company or any person's reputation.

Once again, the NLRB and the ALJ decided that these broad rules inhibit employee exercises of their organizational rights as guaranteed by NLRA Section 7. Sensitive personal and financial information may be discussed among employees for the purposes of concerted action as evidenced by decisions already mentioned.[86]

The requirements of "appropriate business decorum" in electronic communications and the prohibition of language that tends to damage the corporation or person is likewise too broad and will inhibit concerted employee action, which often involves indecorous language and demonstration.[87]

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[83] *For the underlying legal principal, see MTD Products,* 310 NLRB 733 (1993); *Brunswick Corp.,* 282 NLRB 794, 795 (1987); *Crowne Plaza Hotel,* 352 NLRB at 384-385.

[84] *For the underlying legal principal, see Double Eagle Hotel & Casino,* 341 NLRB 112, 113-116 (2004), *enf'd as modified,* 414 F.3d 1249 (10th Cir. 2005) (rule explicitly restricts discussion of terms and conditions of employment as defined by employer as "confidential information"). These citations and their explanations are contained in the body of the Costco decision.

[85] *For the underlying legal principal, see NLS Group,* 352 NLRB 744, 745 (2008) (rule states that terms of employment including compensation are confidential and disclosure of such terms to other parties may constitute grounds for dismissal); *Cintas Corp.,* 344 NLRB 943 (2005), enforced, 482 F.3d 463 (DC Cir. 2007) (employer deemed any information concerning its "partners" confidential and prohibited disclosure); *Flamingo Hilton-Laughlin,* 330 NLRB 287, 288 at n. 3 (1999) (prohibition on employees revealing confidential information about "fellow employees" overbroad and unlawful); *IRIS U.S.A. Inc.,* 336 NLRB 1013 (2001) (rule in handbook instructs employees to keep information about employees strictly confidential). These citations and their explanations are contained in the body of the Costco decision.

[86] *See also, Bigg's Food,* 342 NLRB 425 at n.3 (2006) (prohibiting disclosure of salaries to anyone outside the company); *Pontiac Osteopathic Hospital,* 284 NLRB at 466 (rule bans discussion of employee problems).

[87] *See Lutheran Heritage Village,* 343 NLRB at 650; *University Medical Center,* 335 NLRB 1318, 1321 (2001), enforced in part, 916 F.2d 932, 940 (4th Cir. 1990); *Ridgeview Industries,* 353 NLRB 1096 (2009) (rule prohibiting employees from engaging in behavior designed to create discord or lack of harmony found unlawful).

B. *The Chipotle Decision*

The August 18, 2016 NLRB Decision in Chipotle Services LLC d/b/a Chipotle Mexican Grill and Pennsylvania Workers Organizing Committee, a project of the Fast Food Workers Committee (hereinafter "Chipotle")[88] provides important insights into the balance between employers' and employees' social media rights under the NLRA.

The case focused upon the lawfulness of Chipotle's "Social Media Code of Conduct" and employee handbook. The social media policy included the following restrictions (the complete excerpts of the Social Media and Employee Handbook provisions set forth in the Chipotle decisions are set forth in Appendix A of this Article, *infra* at pp. 29-30):

- If you aren't careful and don't use your head, your online activity can … spread incomplete, confidential or inaccurate information;

- You may not make disparaging, false, misleading, harassing, or discriminatory statements about or relating to Chipotle, our employees, suppliers, customers competition or investors.

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

One view of these policies supports the conclusion that they are designed to protect important assets and interests of the firm, such as its logo, brand value and business goodwill; and its legitimate interest in workplace discipline and efficiency. For example, as discussed above, Chipotle's brand value exceeds the value of its balance sheet total assets. Notwithstanding these factors, the Board found that key aspects of Chipotle's social media policies and employee handbook violated the Act based on their prospective chilling effect on employees' rights as protected by Sections 7 and 8 of the NLRA.

The underlying dispute focused on an employee's negative comments about Chipotle on posted to his Twitter account. One tweet complained that hourly Chipotle employees were required to work on snow days when certain other employees were off. The tweet was directed to the employer's communications director. The employee posted other tweets in response to customer comments. For example, in response to customer comments, employee tweeted that "nothing is free, only cheap #labor. Crew members only make $8.50hr how much is that steak bowl really?",[89] and commented that Chipotle charges extra for guacamole "not like #Qdoba, enjoy the extra $2."[90]

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[88] *Chipotle Services LLC d/b/a Chipotle Mexican Grill*, 364 NLRB No. 72 (Aug. 18, 2016)
[89] *Id.* at p. 6.
[90] *Id.*

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

The underlying decision of the ALJ, which is adopted by the Board's decision, cites the legal framework for evaluating the countervailing rights of employers and employees in social media cases. When evaluating the appropriateness of employers' social media rules, the Board balances the legitimate interests of the employer against the Section 7 rights of employees.[91] When work rules are overly broad or ambiguous, they may reasonably be read by employees to prohibit lawful Section 7 activity, and may serve to chill employees in the exercise of their Section 7 rights. Ambiguous rules are construed against the employer.[92]

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

One important aspect of the Chipotle decisions was the ruling that merely false or misleading social media activity remains protected by the Act. Social media activity only loses its Section 7 protections if there is sufficient evidence that the employee acted with "a malicious motive." Such a motive is established if the social media comments are "made with knowledge of their falsity or with reckless disregard for the truth or falsity." Based on this analysis, Chipotle's rules restricting "misleading, inaccurate and incomplete statements" were found to be unlawful.

Similarly, Chipotle's restrictions against the disclosure of confidential information were determined to be unlawful based upon the absence of a definition of the concept. For example, the word "confidential is vague and undefined. Thus, an employee could construe the word as restricting Section 7 rights." From the perspective of the employer, confidential information could encompass trade secrets or proprietary information that contributes to the firm's sustainable competitive advantages. Alternatively, if it is not carefully crafted, such a broad restriction could cause employees to refrain from protected concerted activities. Thus, the Chipotle case resolves these offsetting interests by requiring supplemental unambiguous definitions and contextual examples.

Chipotle's prohibitions that direct employees to refrain from posting harassing or discriminatory statements do not violate the Act. These terms are not "so amorphous that reasonable employees would be incapable of grasping the expectation that they comport themselves with general notions of civility and decorum in the workplace …" Thus, the phrases "harassing or discriminatory statements" was not considered ambiguous, while the phrase "confidential information" was considered ambiguous. Accordingly, the former was not found

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[91] *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945).
[92] *Lafayette Park Hotel*, 326 NLRB 824 (1998), *enf'd*, 203 F.3d 52 (D.C. Cir. 1999).

to chill employees' lawful rights, while the later was interpreted against the employer and found unlawful without further explanation.

Additionally, the employer's anti-solicitation policy was ruled to be overbroad since it did not limit any restricted employee conduct to customer selling areas. As a result, the policy extended to areas where customers did not have the right of access (e.g. break rooms) and where employees may engage in protected concerted activities without improperly interfering with a firm's interface with its customers or clients.

Chipotle's restrictions against the use of its corporate logo were deemed unlawful. Once again, these restrictions implicate countervailing interests of employers and employees. As to employers, a firm's logo is important and valuable intellectual property. It is how people recognize the firm and helps to execute a differentiation strategy.[93] Accordingly, a well recognized logo is an integral component of brand value. As previously set forth, Chipotle's 2016 brand value was estimated at $8.031 billion.[94] Its 2016 total assets were $2.6 billion and total shareholder equity was $1.04 billion. Thus, Chipotle's brand value appears to exceed its balance sheet values.

Alternatively, under the Act, employees would be unable to call attention to unfair working conditions if could not identify the employer, and a logo is one way to identify such a firm. This implicates the broad based rights of workers to organize and secure safe and fair working conditions. Accordingly, in Chipotle, the Board resolved these countervailing interests in favor employees' rights. For example, use of the logo on a T-shirt as part of a protest regarding working conditions was previously referred to as lawful in the *American Medical Response of Connecticut, Inc.* case.[95]

The Board found that Chipotle's did not violate the law by ordering the employee to delete certain tweets since the communications did not constitute concerted activity. Finally, Chipotle's social media policy included a disclaimer that it does "not restrict any activity that is protected or restricted by the National Labor Relations Act …." The Board ruled that such a savings clause cannot "cure the unlawfulness of" an otherwise illegal policy.

C. *Decisions Preceding Chipotle*

The prior decisions regarding social media policies are consistent with, and provide bases for the Chipotle decision. These cases include *American Medical Response of Connecticut, Inc.*, October 10, 2010 Advice Memorandum,[96] *Target Corporation*, December 16, 2011 Advice Memorandum,[97] the Board's 2013 Decision in *Dish Network Corporation and Communications*

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[93] Peter Shadbolt, *"How Important is it for a company to have a great logo?* BBC News, http://www.bbc.com /news/business-32495854 (last visited March 30, 2017).
[94] *Brand value of the 10 most valuable fast food brands worldwide in 2016*, Statista, https://www.statista.com/statistics/273057/value-of-the-most-valuable-fast-food-brands-worldwide/ (last visited March 30, 2017).
[95] *American Medical Response of Connecticut, Inc.*, Case 34-CA-12576, Advice Memorandum (October 5, 2010).
[96] *Id.*
[97] *Target Corporation*, Case 29-CA-30713, Advice Memorandum (December 16, 2011).

Workers of America, Local 6171, et al.,[98] the 2012 *McKesson Corporation* decisions,[99] and the May 2012 *General Motors* decisions.[100]

In 2010, the Office of the General Counsel of the NLRB, considered the written policies of American Medical Response of Connecticut, Inc.,[101] and found the firm's restrictions on blogging, email and other Internet activity were unlawful under the NLRA.

The following provisions of the AMR employee handbook were at issue:[102]

Blogging and Internet Posting Policy.

* * *

- Employees are prohibited from posting pictures of themselves in any media, including but not limited to the Internet, which depicts the Company in any way, including but not limited to a Company uniform, corporate logo or an ambulance, unless the employee receives written approval from the EMSC Vice President of Corporate Communications in advance of the posting;

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

* * *

Solicitation/Distribution.

* * *

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

* * *

- Solicitation of others regarding the sale of material goods, contests, donations, etc., is to be limited to approved announcements posted on designated break

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[98] *Dish Network Corporation and Communications Workers of America, Local 6171 and Eric Sutton*, 359 NLRB 108 (2013).
[99] The NLRB General Counsel issued two Advice Memoranda addressing the *McKesson Corporation* controversy, one in March 2012 (*McKesson I*) and one in June 2012 (*McKesson II*)
[100] *See* Exceptions of NLRB Acting General Counsel in *General Motors LLC and Michael Anthony Henson*, case 07-CA-053570 (August 22, 2012).
[101] *American Medical Response of Connecticut, Inc.*, Case 34-CA-12576, Advice Memorandum (October 5, 2010).
[102] *Id.* at pp. 5-6.

room bulletin boards. Use of the electronic mail system for solicitation is strictly prohibited.

The employer, AMR, is an emergency medical services provider. The employee was a paramedic with eleven years of experience. The case involved a "union shop," and the employee was a union member. The employee was discharged primarily for conduct that transpired over November 7 and 8, 2009.[103]

The complaints against the employee commenced as a result her alleged treatment of the occupants of one of the vehicles involved in an automobile accident to which she responded as a paramedic, and complaints by medical personnel where the occupants were eventually examined. Thereafter, the employee engaged in a disagreement with one of her supervisors about drafting an incident report regarding the incident, and her request for union representation in completing the report.

Following the disagreement, the employee posted comments on her Facebook page. The first post stated, "Looks like I'm getting some time off. Love how the company allows a 17 [AMR code for a psychiatric patient] to be a supervisor."[104] In response to a coworker's inquiries and comments, the employee posted, "Frank being a dick … [ ] he's a scumbag as usual."[105]

The employer suspended and terminated the employee. The following social media related grounds were cited along with other reasons for this disciplinary action: "… shortly after this incident during your November 7 shift, you posted derogatory remarks about your supervisor on 'Facebook.' "[106] In its pleadings, the employer stated that these comments violated its "Blogging and Internet Posting Policy," but did not cite the solicitation rule as a reason for the employees termination.[107]

The Advice Memorandum determined that the AMR Blogging and Internet Policy violated the Act because it has a chilling effect on the right of employees to engage in activities protect by Section 7. The component of AMR Policy that prohibited employees from posting pictures improperly precludes the "posting [of] a picture of employees carrying a picket sign depicting the company's name, or wearing a t-shirt portraying the company's logo in connection with a protest involving the terms and conditions of employment."[108] In this way, the Advice Memorandum appears to place a higher value on not chilling employees' rights to engage in concerted activities than on the possible collateral devaluation of a firm's intellectual property or brand value. This is consistent with the ruling in *Chipotle*, analyzed the prior subsection.

With regard to AMR's prohibition against "disparaging comments," the Advice Memorandum ruled that it is too ambiguous because "it contained no limiting language or

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[103] An incident that transpired on October 27, 2009 was also cited as one of the grounds for discharge. *Id.* at p. 4. However, this incident did not implicate the social media policies that are the subject of this paper.
[104] *Id.* at p. 3.
[105] *Id.*
[106] *Id.* at p. 5.
[107] *Id.* at pp. 5-6.
[108] *Id.* at p. 13.

context that would clarify to employees that the rule did not restrict" activities protected by the Act.[109] In contrast, AMR's prohibition on discriminatory or defamatory remarks was also found to be lawful based on the fact that these restrictions were not ambiguous and could "not reasonably [be] interpret[ed] ... restricting Section 7 activity. Such remarks are also often unprotected by the Act."[110] These distinctions suggest that perhaps the most important factors in deciding social media policy cases will be the contextual details that may or may not be set forth in the employer's written documents.

The Solicitation/Distribution Policy was also found unlawful. This conclusion was based on the fact that limiting such conduct to "approved announcements posted on designated break room bulletin boards," implicates protected conduct (all unapproved activities and confines approved activities to "designated break room bulletin boards."[111]

The restriction against using the employer's electronic mail system for solicitation was not unlawful since a firm "may lawfully bar employees' non-work-related use of its email system unless the [employer] acts in a manner that discriminates against" activities protected by the Act.[112]

The reasoning of the Target Corporation, December 16, 2011 Advice Memorandum[113] expands on the prior rulings on employers' social media policies. In finding Target's social media policy unlawful, the General Counsel stated that "Rules that are ambiguous as to their application to [protected] activity, and contain no limiting language or context that would clarify to employees that the rule not restrict [protected] rights, are unlawful."[114] As with the AMR decision, this suggests that perhaps the most important factors in deciding social media policy cases will be the contextual details that may or may not be set forth in the employer's written documents.

The Target policies were set forth in the firm's employee Handbook and distributed and/or made available to employees. The social media section cautions employees to refrain from releasing "confidential guest, team member or company information." At first blush, this appears to implicate the legitimate interests of the employer. In this regard, such confidential information could be the subject of a Non-Disclosure Agreement ("NDA") or involve valuable trade secret intellectual property.

The Advice Memorandum implicitly dismissed such employer focused considerations by finding that this broad policy has a chilling effect on employees' rights to discuss and disclose information regarding the conditions of employment. The Advice Memorandum reasons that employees have a right to discuss wages and conditions of employment with third parties and among one another. Such a rule would unlawfully interfere with such activity by causing

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[109] *Id.* at p. 13.
[110] *Id.* at p. 13.
[111] *Id.* at p. 14.
[112] *Id.* at p. 14.
[113] *Target Corporation*, Case 29-CA-30713, Advice Memorandum (December 16, 2011).
[114] *Id.* at p. 3.

employees to reasonably believe they were restricted from discussing "terms and conditions of employment."

Another section of Target's handbook, entitled "Communicating confidential information," implores employees to refrain from sharing confidential information with other "team member[s]" except on a "need to know" basis to perform their job, to consult their supervisors if they are unsure, and to refrain from conversing about such confidential information in "the break room, at home or in open areas and public places."[115] As with the prior section of the Handbook, on initial consideration, this could also have been the subject of Non-Disclosure Agreement ("NDA") or valuable trade secret intellectual property.

Once again, the potential considerations of the employer were tacitly rejected. In this regard, the Advice Memorandum found these restrictions unlawful based on the fact that employees would reasonably interpret them as forbidding discussions regarding the terms and conditions of employment. Focusing on the constraints surrounding communications in break rooms, public places or at home, the Advice Memorandum found Target's rules overbroad since they restricted activities protected by Section 7 "virtually everywhere such discussions are most likely to occur."[116]

In contrast, the Advice Memorandum upheld the language in the Handbook counseling employees to "[d]evelop a healthy suspicion," to avoid "[b]eing tricked into disclosing confidential information," and to "be suspicious if asked to ignore identification procedures."[117] The reasoning stated that this language "merely advises employees to be cautious about unwittingly divulging such information and does not proscribe any particular communications." This aspect of the decision recognizes the importance of a firm's trade secrets and general confidentiality and attempts to draw a distinction between the over breadth of the constraint against communicating all confidential information – including between co-workers and carelessly or negligently divulging such information to competitors or other non-concerted activities situations.

The March 2012 *McKesson Corporation* decision held that, although the employee's conduct was not protected, the employer's social media guidelines violated the Act.[118]

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

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[115] *Id.* at p. 4.
[116] *Id.* at 5.
[117] *Id.*
[118] *McKesson I*, Case 0-066504, NLRB Advice Memo (March 1, 2012).

McKesson, the employer, is an international healthcare services company. The complainant was employed as a refund processor with approximately eight years tenure. The employee became outspoken about her work place concerns. For example, the employee commented that her workload had substantially increased. She also complained about wages and that employees had to purchase their own office supplies. The complainant then became concerned that the employer would outsource her job. In this regard, on November 10, 2010 posted a statement on her Facebook: "Help! I am being outsourced... anyone know of a company who is hiring that doesn't outsource??" The employee did not identify herself, but some fellow employees were her Facebook friends. She subsequently emailed her manager requesting the employer's severance policy in the event that her work was outsourced.

Coworkers grew fearful of the complainant, felt threatened, and eventually reported the Facebook incident to management. Management convened a meeting with the complainant and discussed these issues. The next day the complainant wore a t-shirt to work bearing the slogan "Trust No One." In December 2010, another employee anonymously accused the complainant of being a bully who threatened her co-workers by her cruel, vicious and intimidating manner. Management subsequently met with the complainant, alleged that was causing low morale, and ultimately discharged her in September 2011.

Because the complainant had not engaged in concerted activity at any time, and her negative behavior in fact had alienated her co-workers, the NLRB concluded that the complainant was not engaged in protected concerted activity. However, the Board also ruled that the McKesson Corporation social media rules were unlawful under the Act.

The employer's prohibition against the disclosure of personal information about other employees and contingent workers without supervisory approval violated the Act. The Board reasoned that this aspect of the social media policy was illegal because employees could reasonably construe that it precluded employee discussions of wages and working conditions, which is within the heart of Section 7 protections.[119] Similarly, the restriction regarding the discussion of legal matters was found to interfere with employees' rights to discuss potential claims against the employer, including Section 7 claims.[120]

The "friendly tone" and "professional tone" mandate in McKesson's employee handbook could reasonably be interpreted to prevent discussions – or complaints – about working conditions and unionism.[121] As well, the restrictions against the mention of politics and religion could inhibit discussions about working conditions related to these issues.[122]

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[119] *Reynolds Electric, Inc.*, 342 NLRB 156, 166 (2004) (discussion of wages constitutes protected concerted activity), *quoting Aroostook County Regional Ophthalmology Center,* 317 NLRB 671, 680 (2004), *enf'd in relevant part,* 209 Fed. Appendix 629, 2006 WL 3487113 (9th Cir. 2006) (employer violated Section 8(a)(1) by terminating employee for discussing employees' bonuses with his co-workers); *Williams Contracting,* 309 NLRB 433, 438 (1992) (employer unlawfully terminated employees for complaining about wages). This citation appears as footnote 4 in the *McKesson* Advice Memorandum.

[120] *McKesson I*, Case 0-066504, NLRB Advice Memo (March 1, 2012), at p. 7.

[121] *Id.* at 7-8.

[122] *Id.*

Even the laudatory goal of respect for intellectual property laws was considered too broadly written. The portion of the rules prohibiting the posting of pictures would tend have a chilling effect upon employees' protected right to publish photographs of picket lines or unsafe working conditions.[123] Consider a situation where an employee posted pictures to a social media site of striking employees holding picket signs with the trademarked company name or including the company headquarters in the background.

The encouragement to employees to resolve concerns about work "by speaking with co-workers, supervisors or managers," rather than communicating their grievances among themselves online, was also found to inhibit employee protected activity.[124] This policy acts as both a limitation on the means of talking to co-workers and the exhortation to talk to supervisors or managers instead.

Despite these issues with the social media policy, there was insufficient evidence to indicate that the employer acted pursuant to those unlawful rules.[125]

In the May 2012 *General Motors* case,[126] the employer's social media policies forbade the use of egregious language in social media language communications. This included limiting discriminatory comments, the threats of violence; requiring respectful, fair and courteous language, rather than bullying and hostile speech; mandating confidentiality regarding the employer's intellectual property rights (including corporate logos and trademarks); requiring appropriate communications, whether in the workplace or online; and directing employees to report any inappropriate social media conduct to management.

The General Motors Exceptions of Counsel pointedly indicated that the Administrative Law Judge in the case had erred in collecting factual evidence and in a number of his conclusions about General Motors' Social Media Policy. The General Counsel noted, with respect to the policy, that the company may not broadly prohibit the incorporation of company logos and trademarks in employee online communications.[127] Further, the company may not prohibit all inappropriate or offensive or online remarks.[128] And the company may not caution employees about online "friending,"[129] nor broadly require that employees report "any unusual or inappropriate or internal social media activity" to the system administrator.[130]

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[123] *See Sullivan, Long & Hagerty,* 303 NLRB 1007, 1013 (1991), *enf'd,* 976 F.2d 743 (11th Cir. 1992) (employee tape recording at jobsite to provide evidence in a Department of Labor investigation considered protected). *Contrast with Flagstaff Medical Center,* 357 NLRB No. 65, slip op. at 4-5 (August 26, 2011) (holding lawful rule prohibiting employees from taking photographs of hospital patients or property in light of "weighty" privacy interests of hospital patients and "significant" employer interest in preventing wrongful disclosure of individually identifiable health information). This citation appears as footnote 14 in the *McKesson* Advice Memorandum.

[124] *See also, Kinder-Care Learning Centers,* 299 NLRB 1171 (1990).

[125] *McKesson I,* Case 0-066504, NLRB Advice Memo (March 1, 2012), at n. 3 (*citing The Continental Group, Inc.,* 357 NLRB No. 39, slip op. at 4 (2011)).

[126] *See* Exceptions of NLRB Acting General Counsel in *General Motors LLC and Michael Anthony Henson,* Case 07-CA-053570 (August 22, 2012).

[127] *Id.* at point 8.

[128] *Id.* at point 9.

[129] *Id.* at point 10.

[130] *Id.* at point 11.

The NLRB General Counsel indicated that the General Motors had not provided employees with sufficient examples or illustrations or explanations of the Social Media Policy such that the employees would understand more specifically what activity was prohibited or permitted. This failure tends to inhibit the exercise of company employees NLRA Section 7 rights to organize.

As discussed in Section I, *supra*, the NLRA does not protect an employee who engages in personal or private speech. Because the test for what qualifies as concerted (and protected) activity is heavily fact-based,[131] there are no bright line rules. This has led to confusion in the context of social media and raises the issue: Does an employee's posting about working conditions on social media where other employees may be present necessarily constitute concerted activity? The relevant rulings have been inconsistent.

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

In *McKesson*, the company included the following "savings clause" in its social media policy:

> This policy will not be construed or applied in a manner that improperly interferes with employees' rights under the National Labor Relations Act.[132]

A savings clause that indicates that the interpretation of a clause in a policy or a contract is not to be interpreted in contravention of the law may be favorably dispositive to a drafter in many situations. In this case, however, given the importance of the protections of the Act, such language will not bring language that tends to discourage concerted employee activity with the scope of the law.[133]

The Board's 2013 Decision and Order in Dish Network Corporation and Communications Workers of America, Local 6171, et al. (hereinafter "Dish Network")[134] is the next important ruling on social media policies. The Board adopted an Administrative Judge's decision that, *inter alia*, found the employer's social media policy was unlawful.

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[131] *See Meyers I*, 268 NLRB at 497.

[132] *McKesson I*, Case 0-066504, NLRB Advice Memo (March 1, 2012).

[133] *Ingram Book Co.*, 315 NLRB 515, 516 (1994) (finding employer maintenance of a disclaimer that "[to] the extent any policy may conflict with state or federal law, the Company will abide by the applicable state or federal law" did not salvage the employer's overbroad no-distribution policy); *Ingram Book Co.*, 315 NLRB at 516 n.2 ("Rank-and-file employees do not generally carry law books to work or apply legal analysis to company rules … and cannot be expected to have the expertise to examine company rules from a legal standpoint"); *Allied Mechanical*, 349 NLRB at 1077 n.1, then Member Kirsanow concurring ("[t]he problem with this release, as the judge observed, is that it assumes employees 'are knowledgeable enough to understand that the Act permits the very thing prohibited in the first portion' of the release"). This citation appears as footnote 16 in *McKesson I*.

[134] *Dish Network Corporation and Communications Workers of America, Local 6171 and Eric Sutton*, 359 NLRB 108 (2013).

The social media policy at issue is another example of language that restricted employees from making "disparaging or defamatory comments about [their employer], its employees, officers, directors, vendors, customers, partners, affiliates or out, or their products/services."[135] It further advised employees that they "may not .... [p]articipate in these activities with DISH network resources and/or on Company time."[136]

As with the similar policies considered in the prior cases previously reviewed, the regulation against disparaging and defamatory comments appears to protect the important essential assets of the DISH network's reputation and business good will. However, citing prior decisions of the Board, *DISH Network* rules that such a proscription against "disparaging or defamatory comments" improperly restricts activity under the act.[137] Again, this implicitly accords greater value on the prospective or unfounded burdens on concerted activity than the possible damage to a firm's reputation.

Additionally, DISH Network's restrictions against all activity during company time were ruled "presumptively invalid because they fail to clearly convey that solicitation can still occur during breaks and other nonworking hours at the enterprise."[138]

Two other components of the DISH Network's employee handbook are relevant since they have the potential to implicate social media activities. The firm restricted contact with the media "regarding DISH network" without "prior authorization of the Corporate Communications Department."[139] The Handbook specifically required employees to notify General Counsel of any contact with government agencies, notify managers of any written correspondence from the government, refer Government correspondence to General Counsel, to refrain from responding to Government correspondence unless other directed, and ordered employees to refer all government callers to General Counsel and immediately notify a supervisor.

Given that contact with the media and government is increasingly likely to transpire through social media, such policies are relevant to the subject matter of this article. Such restrictions against media contact without prior authorization are unlawful on the grounds that they "unduly interfere with employees' rights under Section 7 to 'improve terms and conditions of employment' by seeking assistance 'outside the immediate employee-employer relationship.' "[140] Similarly, restrictions on employees' independent communications with government actors are unlawful based on the fact that it "could rationally construed by workers as limiting independent communications with Board agents ...."[141]

D. The Walmart Social Media Policy: One of the Only Policies to Pass Muster

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[135] *Id.* at p. 5.
[136] *Id.*
[137] *Id.*
[138] *Id.*
[139] *Id.*
[140] *Id.* at p. 6.
[141] *Id.*

The May 2012 *Walmart* case[142] provides an example of an employer's extensive social media policy found acceptable by the General Counsel (the complete social media policy included in the General Counsel memorandum is set forth in Appendix B).[143] The factor that appears to distinguish the Walmart social media policy from those of the previously reviewed cases are the specificity of the rules and the inclusion of important examples of that provide explanatory context. These aspects of the Walmart's social media policy found to sufficiently guide employees from being misled that that any concerted activity is somehow prohibited.

In the *Walmart* case, involved an employee's Facebook account, which was open to the public, including 1,800 friends, five to 10 of whom were co-workers. On his Facebook wall, the employee stated:

> The government needs to step in and set a limit on how many kids people are allowed to have based on their income. If you can't afford to feed them you shouldn't be allowed to have them … Our population needs to be controlled! In my neck of the woods when the whitetail deer get to be too numerous we thin them out! …. Just go to your nearest big box store and start picking them off…. We cater too much to the handicapped nowadays! Hell, if you can't walk, why don't you stay the f@*k home!!!![144]

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

The NLRB concluded that the employer had not violated the Act, because the employee's comments did not address work conditions, nor did it arise out of any concern for work conditions. The employee's activities were "wholly distinct from activity that falls within the ambit of Section 7."[145]

For example, the Walmart social media policy prohibited inappropriate discriminatory, harassing, or violent speech. Its general prohibition on the failure of respect resulting in malicious, obscene or threatening language was followed with an example that explained "such as that based on race, sex, disability, religion, or other legally protected status." The policy spoke of accuracy in posting information about "Walmart, fellow associates, members, customers, suppliers, people working on behalf of Walmart or competitors,"[146] rather than

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[142] *Walmart Corp.*, Case 11-CA-067171, Advice Memorandum (May 30, 2012).

[143] In presenting the *Walmart* case, full disclosure of the facts requires that it be noted that the NLRB Inspector General issued a report on September 13, 2012, finding that the Acting General Counsel Lafe Solomon's involvement in this case was a violation of ethics rules that prohibit NLRB employees from participating "substantially" in matters in which they have financial interests, such as stock worth $15,000 or more, if the case "will have a direct and predictable effect on that interest." Melanie Trottman, *NLRB Inspector General Finds Improper Conduct by Top Agency Lawyer*, The Wall Street Journal (Sept. 16, 2012).

[144] *Walmart Corp.*, Case 11-CA-067171, Advice Memorandum (May 30, 2012) at p. 4.

[145] *The Continental Group, Inc.*, 357 NLRB No. 39 at 5.

[146] *See* the policy appended to the *Walmart* Advice Memorandum, 6-8. The relevant policy provisions are set forth in Appendix B of this article, *infra* pp. 30-32.

prohibiting such posting. The policy also referred to posting only "appropriate and respectful content."[147] An example of inappropriate conduct was "when confidential information, trade secrets, internal reports, including financial insider information are revealed."[148] Thus, the application of the potentially problematic policy that could have been interpreted to include working conditions and wages as part of confidential information is seen as limited to company data of a competitive nature.

CONCLUSION

Given the nature of social media, its pervasive reach, and its fast pace of change and innovation, there is considerable uncertainty for employers that promulgate social media policies and for employees with regard what social media activities may be legitimately restricted. For example, even Board precedent in these areas of such change may carry a significant risk of being overruled. For example, the Board has reversed itself in the context of other employer-employee disputes regarding other Internet era issues.[149]

In this regard, the NLRA was enacted in 1935, within the shadow of the great depression. This was before the analogue era that commenced during World War II proceeding into the late 20th century, and well before the digital and Internet era. Accordingly, the explicit language of the Act did not contemplate the issues raised by social media. For example, the instant, asynchronous communication, the permanent nature of social media posts, the sheer magnitude of the power of employee one to communicate with a virtually unlimited number of other people internal and external to the firm.

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

Given that the specific details of the issues presented by social media policies are not explicitly considered by the plain language of the Act, the scope of permissible and impermissible social media policies must be gleaned from the relevant rulings of the Courts, the N.L.R.B., the ALJs, and the General Counsel. In fashioning such rulings, the N.L.R.A. requires balancing the competing interests of employees and employers. When considering the social media activity of individual employees, the cases have tended impose a narrow interpretation of concerted activities and provided employers with broad discretion take remedial action against individuals whose posts to social media threaten a firms legitimate business interests.[150] In contrast, when considering the permissible scope of employers' social media policies, the

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[147] *Walmart Corp.*, Case 11-CA-067171, Advice Memorandum (May 30, 2012) at p. 4.
[148] *Id.*
[149] *Compare Purple Communications*, 361 NLRB No. 126 (December 11, 2014), *with Register Guard*, 351 NLRB No. 110 (2007), *enf'd in relevant part and remanded sub nom., Guard Publishing v. NLRB*, 571 F.3d 53 (D.C. Cir 2009), *rev'd Purple Communications*, 361 NLRB No. 126 (December 11, 2014).
[150] Jessica A. Magaldi, et. al, *How the NLRB's Decisions in Cases Involving Social Media Have Narrowed the Definition of Concerted Activity . . . Whether Employees "Like" It or Not*, __ U. TOL. L. REV. __ (2018).

adjudicating authorities have imposed a narrow interpretation of what is permissible.

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

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

With regard to the rulings that help establish the scope of permissible and impermissible social media policies, these parameters may be circumscribed by the *Walmart* and *Chipotle* decisions previously analyzed in this article. The analyses set forth in prior sections of this article suggest the following regarding the lawful boundaries of employers' social media policies.

Employers may not completely prohibit their employees from engaging with, or participating in social media.

Employers may not impose broad based restrictions on the use of confidential or private information in social media is unlawful under the act since it could restrict protected conversations regarding wages, union activity, unfair treatment by the employer, or work conditions. Employers must make clear that restrictions on dissemination of confidential information do not impact employees' rights to discuss working conditions, wages and the like. Only if they contain sufficient specificity and contextual examples, will such prohibitions against the dissemination of company confidential information with stand scrutiny, and only as it pertains to specifically to trade secrets, such as secret formulas, product features, launch dates, customer lists and similar topics or items of a competitive nature.

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

Employers may prohibit employees from ranting about a firm on social media, but only insofar as the communication is not in and of itself a part of or related to concerted action. In considering this issue, restrictions on employee disparagement of the employer or broad restrictions regarding confidential information will prove difficult for the employer to defend. In this regard, such restrictions will likely be overbroad and thus be construed to have a chilling effect on workers' rights to comment upon working conditions and pay, which are with the core of the protection of the Act. Providing explicit contextual examples (e.g. refrain from disparaging product features, denigrating the employer's customers, or making such comments on the sales floor in front of customers) may overcome such over breadth.

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

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

There are fewer issues regarding limitations as to where and when employees may make use social media. For example, content neutral prohibitions on posting during the workday or on work equipment will have a much lower chance of being interpreted as violations of the Act. However, employees have the right to engage in protected activities on the employer's properties during non-work time and in non-work areas. For example, workers can engage in concerted action in break rooms maintained by the employer.

As disclosed by contrasting the *Walmart* case with the *Chipotle* case, specificity and contextual examples as to restrictions and permitted activity is important and may be the distinction between certain lawful and unlawful social media policies.

Finally, savings clauses that limit that state that social media policy restrictions are not intended to apply to activities protected by the Act will not bring an otherwise unlawful social media policy within the constraints of the NLRA.

APPENDIX A

The following are the Social Media Policy and excerpts of the employee handbook referred to the Chipotle decisions.[151]

Chipotle Social Media Code of Conduct

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

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

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

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

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

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

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[151] The authors have edited out the page numbers and headers that were inserted when the policies were inserted into the Chipotle decisions.

Excerpts from Chipotle Employee Handbook

Solicitation Policy

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

* * *

Chipotle's Confidential Information

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

* * *

Ethical Communications

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

Political/Religious Activity and Contributions

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

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

APPENDIX B

The following is the Social Media Policy of Walmart appended to the Walmart Advice Memorandum.[152]

Social Media Policy

Updated: May 4, 2012

At Walmart, we understand that social media can be a fun and rewarding way to share your life and opinions with family, friends and co-workers around the world. However, use of social media also presents certain responsibilities. To assist you in making responsible decisions about your use of social media, we have established these guidelines for appropriate use of social media.

This policy applies to all associates who work for Wal-Mart Stores, Inc., or one of its subsidiary companies in the United States (Walmart).

Managers and supervisors should use the supplemental Social Media Management Guidelines for additional guidance in administering the policy.

GUIDELINES

In the rapidly expanding world of electronic communication, *social media* can mean many things. *Social media* includes all means of communicating or posting information or content of any sort on the Internet, including to your own or someone else's web log or blog, journal or diary, personal web site, social networking or affinity web site, web bulletin board or a chat room, whether or not associated or affiliated with Walmart, as well as any other form of electronic communication.

The same principles and guidelines found in Walmart policies and three basic beliefs apply to your activities online. Ultimately, you are solely responsible for what you post online. Before creating online content, consider some of the risks and rewards that are involved. Keep in mind that any of your conduct that adversely affects your job performance, the performance of fellow associates or otherwise adversely affects members, customers, suppliers, people who work on behalf of Walmart or Walmart's legitimate business interests may result in disciplinary action up to and including termination.

Know and follow the rules

Carefully read these guidelines, the Walmart Statement of Ethics Policy, the Walmart Information Policy and the Discrimination & Harassment Prevention Policy, and ensure your postings are consistent with these policies. Inappropriate postings that may include

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[152] The authors have edited out the page numbers and headers that were inserted when The Policy was inserted into the Walmart Advice Memorandum.

discriminatory remarks, harassment, and threats of violence or similar inappropriate or unlawful conduct will not be tolerated and may subject you to disciplinary action up to and including termination.

Be respectful

Always be fair and courteous to fellow associates, customers, members, suppliers or people who work on behalf of Walmart. Also, keep in mind that you are more likely to resolved work-related complaints by speaking directly with your co-workers or by utilizing our Open Door Policy than by posting complaints to a social media outlet. Nevertheless, if you decide to post complaints or criticism, avoid using statements, photographs, video or audio that reasonably could be viewed as malicious, obscene, threatening or intimidating, that disparage customers, members, associates or suppliers, or that might constitute harassment or bullying. Examples of such conduct might include offensive posts meant to intentionally harm someone's reputation or posts that could contribute to a hostile work environment on the basis of race, sex, disability, religion or any other status protected by law or company policy.

Be honest and accurate

Make sure you are always honest and accurate when posting information or news, and ifyou make a mistake, correct it quickly. Be open about any previous posts you have altered. Remember that the Internet archives almost everything; therefore, even deleted postings can be searched. Never post any information or rumors that you know to be false about Walmart, fellow associates, members, customers, suppliers, people working on behalf of Walmart or competitors.

Post only appropriate and respectful content

- Maintain the confidentiality of Walmart trade secrets and private or confidential information. Trades secrets may include information regarding the development of systems, processes, products, know-how and technology. Do not post internal reports, policies, procedures or other internal business-related confidential communications.

- Respect financial disclosure laws. It is illegal to communicate or give a "tip" on inside information to others so that they may buy or sell stocks or securities. Such online conduct may also violate the Insider Trading Policy.

- Do not create a link from your blog, website or other social networking site to a Walmart website without identifying yourself as a Walmart associate.

- Express only your personal opinions. Never represent yourself as a spokesperson for Walmart. If Walmart is a subject of the content you are creating, be clear and open about the fact that you are an associate and make it clear that your views do not represent those of Walmart, fellow associates, members, customers, suppliers or people working on behalf of Walmart. If you do publish a blog or post online related to the work you do or subjects associated with Walmart, make it clear that you are not speaking on behalf of Walmart. It is best to include a disclaimer such as "The postings on this site are my own and do not necessarily reflect the views of Walmart."

Using social media at work

Refrain from using social media while on work time or on equipment we provide, unless it is work-related as authorized by your manager or consistent with the Company Equipment Policy. Do not use Walmart email addresses to register on social networks, blogs or other online tools utilized for personal use.

Retaliation is prohibited

Walmart prohibits taking negative action against any associate for reporting a possible deviation from this policy or for cooperating in an investigation. Any associate who retaliates against another associate for reporting a possible deviation from this policy or for cooperating III an investigation will be subject to disciplinary action, up to and including termination.

Media contacts

Associates should not śpeak to the media on Walmart's behalf without contacting the Corporate Affairs Department. All media inquiries should be directed to them.

For more information

If you have questions or need further guidance, please contact your HR representative.

Patient Safety and Modesty:

Policy and Compliance

Tri-State ALSB Edition

by

Tom Ealey

Elizabeth Cameron

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Takeaways:

Failures in protecting patient modesty and safety create large risks.

Risks can be both financial and reputational.

"Failure to supervise" is a common theme in negligence litigation.

Proper "informed consent" is critical to protect the organization.

Constant monitoring, supervision and discipline are critical to compliance.

Tom Ealey, is a professor of business administration at Alma College, and is an experienced health care management consultant, physician practice administrator and compliance officer.

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In the fall of 2016 a tsunami of litigation and criminal investigations hit a Midwest university, the country's most prominent national women's gymnastics organization, and a much heralded sports medicine physician who served both the university and many elite national women gymnasts. [1]

At this writing the physician is in jail without bond for multiple counts of sexual assault and federal charges of possessing child pornography. Plaintiffs are being added weekly in federal litigation. [2] Nationally women's gymnastics is in chaos, and victims are coming forward from other sports.

If the allegations are proven correct, the leaders and supervisors of these organizations failed to notice horrific physician misconduct for more than twenty (20) years!

The lawsuits contain many charges but the central focus directed at the organizations is one key concept – *failure to supervise*.

The good news is most medical providers and provider organizations will never face such a nightmare.

However, every physician, provider and provider organization has potential financial and reputational risks while providing care to patients. Every physician, provider and provider organization has a duty to create safety and modesty policies for patients and ensure compliance with those policies.

A Duty of Care

Health care services by necessity involve personal and intimate contact with patients. Most of us know this through our personal and professional experiences.

Providers and their employing organization have an ethical, professional and risk management duty to protect the privacy, modesty and physical security of patients.

Some patients have gender preferences for providers, some for reasons of modesty and some for religious or cultural reasons. Sometimes these wants are easy to accommodate, but not always. Every effort should be made to accommodate patients within the resources available.

"Chaperone" policies

Physicians and their teams; nurses, technicians, front desk personnel, surgery team members, hospital staffers and etc. all have a duty to protect modesty and privacy. Protecting modesty is often very difficult, many medical exams and treatments are by necessity personal and invasive.

A physician or other professional should never view or touch a patient with any prurient interest, which is totally and completely forbidden.
These issues cut through all genders of provider-patient; male-female, male-male, female-male, and female-female. From historical experience though, we know a substantial of the reported problems are male providers with female patients. [3]

Those of us who have spent considerable time in physician offices know the nurses and medical assistants tend to run in and out of exam rooms as they are required to multitask through the day.

The most frequent excuses for noncompliance – the physician was in a hurry, the office was understaffed, the chaperone stuff is silly, patients aren't concerned, this patient knows me, efficiency is important – none of these justify creating major risks for the patient or organization.

When possible there should be a "chaperone" – a spouse or parent or friend or a professional staffer in the room every minute but the third person is critical when intimate areas are exposed or examined. The gender of the patient and physician is irrelevant.

How to insure compliance? Sound policies must be implemented to insure compliance through training, and floor supervision watching the flow of patients flow of staffers evaluating compliance..

Informed Consent

All providers and staff must deal with patients and families in a courteous manner, present full and accurate information in the clearest terms possible, answer questions and above all get the best possible outcomes.

Accurate information is essential to a major compliance issue; no patient should ever be touched, examined or treated without informed consent (excluding emergencies). [4]

In health care "informed" is a term of art as much as a term of law – how much does the patient need to know, how much can the patient understand, how much risk information is enough or is too much, what are the intellectual and cognitive abilities of the patient (and the family chaperone), how much must parents and guardians be told, and etc.?

Physician offices tend to work on an implied consent standard – if a patient calls and makes an appointment, shows up, fills out paperwork, signs a HIPAA form and walks to the exam room that indicates consent to be examined. Any further procedures, exams or tests require additional consent, which should, at a minimum, be noted in the medical records, and surgery requires an additional written consent with a patient signature.

Only patients with legal "capacity" (ability to make their own decisions) can give informed consent to medical treatment. This may require "proxy consent" by a power-of-attorney, spouse, guardian, etc. As a general rule minors in most states do not have capacity, but review the discussion below and consult your legal counsel when setting policy.

There are special situations in which capacity is not evident – cognitive disability, dementia, Alzheimer's, substance abuse – that require special sensitivity to consent issues. In a perfect world these patients would have power-of-attorneys (POAs) or guardians, but many do not. Often a spouse or family member becomes a *de facto* POA of necessity.

These situations are not reasons for denial of care, but are a reasons for caution including as much communication as is possible and thorough documentation. Most clinicians have documented

something to the effect of "patient is oriented to person, place, time and situation" or "patient is oriented to person and place but not to time and situation." Failure of any criteria is cause for extra caution and additional documentation.

Informed Consent for Minors

For most minors informed consent can only come from parents or guardians, emergent situations excepted. Proper consent before examining or treating a minor is absolutely critical, even more so if the exam involves any undressing or examination of intimate areas.

Clear policies and rigid enforcement are absolutely essential during the treatment of minors.

Providers should check state statutes, because there could be one or more special categories of minors. A process to verify age is essential, some minors may look like adults (requesting a driver's license or other ID at check in is one approach.

"Emancipated minors" in states would be minors who are married or who have totally severed a relationship with their parents and are self-sufficient. How to verify the emancipation is a judgment call.

"Mature minors" is a category created largely for young women seeking gynecological and reproductive health care. A thorough knowledge of state law on this issue is crucial for any provider offering such services, particularly laws on contraceptives and abortion services.

The concept of "adolescent health care" has developed and expanded, creating another categorization scheme in which providers can consider health care for those under the age of 21. [ ]

The authority of minors to refuse treatment is murky and should be reviewed on a state law level, but for an older minor or for an elective procedure (therapy for an athlete?) caution should be taken.

Physicians and parents, however, should collaborate with minor children and include them to the greatest extent possible in decision making, unless there are age or other persuasive reasons for exclusion.

The risk in dealing with minors is higher than the risk of dealing with adults, clinician beware.

Minors Away From Home

Every year millions of minors attend summer youth camps and sports camps, some operated by youth organizations and some by colleges and universities (minors and older athletes with Olympic ambitions may attend specialized camps all through the year).

Typical registration policies require a physical exam and/or a health history, parental contact information and a broad consent focused on emergency services.

Both sponsoring organizations and providers (paid or volunteer) need to set and adhere to policies designed to protect the health and modesty of the youth participants. An enforced chaperone rule is very critical to protect both the minors and the providers.

When provider entities allow clinicians to work with camps or to serve as team physicians, liability may follow the provider. At the very least malpractice insurance policies should be reviewed for coverage or lack of coverage. Clinicians should be required to obtain permission before volunteering. If the organization is involved (orthopaedic groups providing team physicians for example) there should be clear policies on the arrangement with the school or camp and regulations for treatment and follow-up.

Duty to Supervise

All employers have a duty to supervise employees, risk management requires us to always be aware of vicarious liability. Employers of clinicians have a major duty to supervise, due to the nature of the contact and the potential liability from any malpractice or other negligence.

This duty cannot be discharged sitting in an office waiting for complaints. Supervisors must be in clinical areas watching and observing patient flow and observant of protocols (there is also human resources value to being visible).

A classic management book calls this "management by wandering around" or "MBWA," but the wandering must be intentional and monitoring details of operational performance. [6] And there are human resources advantages to supervisors being present and visible on a regular basis.

Can Physicians be Supervised?

Anyone who has worked extensively with physicians knows the profile: smart, highly educated, ambitious, confident and somewhat driven.

This makes for a confident physician but does not make for someone who accepts supervision easily, or at all.

Some physicians will accept supervision from physician executives, some chafe even at that. Physicians tend to accept regulations when necessary, say the Joint Commission regulations for surgery units.

Physicians tend toward compliance when there is a culture of compliance, such as when the staff is trained to protect patient privacy and acts accordingly. A culture of compliance is reinforced when other physicians and physician leaders insist on compliance with clinical safety and modesty procedures.

With the movement toward employment of physicians (rather than the physician working in an independent practice unit) compliance risks falls more heavily on the hospital, network, or university, necessitating a strong culture of compliance.

"An internet search for "how to supervise physicians" yielded thousands of responses, with all of the articles reviewed being about *how physicians should supervise other providers.*

Physicians cannot be allowed to override or ignore safety, privacy and modesty policies, and must not be allowed to pressure staff members to disregard policies and procedures.

Supervising Other Providers

All providers and staff members who contact patients in clinical settings must be subject to the same policies, trained to follow those policies, supervised for compliance, and must have a safe whistle blower outlet.

This includes physician assistants, nurse practitioners, chiropractors, therapists (physical, occupational, speech), therapy aides, athletic trainers and assistants, imaging technicians, nurses, nurse aides, office medical assistants, lab techs and anyone else who sees patients face-to-face, places patients in exam rooms, staff who are involved with patients who are in any state of undress or staff who lay hands on patients in any way.

For an overwhelming majority of providers and staff there is nothing prurient about their work with patients, professionalism trumps curiosity or discomfort.

But for a tiny tiny minority of providers, patient contact has a different meaning, and those providers create a safety and liability nightmare.

No provider is too prestigious or too important to be beyond supervision for compliance with clinical policies and procedures.

The Basics of Modesty

Many of us know the queasy feeling one has when shuffling down the hospital hallway in one of those awful hospital gowns. We tolerate the embarrassment because we know the intentions are good and we want to help those who are trying to fix our medical problems.

Medical exams, treatments, surgery, procedures and daily care involve states of undress and very intimate viewing and touching. This is hardly news to clinicians, they have been in this environment since very early on in their education and training.

This is not routine for patients, even when the activity is appropriate. When the activity is inappropriate it becomes a potential liability nightmare and also may cross the line to criminal activity.

When such activities become routine for providers, compliance with procedures may slide.

Every activity done to and with patients should be thought out, procedures developed and communicated through training, and appropriate supplies provided and used.

Some patients will assist the process by wearing appropriate clothing, other will not have that foresight. Appropriate gowns and draping materials should be available in the clinical environment (an orthopaedic office would have different needs than a gynecological office). Curtains must be installed in all appropriate areas.

The Healing Touch

No clinician should ever touch a patient without clear informed consent, emergent situations excepted.

No clinician should ever touch a patient with any prurient intent or interest.

If there is any indication consent is not given, the clinician should back off and be certain there is a proper level of understanding and consent.

No clinician should ever touch or examine a minor without a very clear consent from a parent, guardian, or a minor legally classified as mature or emancipated within state law, emergent situations excepted.

The current scandals warn us of problems with special situations – a minor away from home or in an athletic program (for example a gymnastics club), a general consent for treatment, an expectation of routine treatment by athletic trainers and a sports medicine physician, and a level of trust based on the understanding that almost all clinicians are decent caring people, and parents who trust the clinicians.

When this goes bad, it is very very bad.

Exhibit #1:

Policy and procedure statements for patient safety and modesty.

"Chaperone" policy

Gowns, drapes and curtain policy

therapy and treatments

Imaging, testing, procedures

Gynecology and Obstetrics policies

Gloving policy (and related universal precaution policies)

Informed consent policy

Informed consent minors: examination and treatments

Minors: emancipated (see state law)

Minors: "mature" minors (see state law

Minors: abortion rights (see state law)

Mental Illness: patient and provider protection

Cognitive impairment, patient and provider protection

Reporting and complaint procedures

Notes:

[1] Excellent journalism on these cases is available from www.lansingstatejournal.com (emphasizing problems at Michigan State University) and www.indystar.com (emphasizing problems with national gymnastics programs)

[2] see *Denhollander and Jane Doe plaintiffs versus Michigan State University et. al*

United States District Court
Western District of Michigan (Southern Division (1))
Civil docket 1:17-cv-00029-GJQ-ESC

Note: due to a recent court order subsequent intervenor plaintiffs will file new cases with similar or identical allegations, causing multiple case dockets

[3] for example see the series entitled "Doctors and Sex Abuse" (c) 2015, the Atlanta Journal Constitution, http://doctors.ajc.com

[4]
https://www.jointcommission.org/assets/1/23/Quick_Safety_Issue_Twenty-One_February_2016.pdf

http://journalofethics.ama-assn.org/2012/07/hlaw1-1207.html

https://www.cms.gov/Medicare/Provider-Enrollment-and-Certification/SurveyCertificationGenInfo/downloads/SCLetter07-17.pdf

http://www.acog.org/Resources-And-Publications/Committee-Opinions/Committee-on-Ethics/Informed-Consent (reaffirmed 2015)

Journal of Medical Ethics http://jme.bmj.com/content/40/7/435

[5] for detailed information see:

Center for Adolescent health and The Law, http://www.cahl.org

See also the Committee on Adolescence, American Academy of Pediatricians: policy papers found at http://pediatrics.aappublications.org/collection/committee-adolescence

Coleman, Rosoff: "The Legal Authority of Mature Minors to Consent to General Medical Treatment" Pediatrics, April 2013, Vol. 131, No. 4

[6] Peters, Waterman, "In Search of Excellence: Lessons from America's Best-Run Companies" HarperBusiness; Reprint edition (2006) Original Edition Harper and Row (1982)