The Anti-Social Network:
Facebook, Smart Phones and Other Social Media in Employment

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Part I – Social Media and the National Labor Relations Act

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I. An Overview of the State of Social Media and the Workplace

A. Proskauer Rose, LLP, *Social Networks in the Workplace Around the World* (2011): surveyed 120 multinational companies. Some key findings:

- 76.3% use social networking for business purposes; 37.3% have done so for less than one year
- 29.3% actively block employee access to social networking sites at work
- 27.4% monitor the use of social networking sites at work
- 44.9% do not have any social networking policy in place
- 56.6% have had to deal with issues concerning misuse of social networks and 31.3% have disciplined employees for misuse of social networks

II. Key Provisions of the NLRA

A. Section 7: The Heart of the NLRA

Employees shall have the right to self organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and *to engage in other concerted activities for the purpose of* collective bargaining *or other mutual aid and protection* . . . (emphasis added)

B. Section 8(a)(1)

It shall be an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7

III Examples of 8(a)(1) Violations

A. Disciplining, discharging or taking other adverse action against an employee because of the employee's Section 7-protected activity

B. Taking adverse action to preempt an employee's activity from becoming Section 7-protected. *See Parexel International, LLC*, 356 N.L.R.B. No. 82 (Jan. 28, 2011)

C. Maintaining an employment policy or conduct rule that forbids employees from engaging in Section 7-protected activity or that is worded in such a way that it would deter a reasonable employee from engaging in Section 7-protected activity. *See, e.g.*, *Lafayette Park Hotel*, 326 N.L.R.B. 824 (1998), *enf'd*, 203 F.3d 52 (D.C. Cir. 1999) (holding the following work rules violative of § 8(a)(1): being uncooperative with supervisors, employees, guests and/or regulatory agencies or otherwise engaging in conduct that does not support the Lafayette Park Hotel's goals and objectives; divulging Hotel-private information to employees or other individuals or entities that are not authorized to receive that information; making false, vicious, profane or malicious statements toward or concerning the Lafayette Park Hotel or any of its employees; unlawful or improper conduct off the hotel's premises or during non-working hours which affects the employee's relationship with the job, fellow employees, supervisors, or the hotel's reputation or good will in the community; forbidding employees from using the restaurant or cocktail lounge for entertaining friends or guests without the approval of the department manager; forbidding employees from fraternizing with hotel guests anywhere on hotel property; requiring employees to leave the premises immediately after the completion of their shift and are not to return until the next scheduled shift.); *Heck's Inc.*, 293 N.L.R.B. 1111 (1989) (holding unlawful rule requesting employees not to discuss their wages with each other absent business justification).

IV Elements of Section 7 Protection

A. The activity must be concerted.

Clearly, when two or more employees act together, their activity is concerted. However, the action of a single employee may be considered to be constructively concerted. In *NLRB v. City Disposal Sys., Inc.*, 465 U.S. 822 (1984), the Supreme Court upheld the Board's *Interboro* Doctrine which regards a single employee acting alone but asserting rights under a collective bargaining agreement as engaged in constructive concerted activity. However, the Board's position with respect to constructive concerted activity in the non-union setting has varied over the years. *Compare Alleluia Cushion Co.*, 221 N.L.R.B. 999 (1975) (holding that a single employee's complaint of safety issues to a state occupational safety and health agency was constructively concerted) *with Meyers Indus., Inc.*, 281 N.L.R.B. 882 (1986), *aff'd sub nom* Prill v. NLRB, 835 F.2d

1481 (D.C. Cir. 1987) (overruling *Alleluia Cushion* and holding that to be concerted employee must act "with or on the authority of other employees").

B. The activity must be for mutual aid and protection.

Different Boards have taken varying approaches to how broadly they construe what is for mutual aid and protection. *Compare Holling Press, Inc.*, 343 N.L.R.B. 301 (2004) (holding that employee's request to coworker to testify before state human rights agency in support of her sexual harassment complaint was for sole benefit of employee and not for mutual aid and protection) *with D. R. Horton, Inc.*, 357 N.L.R.B. No. 184 (Jan. 3, 2012) (holding that class or collective action law suit or arbitration claim is concerted activity for mutual aid and protection).

C. Even if the activity is concerted and for mutual aid and protection, it may be so indefensible as to be denied protection.

See NLRB v. IBEW Local 1229 (Jefferson Standard Broadcasting Co.), 346 U.S. 464 (product disparagement disloyal and not protected); *compare Timekeeping Sys., Inc.*, 323 N.L.R.B. 244 (1997) (holding employee's mass e-mail to coworkers sarcastically criticizing employer's new paid time off policy protected despite its arrogant, and perhaps boorish, tone) *with Endicott Interconnect Technologies v. NLRB*, 453 F.3d 532 (D.C. Cir. 2006) (holding unprotected employee's postings on local newspaper's blog criticizing employer's reduction in force for leaving "gaping holes" in areas of crucial technical knowledge and claiming that the "business is being tanked by a group of people that have no good ability to manage); *see also Atlantic Steel Co.*, 245 N.L.R.B.814 (1979) (holding that whether employee statements internally, such as to supervisors, loose their protection depends on the place of the discussion, the nature of the discussion, the nature of the outburst and whether the outburst was provoked by unfair labor practices; key is the degree to which it disrupts or undermines discipline).

V. The NLRB's Scant Authority Dealing with Social Media

A. *Bay Sys Technologies, LLC*, 357 N.L.R.B. No. 28 (Aug. 2, 2011):

Default judgment entered where employer withdrew its answer to the complaint. Factual allegations of the complaint deemed admitted included that employees posted comments on Facebook critical of delays in their paychecks; comments were republished by local newspaper; employer discharged one of the employees because of the posting and told other employees that it was disappointed in their conduct, that their conduct breached their confidentiality agreements, threatened them with legal action; implied that they would be discharged unless they provided written explanations; threatened that their supervisors would be conducting performance evaluations in which their postings would be considered; interrogated employees about their postings; told employees that if they had complaints they should find other jobs and told employees that they should have

brought their complaints to management instead of posting them on Facebook. Based on the admitted factual allegations, the Board held that the postings were protected by Section 7 and the employer violated Section 8(a)(1).

B. *Hispanics United of Buffalo, Inc.*, No. 3-CA-27872, JD-55-11 (NLRB ALJ Sept. 2, 2011)

An employee of a not-for-profit social services agency sent text messages to various coworkers accusing them of not properly performing their jobs. Another employee posted on her Facebook page a message naming the coworker as feeling "that we don't help our clients enough," saying that she "about had it," and asking, "My fellow coworkers how do u feel?" Several other employees responded with posts commenting about their jobs and clients. The employee who had sent the text messages posted asking the employee who made the original Facebook post to stop her lies.

The employee who had sent the text messages complained of bullying and harassment to the employer's executive director. The executive director fired each of the employees who posted on the matter, telling them that they violated the employer's policies against harassment and that their harassment had caused the employee to suffer a heart attack.

The ALJ held that the employees' "Facebook communications with each other, in reaction to a co-worker's criticisms of the manner in which HUB employees performed their jobs, are protected." Among other findings, the ALJ opined that the employees "were taking a first step towards taking group action to defend themselves against the accusations they could reasonably believe Cruz-Moore was going to make to management." The ALJ further held that the employees' conduct was not so indefensible as to forfeit Section 7 protection. The ALJ found that the conduct did not violate the employer's anti-harassment policy.

C. *Karl Knauz Motors, Inc. d/b/a/ Knauz BMW*, No. 13-CA-46452, JD(NY)-37-11 (NLRB ALJ Sept. 28, 2011)

The employer, a BMW car dealership, launched a redesigned BMW 5 Series car with an "Ultimate Driving Event." The employer's general sales manager, in a meeting with the sales representatives, advised them that at the event it would have a hot dog cart and would also serve cookies and chips. Several sale reps voiced concern that the food was not sufficiently upscale for the event. The sales reps' compensation included commissions and bonuses based on sales volume.

The employer also operated an adjacent Land Rover dealership. A few days after the BMW event, a sales rep at the Land Rover dealership allowed a customer's 13 year old son to sit in the driver's seat. The child engaged the vehicle, rolled over the customer's foot and down an embankment and into a pond. The sales rep was thrown into the water. A sales rep at the BMW dealership was fired after he posted pictures of the Ultimate Driving Event on his Facebook page with sarcastic comments about it and pictures of the Landrover in the pond with sarcastic comments.

The ALJ held that the BMW postings were protected by Section 7. The postings related to the common complaints of the sales reps about the food offered at the event which was linked to their concerns that the food might inhibit sales and, consequently, their earnings. The ALJ found that the sarcasm employed did not rise to the level of disparagement such as to constitute unprotected disloyalty.

The ALJ held that the Landrover posting was not protected. The sales rep acted alone "apparently as a lark, without any discussion with any other employee . . . and had no connection to any of the employees' terms and conditions of employment." The ALJ also found, as a matter of fact, that the discharge was motivated by the Landrover posting and not the BMW posting and, therefore, concluded that the discharge did not violate the NLRA.

The ALJ, however, found that several provisions of the employer's handbook violated Section 8(a)(1). These were provisions prohibiting employees from discussing other employees with "attorneys, peace officers, investigators or someone who wants to 'ask a few questions;'" and providing that employees were "expected to be courteous, polite and friendly to our customers, vendors, suppliers, as well as to their fellow employees. No one should be disrespectful or use profanity or any other language which injures the image or reputation of the Dealership." However, the ALJ found that a rule requiring employees to "display a positive attitude toward their job" did not violate Section 8(a)(1) because employees would reasonably understand it to protect the dealership's relationship with its customers rather than restrict their Section 7 rights.

D. *Report of the Acting General Counsel Concerning Social Media Cases*, GC Memo OM 11-74 (Aug. 18, 2011)

The report relates cases referred by the regions to the General Counsel's Division of Advice. Two of the cases resulted in the ALJ decisions detailed above. The others are:

1. The General Counsel found an employer violated Section 8(a)(1) by discharging an employee whose supervisor had denied her request for union representation when she was required to complete an incident report about a customer complaint. The employee had posted remarks criticizing the supervisor on her Facebook page and several coworkers responded. The General Counsel found the postings protected even though one referred to the supervisor as a "scumbag." The General Counsel also found employer policies prohibiting employees from depicting the company in any media without company permission and from making disparaging remarks when discussing the company or supervisors violated Section 8(a)(1).

2. An employee posted comments on her Facebook page criticizing the employer's tax withholding and the fact that she now owed state income tax and alleging that the employer could not even do paperwork correctly. Another employee clicked "like" in response and several other employees also posted

comments, including one who referred to the employer as an asshole. Two of the employer's customers also participated in the conversation. The employer fired two of the employees for disloyalty. The General Counsel found the postings protected and the discharges illegal. The General Counsel also found that an employer policy that stated that employees were subject to discipline for engaging in "inappropriate discussions" on the Internet concerning the employer, management and coworkers violated Section 8(a)(1) because employees could reasonably understand it to prohibit Section 7-protected activity.

3. A newspaper reporter was discharged for postings on his Twitter account in which he identified himself as a reporter for the employer. One tweet criticized the paper's copy editors; others related to his public safety beat, homicides, sexual content and a criticism of a local television station. The General Counsel determined that the employee's conduct was not protected by Section 7 because it did not involve other employees (not concerted) and did not relate to working conditions (not for mutual aid and protection).

4. A bartender was fired for posting on Facebook criticism of his employer's policy that wait staff need not share their tips with bartenders even when the bartenders assist in serving food. The General Counsel found the posting not protected because, although it related to working conditions, it was not concerted as the bar tender did not discuss it with coworkers, no coworker responded to the posting and there were no employee meetings or attempts to initiate collective action concerning the tipping policy.

5. An employer discharged an employee for posting criticisms of the employer on the wall of the Facebook page of one of her U.S. senators. The General Counsel found the employee's conduct unprotected because it was not concerted. The employee did not discuss the postings with any other employees and the postings were not aimed at initiating group action.

6. A retail store employee was fired for posting on her Facebook page complaints about the assistant store manager, calling him a "super mega puta" and complaining that she was chewed out for mispriced or misplaced merchandise. The General Counsel concluded that her postings concerned personal gripes and were not protected by Section 7.

7. The General Counsel found the following provisions in employer social media policies over-broad and in violation of Section 8(a)(1):

   a. A policy prohibiting employees from using any social media that might violate, compromise or disregard the rights and reasonable expectations as to privacy or confidentiality of any person or entity.

   b. A policy prohibiting any communication that constituted embarrassment, harassment or defamation of the employer or any employee, officer, board member or staff member or that lacked

truthfulness or might damage the employer's reputation or goodwill.

c. A policy prohibiting employees from talking about company business, posting anything they would not want their managers or supervisors to see or could put their jobs in jeopardy; disclosing inappropriate or sensitive information about the employer or posting pictures or comments that could be construed as inappropriate.

d. A policy prohibiting employees from posting personal information regarding employees, company clients, partners or customers without their consent and precluding the use of the employer's logos and pictures of the employer's store, brand or product without written authorization.

8. The General Counsel found the following social media policies lawful:

a. A policy prohibiting employees from pressuring coworkers to connect or communicate with them via social media.

b. A policy that provided that it was imperative that the company's public affairs office be the one voice speaking for the company with the media. The policy prohibited employees from using cameras in the store or parking lot without prior approval. It also required employees to respond to media inquiries by stating that they were not authorized to speak for the employer. The General Counsel found that the policy was designed "to ensure a consistent controlled company message and limited employee contact with the media only to the extent necessary to effect that result . . ."

E. *Report of the Acting General Counsel Regarding Social Media Cases,* GC Memo OM 12-31 (Jan. 24, 2012)

The General Counsel's second report covers 14 cases on which the General Counsel decided to issue complaints or dismiss charges since the first report.

1. Several cases dealt with the legality of employer social media policies. The General Counsel found unlawful policies that broadly prohibited employees from making disparaging comments about the employer, prohibited employees from identifying themselves as the employer's employees unless discussing terms and conditions of employment in an appropriate manner, prohibited "disrespectful conduct" and "inappropriate conversations," prohibited disclosure of "confidential, sensitive or non-public information," prohibited use of the employer's name or service marks outside the course of business without prior approval. On the other hand, the General Counsel found lawful policies that prohibited comments that were "vulgar, obscene, threatening, intimidating, harassing or in violation of the employer's workplace harassment and anti-discrimination

policies, and policies prohibiting employees from using or disclosing confidential or proprietary information such as personal health information about customers or patients, launch and release dates and pending reorganizations.

2. The General Counsel continues to draw fine lines between protected discussions of working conditions and unprotected personal gripes. Similar fine lines are drawn between concerted activity and activity deemed not concerted. The General Counsel appears to place particular emphasis on whether the social media posting grew out of workplace discussions, whether it was aimed at inciting other employees to action and whether coworkers responded to the posting.

3. The General Counsel addressed issues of alleged employer surveillance. The GC opined that "even where employees are engaging in protected activity, there can be no unlawful surveillance if the employer's agent was invited to observe." Consequently, when employees friend their supervisors on Facebook, they are inviting their supervisors to their postings.

Part II - Employer Social Media Policies and the Duty to Bargain

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I. Overview of Employer Social Media Policies

A. Social Media Statistics:

1. As of 2011, there are 500,000,000 active Facebook users (1 in every 13 people on earth)

2. Over 70% of individuals who use the internet in the United States are members of Facebook

3. Over 1.5 million businesses maintain active pages on Facebook as of 2010

4. Twitter has over 106 million user accounts and 180 million visitors each day

5. Youtube exceeds over 2 billion views each day

6. 24 hours of video are uploaded every minute on Youtube

B. Employer Social Media Policy Statistics:

1. Proskauer Rose LLP 2011 survey:

a) 44.9% of employers do not have <u>any</u> social media policy in place

b) 31.3% of employers have disciplined employees for misuse of social media

2. Society for Human Resource Management (SHRM) survey (Jan. 12, 2012):

a) 40% of organizations have a formal social media policy—leaving vast majority of organizations with no formal policy in place

b) 39% of employers reported monitoring employee social media activity on employer-owned computers or handheld devices

c) Smaller organizations less likely to have a policy compared with organizations with 100+ employees

3. Most common components of employer social media policies:

a) Code of conduct for employee use of social media for work-related purposes

b) Code of conduct for employee use of social media for personal purposes

c) Note regarding employer's right to monitor social media usage

d) Guidelines for social media communications and for responding to feedback on social media

II. The Duty to Bargain

A. The NLRA

1. Section 8(d): For purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement or any question arising thereunder . . . but such obligation does not compel either party to agree to a proposal or require the making of a concession . . .

2. Section 8(a)(5): It shall be an unfair labor practice for an employer or its agents to refuse to bargain collectively with the representatives of its employees.

3. Generally, a matter is mandatorily negotiable pursuant to the NLRA when it is "plainly germane to the working environment" and not among those "managerial decisions, which lie at the core of entrepreneurial control." See, e.g., Ford Motor Co. v. NLRB, 441 U.S. 488 (1979).

4. Generally, an employer may not unilaterally implement changes regarding mandatory subjects of bargaining prior to impasse.

B. The Public Sector

1. No single statutory framework, and for those states that continue to recognize a duty to bargain between public employers and the representatives of their employees, the approaches vary.

2. Public Sector Sampler:

a) *Illinois*: three part test considers whether the topic: (1) is a matter affecting employee wages, hours and terms and conditions of employment; (2) if it is a matter of inherent managerial authority; and (3) a balance of the benefits of bargaining versus the burdens bargaining imposes on the employer's decision-making process

b) *California*: a subject is within the scope of representation if (1) it involves the employment relationship; (2) is of such concern to both management and employees that conflict is likely to occur and the mediatory influence of collective bargaining is an appropriate means of resolving the conflict; and (3) the employer's obligation to negotiate would not unduly abridge its freedom to exercise those managerial prerogatives (including matters of fundamental policy) essential to the achievement of the employer's mission.

c) "Laundry List" approaches (e.g., Iowa PERA)

C. Duty to Provide Information

1. The duty to bargain under the NLRA generally requires that employers provide information to exclusive bargaining representatives where that information is relevant to mandatory subjects of bargaining. See, e.g., NLRB v. Truitt Mfg. Co., 351 U.S. 149 (1956).

2. Broad discovery-type standards control relevance determinations.

3. Public sector jurisdictions that recognize the duty to bargain between public employers and the exclusive representatives of their employees apply a similar standard.

4. In certain circumstances, an employer's confidentiality interests may justify the non-disclosure of certain information. See, e.g., Detroit Edison Co. v. NLRB, 440 U.S. 301` (1979). However, an employer must do more than simply assert that information is "confidential," and instead must bargain toward an accommodation between the union's information needs and the employer's legitimate confidentiality concerns. See, e.g., U.S. Testing Co. v. NLRB, 160 F.3d 14 (D.C. Cir. 1998).

D. Waiver

1. In both the private and public sectors, it is well settled that Section 8(a)(5)—and its counterparts—is not violated when the exclusive representative has or may be said to have waived its right to bargain about a specific subject. It is equally well settled, however, that the waiver of a statutory right must be clear and unmistakable. See, e.g., Metropolitan Edison Co. v. NLRB, 460 U.S. 693 (1983).

2. The NLRB has held that generally worded management rights clauses and zipper clauses will not be construed as waivers of statutory bargaining rights. See, e.g., Johnson Bateman, Co., 295 NLRB 180 (1989).

III. Social Media Policies: Mandatory Subjects of Bargaining?

A. To date, the NLRB has not directly addressed this issue.

1. As of January 24, 2012, NLRB activity concerning social media has arisen in the context of non-union settings.

2. Reportedly, a failure to bargain over an employer's social media policy was alleged in the following cases:

a) Thomson Reuters Corp., Case No. 2-CA-39682 (employer alleged to have unilaterally implemented a new policy concerning the use of Twitter).

(1) The Region determined ultimately that the policies were issued outside the statute of limitations and that no 8(a)(5) allegation could proceed.

b) Children's Hospital of Pittsburgh of UPMC, Case No. 6-CA-37047.

(1) A complaint issued alleging that the employer promulgated and maintained a social networking policy without prior notice to the union that represented the employees covered by the policy, and without providing an opportunity to the union to bargain over the conduct covered by the policy or the effects of such conduct. Ultimately, the parties settled.

B. Relevant precedent that current NLRB may examine for guidance:

1. *E-mail use policies*: In ANG Newspapers, 350 NLRB 1175 (2007), the NLRB affirmed an administrative law judge's decision, which recognized that, "There is no dispute that a rule respecting employee use of the employer's e-mail system, like a rule respecting employee use of employer telephones, is a mandatory subject of bargaining." See also, TXU Electric, 2001 NLRB GCM LEXIS 74 (2001)(finding that employer e-mail policy was a plant rule clearly affecting terms and conditions of employment and was a mandatory subject of bargaining).

2. *Telephone use policies*: In Illiana Transit Warehouse Corp., 323 NLRB 111 (1997), and Treanor Moving & Storage Co., 311 NLRB 371 (1993),

the NLRB held that telephone use policies constitute mandatory subjects of bargaining.

3. *Bulletin board use policies*: The NLRB and courts have held that bulletin boards are mandatory subjects of bargaining. See, e.g., NLRB v. Proof Co., 242 F.2d 560 (7th Cir. 1957); Arizona Portland Cement Co., 302 NLRB 36 (1991).

4. *Policies/Rules that establish grounds for discipline*: The NLRB has held that work rules that can be the basis for discipline are mandatory subjects of bargaining. See, e.g., Praxair, Inc., 317 NLRB 435 (1995); Womac Industries, 238 NLRB 43 (1978); Murphy Diesel Co., 184 NLRB 757 (1970), enf'd, 454 F.2d 303 (7th Cir. 1971).

5. *Surveillance cameras*: The NLRB and courts have found that the use of surveillance cameras is a mandatory subject of bargaining. See, e.g., Nat'l Steel Corp., 335 NLRB 747 (2001); enf'd, 324 F.3d 928 (7th Cir. 2003); Colgate Palmolive Co., 323 NLRB 515 (1997).

6. *Social Media Policies—"Core of Entrepreneurial Control"*: Recalling the statistics noted above, and namely that 1.5 million businesses have Facebook pages, it is certainly possible that a social media policy represents a management decision striking at the core of entrepreneurial control. Businesses increasingly rely on social media platforms to relate to customers and operate their businesses—Groupon and many of the "hyper deal" web sites are prime examples.

C. Relevant Public Sector Precedent:

1. Scant decisions address social media policies, let alone whether any mandatory duty to bargain exists with respect to such policies.

2. The California PERB has held that the decision to implement a computer resource policy was a matter of inherent managerial prerogative and therefore not negotiable. California Faculty Ass'n v. Trustees of California State Univ., 31 PERC ¶152 (CA PERB 2007). It also held, however, that the employer was not relieved of its duty to negotiate the effects of its decision regarding a computer resource policy on bargaining unit members (e.g., discipline and union access rights). Id.

3. Even assuming that the use of electronic surveillance or monitoring to track employees, the Florida PERC dismissed an unfair labor practice charge alleging that an employer unilaterally changed its past practice of monitoring employees by personal observation only. Clay Educational Staff Prof. Ass'n v. Sch. Dist. of Clay Cnty., 34 FPER ¶139 (FL PERC 2008); see also, Orange Cnty. Prof. Firefighters, IAFF Local 2057 v.

Orange Cnty. Bd. of Cnty. Commissioners, 38 FPER ¶131 (FL PERC 2011) (holding that employer's social media policy was overbroad; failure to bargain was not an issue).

4. The Michigan ERC likewise dismissed an unfair labor practice charge in which it was alleged that a school district improperly refused to bargain over its implementation of a web page program for teachers. Grand Haven Public Schools and Grand Haven Educ. Ass'n, 19 MPER ¶82 (MI ERC 2006). The agency found that implementation of that program was a prohibited subject of bargaining under the Michigan PERA, which prohibited public school employers and unions from bargaining over decisions concerning the use of technology to deliver educational programs and services and staffing to provide the technology or the impact of these decisions on individual employees or the bargaining unit. Id.

Part III – The Intersection of Social Media and Labor Arbitration of Discipline and Discharge Cases

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I. Is Social Media an Attractive Nuisance for both Employees and Employers?

II. The Exclusionary Rule in Labor Arbitration – Should Communications Obtained from Social Media Ever Be Excluded? If so, When?

A. A Long-Standing Difference of Opinion. The more things change…

1. The view that evidence wrongfully obtained should be excluded from labor arbitration hearings:
"It was the position of the labor members of the committee that an employee does not give up all of his personal rights as a condition of employment. They are of the conviction that conduct, such as breaking into a locker exclusively assigned to an employee for his own use, forcible search of his person, or breaking into his automobile is conduct which should not be tolerated in the employer-employee relationship, and the arbitrator should exclude such evidence upon objection or a motion to suppress." *Problems of Proof in the Arbitration Process: Report of the Chicago Area Tripartite Committee, in* PROCEEDINGS OF THE 19TH ANNUAL MEETING OF THE NAA 105 (Jones ed., BNA Books 1967)
2. The contrary view:
"…the management members of the committee were of the opinion that an employee does not have the right to have excluded from evidence in an arbitration case evidence which is relevant and important to reaching the right result." *Id.*
3. And with regard to evidence provided by "closed circuit TV" systems:
"The committee was in agreement that if an employee is aware of the fact that he is being observed, the testimony of the observant should be admissible. The labor members took a position, however, than if an employee does not know of the existence of the TV system, the evidence should be inadmissible. The same division took place with reference to the use of motion pictures." *Id.*
4. Marvin Hill and Anthony Sinicropi took up this debate in their treatise, *Evidence in Arbitration,* 77-84 (BNA Books 1980) noting on one hand the award and rationale of Arbitrator Lohman:

"…both the knowledge and possession of the knife by the company were brought about under highly questionable if not illegal procedures. Knowledge, even though incriminating, if acquired through such

illegitimate procedures, is of questionable validity in bring action against the individual…" *Campbell Soup Co.,* 2 LA 27 (Lohman, 1946)

On the other hand the authors cited Arbitrator David Dolnick's reasoning to support the opposite conclusion: "An arbitration hearing is a civil proceeding. It is not a court of law. I do not derive my authority to hear and decide the issue in dispute from any statute, ordinance or law enacted by a legally constituted legislative body."

5. And the Elkouri's sum up the current status of the question: "Reported arbitration decisions reveal that arbitrators differ significantly in their views as to the use of such evidence, though the inclination to accept and rely on it appears to be fairly strong." *How Arbitration Works*, Elkouri and Elkouri, 399 (BNA Books, 6th ed., 2003).

B. Federal Law Ostensibly Protecting the Privacy of Internet Communications.

1. Fourth Amendment (Public Employees)
   a. *City of Ontario v. Quon*, 130 S. Ct. 2619 (2010); *O'Connor v. Ortega*, 480 U.S. 709 (1987); *Katz v. United States*, 389 U.S. 347 (1967).
   b. Facts: A governmental employer conducted a search of an employee's text messages on an employer-provided cell phone to determine the cause of an overage that had resulted in additional charges. The search revealed personal messages sent during work time including some that were sexually explicit. The employee was disciplined for violation of work policies.
   c. Two part test (drawn from plurality decision in *O'Connor*:
      i. Did the employer have a reasonable expectation of privacy? (Assumed by the Court)
      ii. Was the search reasonable?
      "Under the approach of the *O'Connor* plurality when conducted for a "non-investigatory, work-related purpose" or for the "investigation of work-related misconduct," a government employer's warrantless search is reasonable if it is "'justified at its inception' " and if "'the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of' " the circumstances giving rise to the search. The search here satisfied the standard of the *O'Connor* plurality and was reasonable under that approach."
   d. The Court did not have before it the question of whether the service provider violated the Stored Communications Act (though the Court of Appeals so held), however Quon argued that such a violation required the conclusion that the search was unreasonable *per se.* The Court rejected this argument relying on precedent to reach the opposite conclusion.
2. Electronic Communications Privacy Act of 1986 (ECPA), 18 U.S.C. Sec. 2510 et seq. (2006); Stored Communications Act (SCA) (18 U.S.C. §§

2701-11); and the Computer Fraud and Abuse Act (CFAA), 18 U.S.C. § 1030 .

a. *Overview*: "Congress passed the Electronic Communications Privacy Act (ECPA) …which was intended to afford privacy protection to electronic communications. Title I of the ECPA amended the federal Wiretap Act, which previously addressed only wire and oral communications, to "address the interception of … electronic communications." … Title II of the ECPA created the Stored Communications Act (SCA), which was designed to "address access to stored wire and electronic communications and transactional records." Id." *Konop v. Hawaiian Airlines, Inc*., 302 F.3d 868, 874 (9th Cir. Cal. 2002)

   The Computer Fraud and Abuse Act supplements the ECPA and SCA by making it a criminal misdemeanor for an individual to intentionally access a protected computer without authorization or in excess of authorization and thereby obtain information from the computer. The conduct becomes a felony if the act was to further tortious or criminal conduct. *United States v. Drew*, 259 F.R.D. 449, 457 (C.D. Cal. 2009)

b. *Selected Cases*:
   i. Employee states a claim under the SCA against supervisor who obtained user names and passwords for a protected webpage from co-employee and then uses them to access, retrieve and discipline the employee for comments critical of the supervisor. Employee also states claim for violation of employee's protected activities under Railway Labor Act. *Konop. Id*.
   ii. Employee found guilty of interception of electronic communications under 18 U.S.C.S. § 2511(a) when he redirected supervisor's email by automatic forwarding of them to his email address. United States v. Szymuszkiewicz, 622 F.3d 701 (7th Cir., 2010.) *Query: Could a supervisor's similar interception an employee's email be criminal misconduct?*
   iii. The owner of a company and the company were found to have violated the SCA when the owner admitted to accessing the employee's personal AOL account at all hours of the day, from home and internet cafes, and from locales as diverse as London, Paris, and Hong Kong. During discovery, the owner produced copies of 258 different emails he had taken from her AOL account. *Van Alstyne v. Elec. Scriptorium*, Ltd., 560 F.3d 199, 202 (4th Cir. Va. 2009)
   iv. A district court denied an employer's motion to dismiss SCA claims brought against by an employee in the following factual context: The company implemented a social media program to advertise its business. The employee created personal "twitter" and "Facebook" accounts that were password protected, but she

stored the access information on her employer's computer. She used her personal accounts to augment the social media campaign until an automobile struck and seriously injured her. While hospitalized she found out that the company had posted entries on her Facebook page and posted Tweets on her Twitter account promoting the campaign. She asked the company to refrain from posting updates to her Facebook page and Twitter account while she was in the hospital and not working, yet the company continued to do so. *Maremont v. Susan Fredman Design Group*, Ltd., 2011 U.S. Dist. LEXIS 140446, 6-7 (N.D. Ill. Dec. 7, 2011)

v. In *United States v. Drew*, the government alleged that the defendant and others conspired to intentionally access a computer used in interstate commerce without authorization in order to obtain information for the purpose of committing the tortious act of intentional infliction of emotional distress upon "M.T.M." a 13 year old girl living in the community and a classmate of a sibling of one of the defendants. The conspirators registered and set up a profile for a fictitious 16 year old male juvenile named "Josh Evans" on "MySpace", and posted a photograph of a boy without that boy's knowledge or consent. Such conduct violated MySpace's terms of service. The conspirators contacted M.T.M through the MySpace network (on which she had her own profile) using the Josh Evans pseudonym and began to flirt with her over a number of days. Then, the conspirators had "Josh" inform M.T.M that he was moving away, tell her that he no longer liked her and that "the world would be a better place without her in it." Later on that same day, after learning that Megan had killed herself, one of the defendants caused the Josh Evans MySpace account to be deleted. The government did not prove up all of the fact allegations contained in the indictment, the jury acquitted the defendant of the felony charge, but found him guilty of the misdemeanor of accessing a computer without authorization (or in excess of authorization). The District Court granted the defendant's motion for acquittal on the ground that the CFFA was void for vagueness. *United States v. Drew*, 259 F.R.D. 449, 452 (C.D. Cal. 2009)

vi. Pietrylo was employed by Hillstone Restaurant Group as a server. He created a group on MySpace called the "Spec-Tator." He stated in his initial posting that the purpose of the group would be to "vent about any BS we deal with out work without any outside eyes spying in on us. This group is entirely private, and can only be joined by invitation." Pietrylo then exclaimed "[l]et the s**t talking begin." Once a member was invited to join the group and accepted the invitation, the member could access the Spec-Tator whenever they wished to read postings or add new postings. A manager asked an employee to provide the password to access the Spec-Tator, which she did. While the employee stated that she

was never explicitly threatened with any adverse employment action, she said that she gave her password to members of the management solely because they were members of management and she thought she "would have gotten in some sort of trouble." The manager used the password provided by the employee to access the Spec-Tator from St. Jean's My Space page. Anton printed copies of the contents of the Spec-Tator.

The posts on the Spec-Tator included sexual remarks about management and customers of Houston's, jokes about some of the specifications ("specs") that Houston's had established for customer service and quality, references to violence and illegal drug use, and a copy of a new wine test that was to be given to the employees. Pietrylo explained in his deposition that these remarks were "just joking"; however, members of management testified that they found these postings to be "offensive." Hillstone terminated Pietrylo and a co-employee based on the information gathered from the protected website.

Plaintiffs filed a complaint against Defendant alleging among other claims, violations of the federal Wiretap Act, the federal Stored Communications Act and common law tort of invasion of privacy. The District Court denied Defendant's motion to for summary judgment on these claims. *Pietrylo v. Hillstone Rest. Group*, 2008 U.S. Dist. LEXIS 108834, 1-6 (D.N.J. July 24, 2008)

A jury trial commenced to determine whether the Defendants (1) violated the federal or state Stored Communications Acts, (2) invaded Plaintiffs' privacy, and/or (3) wrongfully terminated Plaintiffs in violation of public policy. The jury returned a verdict in favor of Plaintiffs on the Stored Communications Acts claims, finding that Defendant had, through its managers, knowingly or intentionally or purposefully accessed the Spec-Tator (a chat group on MySpace.com, accessed by invitation and then the members' MySpace accounts and passwords) without authorization on five occasions. The jury found that Defendant had not, however, invaded Plaintiffs common law right of privacy. The jury further found that Defendant had acted maliciously, leading to a right to punitive damages. *Pietrylo v. Hillstone Rest. Group*, 2009 U.S. Dist. LEXIS 88702 (D.N.J. Sept. 25, 2009)

C. State regulation.
   1. Invasion of Privacy
      a. *Overview:* Wisconsin, for example, prohibits "invasion of privacy" and defines one form of it as: "Publicity given to a matter concerning the private life of another, of a kind highly offensive to

a reasonable person, if the defendant has acted either unreasonably or recklessly as to whether there was a legitimate public interest in the matter involved, or with actual knowledge that none existed. It is not an invasion of privacy to communicate any information available to the public as a matter of public record." Sec. 995.50(2)(c), Wis. Stats.

b. *Case:*

i. Court allows plaintiff to proceed with claims advanced against his employer and various fellow employees under the Electronic Communications Privacy Act, the Electronic Communications Storage Act, and Wisconsin's right to privacy statute, Wis. Stat. Section 895.50, as well as a common law defamation claim, arising out of defendants' interception of a telephone call plaintiff placed from his place of employ, and defendants' review of e-mails contained in a personal e-mail account plaintiff maintained with Hot Mail, which account plaintiff accessed from his work place. There were sharply differing versions of the content of these various communications. Defendants alleged that during the telephone call, the participants, while masturbating, graphically described homosexual activity between two males. Plaintiff denied this. Defendants also alleged that e-mails read from plaintiff's email account evidenced that plaintiff was involved in homosexual activity. Plaintiff denied that these e-mails had been sent to him.

The court refused to dismiss plaintiff's claim, advanced under Wisconsin's right of privacy law, section 895.50, arising out of the review of e-mail from plaintiff's personal Hot Mail account. The court held that issues of fact existed as to whether the review of such e-mail would be highly offensive to a reasonable person, and as to whether a reasonable person could consider such an account to be private, which precluded a grant of summary judgment to defendants. The court also refused to dismiss the claim plaintiff brought under the Electronic Communications Storage Act arising out of the review of these e-mails. If such a review took place (as opposed to defendants' having fabricated the e-mails) it would run afoul of the Stored Communications Act. The court did dismiss the claims plaintiff raised under the Computer Fraud and Abuse Act, holding that plaintiff had not alleged economic damages arising from the review of these e-mails sufficient to state a claim under the Act. *Randall David Fischer v. Mt. Olive*

Lutheran Church, et al., 207 F. Supp.2d 914 (W.D. Wis., March 28, 2002)

ii. The jury found that managers did not invade plaintiffs' privacy rights by requesting password from co-employee to employee's website. *Pietrylo*. Supra.

III. Surveillance and Social Media

A. Monitoring of employees' internet and social media footprints.

1. In June, 2011, Forbes reported that the Federal Trade Commission dropped its investigation of Social Intelligence Corporation's search methods of social media and the internet generally. http://www.forbes.com/sites/kashmirhill/2011/06/15/start-up-that-monitors-employees-internet-and-social-media-footprints-gets-gov-approval/. The article reported further:

> "And what about ongoing monitoring of employees after they've been hired? Andrews was reluctant to talk about who their clients are or how many there are. He said they have clients in the Fortune 500, in the healthcare industry (making sure doctors and nurses aren't discussing their patients around the Web) and from the educational sphere (people who work with children are in need of special scrutiny?).
>
> "We recommend that companies inform their employees about this ongoing monitoring," says Andrews. The company only provides monitoring services if a client has a social media policy set up with its employees. Most of the time, Social Intelligence is scanning the Web for employees' disclosure of confidential or proprietary information, professional misconduct, or illegal activity. Andrews said though that monitoring does sometimes extend to looking to make sure an employee isn't criticizing the company somewhere or getting into Internet fights with colleagues. (The company will not monitor ex-employees.)"

2. On September 19, 2011 Senators Blumenthal and Franken sent correspondence to Max Drucker, CEO of Social Intelligence, Corp, asking specific questions that reveal the potential pitfalls of the search techniques. http://blumenthal.senate.gov/newsroom/press/release/blumenthal-franken-call-on-social-intelligence-corp-to-clarify-privacy-practice.

3. Issues associated with Social Media search engines.

> "Social media legal experts and various literature point to a multitude of issues and risks faced by both the CRA and the employer who uses social media checks, which include, but are not limited to:
>
> - **Problems under FCRA section 607(b) in exercising "reasonable procedures to assure maximum possible accuracy" of the**

information.
Since the information on social media sites is self-reported and can be changed at any time, it is often difficult if not impossible to ascertain that the information is accurate, authentic and belongs to the subject. Online identity theft is not uncommon, as are postings under another person's name for the purpose of "cyber–slamming" (which refers to online defamation, slander, bullying, harassment, etc.)

- **Information may be discriminatory to job candidates or employees, or in violation of anti-retaliation laws.**
  Social sites and postings may reveal protected concerted activity under the National Labor Relations Act (NLRA,) and protected class information under Title VII of the Civil Rights Act and other federal laws, such as race, age, creed, nationality, ancestry, medical condition, disability, marital status, gender, sexual preference, labor union affiliations, certain social interests, or political associations. And while the information may have no impact on the employment decision, the fact that the information was accessed may support claims for discrimination, retaliation or harassment.
- **Accessing the information may be in violation of the federal Stored Communications Act (SCA).**
  To the extent that an employer requests or requires an employee's login or password information, searches of social networking sites may implicate the SCA (18 U.S.C. § 2701) and comparable state laws which prohibit access to stored electronic communications without valid authorization. A California court recently ruled that the SCA also may protect an employee's private information on social networking sites from discovery in civil litigation.
- **Assessing the information may violate terms of use agreements and privacy rights.**
  While certain social media sites have stricter privacy controls than others, most if not all limit the use of their content. The terms of use agreements typically state that the information is for "personal use only" and not for "commercial" purposes. Although the definition of "commercial" in connection with employment purposes is interpretive, most legal experts indicate that employment screening fits that scope.
- **Information may be subjective and irrelevant to the employment decision.**
  Blogs, photos and similar postings often do not provide an objective depiction of the subject or predict job performance. The California Labor Code, for example, specifically provides that an employer is prevented from making employment-related decisions based on an employee's legal off-duty conduct. Employers may use such information only if the off-duty conduct is illegal, if it presents a conflict of interest to the business or if it adversely affects the employee's ability to do his/her job. And the evidence of such activities must be clear.

http://workforceverification.com/2012/02/20/controversy-abounds-in-employment-decisions-based-on-social-media-searches/.

IV. A Fair Investigation: When Does it Come into Play?

The division among labor arbitrators and those who practice before them, might there be other remedial alternatives to the exclusion of evidence illegally obtained. For example, might the arbitrator sustain the termination, but find the employer to have violated its obligation pursuant to the "just cause" standard to conduct a fair investigation? Could that remedy include a cash payment to the discharged employee? A cease and desist order in favor of the union?

CHAPTER IV
PROBLEMS OF PROOF IN THE ARBITRATION PROCESS:
REPORT OF THE CHICAGO AREA TRIPARTITE COMMITTEE*

8. The Sources Affecting the Admissibility of Evidence

We are here concerned with the admissibility of confidential company records or records not available to the union, items taken from employees' lockers, or picked out of wastebaskets, closed circuit TV systems, moving pictures, etc. On this issue the committee was divided. The principal problem appeared to be a civil rights issue. This issue was posed most sharply with relation to the breaking into of employees' lockers without consent and without a search warrant. It was the position of the labor members of the committee that an employee does not give up all of his personal rights as a condition of employment. They are of the conviction that conduct, such as breaking into a locker exclusively assigned to an employee for his own use., forcible search of his person, or breaking into his automobile is conduct which should not be tolerated in the employer-employee relationship, and the arbitrator should exclude such evidence upon objection or on a motion to suppress.

While the committee was in agreement that the arbitrator should exclude a forcibly extracted confession, the management members of the committee were of the opinion that an employee does not have the right to have excluded from evidence in an arbitration case evidence which is relevant and important to reaching the right result. A similar division of opinion took place with reference to the use of a closed circuit TV system. The committee was in agreement that if an employee is aware of the fact that he is being observed, the testimony of the observant should be admissible. The labor members took a position, however, that if an employee does not know of the existence of the TV system, the evidence should be inadmissible. The same division took place with reference to the use of motion pictures.

What is presented is an issue of considerable importance in the development of sound management labor policy. Does an employee give up his right to privacy within the plant? Outside the plant he is protected by the constitution from search and seizure, even by police officers, and the breaking into of private property, including an automobile, is both a crime, and a tortious act. Why should the employee lose these protections once he enters the plant? The answer given by the company representatives is that when an employee takes a job, he takes the job with the knowledge that certain conditions may be imposed upon him and that he must adhere to plant rules and may also be required to give up certain rights which he has on the outside. An employee's locker which is assigned to him remains company property and the company has the same right to enter the locker that it has to open up any other files or containers in the plant.

On the other side, it is contended by the union representatives that the employee should be accorded the dignity and worth he has as a person whether or not he is in the plant, and that there is an undesirable and distasteful intrusion into his way of life when a company can break into his locker or monitor his actions by closed circuit TV or movie, or otherwise spy upon him. This demeans the employee instead of encouraging him to live up to high standards and may in fact cause resentment and in turn cause him to act in undesirable ways. At what point does the violation of privacy of the individual require the arbitrator to rule out the evidence? For example, one of the company representatives recognized as an exception a tactic condemned by the Supreme Court, the use of a stomach pump to force out the contents of an employee's stomach in order to ascertain whether or not incriminating evidence was swallowed. The broader question presented to the arbitrator is that, absent a constitutional right or a right specified in the contract, may the arbitrator reject evidence because the manner in which it has been obtained is reprehensible or distasteful to him or because it is his opinion that sound labor-management relations would be better served by such exclusion. These are not easy questions to answer and deserve extensive discussion.

As to company records, the committee was in agreement that the union is entitled to see all records, that this is part of the national labor policy under the broad rules established by the National Labor Relations Board. Accordingly, there should be relatively few records relevant to the issues not available to the union to examine. But even as to company records or letters not subject to production on request, the committee was in agreement that such records should be admissible in evidence