With employees' social media use ranging from merely diversionary to defamatory, employers have struggled to keep pace. This article will examine the National Labor Relations Board's recent activity in this complicated arena and provide suggestions for helping companies navigate the board's evolving standards.

By James R. Moss

Social Media and the NLRB

"L," an employee at a domestic violence clinic in Buffalo, N.Y., threatened to tell management that her co-workers gave poor client service. "M," another employee, posted to Facebook from her home computer, asking, "My fellow co-workers how do u feel?" In doing so, she likely did not consider herself an heir to the mineworkers and steelworkers who prompted the passage of the Wagner Act in 1935.[1] She certainly wasn't seeking to organize a union, or even to "stick it to the man," given that L was merely a co-worker.

But an administrative law judge with the National Labor Relations Board (NLRB) held in September 2011 that M's post constituted concerted activity, protected by Section 7 of the National Labor Relations Act (NLRA); that her co-workers also engaged in protected activity when they defended themselves and took after L in Facebook responses posted from their own home computers; and that their employer violated Section 8 of the NLRA when it fired M and the others for harassing L, after L printed the posts and took them to management. The NLRB had entered the Facebook era.

The National Labor Relations Board is known for administering collective bargaining agreements and developing traditional labor law. The board and its administrative law judges enforce the NLRA, 29 USC §§151–16, by investigating allegations of wrongdoing brought by workers, unions, or employers; conducting elections; and deciding and resolving cases**.** Non-union employers, unless they are presented with a union-organizing drive, often pay attention to the NLRB only when following developments in the news, such as the potential overhaul of union election procedures through the Employee Free Choice Act (EFCA), which ultimately failed in Congress,[2] or the battle over President Barack Obama's recess appointments to the NLRB.[3]

But the board has recently taken a much more active role in applying the act to non-union employers, creating uncertainty for employers who have followed its actions and catching many employers completely unaware.[4] The NLRB has targeted employers large and small across various industries, limiting their use of at-will policies, arbitration agreements, and other policies found to infringe on concerted activity. Beginning in 2011, employers' social media policies have been the most frequent subject of the NRLB's intervention in the non-union workplace. Faced with a dramatic decline from its industrial-era membership peak, it is ironic that the NLRB has reasserted itself in one of the most current and cutting-edge areas of employment law. Recent surveys have found that one-third of American employees use social media at least once a day at work, and one quarter report they would not take a job from an employer that did not provide access to social media. With employees' social media use ranging from merely diversionary to defamatory, employers have struggled to keep pace, implementing policies and imposing discipline within a thicket of laws governing privacy, harassment, trade secrets, and use of company property. This article will examine the NLRB's recent activity in this complicated arena and provide suggestions for helping companies navigate the board's evolving standards.

NLRA Background: Concerted Activity

Section 7—Protected Activity

Since the Wagner Act was passed in 1935, Section 7 of the NLRA has protected private-sector employees' right to engage in "concerted activity":

> "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."[5]

As the Supreme Court explained in *Auto Workers Local 232 v. Wisconsin Employment Relations Board*,[6] "[t]he most

effective legal weapon against the struggling labor union was the doctrine that concerted activities were conspiracies, and for that reason illegal. Section 7 of the Labor Relations Act took this conspiracy weapon away from the employer in employment relations which affect interstate commerce."[7] Over the past several decades, the courts and the NLRB have established that Section 7 protects not only the right to organize a union for the purpose of collective bargaining, but also the right of two or more employees to act together to improve wages or working conditions. The board in *Myers Industries*[8] reached back to Tocqueville in support of protecting concerted action: "The most natural privilege of man, next to the right of acting for himself, is that of combining his exertions with those of his fellow creatures, and of acting in common with them."[9]

However, in the absence of formal union organizing, distinguishing between individual activity and protected, concerted activity has proven difficult. The courts have held that the action of even a single employee may be considered concerted if he or she acts "with or on the authority of other employees, and not solely by and on behalf of the employee himself." It also requires that the improvement sought by the employee benefit more than just the employee taking action.[10] Thus, in *Mannington Mills*,[11] the board found that an employee was not "acting in concert" with other employees when he threatened a work stoppage to protest extra work assignments because there was no evidence (1) that any employee had authorized or instructed the employee to make the threat; (2) that any employee had discussed with him the possibility of a work stoppage; or (3) that any employee was aware of and supported his threat.

Before entering the social media arena, the NLRB had applied the standard developed in the *Myers* cases to Internet communications, finding that concerted activity does not lose protection because it is communicated through the Internet.[12] However, these decisions did not squarely confront the collaborative opportunities presented by online social media.

Section 8—Interference with Section 7 Rights

Section 8 of the NLRA makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 of this Act." An employer violates Section 8(a)(1) not only by disciplining or firing employees for engaging in concerted activity, but also through the maintenance of a work rule if that rule "would reasonably tend to *chill employees* in the exercise of their Section 7 rights."[13]

This "chilling" effect has played a significant role in the aggressiveness and resulting uncertainty of the NLRB's social media activity. The NLRB uses a two-step test to determine whether a work rule would have such an effect:

1. A rule is clearly unlawful if it explicitly restricts Section 7 protected activities.
2. If the rule does not explicitly restrict protected activities, it may still violate Section 8(a)(1) upon a showing that: (a) employees would reasonably construe the language to prohibit Section 7 activity; (b) the rule was promulgated in response to union activity; or (c) the rule has been applied to restrict the exercise of Section 7 rights.[14]

Thus, policies themselves may be impermissible *even when not enforced*. Additionally, "discipline imposed pursuant to an unlawfully overbroad rule violates the Act in those situations in which an employee violated the rule by (1) engaging in protected conduct or (2) engaging in conduct that otherwise implicates the concerns underlying Section 7 of the Act."[15]

Recent Developments

NLRB General Counsel's 2011 and 2012 Reports and Division of Advice Guidance on Employer Social Media Policies

As employees began using social media to publicly discuss the workplace, their co-workers, and their managers, employers in turn began to formulate policies intended to limit discourteous or harassing speech, disparagement of the company's services or products, disclosure of sensitive information, and criticism of management. Employers also began to take disciplinary action against employees for social media activity, and some employees made their way to the NLRB. During 2010 and 2011, the NLRB conducted investigations, issued complaints and settled complaints with employers, largely out of the public view.[16]

After handling a number of social media complaints, the NLRB's acting general counsel issued three reports during 2011 and 2012 outlining the NLRA's application to employee social media postings and employers' policies. Taken together, the reports established and elaborated upon these general principles:

a. Employer policies should not be so sweeping that they prohibit the kinds of activity protected by federal labor law, such as the discussion of wages or working conditions among employees.
b. However, an employee's comments on social media are generally not protected if they are merely personal gripes not made in relation to group activity among employees.

As with traditional concerted activity, the reports suggest that a rule will be found to unlawfully chill protected activity if: (1) employees reasonably would construe the rule to prohibit such activity; (2) the rule was issued in response to union activity; or (3) the rule has been applied to restrict protected activity. Generally, the more expansive a social media policy's prohibitions, the more likely it will be considered unlawfully overbroad.

In the first report, issued in August 2011, the board's acting general counsel examined a nonprofit social services provider's discharge of five employees for posting Facebook comments related to a co-worker's criticism of their job performance. It determined that the postings constituted "protected activity" under the *Meyers* cases cited above, extending the principle that co-worker statements about staffing levels are protected when they implicate working conditions.[17]

On January 24, 2012, the acting general counsel issued a second report, expanding its criticism of broadly worded policies to include those prohibiting disparaging or inappropriate comments, disrespectful conduct, or the disclosure of sensitive or confidential matters. The acting general counsel disapproved such policies on the grounds that they had the impermissible effect, whether or not they were actually enforced, of chilling employees' exercise of their Section 7 rights. It also cast significant doubt on the use of a disclaimer or savings clause, which pledges that the employer will not enforce its policy in violation of law. Because such clauses are not likely to provide sufficient clarity regarding the potential enforcement of the policy, they do not diminish the chilling effect of an overbroad rule and are therefore insufficient to rescue the policy.

However, the report also provided some good news for busi-

nesses by recognizing that employee postings that are not focused toward group action, but rather present only an individual gripe, are unprotected and may be subject to discipline. It also gave employers a helpful tip for drafting compliant policies, by highlighting and approving those that offered *specific examples* of prohibited conduct, or other contextual limitations. For example, a policy that prohibits vulgar, obscene, threatening, or intimidating policies, rather than merely discourteous ones, will be lawful because the prohibitions are sufficiently detailed. Likewise, a policy requiring compliance with securities regulations and other laws that prohibit disclosing confidential or proprietary information is permissible, whereas a broad restriction on disclosing personal or sensitive information, which could encompass working conditions, is not. The report discussed several employers' policies by way of illustration.[18]

The courts have held that the action of even a single employee may be considered concerted if he or she acts "with or on the authority of other employees, and not solely by and on behalf of the employee himself."

The acting general counsel released its third report on May 30, 2012. Where the first reports addressed discipline in response to concerted activity on Facebook and other social media sites, as well as employer policies, the third focused only on employer policies and provided helpful guidance. It examined seven cases, finding only one to be entirely compliant with the act. For example, the report approved Wal-Mart's social media policy prohibiting "inappropriate postings that may include discriminatory remarks, harassment and threats of violence or similar inappropriate or unlawful conduct," which the retailer had revised after conversations with the NLRB. But it disapproved General Motors' policy: "We found unlawful the instruction that 'offensive, demeaning, abusive or inappropriate remarks are as out of place online as they are offline.'" It also found that the "provision proscribes a broad spectrum of communications that would include protected criticisms of the employer's labor policies or treatment of employees."[19]

The acting general counsel wrote that employer limitations on discussing confidential information, using offensive or abusive language, "friending" co-workers, disclosing personal employee information, and commenting on legal matters involving the employer were overly broad. Likewise, it took the position that employer policies could not require employees to obtain permission before posting comments, to resolve employment-related issues through an in-person forum rather than online, to report inappropriate use of social media, and to communicate online in a professional manner.

On the other hand, the third report provided some relief and clarification for employers, approving policies that prohibit online bullying and disclosing attorney–client privileged information and require employees to respect all copyright and other intellectual property laws. Perhaps most significantly, the report approved and shared as an example one employer's policy in its entirety. The approved policy provides a much-needed benchmark for employers.

Finally, in a March 2012 advice memorandum, the acting general counsel concluded that portions of *Giant Food LLC's* social media policy, including its ban on photographing or video recording the company's premises, violated the NLRA.[20] According to the memo, "[T]he portion of the rule prohibiting employees from photographing or videotaping the Employer's premises is unlawful as such a prohibition would reasonably be interpreted to prevent employees from using social media to communicate and share information regarding their Section 7 activities through pictures and videos, such as of employees engaged in picketing or other concerted activities." It also found that the policy's rule against disclosure of confidential or non-public information was "so vague" that "without limiting language," employees could perceive it as prohibiting protected, concerted activity, such as discussing the terms and conditions of their employment. The acting general counsel reasoned that employees could interpret the ban on using Giant Food's logo, trademarks, or graphics as prohibiting them from using that information in protected online communications, such as electronic leaflets, cartoons, or photos of picket signs. It reached this conclusion without any allegation that employees had actually considered engaging in such activity but refrained due to the employer's policies. The acting general counsel found that even if Giant Foods had a proprietary interest in its trademarks, it is not "remotely implicated" by employees' noncommercial use of them. However, the acting general counsel did find lawful the policy's requirement that employees "not defame" or "otherwise discredit" the company's products or services, and that employees "[s]peak up" if they believed anyone was violating the policy.

NLRA Decisions Expanding the Definition of Concerted Activity in Social Media

Elaborating on the acting general counsel's reports, the NLRB has published decisions in several cases regarding employee discipline for social media usage. The facts of the cases demonstrate the significant difficulty of identifying concerted activity, and highlight an important difference between traditional concerted activity and social media activity: while critical comments by an employee at the water cooler may pass without comment, the same words printed online, given permanence in a social media forum, may encourage other employees to join the complaint and thereby render the discussion protected. They also demonstrate that discipline based on posts related directly to union activity will almost certainly be found impermissible. Finally, they illustrate the penalties available to the NLRB for punishing noncompliant policies or unlawful discipline.

Hispanics United of Buffalo, Inc. v Carlos Ortiz[21]

An employee named Lydia told her co-worker Marianna that she planned to tell their manager that her co-workers' client service was inadequate. Marianna posted on Facebook from home: "[L], a coworker feels that we don't help our clients enough at [respondent]. I about had it! My fellow coworkers how do u feel?" Four other co-workers then posted comments defending Marianna and criticizing Lydia. Lydia responded on Facebook by accusing the co-worker of lying and turned in the posts to their manager. The manager terminated the five employees for "bullying and harassing" Lydia, in violation of the company's policies.

The NLRB found that the employees were terminated in part

because of their Facebook comments regarding Lydia and found the Facebook comments to be concerted activity for "mutual aid or protection" that was protected under Section 7. The NLRB ordered the employer to reinstate the employees with back pay and benefits.

Costco Wholesale Corporation and United Food and Commercial Workers Union, Local 371[22]

The board itself invalidated an employer's electronic posting rule prohibiting employees from making statements that "damage the Company … or damage any person's reputation," on the grounds that the policy could chill employees' exercise of their right to engage in "concerted activity" under Section 7. The NLRB ordered Costco to rescind the policy based on its finding that it inhibited employees from engaging in protected concerted activity.

Karl Knauz Motors, Inc.[23]

The employer terminated an employee for multiple reasons, including Facebook postings. A mishap had occurred at an adjacent Land Rover dealership, also owned by Knauz, when a salesperson was showing a Land Rover to a customer and the vehicle crashed into a pond. The employee took photos of the accident, which he later posted on Facebook with the comments, "[T]his is your car; this is your car on drugs," and "[T]he kid drives over his father's foot and into a pond in all of about 4 seconds and destroys a $50,000 truck. OOPS!" The employer found that his comments violated its courtesy rule, requiring employees to be "courteous, polite and friendly" to customers, vendors, suppliers, and fellow employees and not use "language which injures the image or reputation of the Dealership." A few days earlier, the employee had also taken photos at a sales event where his dealership served hot dogs, cookies, and chips. The employee posted photos of the food on Facebook with comments criticizing management for the inferior quality of the event.

The NLRB argued that both posts were protected activity relating to the terms and conditions of employment. The administrative law judge agreed that the post about the sales event was protected but found that the employee was not terminated for that post, but for the post about the auto accident, which the judge said was not protected. The judge found that "[i]t was posted solely by [the employee], apparently as a lark without any discussion with any other employee of the Respondent, and had no connection to any of the employees' terms and conditions of employment." The termination was therefore upheld.

However, the NLRB ordered the employer to rescind its social media policy. The NLRB held that the courtesy rule violated the NLRA because employees could "reasonably construe its broad prohibition against 'disrespectful' conduct and 'language' which injures the image or reputation of the Dealership as encompassing Section 7 activity."

Design Technology Group, LLC.[24]

Employees approached their manager about closing the store, located in a dangerous area of San Francisco, at 7 p.m. instead of 8 p.m., because of safety concerns. The manager told them she would discuss their concerns with corporate officials, but the issue was never resolved. Two employees then posted messages on Facebook criticizing the manager's handling of the issue, including: "It's pretty obvious that my manager is as immature as a person can be and she proved that this evening even more so. I'm am [sic] unbelievably stressed out and I can't believe NO ONE is doing anything about it! The way she treats us in [sic] NOT okay but no one cares because everytime we try to solve conflicts NOTHING GETS DONE!!" Another employee showed the manager the posts, and days later both employees who made the critical Facebook posts were fired.

The NLRB found that the posts were a "classic connected protected activity" under the NLRA, because they were part of the employees' efforts to convince their employer to close the store earlier in the evening, based on their concerns about working late in an unsafe neighborhood. The NLRB therefore found that the employees' terminations violated the act and ordered them reinstated with back pay.

New York Party Shuttle, LLC and Fred Pflantzer[25]

Fred Pflantzer, a tour bus driver, complained online about On Board Tours' lack of health insurance and sick and vacation days, unsafe buses, and payroll practices. He complimented a competitor, City Sights, calling it a "worker's paradise" compared to On Board. Pflantzer also complimented a labor union for creating a positive workplace at City Lights and informed the readers of the benefits of having a labor union. On Board considered his post libelous and admitted that it was a motivating factor in terminating Pflantzer. The board found that such activity was protected under Section 7 of the NLRA, even though there was no evidence that other On Board employees had access to the Facebook page, which was private. The board reasoned that the post explicitly advanced union involvement and was intended to influence On Board, even if indirectly.

University of Pittsburgh Medical Center[26]

The University of Pittsburgh Medical Center's policy prohibited employees from soliciting employees "to support any group or organization," using e-mail "in a way that may be disruptive, offensive to others, or harmful to morale," limiting use of e-mail and social media to authorized activities.

The administrative law judge found that while these policies were not necessarily targeted at prohibiting protected activities, they were so ambiguous that they would chill employees from engaging in protected, concerted activities. For that reason, they were held to be overbroad and ordered to be removed.

Weyerhauser Company and Association of Western Pulp and Paper Workers[27]

Weyerhaeuser implemented a company-wide electronic media use policy limiting employees' use of the company's e-mail system to business purposes. However, the company allowed some personal use

When drafting social media policies, discouraging employees from "friending" colleagues may be unlawfully overbroad because it can discourage communication among co-workers.

with management's consent. In a 2007 collective bargaining agreement, union representatives were allowed to use the company's e-mail system to discuss contract administration. The agreement provided that employees may use the company's e-mail system for these purposes during work hours, when the representatives' schedules and supervisors allowed. In 2010, however, Weyerhaeuser issued a company informational notice (CIN) exclusively to Longview employees that explicitly "supersede[d] all discussions on the use of the Company e-mail system by Union Representatives to conduct Contract Administration." The notice stated that the time union representatives spent discussing contract administration matters, as allowed under the relevant contract provision, had "risen to an unacceptable volume," and directed that such communications "should be focused on the process that needs to take place rather than protracted dissertations or arguments composed and sent during working hours."

The administrative law judge held that Weyerhaeuser's 2004 policy on electronic communications lawfully prohibited the use of the company's e-mail and telecommunications systems for all nonbusiness-related purposes. However, the judge held that the notice discriminated against Section 7 activities, and the NLRB affirmed. It noted, "By its own terms, the CIN placed limitations only on e-mail messages sent by union representatives and related to union business." Furthermore, the board stated that the notice was not an application of the company's existing electronic media use policy but a "freestanding restriction on union-related e-mail that the [company] put in place independently of its previous efforts to regulate the use of its electronic media." Because the new rule was "specific to the Longview facility and was promulgated in response to e-mail use by union representatives there," the board held that Weyerhaeuser violated the act by implementing the notice.

Examples of "Concerted Activity" Protected from Discipline

The chart below contains examples from recent NLRB cases and reports of conduct found to be protected as "concerted activity," and conduct found not to be protected.

NLRB and Administrative Law Judge Decisions on Employer Social Media Policies

The chart below contains examples from recent NLRB cases and reports of social media policies that the NLRB has found overbroad as well as others that have been found not to violate Section 7 or 8(a)(1).

Although the nature of social media and the unanticipated nature of the NRLB's action has created a great deal of uncertainty, the board has fairly quickly developed a sufficient body of analysis and decisions to provide some initial guidelines for conscientious employers.

Tips for Drafting Social Media Policies

1. Be aware that the NLRA applies to you even if you don't have a union.
2. Do not implement a social media policy in response to union activities or restrict discussion of union activity—such a policy is almost certain to be held unlawful.
3. Provide specific examples whenever possible. Several NLRB decisions have indicated that a particular policy might have been lawful if it had included examples of prohibited conduct. Rather than stating that the policy prohibits inappropriate behavior, provide examples such as harassment, threats, etc.
4. Policies may restrict commercial use of company trademarks and intellectual property. Employees have the right to disclose the name of the company while complaining internally or externally but do not have the right to use company logos and protected marks for commercial purposes. Any policy should make clear that commercial restrictions do not prohibit non-commercial use such as work-related discussions or in labor related activities.
5. Confidentiality clauses should be narrowly tailored. Employers may restrict employees from disclosing company trade secrets in social media. However, employers cannot restrict discussion of wages, workplace conditions, and employee or company performance, even in a public forum. Policies restraining disclosure of confidential and proprietary information should include careful definitions of confidential and proprietary to avoid being overbroad.
6. Avoid overly broad courtesy clauses. Employers may prohibit employees from making insulting remarks or engaging in hateful or threatening speech, but generically restricting offensive speech will likely be deemed overbroad.
7. Be careful and specific about restrictions on unauthorized outside interviews. Unlike courtesy clauses, the NLRB upheld a clause in a social media policy that prohibited bad attitudes. While an employee has the right to speak publicly and even distastefully when engaged in discussion with other employees, the employee does not have the right to act offensively in outside and unauthorized interviews about the company.
8. Requiring posts to social media sites to be accurate and not misleading might be overbroad if further clarification or examples are not provided.
9. Avoid requiring employer approval before posting—such provisions can be deemed to inhibit protected activity.
10. Be careful about instructing employees about posting photos, videos, quotes, or other content involving third parties. An outright prohibition, even when intended to protect third-party rights, could be considered overbroad.
11. Requiring employees to report certain activities or communications of others can be unlawful, but employers may instruct employees to be cautious of persons trying to trick them into disclosing confidential information.
12. Discouraging employees from "friending" colleagues may be unlawfully overbroad because it can discourage communication among co-workers.
13. Restricting disclosure of confidential guest, team member or company information can be unlawful because employees may interpret it as prohibiting discussion of their own conditions of employment and the conditions of employment of other employees.
14. Be careful about restricting comments on legal matters, litigation, or disputes, as such discussions could include potential claims against the employer, a protected subject.
15. Use a savings clause, but realize it is not guaranteed to rescue an otherwise overbroad policy. Example: "Nothing in this policy should be construed or applied to prohibit employees from exercising their rights under the National Labor Relations Act." Some decisions have held that it is unreasonable to expect employees to understand their rights and whether the policy restrains them. Include the clause, but make sure the policy is compliant.

Tips for Disciplining or Terminating Employees for Violating Social Media Policies

1. Employers may impose discipline or termination for personal rants. Individual employee complaints or insults (without engag-

ing other employees) are not protected and can be subject to discipline termination.
2. Be careful when more than one form of posting is involved—avoid taking action for protected activity, focus only on unprotected activity, and ensure the company policy distinguishes between the two.
3. Employers can and must prohibit sexual harassment, workplace violence and threats of violence, sabotage, and/or abusive and malicious activity.
4. Employers may still limit the use of social media at work, during working time, and/or on company computers or other equipment.
5. Expressing an opinion about co-workers, even when it is not correct, may be protected under the act. Making false statements may be unprotected; the context and inclusion of others must be evaluated.

Monitoring/Surveilling Social Media

In addition to questions about whether to enforce a social media policy, determining whether an employee has violated the policy presents its own hazards. In most of the cases cited above, a co-worker printed and provided online postings to management. Anecdotal reports suggest that many employers have asked co-workers to view postings by an employee whom they suspect of posting inappropriate material. This practice may also create a chilling effect by suggesting intrusive monitoring and the threat of retaliation, and therefore may run afoul of the NLRA. While many questions remain on this topic, the NLRB has indicated that a supervisor who is a Facebook friend of an employee can view a Facebook page.[28] However, the board has cautioned against asking for another employee's password to access Facebook or other password-protected sites. It may be also be unlawful for a supervisor to comment to an employee about what he or she lawfully saw on the Internet, as that might create the unlawful impression of surveillance.[29]

On the other hand, the board has held that no impression of surveillance was created where a supervisor told employees he knew about a message on a password-protected union website because "we think that a reasonable employee would assume that [the supervisor] lawfully learned of [the] message exactly the way [he] did—through public dissemination by another website subscriber."[30] This decision suggests that no unlawful surveillance would be found where a co-worker with access to a post voluntarily showed the post to the employer. The Division of Advice has also found no unlawful surveillance where the employee "friends" a supervisor, as the employee has invited the supervisor's presence at the communication.

As of January 1, 2013, California and Illinois joined several other states in prohibiting companies from asking employees or job applicants for their social network passwords. Employers should be very wary of requesting "friending" as a means of gaining the ability to monitor employees' social media use and of asking friends of employees to act as surrogates in monitoring or reporting their co-workers' social media activity.

Interaction with State Laws Affecting Employer Social Media Policies

In addition to the NLRB's recent action, several states have enacted rules regarding corporations and social media. Such laws are beyond the scope of this article but should be reviewed in combination with the NLRB's rule-making developments. One of the interesting questions for further, state-based analysis is the potential conflict between state laws protecting employees from harassment and discrimination and the NLRB's nullification of broadly worded courtesy policies. The *Hispanics United* decision is especially controversial because it may conflict with an employer's competing obligation under federal and state discrimination laws to prevent workplace harassment.

Conclusion

Although the recent defeat of the Employee Free Choice Act seemed to signal a retreat from the reinvigoration of traditional union organizing, employers put themselves at risk if they do not follow and understand the NLRB's enforcement of employees' Section 7 rights in the non-union context. It remains to be seen whether the D.C. Circuit's nullification of President Obama's recess appointments will have any effect on the rules promulgated by what has been deemed an insufficient board to form a quorum. However, the board has now been fully constituted, and there is no sign that it will retreat from its recent course. Employers and their counsel must tread cautiously as the NLRB continues to creatively update industrial-era principles for the Internet age. ⊙

James R. Moss is the managing partner of the Salt Lake City office of Payne & Fears LLP, a business litigation firm serving clients throughout the Western United States. He has represented and counseled employers for 15 years in employment and labor law, defending companies before federal and state courts, administrative agencies, and the National Labor Relations Board. He clerked in the U.S. District Court for the Central District of California; he received his J.D. from Brigham Young University and his Ed.D. from the University of Southern California. He can be reached at jrm@paynefears.com.

Endnotes

[1]*National Labor Relations Board v. Jones & Laughlin Steel Corporation*, 301 U.S. 1 (1937).

[2]*See generally,* Beam, Christopher, "Uncivil Union: Does card check kill the secret ballot or not?" *Slate*. 10 March 2009.

[3]In January 2013, the U.S. Court of Appeals for the District of Columbia struck down President Barack Obama's January 2012 "recess" appointment of three members of the NLRB. *See Noel Canning v. NLRB*, No. 12-1115 (D.C. Cir. Jan. 25, 2013). This decision resulted in a lack of a quorum, invalidating all board decision since January 4, 2012. The Court of Appeals held that the Senate was not in recess at the time of the appointments, and the President's recess appointments were not valid. The decision will most likely be appealed to the U.S. Supreme Court.

[4]NLRB, "What We Do," available at www.nlrb.gov/what-we-do.

[5]29 U.S.C.A. § 157.

[6]*Auto Workers Local 232 v. Wisconsin Employment Relations Board (Briggs & Stratton)*, 336 U.S. 245, 257 (1949).

[7]*Id.* at 258.

[8]*Myers Industries* (*Myers II*), 281 NLRB 882 (1986).

[9]*Id.* at fn. 15, quoting A. de Tocqueville, *Democracy in America*, 98 (R. Heffner ed. 1956).

[10]*See Meyers Industries (Meyers I)*, 268 NLRB 493 (1984),

revd. sub nom *Prill v. NLRB*, 755 F. 2d 941 (D.C. Cir. 1985), cert. denied 474 U.S. 948 (1985), on remand *Myers Industries* (*Myers II*), 281 NLRB 882 (1986), affd. sub nom *Prill v. NLRB*, 835 F. 2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988).

[11]272 NLRB 176 (1984).

[12]*See, e.g., Valley Hospital Medical Center*, 351 NLRB 1250, 1252-54 (2007), enfd. sub nom.; *Nevada Service Employees Union, Local 1107 v. NLRB*, 358 F. App'x. 783 (9th Cir. 2009).

[13]*Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), enfd. 203 F. 3d 52 (D.C. Cir. 1999) (emph. added).

[14]*Id.*

[15]*See The Continental Group, Inc.*, 357 NLRB No. 39, slip. op. at 4 (2011).

[16]See www.nlrbinsight.com/2011/04/nlrb-actively-considering-election-rulemaking/. In April 2011, the NLRB general counsel issued a memorandum directing all regions to submit cases to the NLRB's Division of Advice if they involved "employer rules prohibiting, or discipline of employees for engaging in, protected concerted activity using social media, such as Facebook or Twitter." General Counsel Memorandum 11-11, Mandatory Submissions to Advice (April 12, 2011).

[17]General Counsel Memorandum OM 11-74 (Aug. 18, 2011), "Report of the Acting General Counsel Concerning Social Media Cases."

[18]General Counsel Memorandum OM 12-31 (Jan. 24, 2012).

[19]General Counsel Memorandum OM 12-59 (May 30, 2012).

[20]*Giant Food LLC,* Cases 05-CA-064793, 05-CA-065187, and 05-CA-064795 (March 21, 2012).

[21]*Hispanics United of Buffalo, Inc. v Carlos Ortiz,* NLRB No. 3-CA-27872 (Sept. 2, 2011), aff'd 359 NLRB No. 37 (Dec. 14, 2012).

[22]*Costco Wholesale Corporation and United Food and Commercial Workers Union, Local 371,* NLRB 1, 193 L.R.R.M. (BNA) 1241, 2012 WL 3903806 (Sept. 7, 2012).

[23]*Karl Knauz Motors, Inc.,* Case No. 13-CA-046452, 358 NLRB No. 164 (Sept. 28, 2012).

[24]*Design Technology Group, LLC.*, 359 NLRB No. 96 (April 19, 2013).

[25]*New York Party Shuttle, LLC and Fred Pfantzer,* Case 02-CA-073340 (May 2, 2013).

[26]*University of Pittsburgh Medical Center*, Case 06-CA-081896 (April 1, 2013).

[27]*Weyerhauser Company and Association of Western Pulp and Paper Workers,* Case 19-CA-033069 and 19-CA-033095 (June 20, 2013).

[28]*Buel, Inc.*, Case 11-CA-2236, Advice Memo dated July 28, 2011 at pp. 5-6.

[29]*Magna Int'l Inc.*, Case 7-CA-43093, JD 29-01 (March 9, 2001).

[30]*See Frontier Telephone of Rochester*, 344 NLRB 1270 (2005).