

# Client Alert.

---

January 15, 2013

## Social Media and the National Labor Relations Act: What Employers Need to Know in Drafting and Updating Their Social Media Policies

By Anna Ferrari, Christine Lyon, and Timothy Ryan

This article was first published by ALM Media Properties LLC in *Internet Law & Strategy* (January 2013).

For over a year, the National Labor Relations Board (“NLRB”) has been taking employers to task for intruding too far into employees’ social media activities. The NLRB’s enforcement actions have provided a well-publicized reminder that the protections of the National Labor Relations Act (“NLRA”) are alive and well, applying with as much force to employees’ use of social media as to picketing or other traditional forms of collective activity, and to both non-union and unionized workforces.

The NLRB’s activity in this area has important consequences for employers. While employers may seek to regulate what employees may or may not say in their social media postings, this objective may be at odds with current NLRB authority. When considering the likelihood of enforcement action, it is noteworthy that the NLRB has taken action against employers ranging from large corporations to small businesses and non-profits. This underscores that the NLRB’s enforcement priorities are not limited to any single organizational profile.

We offer below a set of frequently asked questions (“FAQs”) with answers distilling the key points that U.S. employers should understand about this new area of NLRA enforcement activity. These FAQs are accompanied by practical suggestions to help employers navigate these issues in drafting and updating their own social media policies.

### FAQS ON THE NLRA AND SOCIAL MEDIA POLICIES

**How does the NLRA affect social media policies?** Employers will be familiar with the NLRA as the federal law allowing employees to unionize, bargain collectively with their employer, and engage in strikes, picketing, or other concerted activities to improve their terms and conditions of employment. Specifically, Section 7 of the NLRA guarantees employees “the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid and protection.” These rights are known in short as employees’ “Section 7 rights,” and are available to both union and non-union employees.

The NLRA is not just about unions and collective bargaining, however. The “concerted activities” protected by Section 7 include a broader right to communicate about wages, hours, and other terms and conditions of employment. This right extends to communications with co-employees as well as third parties. The NLRA has been interpreted to prohibit employers from taking actions that would have a “chilling effect” on employees’ protected activities, such as adopting policies that prohibit or discourage employees from disclosing their wages or working conditions. These days, the NLRB is finding employers to run afoul of the same principles if their

# Client Alert.

---

social media policies discourage employees from posting about matters related to terms and conditions of employment. As discussed below, however, the NLRB's application of these principles to social media policies may not be obvious or intuitive to employers, especially non-unionized employers with less exposure to the NLRA.

**What types of employees are protected by the NLRA?** The rights under the NLRA apply equally to unionized and non-unionized workforces. However, the NLRA does not cover supervisory or managerial employees. As a result, social media policies that apply solely to senior management may not be subject to these NLRA principles. If your company's social media policy applies to rank-and-file employees, however—as most do—it likely will be subject to these NLRA principles.

**What types of social media activity are protected by the NLRA?** Section 7 rights include the right to engage in “concerted activity” like communicating (and complaining) about wages, working conditions, and other terms and conditions of employment. Concerted activity usually involves two or more employees working together to improve their terms and conditions of employment. In some cases, however, the activities of a single employee may be protected as concerted activity if the employee is acting on behalf of other employees.

Postings may still be protected as concerted activity even if they are rude or unprofessional. The U.S. Supreme Court has explained that the NLRA protects “the most repulsive speech” as long as “it falls short of a deliberate or reckless untruth.”<sup>1</sup> While this might come as an unwelcome surprise to non-union employers, the NLRB has a long tradition of recognizing protection even for hostile or adversarial speech if it involves concerted activity.

**Does the NLRA prevent employers from restricting employees' social media activity during working hours?** Employers are generally allowed to limit or prohibit employees' social media activity during working hours. However, the NLRB has challenged social media policies that regulate social media activity during “company time,” stating that the phrase “company time” fails to convey that employees are free to engage in these types of activities during breaks and other non-working time. Accordingly, employers should be careful in drafting this type of restriction, looking to prior NLRB guidance. The phrase “working time” may be more defensible than “company time,” for instance.

**What are the real-world consequences of violating the NLRA?** The NLRA's remedial structure, while heavy on injunctive relief, is relatively light on damages. A violation of the NLRA may result in a cease and desist order, reinstatement of any employee who suffered adverse action for exercising in Section 7 rights, and potential back pay to the employee. The NLRA does not entitle an employee to receive a jury trial, however, or to recover punitive damages against the employer. Being the target of an NLRB action may also involve adverse reputational considerations in light of heightened public attention being paid to these matters.

---

<sup>1</sup> *Linn v. Plant Guards, Local 114*, 383 U.S. 53, 61-63 (1966).

# Client Alert.

## What types of social media policy provisions have been most frequently challenged under the NLRA?

<i>Type of Provision</i>	<i>Rationale</i>
<p>Prohibiting the posting of disparaging comments about the employer, management, or coworkers.</p>	<p>May chill protected speech concerning the employer’s treatment of its employees; fails to make exceptions for postings that may be critical or harsh, but are still protected by the NLRA.</p> <p><b>Practice Pointer:</b> Consider your choice of words carefully. It may be permissible to prohibit postings that are malicious, abusive, or unlawful, to the extent this conduct falls outside of the NLRA’s protections. Disparaging, derogatory, or negative comments might still be subject to protection, though.</p>
<p>Overly broad definitions of confidential information covering:</p> <ul style="list-style-type: none"> <li>• payroll information</li> <li>• non-public information</li> <li>• employee contact information</li> </ul>	<p>May chill protected speech concerning wages, working conditions, and terms and conditions of employment.</p> <p>May interfere with employees’ ability to exchange their contact information in connection with concerted activity.</p> <p><b>Practice Pointer:</b> Define confidential information carefully, and consider providing examples.</p>
<p>Prohibiting disclosure of any information about the employer to the media without the employer’s permission.</p> <p>Prohibiting any disclosure of company legal matters or investigations.</p>	<p>May interfere with employees’ protected rights to seek outside support to improve their terms and conditions of employment.</p> <p><b>Practice Pointer:</b> Consider providing examples of matters that legitimately may not be disclosed and that do not intrude on protected activity under the NLRA.</p>

# Client Alert.

**Can employers avoid these problems by adding a “savings clause” to their existing policies, stating that nothing in the policy should be interpreted to limit an employee’s ability to engage in legally protected activity under the NLRA and similar laws?** A savings clause might be helpful in some cases, but it is unlikely by itself to save a social media policy that is drafted too broadly. The NLRB has opined that this type of savings clause does not cure an overbroad policy because employees might not understand what protected activities are actually permitted by the NLRA. As a result, even if an employer chooses to include a savings clause in its social media policy, it should also review the rest of the policy to avoid problematic or overly broad provisions.

## ACTION ITEMS

What steps should employers take to address these potential risks under their social media policies? We would suggest the following measures:

- 1. Assess your company’s own risk profile and tolerance.** While all employers should understand the NLRB’s positions on social media policies, not all employers will place the same weight on these considerations. Employers in highly regulated industries may choose to defer to social media guidance from their regulators, even if this may result in some tensions or conflicts with NLRA principles. In comparison, employers already facing labor disputes or activity may choose to follow the NLRB’s guidance more strictly and carefully.
- 2. Review and update your social media policy in light of evolving NLRB guidance.** Many employers are revisiting and revising their social media policies based on the recent NLRB decisions and other NLRB guidance, to reduce the risk of legal challenge. In particular, the NLRB’s May 30, 2012 “Report of the Acting General Counsel Concerning Social Media Cases” is a helpful resource in understanding the NLRB’s views on social media policies. The Report also includes a sample social media policy that the NLRB found to be lawful. The Report is available on the NLRB’s website at [www.NLRB.gov](http://www.NLRB.gov).
- 3. Use examples to clarify your meaning.** It is not easy to craft language that perfectly explains what activities you are trying to restrict. If your policy is too broad, you run the risk that it may appear to chill employees’ Section 7 rights. If your policy is too narrow, employees may fail to understand and comply with those provisions. The NLRB has suggested that the use of examples—even if they are merely examples and not an exhaustive list—may help to avoid unintended overbreadth by showing employees the types of activities you have in mind. This can help to remedy overly broad confidentiality and non-disparagement provisions, for instance, as described above.
- 4. Remember that these principles apply equally to other types of employment policies.** Although the NLRB’s current focus appears to be on social media policies, employers should note that same concepts apply with equal force to a broad range of personnel policies and practices, such as those governing confidentiality, communications, and technology use, in addition to any verbal instructions given to employees concerning the discussion of their employment terms. Finally, members of management and human resources should be trained to understand the scope of employees’ Section 7 rights.

## Contact:

**Christine E. Lyon**  
(650) 813-5770  
[clyon@mofocom](mailto:clyon@mofocom)

**Timothy F. Ryan**  
(213) 892-5388  
[tryan@mofocom](mailto:tryan@mofocom)

# Client Alert.

---

## **About Morrison & Foerster:**

We are Morrison & Foerster—a global firm of exceptional credentials. Our clients include some of the largest financial institutions, investment banks, Fortune 100, technology and life science companies. We've been included on *The American Lawyer's* A-List for nine straight years, and *Fortune* named us one of the “100 Best Companies to Work For.” Our lawyers are committed to achieving innovative and business-minded results for our clients, while preserving the differences that make us stronger. This is MoFo. Visit us at [www.mofo.com](http://www.mofo.com).

*Because of the generality of this update, the information provided herein may not be applicable in all situations and should not be acted upon without specific legal advice based on particular situations. Prior results do not guarantee a similar outcome.*