II. DISCIPLINE IN CONNECTION WITH SOCIAL MEDIA COMMUNICATIONS

If an employer discharges, disciplines, threatens to discharge or discipline, or otherwise retaliates against an employee because of his use of social media, that action may be unlawful. The first step in deciding if the employer's action is unlawful is determining whether the employee's communication was protected under Section 7. The NLRB considers the following issues in order to answer that question:

- Did the communication relate to shared concerns of employees about terms and conditions of employment?
- Did the employee discuss the post with other employees?
- Did other employees respond to the post?
- Was the employee seeking to encourage or prepare for group action?
- Was the post an outgrowth of the collective concerns of employees?

Although this is a new field of law, several cases (available at http://www.nlrb.gov/cases-decisions/board-decisions) have been decided that give examples of employee activity that has been found to be protected, as well as examples of unprotected employee activity, including:

- If workers discuss complaints about their working conditions, including the behavior of their supervisor, on Facebook, it may be protected activity. In one case that was heard by the NLRB, employees posted complaints on Facebook about the conduct of their supervisor and management's refusal to address the employees' concerns. The employees also discussed looking at the book *California Workers' Rights* so that they could determine whether the employer was violating any law. The workers were fired. The NLRB found the employees' conduct to be "protected concerted activity" because their activities involved workers acting together to improve their working conditions. (*Design Technology Group LLC dba Bettie Page Clothing*, 359 NLRB No. 96 (April 19, 2013).)
- Even if there is no proof that a coworker had access to an employee's private Facebook page, the employee's post about working conditions may still be considered protected concerted activity, particularly if it is a continuation of previous communications with coworkers and third parties regarding working conditions. In a case decided in 2013, the NLRB found that an employee had engaged in protected activity when he complained about the lack of health insurance, minimal sick and vacation days, unsafe buses, and payroll practices in an online post, even though there was no evidence that other employees could see his post. (*New York Party Shuttle, LLC and Fred Pflantzer,* 359 NLRB 112 (May 2, 2013).)
- If an employee put a post on Facebook about another employee, it may be protected activity. In a case decided in 2011, employees made Facebook posts in reaction to a coworker's criticisms of their work. The employees were held to be taking the first step towards group action to defend themselves against accusations that they reasonably believed their coworker would make to management. Thus, it was protected concerted activity. (*Hispanics United of Buffalo,* 359 NLRB No. 37 (2011).)

However, employees should know that not all posts on social media sites are protected, even if the posts concern the terms and conditions of employment. There is a difference between an employee's posts about a concern shared by other employees and posts that are personal gripes or rumors about things unrelated to working conditions. If a post is not related to working conditions, it may be a basis for discipline in some circumstances (for example, disclosing information unrelated to working conditions that could damage the business or is defamatory and could create liability). Employees could be fired if there are multiple posts and some are not legally protected.

III. SOCIAL MEDIA COMMUNICATIONS USING THE EMPLOYER'S PROPERTY

In 2010, the U.S. Supreme Court decided a case involving the privacy rights of a public employee who sent personal text messages on pagers provided by his public employer. (*City of Ontario v. Quon (2010)*130 S.Ct. 2619.) The court did not address the key issue of whether an employee has a reasonable expectation of privacy in personal text messages using an employer-issued device. However, in this decision the court found that even when an employee has a reasonable

expectation of privacy in personal communications on workplace equipment, there may be no right to personal privacy if:

- The public employer searches the device for a legitimate work-related reason;
- The means of searching communications are efficient; and
- Some care is taken to make sure that the search is not overly intrusive.

Public and private sector employers are permitted to have a neutral, evenly-applied policy (for example, one that doesn't target discussion of workers' rights) stating that the employer may have access to email and related accounts provided by the employer or accessed on equipment belonging to the employer.

IV. HACKING IS ILLEGAL

Under both federal and state law it is illegal to gain unauthorized access to a password-protected account or website without permission or through unlawful means. (Computer Fraud and Abuse Act, 18 U.S. Code section 1039; Penal Code section 502 et seq.)

V. SOCIAL MEDIA AND DISCRIMINATION

If an employer becomes aware through social media that an employee or an applicant for a job is a member of a protected classification (for instance, by locating information on gender, race, disability status, age, sexual orientation, etc.), this may form the basis for a discrimination claim. See the 2010 edition Chapter 6 for more information on discrimination.

VI. CONCLUSION

In summary, workers do not lose their freedom of speech or legally protected rights to discuss their wages and other conditions of employment with coworkers (and, to some extent, third parties) just because the discussions are on social media. However, it is wise to use common sense when discussing confidential information over the Internet. Employers may make some rules about Internet usage in terms of avoiding activities that distract workers during their actual work time (not including breaks), but such rules should not be so broad that they prevent or discourage employees from their legal right to engage in discussion of their working conditions or other discussions (for instance, regarding public issues) during the time they are not working.