THE 21ST CENTURY WATER COOLER: APPLYING THE NLRA TO SOCIAL NETWORKING AND BEYOND

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I. Protected concerted activity under the National Labor Relations Act and employer conduct interfering with such activity

In deciding cases alleging violations of the NLRA by employer rules governing employee conduct or restrictions on employee use of social networking, e-mail, and the internet, the Board looks to the law of protected concerted activity. As the title of this segment suggests, the conduct at the water cooler is now sometimes the conduct in the social media, but the same law applies. A look at the principles of protected concerted activity will provide you with guidance in this developing application of the law.

A. Statute

1. Section 7 of the NLRA

Section 7 of the National Labor Relations Act (the Act) provides employees with the right to engage in collective action, referred to as protected 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, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

2. Section 8(a)(1)

Section 8(a)(1) of the Act provides that 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 of the Act.

B. Elements of Protected Concerted Activity

In sum, protected concerted activity is the right of employees to act together, with or without a union, to improve working terms and conditions, including wages and benefits.
1. Concert

In *Meyers Industries*,¹ the Board explained that "to find an employee's activity to be 'concerted,' we shall require that it be engaged in with or on authority of other employees, and not solely by and on behalf of the employee himself." In a subsequent *Meyers Industries* decision (*Meyers II*),² the Board clarified that concerted activity "encompasses those circumstances where individual employees seek to initiate or to induce or to prepare for group action, as well as individual employees bringing truly group complaints to the attention of management." The *Meyers II* standard is "expansive enough to include individual activity that is connected to collective activity."³ Concert has been defined broadly since as early as *Root Carlin, Inc.*,⁴ which stated that "the guarantees of Section 7 extend to concerted activity which in its inception involves only a speaker and a listener, for such activity is an indispensable preliminary step to self-organization."⁵ Even if no other employee agrees with the individual protesting working conditions, the activity is no less protected if an employee is found to be engaging in a call for group action.⁶ In contrast, however, a "personal gripe" made by one employee for personal benefit alone is not concerted.

Advice has recently clarified the application of concert to Facebook discussions.⁷ Advice first noted that the requirement that concerted activity “must seek to initiate or to induce or to prepare for group action” can be met when the discussion does not include a current plan to act to address the employees’ concerns. Advice notes that the Board has long described concerted activity in terms of interaction among employees. For example, the Board has found unlawful discipline imposed on employees for their discussions of common concerns about wages.⁸

³ *Id* at 885. See, e.g., *JMC Transport*, 272 NLRB 545, 545 fn. 2 (1984) (finding protected truck driver's lone protest to management regarding a discrepancy in his paycheck, where it "grew out of an earlier concerted complaint regarding the same subject matter, i.e., the change in the pay structure.'’), enf’d 776 F.2d 612 (6th Cir.1985).
⁴ 92 NLRB 1313 (1951).
⁵ *Id*. at 1314.
⁶ *Circle K Corp.*, 305 NLRB 932, 933 (1991), enf’d mem. 989 F. 2d 498 (6th Cir. 1993). Accord *Diva, Ltd.*, 325 NLRB 822, 830-31 (1998), citing *El Gran Combo*, 284 NLRB 1115, 1117 (1987) (an individual employee is engaged in concerted activity when he or she solicits other employees to engage in group activity, even if those solicitations are rejected), enf’d 853 F. 2d 996 (1st Cir.1988).
⁷ 36-CA-10824.
⁸ *St. Margaret Mercy Healthcare Centers*, 350 NLRB 203, 204 (2007), enf’d mem. 519 F. 3d 373 (7th Cir. 2008) (employee discussions about the effect of a new performance evaluation policy held concerted, despite lack of evidence that employees contemplated group action); *Trayco of S.C.*, 297 NLRB 630, 633, 633-34 (1990), enf denied mem. 927 F.2d
Moreover, an employer’s discipline of an employee will be found unlawful if it was undertaken to prevent future employee discussion of terms and conditions of employment. Therefore, Advice concluded that the Board’s requirement that group action must be contemplated or authorized before the allegedly concerted action took place, or that the action be the outgrowth of group action, is applicable only in considering whether there has been concerted action by a single employee. Once employees engage in a discussion of terms and conditions of employment, however, the element of concert is supplied.

As an additional theory of concert, Advice noted that discipline for violating an unlawful rule against discussing terms and conditions of employment is unlawful because it cuts off discussions that lead to group action.

Advice has identified other circumstances of Facebook discussions that remain an individual gripe and never become concerted, despite interactions with other employees. For example, in one case, Advice notes that the initial posting was an expression of an individual gripe. In the posting, the individual appeared to have no particular audience in mind or suggest an intent to initiate or induce coworkers to engage in group action. The post did not grow out of a prior discussion about terms and conditions of employment with coworkers, and there was no other evidence that the individual was seeking to induce or prepare for group action for her individual complaint. Although another employee offered sympathy and indicated general dissatisfaction with her job, she did not engage in any extended discussion with the original poster over working conditions or indicate any interest in taking action with the original poster. Consequently, the original, individual posting remained a personal gripe, which is not protected by the Act.

2. "Mutual aid or protection"

Section 7 requires that the concerted activity must be for mutual aid or protection, which covers a range of terms and conditions of employment. While this requirement is broad, it is important to differentiate employee concerns from concerns that bear only a tangential relationship to employee terms and conditions of employment. For example, the Board has held that employee protests over the quality of service provided by an employer are not protected where such concerns have only a tangential relationship to employee terms and conditions of employment. In Waters

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9 See Parexel International, 356 NLRB No. 82 (2011), slip op. at 4 (termination of employee for engaging in discussions about terms and conditions of employment was an unlawful “preemptive strike” designed to prevent the employee from discussing such matters with other employees), and cases cited therein, slip op. at 4, n. 9.

10 See, e.g., Triana Industries, 245 NLRB 1258 (1979) (discussion of wages “may be necessary as a precursor to seeking union assistance and is clearly concerted activity”).


12 See, e.g., Five Star Transportation, Inc., 349 NLRB 42, 44 (2007), enf’d, 522 F.3d 46 (1st Cir. 2008) (bus drivers letters to school district raising concern about students’ safety unprotected).
of Orchard Park, the Board found that the quality of care or welfare of their patients is not encompassed by the "mutual aid or protection" clause. Thus, the conduct of a CNA and LPN at a nursing home in calling a state patient-care hotline to report that patient safety was at risk due to excessive heat was not protected, because the two employees were concerned about the quality of care and welfare of residents rather than their own working conditions and their discipline for making the call was not unlawful under the NLRA. On the other hand, when employees engage in conduct to address the job performance of their coworkers or supervisor that adversely impacts their working conditions, their activity is protected.\textsuperscript{14}

The Supreme Court found efforts to improve working conditions through channels beyond the immediate employer-employee relationship to be protected in \textit{Eastex, Inc. v. NLRB.}\textsuperscript{15} In that case, the Court found that a union newsletter that criticized a presidential veto of an increase in the minimum wage and urged employees to write their state legislators to oppose right-to-work laws came within the broad scope of "mutual aid or protection," which goes beyond the narrower scope of "self-organization" and "collective bargaining," which are also protected by Section 7. The Court acknowledged that "some concerted activity bears a less immediate relationship to employees' interests as employees... and does not come within the reach of "mutual aid or protection." Thus, the activity must be reasonably related to wages, hours, or other terms and conditions of employment to be for mutual aid or protection.

3. Protected vs. unprotected conduct

Although conduct is concerted and for mutual aid and protection, it may become unprotected based on the nature or substance of the conduct. The two main tests are described in \textit{Atlantic Steel Co.}\textsuperscript{16} and \textit{Jefferson Standard Broadcasting.}\textsuperscript{17} The Board generally applies \textit{Atlantic Steel} to determine whether an employee's conduct that is directed at managers or coworkers, and can be seen as insubordinate or even threatening, retains the protection of the Act.\textsuperscript{18} On the other hand, the Board usually applies \textit{Jefferson Standard} where an employee has made comments that are disparaging of the employer or its product, in the context of appeals to outside or third parties.

\textsuperscript{13} 341 NLRB 642 (2004).

\textsuperscript{14} See, e.g., \textit{Georgia Farm Bureau Mutual Insurance Cos}, 333 NLRB 850, 850-51 (2001) (insurance agents report to state insurance commissioner of suspected fraud by their supervisor protected); \textit{Akal Security, Inc.}, 354 NLRB No. 11, slip op. at 4 (2009), \textit{aff'd}, 335 NLRB No. 106 (2010) (guards' meeting with fellow employee about safety concerns raised by his job performance protected).

\textsuperscript{15} 437 U.S. 556 (1978).

\textsuperscript{16} 245 NLRB 814 (1979).

\textsuperscript{17} \textit{NLRB v. Electrical Workers Local 1229 (Jefferson Standard)}, 346 U.S. 464 (1953).

\textsuperscript{18} \textit{Kiewit Power Constructors Co.}, 355 NLRB No. 150, slip op. at 2 (2010), \textit{enfd} 652 F. 3d 22 (D.C. Cir. 2011) (finding protected alleged threat made to supervisor after employee was warned he could be disciplined for opposing employer's recent change in employee break policy).
In Atlantic Steel Co., the Board established a test of four factors to determine whether an employee who is engaged in protected concerted activity has by opprobrious conduct lost the protection of the Act: 1) the place of the discussion; 2) the subject matter of the discussion; 3) the nature of the employee's outburst; and 4) whether the outburst was, in any way, provoked by an employer's unfair labor practice.

In applying Jefferson Standard, the Board examines whether the communication is related to an ongoing labor dispute and whether it is not "so disloyal, reckless, or maliciously untrue as to lose the Act's protection." Labor speech must be evaluated under the “malice” standard enunciated in New York Times v. Sullivan, 376 U.S. 254, 280 (1964). This test requires a determination of whether the statements were made with knowledge of their falsity or with reckless disregard for their truth or falsity. The Board and courts have recognized that statements in labor disputes are often statements of opinion or figurative expression, “rhetorical hyperbole” incapable of being proved true or false in any objective sense.

Recently, Advice formulated what it calls a “modified Atlantic Steel” analysis to apply to situations such as Facebook, where the communication is available to third parties, but, unlike Jefferson Standard, fellow employees, rather than the third parties, are the target of the communication. The Board has applied the Jefferson Standard test only to employee communications that are intended to appeal directly to third parties. Advice concluded that a different framework is necessary for Facebook discussions not specifically directed toward third parties or the general public and not designed to harm the employer independent of the employees’ concerns about terms and conditions of employment. In the case in question, the conversation was only visible to Facebook friends and not the general public. Advice viewed this as more like the situation where a conversation among employees is overheard by third parties, rather than an intentional dissemination of employer information to the public seeking their support. Advice, therefore, applied Atlantic Steel, looking to see if there is disruption of workplace discipline, but also looking at the Jefferson Standard line of cases to analyze the disparagement of the employer’s products and services to determine if the conduct is protected or not.

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19 245 NLRB at 816. See, e.g., Stanford Hotel, 344 NLRB 558, 558-559 (2005) (calling supervisor a "liar and a bitch" and a "fucking son of a bitch" not so opprobrious as to cost the employee the protection of the Act). See also, New River Industries, 299 NLRB 773 (1990) (finding protected letter sarcastically thanking employer for providing ice cream to employees), enf denied on other grounds 945 F.2d 1290 (4th Cir. 1991).


21 To the extent that reports are inaccurate, where an employee relays in good faith what he or she has been told by another employee, reasonably believing it to have been true, the fact that the report may have been inaccurate does not make the report unprotected. See, e.g., Valley Hospital Medical Center, 351 NLRB 1250, 1252-53 (2007), enf. 358 Fed. Appx. 783 (8th Cir. 2009).

22 6-CA-37254.
C. Employer rules relating to protected concerted activity

1. Rules of Conduct

Employees have a Section 7 right to discuss their wages and other terms and conditions of employment. A rule that precludes employees from discussing terms and conditions of employment, or sharing information about themselves or their fellow employees with each other or with non-employees, violates Section 8(a)(1).

An employer violates Section 8(a)(1) of the Act through the maintenance of a work rule if that rule would “reasonably tend to chill employees in the exercise of their Section 7 rights.” The Board has developed a two-step inquiry to determine if a work rule would have such an effect. First, a rule is unlawful if it explicitly restricts Section 7 activities. Second if the rule does not explicitly restrict protected activities, it will violate the Act only upon a showing that: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights. In determining how an employee would reasonably construe the rules, particular phrases should not be read in isolation but considered in context.

See the Appendix for a selection of rules that have been analyzed by the Board, administrative law judges (ALJs), and by the Acting General Counsel in recent memos from the National Labor Relation Board’s Advice Branch, which has been considering social media issues. It is important to note that a rule that is lawful on its face may be unlawful if it is promulgated or applied to interfere with protected concerted activity. It is also necessary to consider any individual rule in the context of any other rules distributed or announced with it.

23 Cintas Corp., 344 NLRB 943 (2005), enfd 482 F.3d 463 (D.C. Cir. 2007) (the unqualified prohibition on the release of any information regarding its partners could reasonably be construed by employees to restrict discussion of wages and other terms and conditions of employment with their fellow employees and with the union); Double Eagle Hotel & Casino, 341 NLRB 112,114-115 (2004), enfd, 414 F. 3d 1249 (10th Cir. 2005).

24 Bigg’s Foods, 347 NLRB 425, 425 n. 4 (2006) (rule prohibiting employees from discussing their own or their “fellow employees” salaries with “anyone outside the company” violates Section 8(a)(1)). See also, Albertson’s, Inc., 351 NLRB 254, 258 (2007) (employer unlawfully used its confidentiality rule to discipline an employee for engaging in protected concerted activity, namely, providing employee names to assist the union’s organizing campaign).


27 Id.

28 Id. at 646.
2. **Board clarifies the circumstances under which discipline imposed under an overly broad rule is unlawful.**

In *Continental Group, Inc.*, the Board clarified the rule under which discipline imposed under an overly broad rule violates Section 8(a)(1). The Board explained that an employer does not violate the Act by disciplining an employee for conduct prohibited by an overly broad rule if the conduct is “wholly distinct” from the concerns of Section 7. But when the conduct for which discipline is imposed pursuant to an unlawfully overbroad rule “touch[es] the concerns animating Section 7,” the discipline has a “chilling effect” on other employees’ exercise of protected rights, even if the conduct could have been proscribed pursuant to a more narrowly drawn rule. For this reason, the Board concluded that it will find unlawful discipline imposed pursuant to an overly broad rule for conduct that is within the subjects “protected” by Section 7, even if the conduct is not concerted. For example, the Board has held that an employer’s discharge of an employee pursuant to an overbroad confidentiality rule by complaining to a client about an individual compensation issue violated the Act.

3. **Employees do not have a statutory right to use their employer’s e-mail system to communicate about union and protected concerted matters, and the Board adopts a new standard governing the discriminatory enforcement of employer rules.**

In *Register Guard*, the Board found that the Employer did not violate Section 8(a)(1) of the Act by maintaining a policy prohibiting the use of the Employer’s e-mail system for all “non-job-related solicitations,” including Section 7 activity. The Board relied on a line of cases that held that employees had no statutory right to use employer-owned equipment – such as bulletin boards, telephones, and televisions – for Section 7 communications, as long as the restrictions were non-discriminatory. The Board rejected the General Counsel’s and dissent’s contention that employees’ use of their employer’s e-mail system should have required a balance between employees’ Section 7 rights and the employer’s interest in maintaining discipline, finding that a broad ban on employee non-work-related e-mail communications should be presumptively unlawful without a showing of special circumstances. Rather, the Board found the analytical framework of *Republic Aviation Corp. v. NLRB*, relied on by the GC and the dissent, was inapplicable because, in that case, the employer prohibited all solicitations at any time on the premises, whereas here the Employer’s policy did not regulate traditional, face-to-face solicitation.

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30 Id. slip op. at 4 (employer’s discharge of an employee for violating its overbroad access rule by sleeping overnight at its facility did not violate the Act).

31 Id. slip op at 4, n. 10 (emphasis in the original), citing *NLS Group*, 352 NLRB 744 (2008), incorporated by reference in 355 NLRB No. 169 (2010), enf’d 645 F.3d 475 (1st Cir 2011).


33 324 U.S. 793, 801-803 (1945).
Regarding the issue of whether the Employer violated Section 8(a)(1) by discriminatorily enforcing the above policy against union-related e-mails while allowing some personal e-mails, the majority modified Board law concerning discriminatory enforcement. The Board adopted the 7th Circuit’s analysis, which distinguished between personal, non-work-related postings on a bulletin board, such as for-sale notices and wedding announcements, and “group” or “organizational” postings such as union materials. Thus, according to the Board, in order to be unlawful, discrimination must be along Section 7 lines. For example, anti-union and pro-union posting should be treated the same, but treating pro-union postings and personal notices differently would not make out a case of discrimination. The majority overruled precedent to the extent inconsistent.

Applying its new standard, the Board noted that the Employer had permitted a variety of personal, non-work-related e-mails, but had not permitted e-mails to solicit support for any group or organization. Thus, the Employer’s enforcement of its policy regarding an employee’s two e-mails that solicited support for the Union did not discriminate along Section 7 lines, and did not violate Section 8(a)(1). As for the employee’s third e-mail, which was not a solicitation, but merely a clarification of the facts surrounding a union rally the day before, the Employer’s enforcement of its policy was discriminatory, because the Employer permitted a variety of non-work-related e-mails other than solicitations.

On appeal to the District of Columbia Circuit, the Union did not challenge the legality of the rule against personal use of the Employer’s computers, but it did, inter alia, challenge the Board’s change to view discrimination as limited to discrimination based on Section 7 activity. The Court reversed the Board’s new discrimination analysis, finding that the employer unlawfully distinguished between e-mail solicitations generally and union-related e-mail solicitations in disciplining an employee, although “neither the Company's written policy nor its express enforcement rationales relied on an organizational justification. [I]n practice the only employee e-mails that had ever led to discipline were the union-related e-mails at issue here.” Because any losing party can file an appeal to the D.C. Circuit under the NLRA, the D.C. Circuit’s determinations are particularly important, although the Board consistently follows its precedent despite conflicts in the circuits.

Based on the D.C. Circuit’s determination in Register Guard, the General Counsel currently has one case before the Board seeking to have the Board reconsider the definition of discrimination in Register Guard.
D. Recent cases on protected concerted activity

1. Employer unlawfully discharged an employee for failure to comply with an overly broad confidentiality policy, in violation of Section 8(a)(1).

In *NLS Group*, an employee who had discussed the terms of his employment with a client was then discharged for failure to comply with the Employer's confidentiality policy. The Board found that the Employer's confidentiality policy, which prohibited employees from disclosing the terms of their employment, including compensation, to "other parties," was unlawful, because employees would reasonably understand that language as prohibiting discussion of their compensation with union representatives. Therefore, the employee's discharge due to his failure to comply with this unlawfully overbroad confidentiality policy violated Section 8(a)(1).

2. Employee's discharge in order to prevent her from engaging in protected activity in the future was unlawful, even though she had not yet engaged in concerted activity at the time of her discharge.

In *Parexel International, LLC*, the majority found that the employer unlawfully discharged an employee as a "pre-emptive strike" to prevent her from engaging in protected activity in the future, regardless of whether her initial conversations were themselves concerted activity. In this case, a coworker told an employee who was not South African that he and his wife, both of whom were South African, had been given a raise by a South African supervisor. The employee was discharged after she stated her belief to supervisors that the employer was paying South Africans higher wages and was going to continue to favor South Africans. For purposes of deciding the case, the majority assumed that the employee had not yet engaged in protected concerted activity at the time of her discharge. The majority found that the employer terminated the employee because of its concern that she would discuss wages and employment discrimination with other employees and its fear of what those discussions might lead to. The Board found that Board law does not require that an employee must have already engaged in protected concerted activity in order for the Board to find that she was unlawfully discharged to prevent protected concerted activity. If an employer acts to prevent protected concerted activity --to "nip it in the bud"--that action interferes with and restrains the exercise of Section 7 rights. What is critical is the intent to suppress protected concerted activity.

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34 355 NLRB No. 169 (2010), incorporating by reference its prior decision at 352 NLRB 744 (2008). The First Circuit had enforced the earlier decision in *Northeastern Land Services, Ltd. v. NLRB*, 560 F. 3d 36 (2009), finding that the Employer's confidentiality rule was unlawfully overbroad because its "language could be fairly read to extend to disclosure of terms of employment to union representatives.” Because the original Board decision was vacated as a two-Member decision under the Supreme Court's *New Process Steel, L.P v. NLRB*, 130 S.Ct. 2635 (2010), decision, the case went back to the First Circuit, which reaffirmed the merits of its original decision. 645 F. 3d 475 (1st Cir. 2011).

35 356 NLRB No. 82 (2011).
3. A single employee's protest to a supervisor, in the presence of coworkers, about a work rule change, was concerted.

In Worldmark by Wyndham, the Board found that an employee was engaged in protected concerted activity when he questioned his supervisor, in front of coworkers, about a new dress code. Therefore, the employer's warning to him concerning the incident was unlawful. The Board noted that the Board has consistently found activity to be concerted when, in front of their coworkers, single employees protest changes to employment terms common to all employees. The Board found that the employee intended to induce group action, because he questioned the supervisor in front of several colleagues, used words such as "us" and "we," and reasonably suspected that his coworkers would disagree with the rule change. Any doubt about the concerted nature of his action was removed when a coworker joined in. The Board found that the employee's conduct was concerted, even though the employee and the coworker who interjected his own complaints during the conversation did not agree in advance to protest together, noting that the Board does not require evidence of a previous plan to act in concert.

4. Property owner unlawfully prohibited off-duty employees of its contractor from handbilling on the property owner's property.

In New York New York Hotel & Casino, the Board, in a case remanded from the D.C. Circuit Court of Appeals, fashioned a test governing the circumstances under which a property owner may exclude from its premises off-duty employees of a contractor who are regularly employed on the property and who seek to engage in organizational handbilling directed at potential customers of the employer and property owner. The case involved off-duty employees of a food concessionaire in a hotel, who were ejected by the hotel property owner when they conducted handbilling both on the covered sidewalk and driveway just outside the hotel's main entrance and directly in front of two restaurants operated by their employer inside the hotel. The Board held that the property owner may lawfully exclude such employees only where the owner is able to demonstrate that the employees’ activity significantly interferes with the employer’s use of the property or where exclusion is justified by another business reason, including, but not limited to, the need to maintain production and discipline. Because this situation involved employees seeking to exercise their own statutory right in their own workplace, the Board did not require the off-duty employees to show that they lack a reasonable alternative means of communicating with their intended audience to permit them onto the property when they were off duty.

5. Employer violated Section 8(a)(1) by prohibiting employees from wearing pro-union T-shirts during an election.

In Stabilus, Inc., the Board found that the Employer violated Section 8(a)(1) by prohibiting employees from wearing pro-union T-shirts during an election. The Board noted the

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38 355 NLRB No. 161 (2010).
Supreme Court's holding in *Republic Aviation Corp. v. NLRB*,\(^{39}\) under which employees have a right to wear union insignia, which may not be infringed, absent a showing of "special circumstances." It found that, even if the Employer had proved that special circumstances justified its policy of requiring employees to wear shirts bearing the company name, the Employer impinged on employees' Section 7 rights because its agents went beyond enforcing its uniform policy by requiring union supporters to remove union T-shirts and other displays of support for the Union that could have been worn consistent with the policy. The Employer's overbroad and targeted use of its policy to force a union supporter to take an action that would influence other employees who observed the Employer's actions would have been unlawful even if the Employer had justified a narrow application of its uniform policy. Moreover, the Employer acted unlawfully by disparately enforcing its policy against union activity, in that the Employer had previously permitted employees to wear noncompany clothing for short periods of time on occasions such as the Super Bowl, Halloween, and the anniversary of the September 11 terrorist attacks.

6. **Employer unlawfully fired a supervisor for refusing to participate in its reasonably evident quest to identify and terminate employees involved in protected concerted activity.**

In *Texas Dental Association*,\(^{40}\) the Board concluded that the employer unlawfully discharged a supervisor for refusing to participate in its reasonably evident quest to identify and terminate employees involved in protected concerted activity. The supervisor had attended an employee meeting in which employees circulated and signed a petition, using aliases to avoid reprisal, in which they expressed their dissatisfaction about work-related matters and requested an opportunity to voice their concerns to an impartial outside source. The employer then announced at a staff meeting that anyone who had participated in any way in the recent communication must contact her as a condition of employment. The employer sought to identify participants through a forensic examination of their computer hard drives and terminated an employee unlawfully when a fragment of the petition was discovered on his computer. The employer then discharged the supervisor on the ground that she had information about the employee meeting and petition but had failed to disclose to the employer what she knew about it.

The Board noted that, even though supervisors are not protected by the Act, a supervisor's discharge violates Section 8(a)(1) under certain limited circumstances, including refusal to commit an unfair labor practice. In such circumstances, a prohibition against discharging the supervisor is necessary in order to vindicate employee rights under the Act. Here, the evidence showed that the employer had embarked on an effort to identify participants in order to terminate them for exercising their rights under the Act. The employer's termination of the supervisor for failure to disclose her knowledge of the employees' protected concerted activities was in substance, a termination because the supervisor failed to cooperate with the employer's unlawful endeavor.

\(^{39}\) 324 U.S. 793, 801-803 (1945).

\(^{40}\) 354 NLRB No. 57 (2009), motions for reconsideration and to reopen the record denied, 354 NLRB No. 107 (2009).
RULES FOUND LAWFUL

Behavioral Rules

In *Lafayette Park Hotel*, 326 NLRB 824 (1998), the Board found the following rule to be lawful:

**Standards of Conduct:** The following conduct is unacceptable:
Being uncooperative with supervisors, employees, guests and/regulatory agencies or otherwise engaging in conduct that does not support the Lafayette Park Hotel’s goals and objectives.

The Board found that the mere maintenance of the rule would not reasonably tend to chill employees in the exercise of their Section 7 rights. The rule addresses legitimate business concerns, including being uncooperative with the named individuals. They find no ambiguity and that the employees would not assume a goal was to remain nonunion.

In *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), the Board found the following rules to be lawful:

- Using abusive or profane language in the presence of, or directed toward, a supervisor, another employee, a resident, a doctor, a visitor, a member of the resident’s family, or any other person on company property (the premises).
- Harassment of other employees, supervisors and any other individuals in any way.
- Verbally, mentally, or physically abusing a resident, a member of a resident’s family, a fellow employee or a supervisor under any circumstances. This includes physical and verbal threats.

The Board found that the mere maintenance of the rule would not reasonably tend to chill employees in the exercise of their Section 7 rights. They noted that the employer has a legitimate right to establish a “civil and decent work place.” They also noted that employers have a legitimate right to adopt prophylactic rules banning such language because employers are subject to civil liability under federal and state law should they fail to maintain a workplace free of racial, sexual, and other harassment, and abusive language can constitute verbal harassment triggering liability under federal or state law. They find no basis for finding that a reasonable employee would interpret a rule prohibiting such language as prohibiting Section 7 activity. Verbal abuse and profane language are not inherent parts of Section 7 activity. An employee using abusive or profane language in the course of Section 7 activity may or may not be protected. Without evidence of an unlawful application of the rule, the Board would not find the mere maintenance of the rule to be unlawful.

In *Palms Hotel & Casino*, 344 NLRB 1363, 1367-68 (2005), the Board, with Member Liebman dissenting, following the analysis of *Lutheran Heritage*, found the following rule to be lawful:

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41 See also: *Tradesmen International*, 338 NLRB 460-463 (2002) (rule prohibiting “verbal or other statements which are slanderous or detrimental to the company or any of the company’s employees” permissible); *Ark Las Vegas*
Standards of Conduct: Employees are prohibited from engaging in any type of conduct that is or has the effect of being injurious, offensive, threatening, intimidating, coercing, or interfering with fellow employees or patrons.  

Confidentiality Rules

In *Lafayette Park Hotel*, 326 NLRB 824, 826 (1998), the Board found the following rule to be lawful:

**Standards of Conduct 17: The following conduct is unacceptable.**

17. Divulging Hotel-private information to employees or other individuals or entities that are not authorized to receive that information.

The Board found that the mere maintenance of the rule would not reasonably tend to chill employees in the exercise of their Section 7 rights. They did not believe that employees would reasonably read this rule as prohibiting discussion of wages and working conditions among employees or with a union. They noted that businesses have a substantial and legitimate business interest in maintaining the confidentiality of private information, including guest information, trade secrets, contracts with suppliers, and a range of other proprietary information.

Advice found the following rule to be lawful in Case 6-CA-37254:

**Employees may not use or disclose any confidential or proprietary information of or about the Employer, its affiliates, vendors, or suppliers, including but not limited to business and financial information.**

Advice found this rule to be lawful because it does not reference employee information and the examples given relate to confidential or proprietary business information. Therefore, the rule would not reasonably be read to cover discussions about wages and other working conditions.

In Memorandum OM 12-31, Report of the Acting General Counsel Concerning Social Media Cases, dated January 24, 2012 (OM 12-31), at 17, Advice found the following rule to be lawful:

**Employees are prohibited from using or disclosing confidential and/or proprietary information, including personal health information about customers or patients.**

*Restaurant Corp.*, 335 NLRB 1284, fn. 2, 1291-1292 (2001) (rules prohibiting “any conduct, on or off duty, that tends to bring discredit to or reflects adversely on, yourself, fellow associates, the Company,” and “conducting oneself unprofessionally or unethically, with the potential of damaging the reputation or a department of the Company” not unlawful); *Flamingo Hilton-Laughlin*, 330 NLRB 287, 288-289 (1999) (rule prohibiting “off-duty misconduct that materially and adversely affects job performance or tends to bring discredit to the Hotel” did not violate the Act); *Albertson’s, Inc.*, 351 NLRB 254, 258-259 (2007) (rule prohibiting “[o]ff-the-job conduct which has a negative effect on the Company’s reputation or operation or employee morale or productivity” lawful); *Lafayette Park Hotel*, 326 NLRB at 825-826 (rules prohibiting conduct which does not meet the employer’s “goals and objectives,” and “unlawful or improper conduct, which affects the employee’s relationship with the job, fellow employees, supervisors or the hotel’s reputation or good will in the community” lawful).
Advice found that prohibiting the disclosure of confidential and/or proprietary information acquired in the course of employment was not overbroad. Considering that the rule contains several references to customers, patients, and health information, employees would reasonably understand that this rule was intended to protect the privacy interests of the Employer’s customers and not to restrict Section 7 protected communications.

**Social Media Rules**

Advice found the following rule to be lawful in case 6-CA-37260:

1. No employee is required to participate in any social media or social networking site (unless required as a part of the job), and no employee should ever be pressured to “friend,” “connect,” or otherwise communicate with another employee via a social media outlet.

Advice found the rule was sufficiently specific in its prohibition against pressuring co-employees and clearly applies only to harassing conduct. It cannot reasonably be interpreted to apply more broadly to restrict employees from attempting to “friend” or otherwise contact their colleagues for the purposes of engaging in protected concerted or union activity.

Advice found the following rule to be lawful in Case 31-CA-30255:

2. The Company may, in its sole discretion, request that you confine your social networking to matters unrelated to the Company if it determines that this is necessary or advisable to ensure compliance with securities regulations and other laws.
   a. Associates shall not use or disclose confidential and/or proprietary information that you acquire in the course of your employment with the Employer. This includes personal health information about the Employer’s customers/patients (or any other information that could be used to identify customers or patients) and proprietary or other confidential business information.
   b. Associates shall not discuss in any form of social media “embargoed information,” such as launch dates, release dates, and pending reorganizations.

Advice found that while the requirement to confine their social networking to matters unrelated to the Company could be construed to restrict their communication regarding their terms and conditions of employment, in context, employees reasonably would interpret the rules to address only those communication that would implicate security regulations, protect the privacy interests of customers, or protect corporate information such as launch dates, which are unrelated to communications about working conditions.

Advice found the following rule valid in cases 8-CA-62080 and 31-CA-30255:

**Promotional Content:** While engaging in social networking activities for personal purposes, whether on online pages created by yourself or others, you must include the following statement: “the views expressed here are mine alone and do not reflect those
of my employer.” You should not refer to the Employer by name and you may not publish any promotional content on that site or forum.

Advice reasoned that employees would not reasonably view this rule on promotional content to restrict Section 7 activity, where there was a definition of promotional activity provided by the company to limit the scope of the rule. Employees would not consider communications about working conditions as designed to promote or advertise their Employer.

In OM 12-31, at 16, Advice found this rule to be lawful:

Social media policy: Employees are prohibited from using social media to post or display comments about coworkers or supervisors or the employer that are vulgar, obscene, threatening, intimidating, harassing, or a violation of the Employer’s workplace policies against discrimination, harassment, or hostility on account of age, race, religion, sex, ethnicity, nationality, disability, or other protected class, status, or characteristic.

Advice noted that the Board has indicated that a rule’s context provides the key to the “reasonableness” of a particular construction. In this regard, the Board has found that a rule forbidding “statements which are slanderous or detrimental to the company” that appeared on a list of prohibited conduct including “sexual or racial harassment” and “sabotage” would not be reasonably understood to restrict Section 7 activity. Tradesmen International, 338 NLRB 460, 460-62 (2002). Similarly here, the rule would not reasonably be construed to apply to Section 7 activity. The rule appears in a list of plainly egregious conduct, such as violations of the Employer’s workplace policies against discrimination, harassment, or hostility on account of age, race, religion, sex, ethnicity, nationality, disability, or other protected class, status, or characteristic.

Multi-purpose Rules

In Triple Play Sports Bar and Grille, JD (NY)-01-12, at 20-21 (Jan. 3, 2012), the ALJ found the following rule to be valid: Important: An appeal will be filed.

Internet/Blogging Policy: The Company supports the free exchange of information and supports camaraderie among its employees. However, when internet blogging, chat room discussions, e-mail, text messages, or other forms of communication extend to employees revealing confidential and proprietary information about the Company, or engaging in inappropriate discussions about the company, management, and/or co-workers, the employee may be violating the law and is subject to disciplinary action, up to and including termination. Please keep in mind that if you communicate regarding any aspect of the Company, you must include a disclaimer that the views you share are yours, and not necessarily the views of the Company. In the event state or federal law precludes this policy, then it is of no force or effect.

The ALJ, relying on the cases cited above in footnote 1, found that the policy would not be reasonably be construed as prohibiting Section 7 activity. Please note, however, that an appeal will be filed, and this is not a reliable rule.
RULES FOUND UNLAWFUL

Behavioral Rules

In *Lafayette Park Hotel*, 326 NLRB 824, 828 (1998), the Board found the following rule to be unlawful:

**Standards of Conduct: The following conduct is unacceptable:**
Employees are prohibited from making false, vicious, profane, or malicious statements toward or concerning the employer or any of its employees.

The Board found this rule would reasonably tend to chill employees in the exercise of their Section 7 rights because it forbids merely false statements, which would not define the areas of permissible conduct clearly enough to avoid chilling employees’ exercise of Section 7 rights.

Advice found the following rule to be unlawful in Cases 8-CA-62080 and 31-CA-30255:

**Associates shall not use social media to disparage the Employer’s or competitors’ products, services, executive leadership, employees, strategy, or business prospects.** (Emphasis added.)

Advice found this rule to be unlawfully overbroad insofar as it prohibits employees from disparaging the Employer’s executive leadership and employees. These are broad terms that would commonly apply to protected criticism of the Employer’s labor policies or treatment of employees. The policy does not define these broad terms or limit them in any way that would exclude Section 7 activity. See, *University Medical Center*, 335 NLRB 1318, 1320-22 (2001), enf. denied in pertinent part, 335 F. 3d 1079 (D.C. Cir. 2003) (work rule that prohibited “disrespectful conduct towards [others]” unlawful because it included “no limiting language [that] removes [the rule’s] ambiguity and limits its broad scope.”)

Advice found the following rule to be unlawful in Cases 7-CA-53556 and 53623:

**Values and Standards of Behavior**

We will not engage in or listen to negativity or gossip. We will recognize that listening without acting to stop it is the same as participating.

Teamwork: We are a team committed to excellence and helping each other be accountable to our mission and values. We practice team together and team apart and empower people to make decisions that promote our success.

We will not make negative comments about our fellow team members and we will take every opportunity to speak well of each other.

We will represent the Employer in the community in a positive and professional manner in every opportunity.
Attitude: We believe that each of us controls our own attitude and what is important is not so much what happens to us, but how we choose to react to it. We believe we must recruit, retain and reward people who make a positive difference in people’s lives.

Advice found that several provisions of the Values and Standards of Behavior rules would reasonably be construed to chill employees in the exercise of their Section 7 rights. These broad statements would reasonably be read to prohibit Section 7 communications or criticisms of the employer’s employment practices and its pay and treatment of its employees. Further, the rules contain no explanation or limiting language to clarify to employees that they do not restrict Section 7 rights.

Confidentiality Rules

In *DirectTV U.S. DirectTV Holdings, LLC*, ALJD (SF-48-11) (Dec. 13, 2011), the ALJ found the following rule to be unlawful: Important: an appeal has been filed.

Confidentiality:

Never discuss details about your job, company business or work projects with anyone outside the company, especially in public venues, such as seminars and conferences, or via online posting or information-sharing forums, such as mailing lists, websites, blogs, and chat rooms.

Never give out information about customers or DIRECTTV employees. In particular, customer information must never be transmitted through regular unencrypted email, even internally within DIRECTTV. If you have additional questions regarding data transmission guidelines, check with the IT department.

The ALJ found the rule unlawful on its face, as it would reasonably tend to inhibit union or protected concerted activity by precluding employees from discussing wages, hours, and working conditions with employees and others, including union representatives, by precluding employees from contacting or conferring with representatives of the media, and by causing employees to be reluctant to contact the Board or deal with Board agents

Social Media Cases

In OM 12-31 at 4, Advice found the following rule unlawful:

Prohibits making disparaging comments about the company through any media, including online blogs, other electronic media or through the media.

Advice found the rule to be unlawful because it would reasonably be construed to restrict Section 7 activity, such as statements that the Employer is, for example, not treating employees fairly or paying them sufficiently. Further, the rule contained no limiting language that would clarify to employees that the rule does not restrict Section 7 rights.
Advice found the following rule unlawful in OM 12-31 at 7-8:

**Social Media Policy:** In external social networking situations, employees should generally avoid identifying themselves as the Employer’s employees, unless there was a legitimate business need to do so or when discussing terms and conditions of employment in an appropriate manner. This policy will not apply so as to interfere with employee rights to self-organize, form, join, or assist labor organizations, to bargain collectively through representatives of their choosing, or to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from engaging in such activities.

Advice found that the Employer’s rule limits discussion of terms and conditions of employment to discussions conducted in an “appropriate” manner, thereby implicitly prohibiting “inappropriate” discussions of terms and conditions of employment. The policy does not define what an “appropriate” or “inappropriate” discussion of terms and conditions of employment would be, either through specific examples of what is covered or through limiting language that would exclude Section 7 activity. Therefore, employees would reasonably interpret the rule to prohibit protected activity, including criticism of the Employer’s labor policies, treatment of employees, and terms and conditions of employment. Advice did not find a savings clause allowing Sections 7 rights, although spelled out in statutory terms, would protect discussions the Employer considers inappropriate.

Advice found the following rule unlawful in OM 12-31, at 12:

**Social media policy:** Prohibits employees from using social media to engage in unprofessional communication that could negatively impact the Employer’s reputation or interfere with the Employer’s mission or unprofessional/inappropriate communication regarding members of the Employer’s community.

Applying *Lutheran Heritage*, Advice found a violation because it would reasonably be construed to chill employees in the exercise of their Section 7 rights. These prohibitions would reasonably be read to include protected statements that criticize the Employer’s employment practices, such as employee pay or treatment. Further, the rule contained no limiting language excluding Section 7 activity from its restriction. Although the rule did contain examples of clearly unprotected conduct, such as displaying sexually oriented material or revealing trade secrets, it also contained examples that would reasonably be read to include protected conduct, such as inappropriately sharing confidential information related to the Employer’s business, including personnel actions.

Advice in OM 12-31, at 13, found the following rules to be unlawful:

**Social media policy:** prohibits employees from disclosing or communicating information of a confidential, sensitive, or non-public information concerning the company on or through company property to anyone outside the company without prior approval of senior management or the law department.

Advice noted that a rule that precludes employees from discussing terms and conditions of employment, or sharing information about themselves or their fellow employees with outside
parties violates Section 8(a)(1). Employees would reasonably understand this provision to prohibit them from communicating with third parties about Section 7 issues such as wages and working conditions. It is irrelevant that the policy only prohibited communications or disclosures made on or through company property, as employees have the right to engage in Section 7 activities on the Employer’s premises during non-work time and in non-work areas. Moreover, the Employer failed to provide any context or examples of the types of information it deems confidential, sensitive, or non-public in order to clarify that the policy does not prohibit Section 7 activity. The rule further violates the Act to the extent that it requires employees to obtain prior Employer approval before engaging in protected activities.

Advice found the following rule unlawful in OM12-31, at 14:

Social media: Employees are prohibited from publishing any representation about the company without prior approval by senior management and the law department. The prohibition included statements to the media, media advertisements, electronic bulletin boards, weblogs, and voice mail.

Advice noted that Section 7 protects employee communications to the public that are part of and related to an ongoing labor dispute. An employer’s rule that prohibits employee communications to the media or requires prior authorization for such communications is therefore unlawfully overbroad. The Employer’s policy goes further, restricting all public statements regarding the company, which would include protected Section 7 communications among employees and between employees and a union.
Advice found the following rule unlawful in OM 12-31, at 14-15:

**Social networking site communications must be made in an honest, professional, and appropriate manner, without defamatory or inflammatory comments regarding the employer and its subsidiaries, and their shareholders, officers, employees, customers, suppliers, contractors officers, employees, customers, suppliers, contractors, and patients.**

Advice found that employees would reasonably construe broad terms, such as “professional” and “appropriate,” to prohibit them from communicating on social networking sites with other employees or with third parties about protected concerns.

Advice found the following rule unlawful in OM 12-31, at 15:

**Social Networking and Weblog Policy: Employees need approval to identify themselves as employees on social media sites and must expressly state that their comments are their personal opinions and do not necessarily reflect the Employer’s opinions.**

Advice noted that personal profile pages serve an important function in enabling employees to use online social networks to find and communicate with their fellow employees at their own or other locations. The policy, therefore, was particularly harmful to the Section 7 right to engage in concerted action for mutual aid or protection and was unlawfully overbroad. Moreover, requiring employees to expressly state that their comments are their personal opinions and not those of the Employer every time that they post on social media would significantly burden the exercise of employees’ Section 7 rights to discuss working conditions and criticize the Employer’s labor policies, in violation of the Act.

Advice found the following rule unlawful in OM 12-31, at 15:

**The Employer may request employees to temporarily and/or permanently suspend posted communications if the Employer believed it necessary or advisable to ensure compliance with securities regulations, other laws, or in the best interests of the company. It required employees to first discuss with their supervisor or manager any work-related concerns, and it provided that failure to comply could result in corrective action, up to and including termination.**

Although the first portion of the provision does not expressly restrict employee communication and would otherwise be lawful, Advice we found that the rule restricted Section 7 activity by requiring, on threat of discipline, that employees first bring any “work-related concerns” to the Employer.
Advice found the following rule unlawful in Case 6-CA-37254:

Social Media Policy: Employees may not use or disclose any employee/patient identifiable information of any kind on any social media. Even if an individual is not identified by name within the information the employee wishes to use or disclose, if there is a reasonable basis to believe the person could still be identified from that information, then its use or disclosure could constitute a violation of HIPPA and Employer policy.

Advice found this rule to be overly broad to the extent it prohibits using or disclosing any employee information of any kind on any social media, because it could be interpreted to include discussions of compensation and other terms and conditions of employment. While context may save an otherwise unlawfully overbroad rule, the references to HIPPA is insufficient, because that would only limit patient information and not employee information. (Emphasis added.)

**Do not use company logos or trademarks without written consent.**

Advice found this rule to be overly broad because the prohibition against the use of company logos or trademarks without written consent would reasonably be understood to restrict Section 7 communications without further examples or explanations.

**Be respectful to the hospital, other employees, customers, partners, competitors, patients, and physicians.**

Advice found that, without clarifying examples of what constitutes respectful conduct, employees might interpret the rule to prohibit robust but protected communication regarding terms and conditions of employment.

**Company Pictures and Logos**

Advice found the following rule unlawful in Case 6-CA-37260:

Team Members may not reference (including through use of photographs), cite, or reveal personal information regarding fellow Team Members, company clients, partners, or customers without their express consent.

Advice found that this rule was unduly broad and could be interpreted as restraining Section 7 activity. Because employees have a Section 7 right to discuss their wages and other terms and conditions of employment, a rule that precludes employees from discussing terms and conditions of employment, or sharing information about themselves or their fellow employees with each other or with non-employees, violates Section 8(a)(1). Nothing clarifies or narrows the scope of this rule to exclude Section 7 activity.
Advice found the following rule unlawful in Case 31-CA-30255:

**Associates shall not post pictures or video of any Employer store, distribution center, office, or other property on any social networking site.**

Advice found this rule to be overly broad because it could reasonably be construed to prohibit employees from posting a photo of employees carrying a picket sign in front of a store, or documenting a health or safety concern in a store or distribution center.

Advice found the following rule unlawful in Case 6-CA-37260:

**Use of Company logos, photographs of any Company store, brand, or product, or use of any other intellectual property is not permitted without written proper authorization from the Company.**

Advice found that this rule would restrain an employee from engaging in protected activity. For example, an employee would be prevented from posting pictures of employees carrying a picket sign depicting the company’s name, peacefully handbilling in front of a store, or wearing t-shirts portraying the company’s logo in connection with a protest involving the terms and conditions of employment.

Advice found the following rule unlawful in Case 31-CA-30255:

**Associates may not use the Company’s logo, trademark, or other proprietary graphics without express written permission to do so.**

Advice found this rule to be unlawfully overbroad because employees would reasonably understand it to restrict protected Section 7 communications. Thus, in the absence of any examples of further explanation, employees would reasonably understand the rule to prohibit the use of the Employer’s logo or trademark in their online Section 7 communications, which could include electronic leaflets, cartoons, or even photos or picket signs. Cf. *Pepsi-Cola Bottling Co.*, 301 NLRB 1008, 1019-20 (1991), enforced, 953 F. 2d 638 (4th Cir.1992) (finding unlawful prohibition against employees wearing company logo or insignia while engaging in union activity during non-working time away from the plant.) Indeed, the Employer’s name may even be trademarked, yet the use of the Employer’s name would be essential for employees to communicate with their colleagues about the workplace or to search for additional employees of the Employer at its other locations. At the same time, the Employer has no legitimate basis to prohibit the use of its logo or trademarks in this manner. Thus, although the Employer does have a proprietary interest in its trademarks and its logo if it has been trademarked or copyrighted, employee use in the manner described here would not be the kind of use that would infringe on that proprietary interest. The Employer does not have a legitimate interest that would permit it to limit the use of its logo or trademark by employees engaged in Section 7 activity.
Communication Rules

In DirectTV U.S. DirecTV Holdings, LLC, ALJD (SF) 48-11 (Dec. 13, 2011), the ALJ found the following rule unlawful: **Important: an appeal has been filed to the Board.**

Communications and Representing DIRECTTV

To ensure that company presents a united, consistent voice to a variety of audiences, these are some of your responsibilities related to communication:

- Do not contact the media, and direct all media inquiries to the Home Services Communications department.

- If law enforcement wants to interview or obtain information regarding a DIRECTTV employee, whether in person or by telephone/mail, the employee should contact the Security department in El Segundo, Calif., who will handle contact with law enforcement agencies and any needed coordination with DIRECTTV departments.

The ALJ found that this rule would preclude employees from contacting or conferring with members of the media, and cause employees to be reluctant to contact the Board or deal with Board agents.

DIRECT TV also maintained a policy, in the DirecTV Policy Communications, Public Relations, and Corporate Events document with the following rules:

**Employees**

Employees may not blog, enter chat rooms, post messages on public websites, or otherwise disclose company information that is not already disclosed as a public record.

**Public Relations**

Employee must direct all media inquiries to a member of the Public Relations team, without exception. Employees should not contact or comment to any media about the company unless pre-authorized by Public Relations. These rules are in place to ensure that the company communicates a consistent message and to ensure that proprietary information is not released.

The ALJ found that the Policy document provisions entitled Employees and Public Relations are unlawful on their face as they would reasonably tend to inhibit union or protected concerted activity by precluding employees from discussing wages, hours, and working conditions with employees and others, including union representatives, through the internet and by other means, and by precluding employees from contacting or conferring with representatives of the media.

**Savings Clause**
Advice found the following general savings clause in Case 6-CA-37260 did not make the rule lawful:

13. Savings clause. Nothing in the guideline should be construed as any limitation on any right available under the National Labor Relations Act.

Advice found that an employer may not prohibit employee activity protected by the Act and then seek to escape the consequence of the prohibition by a general reference to rights protected by law. This is because employees may very well not know what conduct is protected and, rather than take the trouble to get reliable information on the subject, would choose to refrain from engaging in conduct that is protected by the Act. Here, the general savings clause did not provide the employees any guidance as to what activities would be protected by the NLRA and therefore not restricted by the social media policy.