**Teaching Note**

# Just What Constitutes Protected Concerted Activity in Social Media Use by Personnel?

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## Critical Incident Overview

An employee goes home at night, frustrated by what he or she perceives to be an unjust workplace and unfair manager, but can this employee go to social media to complain? Employers sometimes mistakenly accuse personnel of making inappropriate or harmful comments about the employer on social media. However, the federal NLRA protects employees in the private sector who want to raise legally significant issues about their workplace, unionized or not. Those issues might constitute protected concerted activity under the federal statute.

The critical incident is best suited for an undergraduate human resources or business law class. It is a descriptive case in that the events of an NLRB case are described. Instructors could ask students to discuss whether or not the employees should complain online or not; in that way, the critical incident could be construed as decision oriented.

## Research Methods

The critical incident is based on Design Tech. Group., LLC (Bettie Page Clothing) (Apr. 19, 2013). The authors used the NLRB web site, a secondary source.

## Learning Outcomes

In completing this assignment, students should be able to:

1. Appraise the NLRB adaptation of the Wagner Act of 1935 to apply to protected concerted activity on social media.
2. Interpret what constitutes protected concerted activity.
3. Judge legitimate uses of social media by employees with uses that an employer can legally prohibit.

**Discussion Questions**

1. How has the National Labor Relations Board (NLRB) adapted the Wagner Act of 1935 to apply to protected concerted activity on social media? (LO 1)
2. How are protected concerted activities (PCAs) related to unfair labor practices (ULPs) under the National Labor Relations Act (NLRA)? (LO 2)
3. What seemingly legitimate employer restrictions on uses of social media might still violate the NLRA? (LO 3)

**Answers to Discussion Questions**

**1. How has the NLRB adapted the Wagner Act of 1935 to apply to protected concerted activity on social media? (LO 1)**

Businesses, in the private sector, are not subject to the speech and assembly rights under the First Amendment. Regulation of the private sector to require more freedom of expression and association requires a federal or state statute. The federal government and state governments can create statutes that require businesses to observe civil rights. For example, statutes prohibiting discrimination on the basis of race, national origin, religion, sex, disability exist on the federal level and in many states. Nevertheless, regulation of speech and assembly becomes more challenging, particularly with the increasing use of social media (Inazu, 2013). A workplace is often a private organization where owners may be expected to have some rights of controlling when speech can occur and what can be said by employees or even customers. For instance, rude and noisy patrons of a restaurant can be required to leave.

Yet business policies that suggest employees should avoid criticizing the company on social media may well be illegal, not as a violation of the First Amendment. Rather it would be a violation of a statutory right of employees to engage in concerted activity that might lead to union formation under the NLRA (Inazu, 2013). Social media may also provide online forums, many dedicated to the expression of particular ideas. On such sites, employees may well receive particular legal protection, in addition to relevant NLRA provisions, under any statutory scheme protecting civil rights, including the right of assembly (Scheinman, 2013).

The NLRB is an independent federal agency created by Congress through the Wagner Act to enforce the NLRA, passed in 1935. The NLRA protects workers' rights to form unions and engage in collective bargaining. A suspected unfair labor practice can lead to a charge against the employer or labor organization, and the Regional Director of the Board investigates, possibly issuing an injunction to stop the practice (with Board approval), or dismissing the complaint (a decision that could be appealed) or issues a complaint with a notice of hearing before an administrative law judge (ALJ). The ALJ decision can be modified and even dismissed by the Board upon review. Further review is available in the federal circuit courts. The NLRB also provides guidelines for employers on labor issues.

The NLRB has jurisdiction (the power to enforce the law) over various employers, but the jurisdiction is constitutionally limited by the authority provided in the interstate commerce clause Article I, Section 8. Companies engaged in interstate transportation would generally be covered.

Large retailers are included and some non-retailers (e.g., if they engage in interstate commerce of goods or services).

The NLRB perceives the NLRA of 1935 as a living document that applies to contemporary forms of labor organizing and not just unions. When employees get together and exercise their constitutional right to free speech on social media discussing issues contemplated by the NLRA such as wages, hours, and working conditions, or mutual aid or protection, they are engaging in protected concerted activity.

**2. How are protected concerted activities (PCAs) related to unfair labor practices (ULPs) under the NLRA? (LO 2)**

NLRA § 7 protects employees joined in a process of voicing concerns relating to unfair labor practices. "The NLRB protects these employees' rights, and the statute is not limited to union organizing and collective bargaining. The law protects those who are not union members, as well as those who are, and § 7 rights apply to communication on social media as well as face-to-face interactions" (O'Brien, 2014, p. 412).

An unfair labor practice consists of unfair terms or conditions of employment, even in a non-union enterprise and would include pay, safety, training, and associating with other employees for mutual aid and protection. Employers who restrict or inhibit the exercise of Section 7 rights, by speaking with them individually or addressing them through a company policy, would be in violation of the NLRA § 8.

A company policy is in conflict with the NLRA Section 8(a)(1) if it interferes with, restrains, or coerces employees exercising section 7 concerted activity rights. A company policy demanding respectful language or positive attitudes could be acceptable if limited to engagement with customers. Yet if expanded to include all workers, then such a policy could inhibit spontaneous outbursts of dissent that seek mutual support and are related to working conditions. Even if the employer designing a rule (perhaps to promote civility) did not intend to infringe on Section 7 rights, the focus of the NLRB will be on a reasonable interpretation of the language of any rule by the employee.

As long as a worker has some intention of reaching out to other workers about work conditions, protected concerted activity may be found. There may be mixed motives; a conversation that starts out with a discussion of movies but includes or leads into some discussion of the workplace without any planning still receives protection.

Employers might be concerned about employees going on line and making negative comments about a company or endorsing actions that the company does not endorse. A company might think it reasonable to protect its assets (which include reputation) by requiring employees who disclose their employer when discussing the company online to include a disclaimer stating the employees' views are not those of the company. Such a policy was recently found to constitute an unreasonable burden on employees' exercise of Section 7 rights by chilling speech protected under Section 7, according to the Administrative Law Judge in Kroger Co. of Michigan and Anita Granger (2014):

An ever increasing amount of social, political, and personal communication, increasingly by people of all ages, takes place online. This is no less true for work-related and Section 7 communication than it is for every other type of communication between people. Surely there are very few workplaces in the country where a significant amount of whatever Section 7-protected activity that exists, is not happening online between employees. Certainly, the online world is a locus of employee union (and anti-union) campaigning. In this regard, employer prohibitions, restrictions, and burdens on Section 7 online speech can be no more limiting than that of traditional written and oral speech. A rule that required Kroger employees, who are identified as such, to mouth a disclaimer whenever they conversed with others about "work-related information," while standing on a street corner, picket line, in church, in a union meeting, or in their home, would never—ever—withstand scrutiny. As with traditional, in-person communication, this required online disclaimer has no significant legitimate justification and is, indeed, burdensome to the point that it would have a tendency to chill legitimate Section 7 speech (p.11).

**3. What seemingly legitimate employer restrictions on uses of social media might still violate the NLRA? (LO 3)**

Students might identify a company policy that seeks to do the following:

1. Promote respect for all employees. This is a legitimate goal. The challenge is to provide a policy that will not inhibit workers from criticizing workplace conditions through the use of bad language or disrespectful comments.
2. Protect intellectual property. This is a legitimate goal. Businesses have a strong interest, for example, in protecting trade secrets and in promoting a brand through trademarks such as logos. Yet a policy prohibiting the posting of any intellectual property on social media might be too broad. An employee who posts a picture on social media of her uniform with the company logo, and makes fun of the uniform because she finds it physically constricting, might violate the policy but the policy would be preventing discussion of a potential workplace safety or health issue if she seeks comments from other employees.
3. Avoid civil liability for defamation, intentional infliction of emotional distress and other torts. This is a legitimate goal, but a policy prohibiting use of social media without supervisor approval in advance, could again inhibit employees, under the NLRA, from engaging in discussion of workplace issues.

Students might be encouraged to discuss the value of engaging employees in discussion of social media policies, which can legitimately limit many postings. While written policies may allow apparent freedom in discussion of the workplace, employees can be reminded that there is a legal difference between complaints to the general public about a company (probably not protected) and complaints seeking input from other employees (more likely to be protected). Another legal difference that could be noted is that employees might be engaging in defamation (i.e., false statement of facts that could ruin another employee's reputation, including that of a manager or company president) as opposed to statements of fact about workplace issues affecting unfair wages, illegal discrimination and so forth.

In considering features of an appropriate policy, students could consider the guidelines presented by one policy framework provided at the end of the following section on General Discussion.

**General Discussion or Additional Issues**

Since the CI is not disguised, the instructor could assign it as a classroom activity. It's short enough. This would avoid students searching the internet for the NLRB case.

The instructor could use the following vignettes in a classroom exercise to ask that students categorize each as protected concerted activity or not.

1. **Bay Sys Technologies, LLC and Dontray L. Tull. Case 5–CA–36314**: In August 2010, Dontray Tull complained on Facebook that the employees' paychecks had not been issued on time. A local newspaper later published the employees' Facebook conversation. The Bay Sys CEO, Steve Walton, subsequently sent an email message to all employees complaining that employees had complained publicly rather than bringing the matter to his attention. He claimed that their public complaints violated the company's nondisclosure agreements. He further threatened to fire them if they didn't issue public explanations of their behavior and further threatened to include the incident in their performance appraisals. In subsequent conversations with employees the executives interrogated personnel and subsequently fired Dontray Tull.

   **Conclusion:** The NLRB determined that protected concerted activity applied and that Dontray Tull should not have been dismissed.

2. **Hispanics United of Buffalo, Inc. and Carlos Ortiz. Case 03–CA–027872**: Marianna Cole-Rivera and Lydia Cruz-Moore worked for Hispanics United to help victims of domestic violence. They communicated by phone and text messaging during the workday and later. Cole-Rivera stated that Cruz-Moore often was critical of other employees, especially the housing employees, who she thought did not assist clients properly. Other employees also testified that Cruz-Moore had been critical of other employees. On a non-workday, Saturday, 9 October 2010, Cruz-Moore texted Cole-Rivera that she planned to discuss her concerns regarding lax employee performance with Executive Director (ED) Lourdes Iglesias. Cole-Rivera questioned if Cruz-Moore "wanted Lourdes to know . . . how u feel we don't do our job. . . ." Using her home computer, Cole-Rivera posted the following to her Facebook page: "Lydia Cruz, a coworker feels that we don't help our clients enough … . I about had it! My fellow coworkers how do u feel?" Four other off-duty employees, used their home computers. Cruz-Moore then stated that Cole-Rivera "stop with ur lies about me." ED Iglesias then asked for a hard copy of the Facebook comments. On October 12, immediately following the Facebook postings, Iglesias fired Cole-Rivera and the four coworkers who had also posted on Facebook. Iglesias asserted that their postings constituted "bullying and harassment" and violated the organization's "zero tolerance" policy regarding such behavior.

**Conclusion**: The NLRB determined that protected concerted activity applied and that the employees should not have been dismissed.

3. **Triple Play Sports Bar (Three D, LLC d/b/a Triple Play Sports Bar) Cases 34–CA–012915 and 34–CA–012926**: Did the employer, herein referred to as Three D, lawfully discharge two employees that discussed on Facebook their claims that employees unexpectedly were responsible for more State income taxes because of their employer's withholding errors. Jillian Sanzone worked as a waitress and bartender, and Vincent Spinella served as a cook. In early 2011, Sanzone and at least one more employee found they were liable for more in State income taxes than expected. They complained to their employer who arranged a meeting of the employees with the payroll provider. A former employee Jamie LaFrance, posted the following to her Facebook page: "Maybe someone should do the owners of Triple Play a favor and buy it from them. They can't even do the tax paperwork correctly!!! Now I OWE money...Wtf!!!!" Others, both employees and even a customer, posted comments to LaFrance's Facebook page: "You owe them money... that's fucked up;" "I FUCKING OWE MONEY TOO!" There were other comparable comments. Daddona found out about the Facebook discussion from his sister, who was both an employee and a Facebook friend of LaFrance. Daddona then fired Sanzone because of an alleged lack of loyalty. Spinella had "liked" the postings on Facebook, which was enough to get him fired as well.

   **Conclusion:** The NLRB determined that protected concerted activity applied and that the employees should not have been dismissed.

4. **National Labor Relations Board, Office of the General Counsel, Advice Memorandum, Wal-Mart, Case 17-CA-25030 .**Was Walmart justified in disciplining a worker for profane comments posted to Facebook that criticized local management? The employee, labeled as the Charging Party, served as a customer service employee. After he interacted with the Assistant Manager, he posted the following to his Facebook page: "Wuck Falmart! I swear if this tyranny doesn't end in this store they are about to get a wakeup call because lots are about to quit!" Many of his Facebook friends were coworkers, two of whom posted comments. The Charging Party then added:

   You have no clue ... [Assistant Manager] is being a super mega puta! Its retarded I get chewed out cuz we got people putting stuff in the wrong spot and then the customer wanting it for that price...that's false advertisement if you don't sell it for that price...I'm talking to [Store Manager] about this shit cuz if it don't change walmart can kiss my royal white ass!

   The Charging Party thought two coworkers had made supportive comments. However, one coworker gave a hard copy to the Store Manager, who then summoned the Charging Party to her office. The Store Manager categorized the Facebook comments as slander that could result in dismissal of the Charging Party. She stated the Charging Party's comments were "real bad" and that the Charging Party's behavior "look[s] bad on the

company and i[s] not with in [sic] company g[u]ide lines." She warned that the Charging Party would be fired if the behavior continued. The Charging Party then eliminated the Facebook postings. But the Charging Party contended Walmart violated his right to concerted activity.

**Conclusion:** Walmart was justified in disciplining a worker for profane comments posted to Facebook that criticized local management because he acted alone.

5. **National Labor Relations Board, Office of the General Counsel, Advice Memorandum, Wal-Mart, Case 17-CA-25030**: The Charging Party, a Walmart greeter, had a Facebook account with around 1,800 Facebook friends, some that were co-workers. He identified himself as a Walmart employee. He posted to his Facebook wall the following:

   The government needs to step in and set a limit on how many kids people are allowed to have based on their income. If you can't afford to feed them you shouldn't be allowed to have them .... Our population needs to be controlled! In my neck of the woods when the whitetail deer get to be too numerous we thin them out! .... Just go to your nearest big box store and start picking them off. ... We cater too much to the handicapped nowadays! Hell, if you can't walk, why don't you stay the f@*khome!!!!

   One co-worker responded that she wanted to see the punishment of the Charging Party. A customer then wrote to Walmart that the comments "scared [her] to the point that [she did] not think [she could] come back in [the] store." The customer further referenced a fatal shooting from the previous year in the same store. Walmart looked into the matter and the Charging Party had acknowledged that the comments were his but that he was just letting off steam. He acknowledged that the Facebook postings were in poor taste. Walmart then terminated the Charging Party.

   **Conclusion:** The Charging Party, the Walmart greeter, was not acting as part of a protected concerted activity and consequently Walmart was justified in firing him.

**Sample Personnel Policy**

The instructor could ask students to assess an organization's (i.e., NVTA) proposed addition to a personnel policy by comparing it to a policy template recommended by a self-professed expert source for a policy template recommended by an HR consulting firm, XpertHR. NVTA is a 501(c)(3) working in vocational training; its annual budget is around $35 million and it has employees all over the US. The obvious omission in NVTA is allowance for NLRA protected concerted activity. The NVTA policy could be more concise as well since shorter documents are more likely to be read; students could go through the NVTA policy sentence by sentence to compare it to the XpertHR suggested policy and recommend changes. Also, the NVTA policy may be more threatening than necessary; one can clearly state what is permitted and what is not without using threatening language; again students could go through the NVTA policy and edit it to bring it in line with the policy suggested by XpertHR.

The proposed addition to the NVTA personnel policy follows:

> The absence of, or lack of explicit reference to a specific site does not limit the extent of the application of this policy.
>
> Employees using social media or other interactive websites are required to adhere to the following guidelines:
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> An employee's online postings must not violate any of NVTA's policies, be detrimental to NVTA's best interests, or interfere with an employee's regular work duties. For example, employees must always be in compliance with NVTA's policies regarding non-disclosure of proprietary, confidential and personal information. Accordingly, employees are prohibited from revealing, or making any reference to, any proprietary or confidential information, trade secrets, or other information covered by such policy. Even vague or disguised references to such information could violate NVTA's policies and applicable laws.
>
> Employees that post information on their site should comply with NVTA's confidentiality and disclosure of proprietary data policies. This also applies to comments posted on other blogs, forums, and social networking sites.
>
> Employees are also prohibited from creating a hostile work environment, harassing or discriminating against co-workers or clients, or harming the goodwill and reputation of NVTA.
>
> NVTA's Human Resources responds to reference requests. Accordingly, employees must refrain from providing references or recommendations in response to online requests (e.g., providing a recommendation on LinkedIn would violate NVTA's policy).
>
> If an employee's posting in any way identifies NVTA, the employee must not speak in a way that suggests the employee is speaking to, for or on behalf of NVTA employees, students or graduates. Rather, the employee must speak in the first person, and make it clear that the posting only reflects the employee's personal views and opinions.
>
> Employees are prohibited from using NVTA's logos, trademarks or other intellectual property on any non-NVTA site without NVTA's prior written authorization.
>
> Employees are personally and legally responsible for their online postings and comments and must comply with all applicable laws, including copyright and fair use laws. Employees must refrain from posting any content that is harassing, discriminatory, defamatory, threatening, libelous, vulgar or profane in violation of any NVTA policy or otherwise illegal or injurious.
>
> All NVTA's policies that regulate off-duty conduct apply to social media activity including, but not limited to, policies related to illegal harassment, code of conduct, nondiscrimination, and protecting confidential and/or proprietary information.

NVTA, in its sole discretion, will determine whether a particular online posting or other communication violates NVTA's policy. NVTA reserves the right to monitor content sent or received on company-provided technology. In addition, NVTA reserves the right to require employees to refrain from commenting on topics related to NVTA if advisable to comply with securities or other laws, and/or to ensure compliance with any law or policy. This policy is not intended to interfere with any rights employees may have under applicable laws. Failure to follow this policy may lead to disciplinary measures, up to and including possible termination of employment. Should employees have any questions regarding social media, please refer to the Brand Resources, Graphic Identity Standards, Social Media Guidelines and Guidebook.

The Social Media Policy recommended by XpertHR follows (excerpts only taken from XpertHR, September 11, 2014):

Social Media Policy

Definition of Social Media – For the purposes of this policy, social media should be understood to include any website or forum that allows for the open communication on the internet including, but not limited to:

- Social Networking Sites (LinkedIn, Facebook);
- Micro-blogging Sites (Twitter);
- Blogs (including company and personal blogs);
- Online Encyclopedias (Wikipedia); and
- Video and photo-sharing websites (YouTube; Flickr).

Think Before Posting – In general, employees should think carefully before posting online, because most online social platforms are open for all to see. Despite privacy policies, employees cannot always be sure who will view, share or archive the information that is posted. Before posting anything, employees should remember that they are responsible for what is posted online. Employees should carefully consider the risks and rewards with respect to each posting. Employees should remember that any conduct, online or otherwise, that negatively or adversely impacts the employee's job performance or conduct, the job performance or conduct of other co-workers or adversely affects clients, customers, colleagues or associates of [Enter Employer Name] or [Enter Employer Name]'s legitimate business interests may result in disciplinary action, up to and including termination. If employees have any doubt about what to post online, it is probably better not to post, since once something is placed in cyberspace, it is often difficult to retract the information. Employees should use their best judgment and exercise personal responsibility when posting to any social media websites.

Using Social Media at Work – Employees should attempt to limit their use of social media during working hours or on equipment provided by [Enter Employer Name] unless such use is work-related or authorized by a supervisor or [Enter Employer Name]. Employees should attempt to avoid using [Enter Employer Name] - provided email addresses to register on social networks, blogs or other websites for personal use. Employees should note that this provision is

not meant to prohibit employees from engaging in concerted protected activity which is lawful under Section 7 of the NLRA.

Employer Reserves the Right to Monitor – Where applicable law permits, the employer reserves the right to monitor the employee use of any social media, and take appropriate action with respect to inappropriate or unlawful postings. In monitoring social media, the employer will not in any way interfere with any employee rights under Section 7 of the NLRA.

Employees Are NOT Authorized to Speak on Behalf of the Employer, Unless Explicitly Given Permission – Employees should express only personal opinions online and an employee should never represent himself or herself as a spokesperson for [Enter Employer Name] or other co-workers, clients, customers, colleagues or other individuals who work on behalf of or who are associated with [Enter Employer Name]. If an employee chooses to post online content relating to [Enter Employer Name], the employee should make it clear that he or she is not speaking on behalf of [Enter Employer Name]. Any online activity relating to or impacting the employer should be accompanied by a disclaimer stating that "the posting on this website are my own and do not necessarily reflect the views of [Enter Employer Name]." This disclaimer should be visible and easy to understand.

Do Not Post Confidential Information – Employees should aim to protect [Enter Employer Name]'s trade secrets and private, confidential and proprietary information. [Enter Employer Name]'s trade secrets is defined as [Enter Definition]. [Enter Employer Name]'s confidential and proprietary information is defined as [Enter Definition]. Employees should make sure that online postings do not violate any non-disclosure or confidentiality obligations and disclose [Enter Employer Name]'s trade secrets and confidential and proprietary information.

Respect Financial Disclosure Law – Employees should keep in mind that it is illegal to communicate or provide a tip on inside information with respect to the buying and selling of stocks or securities. This may also violate applicable [Enter Employer Name]'s policies.

Be Mindful of Copyright and Intellectual Property Laws – Employees should be careful to comply with all copyright, trademark and intellectual property laws.

Act Appropriately – Employees should act appropriately when posting online. Any online behavior should be consistent with the employer's policies and practices with respect to ethics, confidential information, discrimination and harassment. Because online tone can be interpreted in different ways by readers, employees should not engage in any online conduct that would not be acceptable or appropriate in the workplace, including derogatory or discriminatory remarks, threats, intimidation, harassment, insults, slander, defamation or pornography.

Demonstrate Respect – When posting anything online, employees should always be fair and respectful to co- workers, clients, customers, colleagues and other individuals who may work on behalf of [Enter Employer Name]. Employees should demonstrate proper respect for the privacy of others. If an employee decides to post a complaint or criticisms, the employee should avoid using any statements, photographs, video or audio that may be viewed as malicious, obscene, threatening, harassing or abusive of co-workers, clients, customers, colleagues or other

individuals that work on behalf of or are associated with [Enter Employer Name]. Employees should refrain from engaging in offensive postings that may create a hostile and abusive work environment based on race, sex, religion or any other protected class.

Be Accurate and Honest – Employees should always be accurate and honest in posting any news or information to social media and quickly correct any mistakes or errors. Employees should never post any information which is known to be false about [Enter Employer Name] or any co-workers, clients, customers, colleagues or other individuals that work on behalf of or are associated with [Enter Employer Name].

NLRA Activity – When applicable, protected concerted activity covered by the NLRA or the particular collective bargaining agreement is not prohibited by this policy.

Business-Related Social Media Accounts – All business-related social media accounts and related postings maintained by employees for marketing and/or networking purposes remain the property of [Enter Employer Name]. All information including the account, the login and password should be returned to [Enter Employer Name] at the end of the employee's employment. No employee has the right to use the account after termination of employment and only [Enter Employer Name] is permitted to change the account names and settings.

Retaliation Prohibited – [Enter Employer Name] prohibits taking adverse action (i.e., discipline, transfer, fire) against any employee for reporting a possible violation of this social media policy or cooperating in any investigation with respect to a potential social media policy violation. Any employee who retaliates against any employee for reporting a possible deviation from this policy or for cooperating in any investigation will be subject to disciplinary action, up to and including termination.

Legal Liability – Employees can be legally liable for what is written or posted online. The employer also reserves the right to discipline employees, up to and including termination, for any commentary, content or images that are pornographic, harassing, and libelous or for anything that creates a hostile work environment based on race, sex, religion or any other protected class.

**Epilogue**

On April 27, 2012, the NLRB ordered Bettie Page Clothing to stop discharging or discriminating against employees that engaged in protected concerted activity. Furthermore, the company could not prohibit employees from disclosing their compensation. The discharged employees had to be reinstated.

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