

# SOCIAL MEDIA EMPLOYMENT POLICY AND THE NLRB: UNIFORM STATE LAWS AS A SOLUTION?

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## I. INTRODUCTION

The modern advent of electronic social media plays a huge and increasing role in all areas of employment relations both as a means of personal employee communication, group communication, customer/stakeholder information, and as a tool for team building within organizations. As with the implementation of all new technologies, organizations confront unintended consequences both of a positive and not unsurprisingly negative nature. And, as equally consequential, the laws of employment are challenged to catch up as such spillover effects impact the legal system. Both the individual and organizational benefits of social media pose significant legal and employee relations issues. *Social Media* is generally defined as “forms of electronic communication (such as Web sites for social networking and micro-blogging) through which users create online communities to share information, ideas, personal messages, and other content.”<sup>1</sup>

Confronting the growing issues of social media, states have provided further statutory definitions. For example, the State of Illinois defines *social media* as:

an Internet-based service that allows individuals to: (A) construct a public or semi-public profile within a bounded system, created by the service; (B) create a list of other users with whom they share a connection within the system; and (C) view and navigate their list of connections and those made by others within the system.<sup>2</sup>

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<sup>1</sup> MERRIAM-WEBSTER DICTIONARY, <http://www.merriam-webster.com/dictionary/social%20media> (last visited Oct. 14, 2013) (parentheses added).

<sup>2</sup> 820 ILCS 55/10 (2012).

One of the more significant issues confronting employers has been the recent interpretation by the National Labor Relations Board (NLRB) of employee social media activity as constituting protected *concerted activity* under Section 7 of the National Labor Relations Act (NLRA).<sup>3</sup> The NLRB has, in a number of instances, stepped in to regulate social media activity in order to protect the assumed rights of both union and non-union employees to engage in concerted activity regarding terms and conditions of employment. For example in the *Canning* case, the D.C. Circuit overturned the NLRB's social media decisions, not on the merits of the cases, but based on the fact that the Board itself was unconstitutionally appointed and thus lacked statutory power to make such decisions.<sup>4</sup>

In 2010 the NLRB ruled against a firing by American Medical Response (AMR) for its employment action in suspending an emergency medical technician (EMT) who had placed derogatory comments about her supervisor on her *Facebook* page.<sup>5</sup>

Similarly, Walmart ran afoul of the NLRB's social media regulatory theories in discharging a "greeter" for posts on his personal Facebook page negatively commenting on customers and work. Though the NLRB ruled in Walmart's favor, the company nevertheless changed its employment policies to avoid future charges.<sup>6</sup>

This paper looks at the broader context of social media and employment relations and examines the significance and potential future of the Board's role in determining use of social media by employees to communicate at or about their place of work. Currently, in the absence of clear precedents from appellate courts and the Supreme Court itself, and the problematic constitutionality of prior NLRB decisions on the subject (the Board having been improperly constituted),<sup>7</sup> businesses are left with ambiguity as to the limits of their ability to act in the employment relationship based on

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<sup>3</sup> 29 U.S.C. §157 (2012): "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 to other concerted activities to the purpose of collective bargaining or other mutual aid or protection and shall have the right to refrain from any or all of 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..." (emphasis added).

<sup>4</sup> *Canning v. N.L.R.B.*, 705 F.3d 490 (D.C. Cir. 2013) (*see infra*, note 7).

<sup>5</sup> AMR Advice Memorandum, Office of General Counsel No. 34-CA-12576 (NLRB, October 5, 2010).

<sup>6</sup> Walmart, Advice Memorandum, Office of General Counsel, No. 11-CA-067171 (NLRB, May 30, 2012).

<sup>7</sup> The U.S. Supreme Court will hear arguments in this case in its Spring 2014 Term in *National Labor Relations Board v. Canning*, Case No. 12-128, Cert. granted, April 13, 2013. (Author's Note: The U.S. Supreme Court issued its opinion in *Canning* on June 26, 2014, ruling that the President's recess appointments were unconstitutional. Thus the Board had to be reconstituted and is reaffirming past decisions as a properly constituted board.)

improper or otherwise negative postings by employees on their personal social media.

Social media programs such as *Facebook* and *Twitter* create challenges for employers for multiple reasons. First, not only do employees use these electronic platforms to communicate with friends and family members, but also, in many instances employees use social media communicate with customers and fellow employees. Second, the line between what is appropriate content for personal and professional use can become blurred.

Moreover, the issue is further complicated by the fact that social media usage is not strictly confined to the workplace, but, more often than not is broadly communicated to the general public. Notwithstanding facile passwords, social media use lacks a practical and legal expectation of privacy. Jeffrey Mello in his labor law article states:

Employers see tremendous benefit from social networking which include facilitating collaboration among employees, improved efficiencies in operations, facilitation of orientation and learning, internal brand building, employee and organizational development and faster development of new products and services. However, 85 per cent of IT professionals acknowledge that they are aware of employees visiting social networking sites for personal usage while at work. The use of online social media has contributed to the further blurring of the separation between employees' work and personal lives.<sup>8</sup>

Employee posts on social media which can be viewed as benign in one context, nevertheless, have substantive legal and business implications presenting risks to employers in other contexts. First, there are numerous statutes and regulations which guarantee employee or customer privacy to which organizations are held legally liable for breach. These include for example such privacy rights under the Health Insurance Portability and Accountability Act (HIPPA),<sup>9</sup> the more recent Patient Protection and Affordable Care Act (ObamaCare),<sup>10</sup> and numerous aspects of the Internal Revenue Code<sup>11</sup> just to name a few. More recently the U.S. Federal Trade Commission has weighed into the mix by interpreting breaches of online

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<sup>8</sup> Jeffrey A. Mello, *Social Media, Employee Privacy and Concerted Activity: Brave New World or Big Brother*, 63 LABOR LAW J., at 165-66 (2012).

<sup>9</sup> Pub.L 104-191, 110 Stat. 1936, et. seq. (1996).

<sup>10</sup> Pub. L 111-148, 124 Stat. 119-124, et. seq. (2010).

<sup>11</sup> For example 26 U.S.C. C6103 and §7216 reference confidentiality of tax return information and disclosures.

privacy in interstate commerce as constituting unfair acts in commerce pursuant to its regulatory authority.<sup>12</sup>

Thanks to information technology, privacy protected information is often at the fingertips of line employees who are charged with their use for improved customer service or performance. But when employees misuse such information on their social networks, it is the employer who finds itself legally or otherwise vicariously liable for damages.<sup>13</sup>

The recent example of national security information being transmitted by a low level employee (soldier), Bradley Manning, to Wikileaks,<sup>14</sup> and Edward Snowden's transmittal of National Security Agency proprietary information<sup>15</sup> demonstrate the risk to private and public employers when proprietary or protected information is transmitted or referenced via social media.

A further example of the conundrums of social media to employment law is exemplified by the recently reported case of Patrick Snay, former headmaster of Florida's Gulliver Preparatory School. Snay was non-renewed in his employment and brought charges of age discrimination and retaliation which were ultimately settled for \$80,000 by an out of court settlement agreement containing a confidentiality clause; a common contractual practice in employment law cases. However, Snay's daughter subsequently bragged on *Facebook* about the settlement funding her "vacation to Europe." Florida's Third District Court of Appeal ruled such social media post constituted a breach of the agreement and vacated the settlement.<sup>16</sup> Here the court basing its decision on common principles of contract, noted the

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<sup>12</sup> U.S. Federal Trade Commission, *FTC Notifies Facebook, WhatsApp of Privacy Obligations in Light of Proposed Acquisition*, FTC.GOV, (April 10, 2014), <http://www.ftc.gov/news-events/press-releases/2014/04/ftc-notifies-facebook-whatsapp-privacy-obligations-light-proposed>.; U.S. Federal Trade Commission, *FTC Issues Final Breach Notification Rule for Electronic Health Information*, FTC.GOV, (Aug. 17, 2009), <http://www.ftc.gov/news-events/press-releases/2009/08/ftc-issues-final-breach-notification-rule-electronic-health>.

<sup>13</sup> For example: U.S. Federal Trade Commission, *Fandango, Credit Karma Settle FTC Charges that They Deceived Consumers By Failing to Securely Transmit Sensitive Personal Information: Mobile Apps Placed Credit Card Details, Credit Report Data, Social Security Numbers at Risk*, FTC.GOV, (Mar. 28, 2014) <http://www.ftc.gov/news-events/press-releases/2014/03/fandango-credit-karma-settle-ftc-charges-they-deceived-consumers>.

<sup>14</sup> *Bradley Manning Sentenced to 35 Years for Leaking Secrets*, ABC NEWS, (August 21, 2013), <http://abcnews.go.com/Politics/bradley-manning-sentenced-35-years-leaking-secrets/story?id=20021288>.

<sup>15</sup> Dominic Rushe, Intelligence chair: *NSA leaker Edward Snowden may have had Russian help*, THE GUARDIAN, (Jan. 19, 2014), <http://www.theguardian.com/world/2014/jan/19/edward-snowden-nsa-mike-rogers-russia>.

<sup>16</sup> David Smiley, *Daughter's Facebook boast costs former Gulliver Prep headmaster \$80,000 discrimination settlement*, MIAMI HERALD, (Feb. 26, 2014), <http://www.miamiherald.com/2014/02/26/3961605/daughters-facebook-boast-costs.html>.

confidentiality agreement barred “indirect” disclosure of the settlement. Social media, in this case, *Facebook*, constituted “indirect” disclosure.<sup>17</sup>

These examples are but a few representations of employers’ needs for clarity on when proprietary or protected information ceases to be protected concerted activity of the employee and becomes a legitimate risk management tool of the organization.

The second category of legal risk employers face given the new environment of open cyber communication is when employee postings on social media constitute “legitimate” exercise of free speech and association rights protected by the U.S. Constitution or specific statute.<sup>18</sup> As will be discussed, (other than public employment) there is actually very little protection of an employee’s privacy while at work regarding work related matters. This is because employment in the United States is generally a matter of state law in which all states but one (Montana) adhere to the employment at will doctrine.<sup>19</sup> Outside of government employment, the courts have held in past (non-social media) cases that employee “free speech is limited” unless speaking on a matter of public concern.<sup>20</sup>

For example, in *Waters*, the Supreme Court made clear that a hospital employee was not free to make derogatory and negative statements about her hospital employer and her termination was upheld.<sup>21</sup> Likewise, in *Jeffries* a university department chair, making derogatory speeches outside of campus that caused a loss of donors to the university, was not protected by free speech from termination, even in a public university.<sup>22</sup> More recently, the Supreme Court delimited free speech of public employees when acting in their “official” capacities.<sup>23</sup> And, of course the famous quote of *Schenck*, “one cannot yell fire in a crowded theater,”<sup>24</sup> also continues as a constraint on absolute free speech.

That said, recent federal legislation has been enacted to protect employees who are “whistleblowers” on improper activity within an organization, prohibit retaliation and provide extensive damages against employers and even benefits to the employee who speaks up. The earliest of these and still active are the False Claims Act,<sup>25</sup> Sarbanes-Oxley Act,<sup>26</sup> and provisions of the recent Dodd-Frank Act.<sup>27</sup>

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<sup>17</sup> *Gulliver Schools, Inc. v. Snay*, 137 So.3d 1045, 1047-48 (Fla. Dist. Ct. App. 2014).

<sup>18</sup> U.S. const. amend. I.

<sup>19</sup> See ROGER L. MILLER BUSINESS LAW TODAY: THE ESSENTIALS, at 516 (10th ed. 2014).

<sup>20</sup> See *Connick v. Myers*, 461 U.S. 138 (1983); *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968); *Rankin v. McPherson*, 483 U.S. 378 (1987).

<sup>21</sup> *Waters v. Churchill*, 511 U.S. 661 (1994).

<sup>22</sup> *Jeffries v. Harleston*, 21 F.3d 1238 (2d. Cir. 1994).

<sup>23</sup> *Garcetti v. Ceballos* 547 U.S. 410 (2006).

<sup>24</sup> *Schenck v. U.S.*, 249 U.S. 47 (1919).

<sup>25</sup> 31 U.S.C. §§ 3729-3723 (1863 as amended).

Beyond the federal level numerous states have enacted legislation that prohibit employer access or the taking of tangible employment actions based upon employee's private (off work) social media activity.<sup>28</sup> Emerging out of the 2008 recession, many employers quickly enacted policies demanding social media passwords or access as a condition of employment hiring and retention.<sup>29</sup>

As point of example, a 2009 survey by Career-Builder.com revealed 45 percent of the over 2,600 human resource recruiters surveyed stated they screen applicants by viewing their social network sites. Furthermore, 35% of those surveyed indicated they had rejected applicants based upon content on social networks. In 2010 a survey by Jobvite.com indicated that 80% of employers would use social media in screening job candidates. In fact, 83% would actively use social networking to recruit candidates.<sup>30</sup>

The rapid and pervasive onset of employer demands to access private social media at a time of high national unemployment led to a political backlash, an unprecedented wave of state law enactments, even before Congress could hold hearings on potential national legislation. In 2013 over 20 states had either passed or had pending legislation prohibiting any employer from demanding an individual's social media password or access as a condition of employment or employment application.<sup>31</sup>

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<sup>26</sup> 49 U.S.C. §2305 (2002); *See* section 806 of the Sarbanes-Oxley Act, 18 U.S.C. § 1514A (2012).

<sup>27</sup> 15 U.S.C. §78u-6(h) (2010); *see also* anti-retaliation provisions in Title VII, Civil Rights Act of 1964, 42 U.S.C. §2000 et. seq. as exemplified in *Burlington Northern and Santa Fe Railway Co. v. White*, 548 U.S. 53 (2006); *Thompson v. North American Stainless*, 562 U.S. 170 (2011).

<sup>28</sup> For example, but without limitation *see*, Illinois, *supra*, note 2., Acts 129 and 501 (August 2013); Arkansas, Act 1480 (April 22, 2013); California, A.B. 25 (September 11, 2013); Utah, Ch. 94 (March 26, 2013); Vermont, Act 97 (June 3, 2013), Colorado, Ch. 195 (May 11, 2013); *Employer Access to Social Media Usernames and Passwords 2013*, NAT'L CONF. OF STATE LEGISLATURES, <http://www.ncsl.org/issues-research/telecom/employer-access-to-social-media-passwords-2013.aspx> (last updated Sept. 28, 2014).

<sup>29</sup> As of October 2014, twenty-eight states have enacted some form of statute restricting or banning employers from compelling employees to turn over user names, passwords or access to their personal social media accounts as a condition of hiring or employment. *See Employer Access to Social Media Usernames and Passwords*, NAT'L CONF. OF ST. LEGIS.

<http://www.ncsl.org/research/telecommunications-and-information-technology/employer-access-to-social-media-passwords-2013.aspx>; *see also* Aliah D. Wright, *More States Ban Social Media Snooping*, SOC'Y FOR HUM. RES.MGMT, <http://www.shrm.org/hrdisciplines/technology/articles/pages/social-mediasnooping.aspx>, August 12, 2014.

<sup>30</sup> Wendi S. Lazar & Lauren E. Schwartzreich, *Limitations to Workplace Privacy: Electronic Investigations and Monitoring*, 29 THE COMPUTER & INTERNET LAWYER 1 (2012).

<sup>31</sup> National Conference of State Legislatures, *Employer Access to Social Media Usernames and Passwords 2013*, (Dec. 20, 2013), <http://www.ncsl.org/research/telecommunications-and-information-technology/employer-access-to-social-media-passwords-2013.aspx>.

States have also been swift to adopt existing laws to the subject matter. For example, New York State Labor Law §201 barred employer terminations of employees based on “recreational activities” outside the workplace. This has been interpreted as inclusive of social media.<sup>32</sup> What both the New York example and recent NLRB rulings have presented are social demands to balance rights of employees and employers in social media but without a proper legal vehicle to do so. Hence, public bodies—be they federal or state—seek to adapt, bend (some may even say contort) existing statutes from their original intended purposes to unintended purposes applied to social media.

Both the swift action and comprehensive nature of state enactments under the states’ inherent police powers governing employment raises the question of whether alternative approaches governing employee social media outside the NLRB’s interpretation (some might say overreach) would be more effective and appropriate. A “federal” solution would seem to be less effective in the face of state actions under state employment laws. The fiscal reality is that the NLRB is faced with limited resources to carry out its specific authority and interpretation of national collective bargaining law in specific sector of private sector collective bargaining that is shrinking. Its resources may well be better concentrated on that specific mission. Fiscal realities do not support expanding the scope of its role or reach. Today private employees under collective bargaining represent 6.7% of the non-government workforce, an all-time low.<sup>33</sup> It could well be that rapid enactment by states per above points to the viability of a uniform code voluntarily adopted by the states.

States have long demonstrated effective collective action through cooperative enactment of uniform laws that negate the need for national legislation, often enacted with the encouragement of Congress itself. This can be seen in such laws as the Uniform Commercial Code, Uniform Vehicle Code, Uniform Credit Acts and the like. In such circumstances, states taking advantage of the doctrine of the Dormant Commerce Clause,<sup>34</sup> develop a nationwide standard that would limit the need for NLRB involvement and

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<sup>32</sup> Lazar & Schwartzreich, *supra* note 29, at 8 (*see*, N.Y. Lab. L. §201-d; Cal.Code regs. §7286-7(b)).

<sup>33</sup> U.S. Bureau of Labor Statistics, *Union Members Summary*, DEP’T OF LABOR, (Jan. 24, 2014), <http://www.bls.gov/news.release/union2.nr0.htm>.

<sup>34</sup> The doctrine allows states to enact laws and regulations of commerce and even interstate commerce, but Congress retains the right at any time to assert its constitutional Commerce Clause authority (U.S. cont. art. 1, sec. 8. cl. 3). Congress frequently allows such circumstances where the local regulation is not interfering with interstate commerce and relieves the U.S. government of the expense and regulation of policing an otherwise functioning system of uniform state regulations nationwide: *See, Pike v. Bruce Church, Inc.* 397 U.S. 137, 142 (1970); *Phila. v. N.J.*, 476 U.S. 617, 624 (1978); *Western & S. Life Ins. v. State Bd. of Cal.*, 451 U.S. 648 (1981).

interpretation of social media issues to only those instances where use of social media or limitations on social media have clearly violated specific collective bargaining-related intent under the NLRA.

These alternate uniform state approaches may allow for a better tailored and consistent public policy, balancing between the public interest, the private employee interest, and the interest of the employer. Moreover, they may actually encourage effective commercial relationships by reducing the ambiguity of employment legal risk to employers, clarifying roles of employees and employers, and potentially reducing court disputes which frequently involve complexities of determining the lines of demarcation between employee private conduct and employer-business legitimate interests.

The issue of what employees can or cannot say about their employer or co-workers is timeless. Employees have spoken out for centuries in pamphlets, letters to the editor, comments on the street or in public parks or cooperation with authors of social critical books. The difference today is that the reach of technology in cyber space makes damaging postings instantaneous in access worldwide and the ability to eliminate or counter false or malicious statements virtually impossible to remove.

Damages to an employer as well as to individuals from false and vexatious behavior (i.e. trade libel) using social media may be continuous and in the extreme doom the survival of the enterprise. The gravity of this situation has risen to such a high level that the Court of Justice of the European Union, the highest court of the 28-nation European Union recently established the “right to be forgotten” and ordered all internet search engines (e.g. Google, Bing, etc.) to provide a process for expunging personal and negative information that has been preserved on line via the internet upon request.<sup>35</sup>

In all but one state, the U.S. still operates on the basis of employment-at-will, the doctrine that employers have a right to hire and fire with or without notice or cause.<sup>36</sup> This doctrine has been narrowed by a number of public policy exceptions. Nevertheless, employers still have the prima facie

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<sup>35</sup> Court of Justice of the European Union, *An internet search engine operator is responsible for the processing that it carries out of personal data which appear on web pages published by third parties*. ECR, Press Release No. 70/14, May 13, 2014, <http://curia.europa.eu/jcms/upload/docs/application/pdf/2014-05/cp140070en.pdf>.

<sup>36</sup> For example: See S.C. CODE § 41-1-110 (2012) (“It is the public policy of this State that a handbook, personnel manual, policy, procedure, or other document issued by an employer or its agent after June 30, 2004, shall not create an express or implied contract of employment if it is conspicuously disclaimed. For purposes of this section, a disclaimer in a handbook or personnel manual must be in underlined capital letters on the first page of the document and signed by the employee. For all other documents referenced in this section, the disclaimer must be in underlined capital letters on the first page of the document. Whether or not a disclaimer is conspicuous is a question of law.”).

right to control their workplace and to reasonably restrict communications, terminating employees who violate those restrictions.<sup>37</sup> Excessive restrictions on social media, however, pose their own adverse consequences to an employer's ability to operate effectively, by potentially limiting employment location to certain states that have not legislated on the subject or assuming risks in those who lack judicial clarity on the matter.

This paper turns the key NLRB social media cases 'on their side' to examine how they impact employer rights to manage and employee rights to free speech at the workplace. From the review of cases and NLRB rulings we suggest a framework for uniform policies that could provide the basis for a uniform social media act approach either among the states or Congress in delimiting the rights of employees and the rights of employers in the use and regulation of social media in the work environment.

The social media environment faced by employers is still in a state of flux. NLRB decisions have not yet yielded appellate decisions, and, in the interim, appeals courts have struck down the authority of the NLRB that issued them due to unconstitutional recess appointments of NLRB board members, thus lacking a legal quorum on those decisions. Consequently, employers lack guidance on what constitutes appropriate and inappropriate social media employment policies. That issue has been heard before the U.S. Supreme Court in its 2014 term and decision is pending.<sup>38</sup>

The challenge for privacy issues overall and for social media issues in particular is that unlike other jurisdictions such as the UK, or the recent ruling in the European Union's highest court,<sup>39</sup> the United States has no omnibus legislation addressing the confluence of privacy and social media, thus forcing employers, employees, employee organizations and government agencies to tread through a maze of legislation and court decisions in not only protecting employee privacy but also in maintaining a disciplined workplace. This adds to business risk and presents merely another disincentive in employing larger numbers of workers.

We briefly review the ubiquity of social media in all areas of employment relations, the privacy challenges social media pose for employment relations, concerns about and criticisms of the NLRB's current standards concerning social media, and finally, offer some recommendations for a possible uniform policy on social media use as it impacts employment relations.

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<sup>37</sup> See Susan R. Dana, *South Dakota Employment at Will Doctrine: Twenty Years of Judicial Erosion*, 49 S.D. L. REV. 47, 47-50 (2003) (discussing briefly the history of the employment at will doctrine in the United States and its continued presence despite judicial exceptions and statutory modifications with subsequent emphasis and discussion on South Dakota jurisprudence).

<sup>38</sup> Pub.L 104-191, *supra* note 9.

<sup>39</sup> Court of Justice of the European Union *supra* note 34.

## II. DISCUSSION

To date employer monitoring of employee communications at the workplace is generally within acceptable law. The general rationale for this is that "...employees cannot expect any reasonable expectation of privacy relative to websites they visit while they are at work and being paid by the employer for their services."<sup>40</sup> So where does this leave the protection of an employee's privacy especially regarding electronic communications?

This question becomes especially problematic when electronic communications at the work place are personal and may have no relevance to the employer. How does an employer know what is relevant to the workplace without having access to such communications? Legislation limiting government invasion of personal privacy offers a broader framework within which to view this question. Protecting an individual's right to privacy from government intrusion was of course an original concern of the Constitution's framers based on the experiences of Colonial Americans with imperial Great Britain. Even today, the Supreme Court struggles with the right to privacy in a simple traffic stop. Can a police officer search a cell phone?<sup>41</sup>

These historical concerns of personal privacy typically appear in cases which directly involve privacy intrusions by the government (i.e. *arm of the state*) and thus, have invoked judicial limitations on government authority (Enumerated Powers) of Article I.<sup>42</sup> Specific limitations of government reach into personal privacy are exemplified in cases involving *unreasonable search and seizure* language of the Fourth Amendment<sup>43</sup> such privacy protections extend to public employees since the government is the actor (as long as the employee is speaking on a "matter of public concern").<sup>44</sup>

Electronic communications did not of course exist prior to the Nineteenth century and U.S. privacy related law has been slow to adapt to frequent changes in the modes of communication. For example, the court was faced with such an issue in the famous *Katz* decision<sup>45</sup> ruled that an individual had an "expectation of privacy" when speaking in an enclosed telephone booth. But *Katz* provides little guidance today in the social media

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<sup>40</sup> Mello, *supra* note 8, at 167.

<sup>41</sup> David G. Savage, *Scalia set to play key role in Supreme Court Smartphone case*, LA TIMES, (April 27, 2014), <http://www.latimes.com/nation/la-na-court-cellphone-20140428-story.html> (Note: The U.S. Supreme Court heard arguments in the case, *Riley v. California* Case No. 13-132 on April 29, 2014. On June 25, 2014 the Court issued its decision that a warrant is needed to search a cell phone. This suggests that an expectation of privacy may well exist at least in the device carrying social media, even when the content has been put in the public domain.

<sup>42</sup> U.S. const. art. 1.

<sup>43</sup> U.S. const. amend. IV; *see also supra* note 40.

<sup>44</sup> *See Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968); *Connick v. Myers* 461 U.S. 138 (1983).

<sup>45</sup> *Katz v. U.S.*, 389 U.S. 347 (1967).

realm, first because the intrusion in *Katz* was that of the government (protected by fundamental rights under the 4th Amendment<sup>46</sup>) not a private employer, and the internet today is an open forum analogous to speaking in a public park, not an enclosed protected venue like *Katz*'s telephone booth.

A more recent treatment was the U.S. Supreme Court's decision in the *Quon*,<sup>47</sup> ruling that employees have no expectation of privacy using electronic devices provided by their employer. Though this case, too, dealt with government employment, it has been extended to private employment by state and federal courts where the employee uses electronic devices or communication networks provided by the employer.<sup>48</sup> For example, even normally sacrosanct "attorney-client" privilege was ruled to not be privacy protected when the communication was sent over an employer's email system as ruled by a California Court of Appeals.<sup>49</sup>

Stephen E. Henderson argues that current federal statutes limiting the government from looking into social media communications are sadly outdated.<sup>50</sup> He makes the case that the three federal laws that could impact social media were framed and enacted long before social media as we now know it was on the scene. These three pieces of legislation, the Wiretap Act,<sup>51</sup> the Pen Trap Act,<sup>52</sup> and the Stored Communications Act,<sup>53</sup> are not integrated and therefore do not deal with social media effectively. The Pen Trap Act deals with routing and dialing information, the Wire Tap Act with current content, and the Stored Communications Act deals with past content. Henderson argues that this division makes no sense since individuals sending messages or posting via social media expect their communications to remain private unless they state otherwise.<sup>54</sup>

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<sup>46</sup> U.S. const., amend IV.

<sup>47</sup> *Ontario v. Quon*, 560 U.S.746 (2010).

<sup>48</sup> The Electronic Communications Privacy Act of 1986 (part of the Omnibus Crime Control and Safe Streets Act, 18 USC sec. 2510 et seq.) contains business exceptions and exceptions for employer owned systems allowing for otherwise prohibited interception of communications; see also Heather Bussing, *Employer Privacy-What Can Employers Monitor?* HR EXAMINER, October 4, 2011 <http://www.hrexaminer.com/employee-privacy-what-can-employers-monitor/>

<sup>49</sup> Howard Law PC, *Electronic Privacy in the Workplace: CA Court Rules Attorney-client Privilege Does Not Protect Work E-mail*, January 11, 2011, <http://www.howardlawpc.com/lawyer-attorney-2233041.html> (See *Holmes v. Ptrovich Development Co.*, Cal.3d.App., 2011).

<sup>50</sup> Stephen E. Henderson, *Expectations of Privacy in Social Media*, 31 MISS.C.L.REV. at 227 (2012).

<sup>51</sup> See 18 U.S.C., ch. 119 et. seq.

<sup>52</sup> See 18 U.S.C., ch. 206 et. seq. (esp. prohibitions in §3121).

<sup>53</sup> See 18 U.S.C., ch. 121 et. seq. (esp. prohibitions in §2701).

<sup>54</sup> Henderson, *supra* note 49.

What about electronic information disclosure without government involvement as a direct actor? This is the area that specifically impacts private sector employers and employees. Henderson remarks:

As for disclosure on private initiative, meaning without government involvement, employers and other service providers that do not provide service ‘to the public’ are entirely unrestrained. Since social media sites are available to all comers—meaning they do provide service ‘to the public’—they typically cannot disclose posts, tweets, and chats on pain of civil liability, including not being permitted to respond to civil subpoenas requesting such contents. They face no similar restraint on disclosing transactional and subscriber information to anyone other than government.<sup>55</sup>

Abril, Levin and Del Riego echo Stephenson’s concerns indicating that employer rights currently trump expectations of employee privacy because of employer interests, the general demands of the workplace and because of the accessibility of information. About the only thing that appears to be beyond the pale of reasonableness is an employer gaining information via coercion.<sup>56</sup> Further in their article on a survey of student attitudes towards internet privacy and review of international privacy practices—most notably those of France—Levin and Del Riego suggest:

[T]he creation of a right of employees to designate certain spaces as private within the workplace or employer-provided spaces. This can be in the form of a tag on a picture labeled ‘confidential’, the subject line of an e-mail reading ‘private’, or the label on a digital folder. Employees should, however, bear the burden of what they want to keep private.<sup>57</sup>

The attempt by an organization to carve out some physical means of privacy within the organization may be a progressive management technique in the workplace, nevertheless, it does not address the more specific issues of privacy that arise when social media is present be it in or outside the workplace. Consequently, the recommendation does not deal with an employee or an employer’s rights when an employee’s labeled ‘private’ electronic communications are ‘broadcast’ to the public-at-large via social media. The question of where are the lines of demarcation between an

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<sup>55</sup> *Id.*

<sup>56</sup> Abril Levin & Del Riego, *Blurred Boundaries: Social Media Privacy and the Twenty-First Century Employee*, 49 AM. BUS. L.J. at 63 (2012).

<sup>57</sup> *Id.*

employers's right to control its business and work environment and an employee's related personal expression that may be job related?

It is fair to say that that statutory protection of employee privacy (and in fact protection of privacy for the citizenry at large) has evolved slowly. Into this legal void entered the National Labor Relations Board (NLRB) and its focus on worker concerted activities to assume a new theory of employee protection, yet to be legislated or recognized by common law. The mandate to protect these rights has been used by the Board to both examine employer social media policy for legality and to determine what is *appropriate* and what constitutes *inappropriate* use of social media by employees.

The NLRB states its position as follows: "Congress enacted the National Labor Relations Act ('NLRA') 29 U.S.C. §§ 151-169 in 1935 to protect the rights of employees and employers, to encourage collective bargaining, and to curtail certain private sector labor and management practices, which can harm the general welfare of workers, businesses and the U.S. economy."<sup>58</sup> The NLRB is charged with enforcing and administering the Act. The legislation has not been substantively amended since the 1959 Landrum-Griffin Labor – Management Reporting and Disclosure Act—which, among other things, sought to promote union democracy.<sup>59</sup>

One keystone of the NLRA is Section 7, which provides any private sector employee the right to act in a concerted manner to organize a union and to bargain collectively. The Act contains a list of employer and employee unfair labor practices that are focused on protecting the rights of all employees to band together in an effort to secure better terms and conditions of employment. It is reasonable to assume that the framers of the Act did not anticipate today's revolution in electronic communications and its impact on the world of work. They also did not anticipate that this provision would be stretched to apply to all non-union employer environments for non-collective bargaining purposes. Indeed, the plain reading of the statute indicates that the concerted activity protections are specific as to affirmative acts: "concerted activities for the purpose of collective bargaining or other mutual aid or protection,"<sup>60</sup> not necessarily every day conversation or garden variety workplace grumbling.

Nevertheless, over the years the NLRB has developed a great deal of regulatory advice regarding what is permissible and impermissible conduct by employees and employers in the workplace. An area that has received significant NLRB attention is what employers may or may not say to employees during a union organizing campaign. Board decisions in determining allowable communications have insisted on "laboratory"

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<sup>58</sup> National Labor Relations Act, 29 U.S.C. §§151-169 (2012).

<sup>59</sup> 29 U.S.C. §401 et. seq. (1959).

<sup>60</sup> 29 U.S.C. §157, *supra* note 3.

conditions<sup>61</sup> prior to a representation vote and have forbidden employers from issuing “promises of benefit or threats of reprisal” to employees who influence a union representation election toward the employer.<sup>62</sup>

The Board has also issued rulings delineating employee rights to discuss union activity.<sup>63</sup> The NLRB policy has permitted employees to discuss concerted activity when on break even if on an employee’s property. These and other decisions focused on employee activity at or nearby the workplace not in the cyberspace that social media now makes easily accessible both at and far away from the workplace.

It is generally agreed that the rights to *free speech* that Americans enjoy outside the workplace do not apply inside the workplace. Thus there has been an evolution of employer restrictions we now confront over where and when (time and place) employees can discuss, amongst themselves issues related to terms and conditions of employment. The NLRBs’ decisions over the years have protected free speech only to the extent that they protect the right of workers to engage in concerted activity. Prior to the advent of social media employee discussions and criticisms of the workplace were usually internal. As one commentator observed:

[I]ssues related to work and employment which were previously “vented” among co-workers at the water cooler, in the cafeteria or in the rest room are now being vented publicly online for a much wider audience. A disgruntled employee doesn’t have to wait to get back to the office to express her or his feelings. Online networks provide an immediate opportunity to deal with issues and express feelings. While such public venting allows for spontaneity of expression, posts also cannot often be retracted and may continue to exist and be accessed long after the employee has “calmed down” or even had a change of heart about any specific incident. More so social network monitoring of existing employees can allow employers to monitor activities and discover personal information which may or may not be work-related. The ethical issue for employers is that much of which may be discovered online is not related to job performance and how is such information to be used once discovered.<sup>64</sup>

The NLRB has addressed the challenge of defining what *are* and *are not* permissible restrictions on employee use of social media. There have been

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<sup>61</sup> General Shoe Corp., 77 NLRB 124, 127 (1948).

<sup>62</sup> NLRB v. Gissel Packing Co., Inc., 395 U.S. 575 (1969).

<sup>63</sup> Republic Aviation Corp. v. Labor Board, 324 U.S. 793 (1945).

<sup>64</sup>Mello, *supra* note 8, at 169.

numerous NLRB decisions dealing with this specific subject.<sup>65</sup> Other examples include advising memos issued by then NLRB Acting General Counsel, Lafe Solomon, discussing the results of investigations in several dozen social media cases.<sup>66</sup>

The specifics of each case are well documented in the Acting General Counsel's memos as well as in other scholarly publications.<sup>67</sup> What has emerged from the NLRB's decisions has been a body of direction that addresses only one part of the privacy issues raised by social media, namely the right of employees—whether they be members of a union or not—to engage in concerted activity using social media and the corresponding issue of what limitations an employer may put on employee use of social media.

The NLRB is not opposed to employer limitations on use of social media *per se* but only when they infringe upon the concerted activity rights of employees. Thus in *WalMart*, the Board stated WalMart's policy restricting use of social media at the work place was sufficiently specific so as not violate employee Section 7 rights.<sup>68</sup> The key factor for the Board in WalMart and other cases challenging employer social media policy such as *Costco*, is that the NLRB looks to whether the employer made clear and explicit that the employer may not discipline employees who use social media for concerted activity.<sup>69</sup> Individual employee 'gripes' made on social media are not in and of themselves protected unless they are associated with *concerted activity* regarding terms and conditions of employment. That is, more than one employee is speaking or influencing another with requisite intent to exercise a Section 7 right.

Another key factor examined by the NLRB have been overbroad technology policies by employers. In the wake of *Quon*, employers moved to specify their formal technology policies. Nevertheless, the Board has been critical of technology policies they find to be far too overreaching to the point where they interfere with Section 7 rights, particularly with regard to social media such as *Facebook*, *Twitter* and the like. Late in 2010, the NLRB cited American Medical Response of Connecticut for just such overbroad language. Here the employer banned employees on and off site and on social media from depicting the company "in any way." The Board found the rule

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<sup>65</sup> See Christine Neylon O'Brien, *The Top Ten NLRB Cases on Face book Firings and Employer Social Media Policies*, OR. L.REV. (June 2013).

<sup>66</sup> See; NLRB General Counsel, *The NLRB and Social Media*, <http://www.nlr.gov/node/5078>.

<sup>67</sup> Alexandra Hemenway, *The NLRB and Social Media: Does the NLRB 'Like' Employee Interests*, 38 IOWA J. CORP. L at 607 (2013).

<sup>68</sup> WalMart, *supra* note 6.

<sup>69</sup> Costco Wholesale Corp., 358 NLRB, No. 106 (September 7, 2012).

too overbroad and settled the case in early 2011 through the company's voluntary narrowing of the policies in question.<sup>70</sup>

Hemenway offers several recommendations to help employers draft a social media policy that will withstand NLRB scrutiny especially in light of her argument that the Board's policy on these issues is not always clear and is evolving. That policy would have to clearly and positively state that nothing in the policy should be construed as limiting the Section 7 rights of employees or as prohibiting their discussion of working conditions.<sup>71</sup> The NLRB has stated that individual employee 'gripes' *per se* are not necessarily protected under the Act—only when they invoke concerted activity about the terms and conditions of employment.<sup>72</sup> But how does an employer know when such activity is in fact intended to be invoked by the employee as opposed to an ex post defense of an employer's employment action? Hemenway argues that employers exercise extreme caution here. For example, she states:

[I]f an employee makes critical comments about her employer on a social media or Internet site...—an employer should examine all of the relevant factual circumstances before taking any disciplinary action against this employee...If the Board considers ...subtle references to the workplace on an employee's social media page a reference to 'terms and conditions' of employment, then employers should not take disciplinary action against an employee.<sup>73</sup>

The NLRA applies to both union and non-union employees. Consequently, in ruling on social media issues the Board has looked at both types of workplaces. Indeed, one of the Board's more controversial social media decisions, *Hispanics United of Buffalo, Inc. and Carlos Ortiz*, took place in a non-union setting where the concerted activity protected was not related to collective bargaining or to union organization. In this case the Board ordered five workers in a non-union shop reinstated who had been dismissed by the employer, primarily for engaging in social media harassment of another worker who had made disparaging comments on social media about the five workers.<sup>74</sup>

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<sup>70</sup> Lazar & Schwartzreich, *supra* note 29, at 4; *see also* NLRB v. Am. Med. Response of Ct, Case #34-CA-12576 (2011).

<sup>71</sup> Hemenway, *supra* note 66, at 631-32.

<sup>72</sup> AMR, *supra* note 7.

<sup>73</sup> Hemenway, *supra* note 40, at 631-32.

<sup>74</sup> *Hispanics United of Buffalo, Inc. and Carlos Ortiz*, NLRB Case 03-CA-027872, December 2012.

In constructing its order the Board stated that it looked to factors set forth in *Atlantic Steel*,<sup>75</sup> which specified tests to determine when an employee's conduct would become so opprobrious to lose protection under the Act. These factors are: 1) the place of the discussion, 2) the subject matter of the discussion, 3) the nature of the employee's outburst, and 4) and whether the outburst was in any way provoked by an employer's unfair labor practice.<sup>76</sup> The Board found:

As to factor 1, the "discussion," the Face book posts were not made at work and not made during working hours. As to (2) the subject matter, the Face book posts were related to a coworker's criticisms of employee job performance, a matter the discriminatees had a protected right to discuss. As to factor (3) there were no "outbursts." Indeed, several of the discriminatees did not even mention Cruz-Moore; none criticized HUB. Regarding *Atlantic Steel* factor (4), while the Face book comments were not provoked by the employer, this factor is irrelevant to the instant case.<sup>77</sup>

The Board further stated:

Respondent has not established that the *discriminatees* violated any of its policies or rules. It relies on an assertion that it was entitled to discharge the five pursuant to its "zero tolerance" policy regarding harassment. Respondent has a policy against sexual harassment which has no relevance to this case...For reasons not disclosed in this record, Respondent was looking for an excuse to reduce its work force and seized upon the Facebook posts as an excuse for doing so.<sup>78</sup>

From a public policy perspective one may ask whether decisions such as *Hispanics United*, which do not directly impact collective bargaining, place the Board in a difficult and potentially unsupportable position. The primary role of the Board has, *de jure*, always been to facilitate *union-management* relations. But, if the Board persists in wading into waters where no union is present, one may ask not only whether this is an appropriate use of Board resources, statutorily allowed, but as well what the implications are to the required neutrality of the Board and its balancing of employer rights to effectively manage the work place.

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<sup>75</sup> 245 NLRB 814 (1979).

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at 9-10.

The following scenario is possible in the future. Suppose the Board's interpretation of what constitutes protected concerted activity goes viral and disaffected employees in non union as well as union shops see it as a green light to disparage an employer or fellow employees as long as they take care to do it as a "concerted activity" and meet the *Hispanics United* and *Atlantic Steel* tests. The Board may find itself with more alleged employer unfair practice charges than it bargained for as employers fight to maintain discipline in the workplace.

This could further expose the NLRB to political pressure by Congress to restrain its activities via legislation or by the Supreme Court in determining the Board had exceeded its statutory authority. The Board is neither equipped nor prepared to occupy the precipice in the uncomfortable position of arbitrator on all matters of electronic communications in the workplace—a role for which it has neither the mandate nor the expertise, nor public support.<sup>79</sup>

### III. DIRECTIONS

What appears to be needed is a consistent omnibus national policy on use of social media and the right to privacy in all spheres of life. The interjection of technology, particularly social media into the workplace has resulted in complex issues that leave employers in positions of great ambiguity. Federal law lacks direction and the legitimacy and scope of the NLRB's rulings to date are problematic. A *one size fits all* strategy from Washington may well be insufficient.

The issues are no clearer at the state level with multiple states interpreting and regulating the issue. Employers of a national level face a daunting array of state and local laws and regulations, often confusing if not conflicting. In effect, businesses are left with precisely the interstate commerce confusion that the Framers attempted to allay when enacting the Constitution's Commerce Clause<sup>80</sup>.

Recognizing that employment law primarily remains a state legal jurisdictional function, states themselves have proven ability to harmonize practices by their historical cooperation on uniform laws governing such areas as vehicle codes, traffic laws, contracts, and credit. Indeed, because

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<sup>79</sup>Author's note: The NLRB experienced the same 5% Budget Sequester as other Federal agencies. However, it lacks sufficient public support to attain any supplemental or emergency budget appropriations and is more likely than not to experience continued fiscal contractions. Thus, the agency must prioritize its core mission delimiting its ability to push the envelope on tangential (and potentially political risky, unpopular) issues as social media enforcement. Such actions and their potential Congressional backlash would detract from its main mission.

<sup>80</sup>U.S. const., Art. 1, sec. 8, cl. 3.

employment law is based on contract law, it follows that a uniform law among the states may prove a better solution than attempts by centralized federal agencies attempting to interpret, imperfectly, old statutes to new, often unintended uses.

The state cooperative mechanism of the National Conference of Commissioners on Uniform State Laws (NCUSL) could prove to be the vehicle of consistency that helps resolve these growing issues. Formed in 1892 from a recommendation of the American Bar Association, NCUSL was established for the purpose of promoting, “uniformity in state laws on all subjects where uniformity is deemed desirable and practical.”<sup>81</sup> Through 2013, the Commissioners have approved over 200 uniform laws and approximately 100 have been adopted by the states.<sup>82</sup> Its largest successes of course have been in the business law area, most notably, the Uniform Commercial Code.

Key benefits of a uniform approach among the states have been articulated by the Commission itself:

- ULC strengthens the federal system by providing rules and procedures that are consistent from state to state but that also reflect the diverse experience of the states.
- ULC statutes are representative of state experience, because the organization is made up of representatives from each state, appointed by state government.
- ULC keeps state law up-to-date by addressing important and timely legal issues.
- ULC’s efforts reduce the need for individuals and businesses to deal with different laws as they move and do business in different states.
- ULC’s work facilitates economic development and provides a legal platform for foreign entities to deal with U.S. citizens and businesses.
- ULC Commissioners donate thousands of hours of their time and legal and drafting expertise every year as a public service, and receive no salary or compensation for their work.
- ULC’s deliberative and uniquely open drafting process draws on the expertise of commissioners, but also utilizes input from legal experts, and advisors and observers representing the views

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<sup>81</sup> *Uniform Laws*, LEGAL INFORMATION INSTITUTE, <http://www.law.cornell.edu.uniform> (last visited Oct. 18, 2014).

<sup>82</sup> *Id.*

of other legal organizations or interests that will be subject to the proposed laws.<sup>83</sup>

The following presents a framework or architecture for consideration of a conference of states in constructing a uniform law governing the particulars of social media, its uses and abuses in the employment setting. The framework is not exhaustive but provides for thoughtful identification and uniform approaches to issues of social media in employment that continue to arise, absent clear judicial/statutory guidance in business environments.

**PROPOSED FRAMEWORK OF A  
UNIFORM SOCIAL MEDIA IN EMPLOYMENT ACT**

**TITLE 1: PURPOSE AND DEFINITIONS**

1. Purpose of the uniform statute
2. Definition of social media rights between employees and employers
3. Definition of Terms
4. Authorities

**TITLE 2: RECRUITING AND SELECTION**

1. Permissible Use of Social Media in pre-employment
2. Permissible Use of Social Media in conditional employment offers (background checks)
3. Identified impermissible uses of Social Media

**TITLE 3: EMPLOYEE RELATIONS**

1. Permissible Use of Social Media on Job, Premises or In Uniform
2. Protection of Employer Proprietary Information and Trade Secrets
3. Use of Social Media in Union-Management Campaigns, Concerted Activity
4. Rules on Privacy Off Job and Off Job Behavior invoking employer name/reputation
5. Disciplinary Rules: Tangible Employment Actions-Social Media

**TITLE 4: COMPENSATION AND BENEFITS**

1. Permissible Uses of Social Media in communicating wages, hours and benefits
2. Protection of Employer Proprietary Compensation Information

**TITLE 5: EMPLOYEE HEALTH AND SAFETY ISSUES IN SOCIAL MEDIA**

1. Permissible Uses of Social Media in communicating matters of health and safety
2. Protected acts from retaliation, statutory protections

**TITLE 6: OTHER HUMAN RESOURCE ISSUES IN SOCIAL MEDIA**

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<sup>83</sup> *About The ULC*, UNIFORM LAW COMMISSION, NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS (NCUSL), <http://www.uniformlaws.org/Narrative.aspx?title=About%20the%20ULC> (last visited May 11, 2014).

## **IV. CONCLUSION**

The above framework would help set in motion the foundation of a national consensus at the state level on the appropriate rules and boundaries for employers and employees on the use of social media. Moreover, it may well serve as a template for a more expanded treatment of employer-employee appropriate rules on uses of all information technologies be they computers, tablets, Smartphones, Google Glass or other emerging technologies where personal privacy and the workplace overlap or even clash.

Such consensus of uniform agreed state law would further serve a public purpose of at one level “unclogging” courts and regulatory agencies from attempting to adapt, interpret or twist unrelated legislation to dealing with the complexities of a technological topic for which the law, has been to this point, essentially unprepared.

Until then, the world of social media will continue to be a legal minefield for employers and employees in which uncertainty will have its own unintended consequences in employment, productivity and ultimately effectively managing the workplace.