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# Compliance Challenges:
# The National Labor Relations Board

## Supplemental Materials

**29 U.S.C.**
United States Code, 2011 Edition
Title 29 - LABOR
CHAPTER 7 - LABOR-MANAGEMENT RELATIONS
SUBCHAPTER II - NATIONAL LABOR RELATIONS
Sec. 151 - Findings and declaration of policy
From the U.S. Government Printing Office, http://www.gpo.gov/

## §151. Findings and declaration of policy

The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

(July 5, 1935, ch. 372, §1, 49 Stat. 449; June 23, 1947, ch. 120, title I, §101, 61 Stat. 136.)

### AMENDMENTS

**1947**—Act June 23, 1947, amended section generally to restate the declaration of policy and to make the finding and policy of this subchapter "two-sided".

### EFFECTIVE DATE OF 1947 AMENDMENT

Section 104 of title I of act June 23, 1947, provided: "The amendments made by this title [amending this subchapter] shall take effect sixty days after the date of the enactment of this Act [June 23, 1947], except that the authority of the President to appoint certain officers conferred upon him by section 3 of the National Labor Relations Act as amended by this title [section 153 of this title] may be exercised forthwith."

**29 U.S.C.**
United States Code, 2011 Edition
Title 29 - LABOR
CHAPTER 7 - LABOR-MANAGEMENT RELATIONS
SUBCHAPTER II - NATIONAL LABOR RELATIONS
Sec. 157 - Right of employees as to organization, collective bargaining, etc.
From the U.S. Government Printing Office, http://www.gpo.gov/

## §157. Right of employees as to organization, collective bargaining, etc.

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 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 as authorized in section 158(a)(3) of this title.

(July 5, 1935, ch. 372, §7, 49 Stat. 452; June 23, 1947, ch. 120, title I, §101, 61 Stat. 140.)

### AMENDMENTS

**1947**—Act June 23, 1947, restated rights of employees to bargain collectively and inserted provision that they have right to refrain from joining in concerted activities with their fellow employees.

### EFFECTIVE DATE OF 1947 AMENDMENT

For effective date of amendment by act June 23, 1947, see section 104 of act June 23, 1947, set out as a note under section 151 of this title.

# Employee Rights

## Under the National Labor Relations Act

The National Labor Relations Act (NLRA) guarantees the right of employees to organize and bargain collectively with their employers, and to engage in other protected concerted activity or to refrain from engaging in any of the above activity. Employees covered by the NLRA* are protected from certain types of employer and union misconduct. This Notice gives you general information about your rights, and about the obligations of employers and unions under the NLRA. Contact the National Labor Relations Board (NLRB), the Federal agency that investigates and resolves complaints under the NLRA, using the contact information supplied below, if you have any questions about specific rights that may apply in your particular workplace.

### Under the NLRA, you have the right to:

- Organize a union to negotiate with your employer concerning your wages, hours, and other terms and conditions of employment.
- Form, join or assist a union.
- Bargain collectively through representatives of employees' own choosing for a contract with your employer setting your wages, benefits, hours, and other working conditions.
- Discuss your wages and benefits and other terms and conditions of employment or union organizing with your co-workers or a union.
- Take action with one or more co-workers to improve your working conditions by, among other means, raising work-related complaints directly with your employer or with a government agency, and seeking help from a union.
- Strike and picket, depending on the purpose or means of the strike or the picketing.
- Choose not to do any of these activities, including joining or remaining a member of a union.

### Under the NLRA, it is illegal for your employer to:

- Prohibit you from talking about or soliciting for a union during non-work time, such as before or after work or during break times; or from distributing union literature during non-work time, in non-work areas, such as parking lots or break rooms.

### Under the NLRA, it is illegal for a union or for the union that represents you in bargaining with your employer to:

- Threaten or coerce you in order to gain your support for the union.

- Question you about your union support or activities in a manner that discourages you from engaging in that activity.
- Fire, demote, or transfer you, or reduce your hours or change your shift, or otherwise take adverse action against you, or threaten to take any of these actions, because you join or support a union, or because you engage in concerted activity for mutual aid and protection, or because you choose not to engage in any such activity.
- Threaten to close your workplace if workers choose a union to represent them.
- Promise or grant promotions, pay raises, or other benefits to discourage or encourage union support.
- Prohibit you from wearing union hats, buttons, t-shirts, and pins in the workplace except under special circumstances.
- Spy on or videotape peaceful union activities and gatherings or pretend to do so.
- Refuse to process a grievance because you have criticized union officials or because you are not a member of the union.
- Use or maintain discriminatory standards or procedures in making job referrals from a hiring hall.
- Cause or attempt to cause an employer to discriminate against you because of your union-related activity.
- Take adverse action against you because you have not joined or do not support the union.

**If you and your co-workers select a union to act as your collective bargaining representative, your employer and the union are required to bargain in good faith in a genuine effort to reach a written, binding agreement setting your terms and conditions of employment. The union is required to fairly represent you in bargaining and enforcing the agreement.**

**Illegal conduct will not be permitted.** If you believe your rights or the rights of others have been violated, you should contact the NLRB promptly to protect your rights, generally within six months of the unlawful activity. You may inquire about possible violations without your employer or anyone else being informed of the inquiry. Charges may be filed by any person and need not be filed by the employee directly affected by the violation. The NLRB may order an employer to rehire a worker fired in violation of the law and to pay lost wages and benefits, and may order an employer or union to cease violating the law. Employees should seek assistance from the nearest regional NLRB office, which can be found on the Agency's Web site: **http://www.nlrb.gov.**

You can also contact the NLRB by calling toll-free: **1-866-667-NLRB (6572)** or **(TTY) 1-866-315-NLRB (1-866-315-6572)** for hearing impaired.

If you do not speak or understand English well, you may obtain a translation of this notice from the NLRB's Web site or by calling the toll-free numbers listed above.

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*The National Labor Relations Act covers most private-sector employers. Excluded from coverage under the NLRA are public-sector employees, agricultural and domestic workers, independent contractors, workers employed by a parent or spouse, employees of air and rail carriers covered by the Railway Labor Act, and supervisors (although supervisors that have been discriminated against for refusing to violate the NLRA may be covered).

**This is an official Government Notice and must not be defaced by anyone.**

SEPTEMBER 2011

# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

**No. 12-5068** **September Term 2011**

**1:11-cv-01629-ABJ**

**Filed On:** April 17, 2012

National Association of Manufacturers, et al.,

Appellants

v.

National Labor Relations Board, et al.,

Appellees

**BEFORE:** Tatel, Brown, and Kavanaugh, Circuit Judges

## ORDER

Upon consideration of the emergency motion for injunction pending appeal and for expedited consideration, the opposition thereto, and the reply; appellants' Rule 28(j) letter and the response thereto; and appellants' second Rule 28(j) letter, it is

**ORDERED** that the emergency motion for injunction pending appeal be granted. Appellant has satisfied the requirements for an injunction pending court review. See Winter v. Natural Res. Def. Council, 555 U.S. 7, 20 (2008); D.C. Circuit Handbook of Practice and Internal Procedures 33 (2011); see also Chamber of Commerce v. NLRB, No. 2:11-cv-02516-DCN, Order (D.S.C. Apr. 13, 2012) (holding National Labor Relations Board lacks authority to promulgate the notice-posting rule).

We note that the Board postponed operation of the rule during the pendency of the district court proceedings in order to give the district court an opportunity to consider the legal merits before the rule took effect. That postponement is in some tension with the Board's current argument that the rule should take effect during the pendency of this court's proceedings before this court has an opportunity to similarly consider the legal merits. We note also that the district court's severability analysis left the posting requirement in place but invalidated the primary enforcement mechanisms for violations of the requirement. The Board has indicated that it may cross-appeal that aspect of the district court's decision. The uncertainty about enforcement counsels further in favor of temporarily preserving the status quo while this court resolves all of the issues on the merits. It is

# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

**No. 12-5068** **September Term 2011**

**FURTHER ORDERED** that this appeal be expedited. The following briefing schedule will apply:

| | |
|---|---|
| Appellants' Brief | May 15, 2012 |
| Appendix | May 15, 2012 |
| Appellees' Brief | June 15, 2012 |
| Reply Brief | June 29, 2012 |

The Clerk is directed to calendar this case for oral argument on an appropriate date in September 2012.

Parties are strongly encouraged to hand deliver the paper copies of their briefs to the Clerk's office on the date due. Filing by mail may delay the processing of the brief. Additionally, counsel are reminded that if filing by mail, they must use a class of mail that is at least as expeditious as first-class mail. See Fed. R. App. P. 25(a). All briefs and appendices must contain the date that the case is scheduled for oral argument at the top of the cover. See D.C. Cir. Rule 28(a)(8).

**Per Curiam**

**FOR THE COURT:**
Mark J. Langer, Clerk

BY: /s/
Timothy A. Ralls
Deputy Clerk

**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

**CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA,**

**and**

**COALITION FOR A DEMOCRATIC WORKPLACE,**

**Plaintiffs,**

**v.**

**NATIONAL LABOR RELATIONS BOARD,**

**Defendant.**

**Civil Action No. 11-2262 (JEB)**

## MEMORANDUM OPINION

According to Woody Allen, eighty percent of life is just showing up. When it comes to satisfying a quorum requirement, though, showing up is even more important than that. Indeed, it is the only thing that matters – even when the quorum is constituted electronically. In this case, because no quorum ever existed for the pivotal vote in question, the Court must hold that the challenged rule is invalid.

On December 22, 2011, the National Labor Relations Board published a rule that amended the procedures for determining whether a majority of employees wish to be represented by a labor organization for purposes of collective bargaining. Two of the Board's three members voted in favor of adopting the final rule. The third member of the Board, Brian Hayes, did not cast a vote. Because Hayes had previously voted against initiating the rulemaking and against proceeding with the drafting and publication of the final rule, the Board nevertheless determined

that he had "effectively indicated his opposition."

In this suit, Plaintiffs – the Chamber of Commerce of the United States of America and the Coalition for a Democratic Workforce – challenge the final rule on myriad grounds. The Court, however, reaches only their first contention: that the rule was adopted without the statutorily required quorum. Absent limited circumstances not present here, the Board must muster a quorum of three members in order to act. Because Member Hayes did not participate in the decision to adopt the final rule, Plaintiffs argue, the other two members of the Board lacked the authority to effect its promulgation. The NLRB, on the other hand, maintains that all three members participated in the rulemaking in the relevant sense and, accordingly, that the quorum requirement was satisfied. The agency has now filed a Motion for Summary Judgment and an Alternative Partial Motion to Dismiss, and Plaintiffs have filed a Motion for Summary Judgment.

Plaintiffs are correct. Two members of the Board participated in the decision to adopt the final rule, and two is simply not enough. Member Hayes cannot be counted toward the quorum merely because he held office, and his participation in earlier decisions relating to the drafting of the rule does not suffice. He need not necessarily have voted, but he had to at least show up. At the end of the day, while the Court's decision may seem unduly technical, the quorum requirement, as the Supreme Court has made clear, is no trifle. Regardless of whether the final rule otherwise complies with the Constitution and the governing statute – let alone whether the amendments it contains are desirable from a policy perspective – the Board lacked the authority to issue it, and, therefore, it cannot stand. The Court, consequently, will grant Plaintiffs' Motion and deny Defendant's.

## I. Background

The National Labor Relations Act, codified at 29 U.S.C. § 151 *et seq.*, governs, *inter alia*, the formation of collective-bargaining relationships between employers and employees in the private sector, and the NLRB is the federal agency charged with administering the statute. See generally id. §§ 151-57. At the time of the agency's creation, the NLRA provided that the Board would consist of three members and that two of those members would constitute a quorum. See Act of July 5, 1935 ("Wagner Act"), ch. 372, §§ 3(a)-(b), Pub. L. No. 74-198, 49 Stat. 449, 451. With the enaction of the Taft-Hartley Act in 1947, however, the Board's membership was increased from three to five. See 29 U.S.C. § 153(a); see also New Process Steel, L.P. v. NLRB, 130 S. Ct. 2635, 2638 (2010). Taft-Hartley concurrently altered the quorum requirement, providing that, except in limited circumstances not present here, "three members of the Board shall, at all times, constitute a quorum." See 29 U.S.C. § 153(b); see also New Process Steel, 130 S. Ct. at 2638. It now takes three Board members, in other words, for the Board to do business.

The five-member Board is endowed with the "authority from time to time to make, amend, and rescind, in the manner prescribed by [the Act], such rules and regulations as may be necessary to carry out the provisions of this [Act]." 29 U.S.C. § 156. One area in which the Board has exercised this authority relates to Section 7 of the NLRA, 29 U.S.C. § 157, which guarantees the right of employees "to bargain collectively through representatives of their own choosing . . . and to refrain from . . . such activities." Id. When employees and their employer are unable to agree whether the employees should be represented by a union for purposes of collective bargaining, it falls to the Board to resolve the question of representation. See 29 U.S.C. § 159.

Although Congress set out the basic steps by which such a question is to be settled, it left it to the Board to fill in the gaps. See NLRB v. A.J. Tower Co., 329 U.S. 324, 330 (1946) ("Congress has entrusted the Board with a wide degree of discretion in establishing the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives by employees."). "The Board has exercised this discretion through two mechanisms. First, the Board has promulgated binding rules of procedure, most of which are found in 29 C.F.R. part 102, subpart C. Second, the Board has interpreted and occasionally altered or created its representation case procedures through adjudication." Final Rule, 76 Fed. Reg. 80,138, 80,138 (Dec. 22, 2011) (footnote omitted).

On June 22, 2011, the Board formally proposed to amend its procedures for resolving disputes about union representation in a Notice of Proposed Rulemaking (NPRM), which was issued by a 3-1 vote of the four members then holding office. NPRM, 76 Fed. Reg. 36,812, 36,812 (June 22, 2011); see also Separate Concurring Statement by Chairman Pearce, 77 Fed. Reg. 25,548, 25,548 (Apr. 30, 2012). Then-Chairman Wilma Liebman, Member Craig Becker, and Member Mark Pearce voted in favor of publishing the NPRM; Member Brian Hayes dissented. See NPRM, 76 Fed. Reg.a t 36,829-33. The proposed rule, the NPRM advised, would "remove unnecessary barriers to the fair and expeditious resolution of questions concerning representation." Id. at 36,812.

More than 65,000 written comments were received in response. See Final Rule, 76 Fed. Reg. at 80,140. In July 2011, the Board held two full days of hearings on the proposed rule. See id. at 80,142. All four Board members participated, and 66 individuals and organizations testified. See id. In the midst of the Board's subsequent deliberations, however, then-Chairman Liebman's term expired, leaving the Board with only three members. See Separate Concurring

Statement by Chairman Pearce, 77 Fed. Reg. at 25,548. In addition, "the Board . . . faced the imminent end of the recess appointment of Member Becker and with it, the indefinite loss of a quorum." Id. (footnote omitted).

At a public meeting held on November 30, 2011, the remaining three members of the Board considered a resolution to "[p]repare a final rule to be published in the Federal Register containing" eight of the amendments proposed in the NPRM and to "[c]ontinue to deliberate on the remainder" of the proposed amendments. See Def.'s Mot., Exh. 2 (NLRB Resolution No. 2011-1). This proposal was intended to allow for those eight amendments to be published in a final rule before the expiration of Member Becker's appointment. See Separate Concurring Statement by Chairman Pearce, 77 Fed. Reg. at 25,548. The resolution was passed by a vote of 2-1, with Member Hayes again dissenting. See Final Rule, 76 Fed. Reg. at 80,147 ("Member Hayes attended [the November 30th meeting], participated fully, and voted against proceeding."); Separate Concurring Statement by Chairman Pearce, 77 Fed. Reg. at 25,548.

Consistent with that resolution, the final rule that is the subject of this case was prepared. The Chairman circulated a draft via email on December 9, 2011, and another draft was circulated via email on December 12. See Def.'s Opp., Exh. 1 (Decl. of Brian Hayes), ¶¶ 4-5.[1] The next day, December 13, another draft was circulated in the Board's internal Judicial Case Management System (JCMS). See id., ¶ 6.

[1] Member Hayes's declaration, which was submitted by the NLRB along with its Opposition to Plaintiffs' Motion, was not part of the administrative record. While the Court's review of agency action is ordinarily limited to the materials before the agency at the time of its action, other evidence may be considered when a challenge is brought to "the procedural validity of [an agency's] action." Esch v. Yeutter, 876 F.2d 976, 991 (D.C. Cir. 1989); see also Franks v. Salazar, 751 F. Supp. 2d 62, 68 (D.D.C. 2010); The Cape Hatteras Access Preservation Alliance v. U.S. Dep't of Interior, 667 F. Supp. 2d 111, 115 (D.D.C. 2009). Here, both parties rely on Hayes's declaration because the details it provides about his participation in the rulemaking process are necessary to their arguments about whether he may be counted as part of a quorum. Indeed, Plaintiffs' quorum-based argument is precisely the type of procedural challenge for which extra-record evidence is necessary. Because Defendant submitted the declaration, both parties refer to it, and the Court agrees that considering his statement is necessary "to enable judicial review to become effective," Esch, 876 F.2d at 991, the Court will consider the declaration in analyzing the quorum issue.

> JCMS is the ordinary procedure for circulating and revising draft decisions, rules, and other documents, and for voting – generally either "approved" or "noted" with an attached dissent or concurrence. The case or rule is moved to issuance when votes are recorded for all Board Members as to the final versions of all circulated documents.

Id., ¶ 6. "In situations where a particular Board Member has not voted and immediate action is desired, the Executive Secretary or Solicitor may convey, by phone or email, a request to act." Id., ¶ 11.

On December 14, 2011, the Chairman distributed by email a draft Order, which directed the Solicitor to publish the final rule in the Federal Register "immediately upon approval of a final rule by a majority of the Board." Def.'s Mot., Exh. 3 (Order, Dec. 15, 2011) at 1; see Hayes Decl., ¶ 7. The Order provided that any concurring or dissenting statements would be published in the Federal Register after the publication of the final rule itself, and it also stated that the Order would "constitute the final action of the Board in this matter." See Order, Dec. 15, 2011, at 1-2. All three members voted on this procedural Order by email on December 14 or 15, with Chairman Pearce and Member Becker voting in its favor and Member Hayes voting against. See Hayes Decl., ¶ 8.

Meanwhile, the draft final rule continued to be revised. A modified draft was circulated via JCMS on December 15. Id., ¶ 9. That same day, an email was sent from the Chairman's Chief Counsel to Hayes's Chief Counsel, with Hayes and others copied, asking whether Hayes wished to include a dissenting statement in the final rule. Id. Later that day, Hayes "authorized [his] Chief Counsel to advise that [he] would not attach any statement to the Final Rule" so long as, consistent with the Board's Order, he would be able to add a dissent later on. Id.

On December 16, the final version of the rule was circulated in JCMS. Id., ¶ 10. Both Chairman Pearce and Member Becker voted to approve the rule, and it was forwarded by the

Solicitor for publication in the Federal Register that same day. See id., ¶ 10. Hayes did not vote. Id., ¶¶ 10-11. Nor was he "asked by email or phone to record a final vote in JCMS before or after the Final Rule was modified, approved by Chairman Pearce and Member Becker, and forwarded by the Solicitor for publication on December 16." Id., ¶ 11. Hayes has averred that "[a]fter [he] voted against the procedural Order on December 15 and indicated that [he] would not attach a personal statement to the Final Rule, [he] gave no thought to whether further action was required of [him]." Id. The rule was nonetheless published in the Federal Register on December 22, 2011. See Final Rule, 76 Fed. Reg. at 80,138. Pearce's concurring statement and Hayes's dissenting statement were subsequently published on April 30, 2012, the same day the rule took effect. See Separate Concurring and Dissenting Statements, 77 Fed. Reg. at 25,548.

In the interim, however, Plaintiffs the Chamber of Commerce of the United States of America and the Coalition for a Democratic Workforce, two organizations that together represent thousands of businesses that are subject to the final rule, filed suit. See First Am. Compl., ¶¶ 4-9. Their First Amended Complaint brings numerous challenges both to the procedure by which the rule was adopted and to its substance. Id., ¶¶ 34-76. The parties have now filed Cross-Motions for Summary Judgment, and the NLRB moves in the alternative for partial dismissal. In addition, several organizations have jointly filed a brief as *amici curiae* in support of Plaintiffs' Motion.

## II. Legal Standard

Summary judgment may be granted if "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); see also Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986); Holcomb v. Powell, 433 F.3d 889, 895 (D.C. Cir. 2006). A fact is "material" if it is capable of affecting the

substantive outcome of the litigation. Holcomb, 433 F.3d at 895; Liberty Lobby, Inc., 477 U.S. at 248. A dispute is "genuine" if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. See Scott v. Harris, 550 U.S. 372, 380 (2007); Liberty Lobby, Inc., 477 U.S. at 248; Holcomb, 433 F.3d at 895.

Although styled Motions for Summary Judgment, the pleadings in this case more accurately seek the Court's review of an administrative decision. The standard set forth in Rule 56(c), therefore, does not apply because of the limited role of a court in reviewing the administrative record. See Sierra Club v. Mainella, 459 F. Supp. 2d 76, 89-90 (D.D.C. 2006) (citing National Wilderness Inst. v. United States Army Corps of Eng'rs, 2005 WL 691775, at *7 (D.D.C. 2005); Fund for Animals v. Babbitt, 903 F. Supp. 96, 105 (D.D.C. 1995), amended on other grounds, 967 F. Supp. 6 (D.D.C. 1997)). "[T]he function of the district court is to determine whether or not as a matter of law the evidence in the administrative record permitted the agency to make the decision it did." Id. (internal citations omitted). Summary judgment thus serves as the mechanism for deciding, as a matter of law, whether the agency action is supported by the administrative record and otherwise consistent with the APA and governing law. See Richards v. INS, 554 F.2d 1173, 1177 & n.28 (D.C. Cir. 1977), cited in Bloch v. Powell, 227 F. Supp. 2d 25, 31 (D.D.C. 2002), aff'd, 348 F.3d 1060 (D.C. Cir. 2003).

**III. Analysis**

Except under circumstances that neither side argues obtain here, the NLRA provides that "three members of the Board shall, at all times, constitute a quorum of the Board . . . ." 29 U.S.C. § 153(b); see also New Process Steel, 130 S. Ct. at 2638-45. It is undisputed that this requirement applies to the promulgation of rules, and it is similarly undisputed that two members of the Board – Pearce and Becker – voted to adopt the final rule and should thus be counted

toward the quorum. At issue with respect to Plaintiff's quorum-based claim, then, is only whether the third member, Hayes, may also be counted.

The NLRB's arguments that he should be considered part of the quorum despite his not having voted on the adoption of the final rule are twofold. First, the agency maintains that Hayes's participation in two earlier decisions relating to the final rule's publication – specifically, the November 30th decision to adopt a resolution providing that the final rule should be prepared and the December 15th decision to issue a procedural order providing that the final rule should be published upon a majority vote to adopt it – sufficed to satisfy the NLRA's quorum requirement with respect to the rule's promulgation. Second, even if Hayes's participation in those earlier votes does not suffice, the NLRB contends that he was "present" for the December 16th vote to adopt the rule and should thus be counted toward the quorum.

The Court will address each of these arguments in turn. Ultimately, it concludes that the December 16th decision to adopt the final rule, not the earlier votes, was the relevant agency action. A quorum, accordingly, must have participated in that decision. And although Hayes need not have voted in order to be counted toward the quorum, he may not be counted merely because he was a member of the Board at the time the rule was adopted. More was required. Because the final rule was promulgated without the requisite quorum, the Court must set it aside on that ground and does not reach Plaintiffs' remaining arguments.

A. Prior Decisions Not Final Agency Action

The NLRB argues in its Motion that the December 15th procedural Order was the agency's final action with respect to the rulemaking. See Def.'s Mot. at 42-43. Because Member Hayes voted on that Order, it argues, 29 U.S.C. § 153(b)'s quorum requirement was satisfied regardless of what took place afterward. See id. The agency refines its position

somewhat in its Opposition to Plaintiffs' Motion, emphasizing that Hayes participated in two earlier decisions relating to the final rule – those regarding the December 15th Order and the November 30th Resolution – and that his votes in those proceedings constitute participation in the rulemaking. See Def.'s Opp. at 4-5. Because the December 16th vote to adopt the final rule was the relevant agency action, however, the NLRB's focus on these earlier decisions is misplaced.

Borrowing from precedent concerning ripeness and finality – which, while not a perfect analog, is certainly informative – it is well established that to be "final," an agency action "must mark the consummation of the agency's decisionmaking process – it must not be of a merely tentative or interlocutory nature." Nat'l Ass'n of Home Builders v. Norton, 415 F.3d 8, 13 (D.C. Cir. 2005) (quoting Bennett v. Spear, 520 U.S. 154, 177–78 (1997)) (internal quotation marks omitted). "[T]he action must 'be one by which rights or obligations have been determined, or from which legal consequences will flow.'" Id. (quoting Bennett, 520 U.S. at 178). The November 30th resolution plainly does not fit this bill. Nor does the December 15th Order, despite the fact that it purports to be the agency's final action. See Order, Dec. 15, 2011, at 2 ("[T]his Order shall constitute the final action of the Board in this matter.").

No rights or legal consequences derive from the December 15th Order. The Order was simply a procedural one, addressing the timing of the rule's publication as well as the subsequent publication of any separate concurring or dissenting statements. Indeed, even while the Order professes to be the agency's final action, it contemplates the subsequent "approval of a final rule by a majority of the Board." See id. at 1. Until and unless the agency voted to adopt the final rule, its terms would not be effective. See id. at 1. The Order, standing alone, does nothing at all. Its effect is expressly made contingent upon subsequent agency action. See Rochester Tel. Corp. v. United States, 307 U.S. 125, 130 (1939) (non-final agency order "does not of itself adversely

affect complainant but only affects his rights adversely on the contingency of future administrative action"). It is that subsequent action – the decision to actually adopt the final rule – that was the Board's final action in relation to the rulemaking.

Although within the confines of the APA and its governing statute an agency is generally free to devise its own procedures, see Vermont Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc., 435 U.S. 519, 524 (1978), it cannot evade the statutorily mandated quorum requirement simply by designating interlocutory decisions as final actions. The NLRB, in other words, may not transform a procedural order into the relevant final action merely by its say-so. As the Supreme Court has emphasized, the quorum requirement is not a mere "technical obstacle[ ]" an agency may contrive to avoid. See New Process Steel, 130 S. Ct. at 2644. Rather, it is a limit on the agency's power to act. Even if, as the NLRB insists, agencies may alter the text of a final rule after the official vote on its adoption, see Def.'s Mot. at 43, a quorum still must participate in that official vote, regardless of any intermediate decisions that may have preceded it.

What if, for example, one of the three Board members had been tragically killed following the vote on the December 15th procedural Order but prior to the December 16th vote to adopt the final rule? Or what if one of the three Board members' terms had expired prior to the vote to adopt the final rule? Under the NLRB's theory, the two remaining members could nevertheless have adopted the rule in either scenario. Such a result, however, would render the three-member quorum requirement meaningless. With Taft-Hartley,Cong ress made the conscious decision to increase the quorum requirement from two to three members. "[H]ad Congress wanted to provide for two members alone to act as the Board, it could have maintained

the NLRA's original two-member Board quorum provision." New Process Steel, 130 S. Ct. at 2641 (citing 29 U.S.C. § 153(b)).

In the end, deciding whether to adopt a regulation that will bind the public is perhaps the agency's weightiest responsibility. Myriad subsidiary decisions are required in the process of promulgating regulations, but it is the final decision to adopt (or not to adopt) a given rule that transforms words on paper into binding law. That decision, which in this case took place on December 16, 2011, required a quorum.

B. Quorum Requirement

To satisfy 29 U.S.C. § 153(b), then, a quorum must have participated in the December 16th decision to adopt the final rule. As the Supreme Court recently explained with reference to the NLRA's quorum requirement, "[a] quorum is the number of members of a larger body that must participate for the valid transaction of business." New Process Steel, 130 S. Ct. at 2642. Put differently, the statute's quorum provision serves to "define the number of members who must participate in a decision." Id. at 2643. Whether "participation" is the appropriate term and what constitutes "participation" in an electronic vote are the questions on which this case hinges.[2]

[2] Neither party mentions the deferential Chevron standard for reviewing an agency's interpretation of the statutes it administers in their arguments on the quorum issue. See Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 (1984). Chevron is also conspicuously absent from both the majority opinion and the dissent in New Process Steel. See "The Supreme Court: 2009 Term – Leading Cases," 124 Harv. L. Rev. 380 (2010) (observing that "[t]he Court never addressed the Chevron framework" in New Process Steel and considering the import of "Chevron's absence"); Julia Di Vito, Note, "The New Meaning of New Process Steel, LP v. NLRB," 46 Wake Forest L. Rev. 307, 325-26 (2011) (noting the "curious" omission of any reference to Chevron in what appeared to be "the prototypical Chevron case"). Indeed, that case has been read in conjunction with other precedents to suggest that Chevron may not apply to agencies' interpretations of their own jurisdiction or power to act. See, e.g., "The Supreme Court: 2009 Term – Leading Cases," 124 Harv. L. Rev. at 385-90. As the question of statutory interpretation presented here both concerns the NLRB's statutory jurisdiction and does not implicate the agency's expertise, Chevron may indeed not be applicable. But see, e.g., Oklahoma Natural Gas Co. v. FERC, 28 F.3d 1281, 1283-84 (D.C. Cir. 1994) (questioning Chevron's applicability to jurisdictional questions but ultimately proceeding under the Chevron framework). The Court, however, need not so decide. Although it will follow the New Process Steel Court in analyzing this issue without Chevron, the Court finds that the NLRA unambiguously

Despite the Supreme Court's repeated use of the term "participate" in New Process Steel, a 2010 case that turned on the proper construction of the NLRA's quorum provision, see generally 130 S. Ct. at 2638, the NLRB quibbles over its appropriateness. "Mere presence," it argues, is enough to constitute a quorum. See Def.'s Opp. at 3 (citing United States v. Ballin, 144 U.S. 1, 5-6 (1892)). If the difference in terminology matters – and the Court is not convinced that it does – Plaintiffs, whose argument for "participation" over "presence" relies on a more recent case involving the same statute at issue here, have the better of the dispute. Indeed, the NLRB itself interpreted the NLRA's quorum requirement to "denote[ ] that the Board may legally transact business when three of its members are participating" in its Brief in New Process Steel. See Br. of Respondent NLRB at 19, New Process Steel, 130 S. Ct. 2635 (emphasis added).

To the extent the agency's argument is simply that a member need not vote in order to form part of the quorum, however, the Court certainly agrees. Indeed, it is axiomatic that "[a]n abstaining voter . . . is counted in determining the presence of a quorum." 59 Am. Jur. 2d Parliamentary Law § 9; see also Ballin, 144 U.S. at 5-6; 2 Am. Jur. 2d Admin. Law § 83 ("One who merely abstains, however, is counted toward the quorum."). The NLRB is correct, therefore, that Member Hayes thus need not have cast a vote in order to be counted.

But whether the standard is "mere presence" or "participation," the difficulty is in applying that standard to an online vote. When the very concept of a quorum seems designed for a meeting in which people are physically present in the same place, what does it mean to be present or to participate in a decision that takes place across wires? In other words, how does one draw the line between a present but abstaining voter (who may be counted toward a quorum)

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precludes the agency's preferred interpretation of the quorum requirement. Analyzing this question through Chevron's lens, accordingly, would yield the same result.

and an absent voter (who may not be) when the voting is done electronically? Even if "mere presence" is enough, the translation of that physicality-based concept to the JCMS process, which "automatically calls for an electronic vote when drafts are circulated," Hayes Decl., ¶ 11, is not obvious.

As a preliminary matter, while electronic voting is relatively new, the idea that "the quorum acting on a matter need not be physically present together at any particular time" is not. Braniff Airways, Inc. v. Civil Aeoronautics Board, 379 F.2d 453, 460 (D.C. Cir. 1967). That the Board may "proceed with its members acting separately, in their various offices, rather than jointly in conference," accordingly, is not controversial. See id. (describing the "notation voting" system). When a full quorum participates – usually, by voting – the use of an electronic voting system that permits the Board to reach a decision without actually being together is perfectly appropriate.

Member Hayes, however, did not vote on the adoption of the final rule when it was circulated through the JCMS system on December 16, 2011. See Hayes Decl., ¶ 11. As the rule was forwarded for publication that same day, see id., it must only have been a matter of hours during which he had the opportunity to do so. When no vote or other response was received from Hayes, no one requested that he provide one, per the agency's usual practice. See id. The NLRB's claim that Hayes was part of the quorum that adopted the final rule, then, is based only on the fact that he was a member of the Board at the time the rule was circulated and thus was sent a notification that it had been called for a vote.

The Supreme Court clearly stated in New Process Steel, however, that a member may not be counted toward a quorum simply because he holds office. See 130 S. Ct. at 2643 n.4. "The requisite membership of an organization, and the number of members who must participate for it

to take an action, are two separate (albeit related) characteristics." Id.; see also FTC v. Flotill Prods., Inc., 389 U.S. 179, 183-84 (1967) (concluding that Commissioner who declined to participate could not be counted toward quorum). Distinguishing between an organization's total membership and those members who are actually a part of a given decision, moreover, is consistent with the way quorum requirements operate in public and private organizations of all sizes. See, e.g.,B allin, 144 U.S. at 5-6 (explaining the quorum requirement for the House of Representatives); 18 C.J.S. Corporations § 454 (explaining quorum requirements with respect to shareholders' meetings); 2 Fletcher Cyc. Corp. § 419 (explaining quorum requirements for actions by boards of directors). The NLRB's suggestion that the quorum requirement was satisfied on the ground that three members held office when the rule was approved, see, e.g., Final Rule, 76 Fed. Reg. at 80,146 ("The Board currently has three members, a lawful quorum under Section 3(b) of the Act."), contradicts the clear pronouncements of the Supreme Court as well as common practice (and common sense). Something more than mere membership is necessary.

Unfortunately, however, nothing more took place here. Member Hayes was sent a notification that the final rule had been circulated for a vote, but he took no action in response. Assuming that no "further action was required of [him]," Hayes Decl., ¶ 11, he simply did not show up – in any literal or even metaphorical sense. Had he affirmatively expressed his intent to abstain or even acknowledged receipt of the notification, he may well have been legally "present" for the vote and counted in the quorum. Had someone reached out to him to ask for a response, as is the agency's usual practice where a member has not voted,or h ad a substantial amount of time passed following the rule's circulation, moreover, it would have been a closer case. But none of that happened here. In our prior world of in-person meetings, Hayes's actions

are the equivalent of failing to attend, whether because he was unaware of the meeting or for any intentional reason. In any event, his failure to be present or participate means that only two members voted, and the rule was then sent for publication that very day.

That Member Hayes issued a dissenting statement months later, furthermore, does not cure the quorum defect. See Separate Concurring Statement by Member Hayes, 77 Fed. Reg. 25,548, 25,559 (Apr. 30, 2012). Indeed, the agency does not appear to argue that it does. See Def.'s Reply to Pl.'s Response to Def.'s Notice at 1-2, ECF No. 38. Even if his *post hoc* dissent were properly considered by the Court – despite its having come into existence after the events in question – it still does not change the fact that no quorum existed to adopt the rule. As the Board made clear in the Federal Register, "neither statement" – Chairman Pearce's or Member Hayes's – "constitutes part of the rule or modifies the rule or the Board's approval of the rule in any way." Separate Concurring and Dissenting Statements, 77 Fed. Reg. at 25548.

In arguing that the electronic transmission to Hayes of a notification that the rule had been put to a vote is enough, the NLRB harps on United States v. Ballin, a case addressing the quorum requirement for the U.S. House of Representatives. See 144 U.S. at 5-6. "What did the non-voting members in Ballin do to constitute the quorum?" the NLRB rightly asks. See Def.'s Opp. at 3 (emphasis added). "They were identified as sitting in their seats when the U.S. House of Representatives called the question for a vote. And then, they did nothing. They did not have to do anything: the quorum was created by their mere presence." Id. Although the members of the House need not have taken any action after they showed up for the vote, the NLRB's argument only confirms that they needed to actually be there in the first place. See Ballin, 144 U.S. at 5-6. In other words, Ballin fully supports the proposition that merely holding office is not

enough and confirms that an individual needs to something – that is, he needs to show up – in order to be counted toward a quorum.

The NLRB further protests that there is no basis "for indefinitely postponing adoption of the final rule and for, in essence, permitting one Member to exercise what would amount to a minority veto over a proper exercise of the Board's rulemaking authority." Final Rule, 76 Fed. Reg. at 80,147. There is no suggestion, however, that this is what happened here. Indeed, Hayes himself has averred that he neglected to vote on the final rule not out of an intent to abstain or to block the rule's promulgation, but rather because he did not realize that his further participation was required. See Hayes Decl., ¶ 11. The other members of the Board appear to have been under a similar misimpression, as the text of the final rule suggests that they believed that it was enough that Member Hayes had "effectively indicated his opposition." Final Rule, 76 Fed. Reg. at 80,146. In any event, while the Court need not decide whether a member of the Board could intentionally prevent the formation of a quorum, it is worth noting that such things happen all the time. See, e.g., Monica Davey, "Wisconsin Bill in Limbo as G.O.P. Seeks Quorum," N.Y. Times, A14 (Feb. 18, 2011).

In the end, the Court recognizes that its decision not to reach the merits here may be unsatisfying to the NLRB, as well as to the many employers and employees who are affected by the rule's provisions. But to do so would degrade the quorum requirement from a fundamental constraint on the exercise of the Board's power to an "easily surmounted technical obstacle[ ] of little to no import." New Process Steel, 130 S. Ct. at 2644. The NLRB is a "creature of statute" and possesses only that power that has been allocated to it by Congress. See Michigan v. EPA, 268 F.3d 1075, 1081 (D.C. Cir. 2001). Indeed, "[i]t is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress."

Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208 (1988). As the final rule was promulgated without the requisite quorum and thus in excess of that authority, it must be set aside.

In so doing, however, the Court emphasizes that its ruling need not necessarily spell the end of the final rule for all time. The Court does not reach – and expresses no opinion on – Plaintiffs' other procedural and substantive challenges to the rule, but it may well be that, had a quorum participated in its promulgation, the final rule would have been found perfectly lawful. As a result, nothing appears to prevent a properly constituted quorum of the Board from voting to adopt the rule if it has the desire to do so. In the meantime, though, representation elections will have to continue under the old procedures.

**IV. Conclusion**

For the foregoing reasons, the Court will issue a contemporaneous Order granting Plaintiffs' Motion for Summary Judgment and denying Defendant's.

*/s/ James E. Boasberg*
JAMES E. BOASBERG
United States District Judge

Date: May 14, 2012

**OFFICE OF THE GENERAL COUNSEL**
**Division of Operations-Management**

MEMORANDUM OM 12-59 May 30, 2012

TO: All Regional Directors, Officers-in-Charge and Resident Officers

FROM: Anne Purcell, Associate General Counsel

SUBJECT: Report of the Acting General Counsel Concerning Social Media Cases

Attached is an updated report from the Acting General Counsel concerning recent social media cases.

/s/
A. P.

Attachment

cc: NLRBU
Release to the Public

REPORT OF THE GENERAL COUNSEL

In August 2011 and in January 2012, I issued reports presenting case developments arising in the context of today's social media. Employee use of social media as it relates to the workplace continues to increase, raising various concerns by employers, and in turn, resulting in employers' drafting new and/or revising existing policies and rules to address these concerns. These policies and rules cover such topics as the use of social media and electronic technologies, confidentiality, privacy, protection of employer information, intellectual property, and contact with the media and government agencies.

My previous reports touched on some of these policies and rules, and they are the sole focus of this report, which discusses seven recent cases. In the first six cases, I have concluded that at least some of the provisions in the employers' policies and rules are overbroad and thus unlawful under the National Labor Relations Act. In the last case, I have concluded that the entire social media policy, as revised, is lawful under the Act, and I have attached this complete policy. I hope that this report, with its specific examples of various employer policies and rules, will provide additional guidance in this area.

/s/
Lafe E. Solomon
Acting General Counsel

## Rules on Using Social Media Technology and on Communicating Confidential Information Are Overbroad

In this case, we addressed the Employer's rules governing the use of social media and the communication of confidential information. We found these rules unlawful as they would reasonably be construed to chill the exercise of Section 7 rights in violation of the Act.

As explained in my previous reports, 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." Lafayette Park Hotel, 326 NLRB 824, 825 (1998), enfd. 203 F.3d 52 (D.C. Cir. 1999). The Board uses a two-step inquiry to determine if a work rule would have such an effect. Lutheran Heritage Village-Livonia, 343 NLRB 646, 647 (2004). First, a rule is clearly unlawful if it explicitly restricts Section 7 protected activities. If the rule does not explicitly restrict protected activities, it will only violate Section 8(a)(1) 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.

Rules that are ambiguous as to their application to Section 7 activity, and contain no limiting language or context that would clarify to employees that the rule does not restrict Section 7 rights, are unlawful. See University Medical Center, 335 NLRB 1318, 1320-1322 (2001), enf. denied in pertinent part 335 F.3d 1079 (D.C. Cir. 2003). In contrast, rules that clarify and restrict their scope by including examples of clearly illegal or unprotected conduct, such that they would not reasonably be construed to cover protected activity, are not unlawful. See Tradesmen International, 338 NLRB 460, 460-462 (2002).

The Employer in this case operates retail stores nationwide. Its social media policy, set forth in a section of its handbook titled "Information Security," provides in relevant part:

> **Use technology appropriately**
>
> *** * * * ***
>
> **If you enjoy blogging or using online social networking sites such as Facebook and YouTube, (otherwise known as Consumer Generated Media, or CGM) please note that there are guidelines to follow if you plan to mention [Employer] or your employment with [Employer] in these online vehicles. . .**

- **Don't release confidential guest, team member or company information. . . .**

We found this section of the handbook to be unlawful. Its instruction that employees not "release confidential guest, team member or company information" would reasonably be interpreted as prohibiting employees from discussing and disclosing information regarding their own conditions of employment, as well as the conditions of employment of employees other than themselves--activities that are clearly protected by Section 7. The Board has long recognized that employees have a right to discuss wages and conditions of employment with third parties as well as each other and that rules prohibiting the communication of confidential information without exempting Section 7 activity inhibit this right because employees would reasonably interpret such prohibitions to include information concerning terms and conditions of employment. See, e.g., Cintas Corp., 344 NLRB 943, 943 (2005), enfd. 482 F.3d 463 (D.C. Cir. 2007).

The next section of the handbook we addressed provides as follows:

**Communicating confidential information**

**You also need to protect confidential information when you communicate it. Here are some examples of rules that you need to follow:**

- **Make sure someone needs to know. You should never share confidential information with another team member unless they have a need to know the information to do their job. If you need to share confidential information with someone outside the company, confirm there is proper authorization to do so. If you are unsure, talk to your supervisor.**
- **Develop a healthy suspicion. Don't let anyone trick you into disclosing confidential information. Be suspicious if asked to ignore identification procedures.**
- **Watch what you say. Don't have conversations regarding confidential information in the Breakroom or in any other open area. Never discuss confidential information at home or in public areas.**

**Unauthorized access to confidential information: If you believe there may have been unauthorized access to confidential information or that confidential information may have been misused, it is your responsibility to report that information. . . .**

**We're serious about the appropriate use, storage and communication of confidential information. A violation of [Employer] policies regarding confidential**

**information will result in corrective action, up to and including termination. You also may be subject to legal action, including criminal prosecution. The company also reserves the right to take any other action it believes is appropriate.**

We found some of this section to be unlawful. Initially, we decided that the provisions instructing employees not to share confidential information with co-workers unless they need the information to do their job, and not to have discussions regarding confidential information in the breakroom, at home, or in open areas and public places are overbroad. Employees would construe these provisions as prohibiting them from discussing information regarding their terms and conditions of employment. Indeed, the rules explicitly prohibit employees from having such discussions in the breakroom, at home, or in public places--virtually everywhere such discussions are most likely to occur.

We also found unlawful the provisions that threaten employees with discharge or criminal prosecution for failing to report unauthorized access to or misuse of confidential information. Those provisions would be construed as requiring employees to report a breach of the rules governing the communication of confidential information set forth above. Since we found those rules unlawful, the reporting requirement is likewise unlawful.

We did not, however, find unlawful that portion of the handbook section that admonishes employees to "[d]evelop a healthy suspicion[,]" cautions against being tricked into disclosing confidential information, and urges employees to "[b]e suspicious if asked to ignore identification procedures." Although this section also refers to confidential information, it merely advises employees to be cautious about unwittingly divulging such information and does not proscribe any particular communications. Further, when the Employer rescinds the offending "confidentiality" provisions, this section would not reasonably be construed to apply to Section 7 activities, particularly since it specifically ties confidential information to "identification procedures." [Target Corp., Case 29-CA-030713]

## Several Policy Provisions Are Overbroad, Including Those on 'Non-Public Information' and 'Friending Co-Workers'

In this case, we again found that certain portions of the Employer's policy governing the use of social media would reasonably be construed to chill the exercise of Section 7 rights in violation of the Act.

The Employer--a motor vehicle manufacturer--maintains a social media policy that includes the following:

> **USE GOOD JUDGMENT ABOUT WHAT YOU SHARE AND HOW YOU SHARE**
>
> If you engage in a discussion related to [Employer], in addition to disclosing that you work for [Employer] and that your views are personal, you must also be sure that your posts are completely accurate and not misleading and that they do not reveal non-public company information on any public site. If you are in doubt, review the [Employer's media] site. If you are still in doubt, don't post. Non-public information includes:
>
> - Any topic related to the financial performance of the company;
> - Information directly or indirectly related to the safety performance of [Employer] systems or components for vehicles;
> - [Employer] Secret, Confidential or Attorney-Client Privileged information;
> - Information that has not already been disclosed by authorized persons in a public forum; and
> - Personal information about another [Employer] employee, such as his or her medical condition, performance, compensation or status in the company.
>
> When in doubt about whether the information you are considering sharing falls into one of the above categories, DO NOT POST. Check with [Employer] Communications or [Employer] Legal to see if it's a good idea. Failure to stay within these guidelines may lead to disciplinary action.
>
> - Respect proprietary information and content, confidentiality, and the brand, trademark and copyright rights of others. Always cite, and obtain permission, when quoting someone else. Make sure that any photos, music, video or other content you are sharing is legally sharable or that you have the owner's permission. If you are unsure, you should not use.
> - Get permission before posting photos, video, quotes or personal information of anyone other than you online.
> - Do not incorporate [Employer] logos, trademarks or other assets in your posts.

We found various provisions in the above section to be unlawful. Initially, employees are instructed to be sure that their posts are "completely accurate and not misleading and that they do not reveal non-public information on any public site." The term "completely accurate and not misleading" is overbroad because it would reasonably be interpreted to apply to discussions about, or criticism of,

the Employer's labor policies and its treatment of employees that would be protected by the Act so long as they are not maliciously false. Moreover, the policy does not provide any guidance as to the meaning of this term by specific examples or limit the term in any way that would exclude Section 7 activity.

We further found unlawful the portion of this provision that instructs employees not to "reveal non- public company information on any public site" and then explains that non-public information encompasses "[a]ny topic related to the financial performance of the company"; "[i]nformation that has not already been disclosed by authorized persons in a public forum"; and "[p]ersonal information about another [Employer] employee, such as . . . performance, compensation or status in the company." Because this explanation specifically encompasses topics related to Section 7 activities, employees would reasonably construe the policy as precluding them from discussing terms and conditions of employment among themselves or with non-employees.

The section of the policy that cautions employees that "[w]hen in doubt about whether the information you are considering sharing falls into one of the [prohibited] categories, DO NOT POST. Check with [Employer] Communications or [Employer] Legal to see if it's a good idea[,]" is also unlawful. The Board has long held that any rule that requires employees to secure permission from an employer as a precondition to engaging in Section 7 activities violates the Act. See Brunswick Corp.,282 NLRB 794, 794-795 (1987).

The Employer's policy also unlawfully prohibits employees from posting photos, music, videos, and the quotes and personal information of others without obtaining the owner's permission and ensuring that the content can be legally shared, and from using the Employer's logos and trademarks. Thus, in the absence of any further explanation, employees would reasonably interpret these provisions as proscribing the use of photos and videos of employees engaging in Section 7 activities, including photos of picket signs containing the Employer's logo. Although the Employer has a proprietary interest in its trademarks, including its logo if trademarked, we found that employees' non-commercial use of the Employer's logo or trademarks while engaging in Section 7 activities would not infringe on that interest.

We found lawful, however, this section's bulleted prohibitions on discussing information related to the "safety performance of [Employer] systems or components for vehicles" and "Secret, Confidential or Attorney-Client Privileged information." Neither of these provisions refers to employees, and employees would reasonably read the safety

provision as applying to the safety performance of the Employer's automobile systems and components, not to the safety of the workplace. The provision addressing secret, confidential, or attorney-client privileged information is clearly intended to protect the Employer's legitimate interest in safeguarding its confidential proprietary and privileged information.

We also looked at the following provisions:

> TREAT EVERYONE WITH RESPECT
> **Offensive, demeaning, abusive or inappropriate remarks are as out of place online as they are offline, even if they are unintentional. We expect you to abide by the same standards of behavior both in the workplace and in your social media communications.**
>
> OTHER [EMPLOYER] POLICIES THAT APPLY
> **Think carefully about 'friending' co-workers . . . on external social media sites. Communications with co-workers on such sites that would be inappropriate in the workplace are also inappropriate online, and what you say in your personal social media channels could become a concern in the workplace.**
>
> **[Employer], like other employers, is making internal social media tools available to share workplace information within [Employer]. All employees and representatives who use these social media tools must also adhere to the following:**
>
> - **Report any unusual or inappropriate internal social media activity to the system administrator.**
>
> **[Employer's] Social Media Policy will be administered in compliance with applicable laws and regulations (including Section 7 of the National Labor Relations Act).**

As to these provisions, we found unlawful the instruction that "[o]ffensive, demeaning, abusive or inappropriate remarks are as out of place online as they are offline." Like the provisions discussed above, this provision proscribes a broad spectrum of communications that would include protected criticisms of the Employer's labor policies or treatment of employees. Similarly, the instruction to be aware that "[c]ommunications with co-workers . . . that would be inappropriate in the workplace are also inappropriate online" does not specify which communications the Employer would deem inappropriate at work and, thus, is ambiguous as to its application to Section 7.

The provision of the Employer's social media policy instructing employees to "[t]hink carefully about

'friending' co-workers" is unlawfully overbroad because it would discourage communications among co-workers, and thus it necessarily interferes with Section 7 activity. Moreover, there is no limiting language clarifying for employees that it does not restrict Section 7 activity.

We also found unlawful the policy's instruction that employees "[r]eport any unusual or inappropriate internal social media activity." An employer violates the Act by encouraging employees to report to management the union activities of other employees. See generally Greenfield Die & Mfg. Corp., 327 NLRB 237, 238 (1998) and cases cited at n.6. Such statements are unlawful because they have the potential to discourage employees from engaging in protected activities. Here, the Employer's instruction would reasonably be construed by employees as applying to its social media policy. Because certain provisions of that policy are unlawful, as set forth above, the reporting requirement is also unlawful.

Finally, we concluded that the policy's "savings clause," under which the Employer's "Social Media Policy will be administered in compliance with applicable laws and regulations (including Section 7 of the National Labor Relations Act)," does not cure the ambiguities in the policy's overbroad rules. [General Motors, Case 07-CA-053570]

Guidelines on Privacy, Legal Matters, Online Tone, Prior Permission, and Resolving Concerns Are Overbroad

In this case, we again found that some of the Employer's social media guidelines were overly broad in violation of Section 8(a)(1)of the Act.

The Employer is an international health care services company that manages billing and other services for health care institutions. We addressed challenges to various provisions in its social media policy, as set out below.

> **Respect Privacy. If during the course of your work you create, receive or become aware of personal information about [Employer's] employees, contingent workers, customers, customers' patients, providers, business partners or third parties, don't disclose that information in any way via social media or other online activities. You may disclose personal information only to those authorized to receive it in accordance with [Employer's] Privacy policies.**

We found that the portion of the rule prohibiting disclosure of personal information about the Employer's employees and contingent workers is unlawful because, in the

absence of clarification, employees would reasonably construe it to include information about employee wages and their working conditions. We found, however, that the portion of the rule prohibiting employees from disclosing personal information only to those authorized to receive it is not, in these circumstances, unlawful. Although an employer cannot require employees to obtain supervisory approval prior to engaging in activity that is protected under the Act, the Employer's rule here would not prohibit protected disclosures once the Employer removes the unlawful restriction regarding personal information about employees and contingent workers.

> **Legal matters. Don't comment on any legal matters, including pending litigation or disputes.**

We found that the prohibition on employees' commenting on any legal matters is unlawful because it specifically restricts employees from discussing the protected subject of potential claims against the Employer.

> **Adopt a friendly tone when engaging online. Don't pick fights. Social media is about conversations. When engaging with others online, adopt a warm and friendly tone that will encourage others to respond to your postings and join your conversation. Remember to communicate in a professional tone. . . . This includes not only the obvious (no ethnic slurs, personal insults, obscenity, etc.) but also proper consideration of privacy and topics that may be considered objectionable or inflammatory—such as politics and religion. Don't make any comments about [Employer's] customers, suppliers or competitors that might be considered defamatory.**

We found this rule unlawful for several reasons. First, in warning employees not to "pick fights" and to avoid topics that might be considered objectionable or inflammatory--such as politics and religion, and reminding employees to communicate in a "professional tone," the overall thrust of this rule is to caution employees against online discussions that could become heated or controversial. Discussions about working conditions or unionism have the potential to become just as heated or controversial as discussions about politics and religion. Without further clarification of what is "objectionable or inflammatory," employees would reasonably construe this rule to prohibit robust but protected discussions about working conditions or unionism.

> **Respect all copyright and other intellectual property laws. For [Employer's] protection as well as your own, it is critical that you show proper respect for the laws governing copyright, fair use of copyrighted**

**material owned by others, trademarks and other intellectual property, including [Employer's] own copyrights, trademarks and brands. Get permission before reusing others' content or images.**

We found that most of this rule is not unlawful since it does not prohibit employees from using copyrighted material in their online communications, but merely urges employees to respect copyright and other intellectual property laws. However, the portion of the rule that requires employees to "[g]et permission before reusing others' content or images" is unlawful, as it would interfere with employees' protected right to take and post photos of, for instance, employees on a picket line, or employees working in unsafe conditions.

**You are encouraged to resolve concerns about work by speaking with co-workers, supervisors, or managers. [Employer] believes that individuals are more likely to resolve concerns about work by speaking directly with co-workers, supervisors or other management-level personnel than by posting complaints on the Internet. [Employer] encourages employees and other contingent resources to consider using available internal resources, rather than social media or other online forums, to resolve these types of concerns.**

We found that this rule encouraging employees "to resolve concerns about work by speaking with co-workers, supervisors, or managers" is unlawful. An employer may reasonably suggest that employees try to work out concerns over working conditions through internal procedures. However, by telling employees that they should use internal resources rather than airing their grievances online, we found that this rule would have the probable effect of precluding or inhibiting employees from the protected activity of seeking redress through alternative forums.

**Use your best judgment and exercise personal responsibility. Take your responsibility as stewards of personal information to heart. Integrity, Accountability and Respect are core [Employer] values. As a company, [Employer] trusts—and expects—you to exercise personal responsibility whenever you participate in social media or other online activities. Remember that there can be consequences to your actions in the social media world—both internally, if your comments violate [Employer] policies, and with outside individuals and/or entities. If you're about to publish, respond or engage in something that makes you even the slightest bit uncomfortable, don't do it.**

We concluded that this rule was not unlawful. We noted that this section is potentially problematic because its

reference to "consequences to your actions in the social media world" could be interpreted as a veiled threat to discourage online postings, which includes protected activities. However, this phrase is unlawful only insofar as it is an outgrowth of the unlawful rules themselves, i.e., the Employer is stating the potential consequences to employees of violating the unlawful rules. Thus, rescission of the offending rules discussed above will effectively remedy the coercive effect of the potentially threatening statement here.

Finally, we looked at the Employer's "savings clause":

> **National Labor Relations Act. This Policy will not be construed or applied in a manner that improperly interferes with employees' rights under the National Labor Relations Act.**

We found that this clause does not cure the otherwise unlawful provisions of the Employer's social media policy because employees would not understand from this disclaimer that protected activities are in fact permitted. [McKesson Corp., Case 06-CA-066504]

Provisions on Protecting Information and Expressing Opinions Are Too Broad, But Bullying Provision Is Lawful

In another case, we concluded that several portions of the Employer's social media policy are unlawfully overbroad, but that a prohibition on online harassment and bullying is lawful.

We first looked at the portion of the Employer's policy dealing with protection of company information:

> **Employees are prohibited from posting information regarding [Employer] on any social networking sites (including, but not limited to, Yahoo finance, Google finance, Facebook, Twitter, LinkedIn, MySpace, LifeJournal and YouTube), in any personal or group blog, or in any online bulletin boards, chat rooms, forum, or blogs (collectively, 'Personal Electronic Communications'), that could be deemed material non-public information or any information that is considered confidential or proprietary. Such information includes, but is not limited to, company performance, contracts, customer wins or losses, customer plans, maintenance, shutdowns, work stoppages, cost increases, customer news or business related travel plans or schedules. Employees should avoid harming the image and integrity of the company and any harassment, bullying, discrimination, or retaliation that would not be permissible in the workplace is not**

**permissible between co-workers online, even if it is done after hours, from home and on home computers. . . .**

We concluded that the rule prohibiting employees from posting information regarding the Employer that could be deemed "material non-public information" or "confidential or proprietary" is unlawful. The term "material non-public information," in the absence of clarification, is so vague that employees would reasonably construe it to include subjects that involve their working conditions. The terms "confidential or proprietary" are also overbroad. The Board has long recognized that the term "confidential information," without narrowing its scope so as to exclude Section 7 activity, would reasonably be interpreted to include information concerning terms and conditions of employment. See, e.g., University Medical Center, 335 NLRB at 1320, 1322. Here, moreover, the list of examples provided for "material non-public" and "confidential or proprietary" information confirms that they are to be interpreted in a manner that restricts employees' discussion about terms and conditions of employment. Thus, information about company performance, cost increases, and customer wins or losses has potential relevance in collective-bargaining negotiations regarding employees' wages and other benefits. Information about contracts, absent clarification, could include collective-bargaining agreements between the Union and the Employer. Information about shutdowns and work stoppages clearly involves employees' terms and conditions of employment.

We also found that the provision warning employees to "avoid harming the image and integrity of the company" is unlawfully overbroad because employees would reasonably construe it to prohibit protected criticism of the Employer's labor policies or treatment of employees.

We found lawful, however, the provision under which "harassment, bullying, discrimination, or retaliation that would not be permissible in the workplace is not permissible between co-workers online, even if it is done after hours, from home and on home computers." The Board has indicated that a rule's context provides the key to the "reasonableness" of a particular construction. For example, a rule proscribing "negative conversations" about managers that was contained in a list of policies regarding working conditions, with no further clarification or examples, was unlawful because of its potential chilling effect on protected activity. Claremont Resort and Spa, 344 NLRB 832, 836 (2005). On the other hand, 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 at 462. Applying that reasoning here, we found that this provision would not reasonably be construed to apply to Section 7 activity because the rule contains a list of plainly egregious conduct, such as bullying and discrimination.

Next, we considered the portion of the Employer's policy governing employee workplace discussions through electronic communications:

> **Employees are permitted to express personal opinions regarding the workplace, work satisfaction or dissatisfaction, wages hours or work conditions with other [Employer] employees through Personal Electronic Communications, provided that access to such discussions is restricted to other [Employer] employees and not generally accessible to the public. . . .**
>
> **This policy is for the mutual protection of the company and our employees, and we respect an individual's rights to self-expression and concerted activity. This policy will not be interpreted or applied in a way that would interfere with the rights of employees to self organize, form, join, or assist labor organizations, to bargain collectively through representatives of their own 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.**

We found that the provision prohibiting employees from expressing their personal opinions to the public regarding "the workplace, work satisfaction or dissatisfaction, wages hours or work conditions" is unlawful because it precludes employees from discussing and sharing terms and conditions of employment with non-employees. The Board has long recognized that "Section 7 protects employee communications to the public that are part of and related to an ongoing labor dispute." Valley Hospital Medical Center, 351 NLRB 1250, 1252 (2007), enfd. sub nom. Nevada Service Employees Union, Local 1107 v. NLRB, 358 F. App'x 783 (9th Cir. 2009).

We concluded that the Employer's "savings clause" does not cure the otherwise unlawful provisions. The Employer's policy specifically prohibits employees from posting information regarding Employer shutdowns and work stoppages, and from speaking publicly about "the workplace, work satisfaction or dissatisfaction, wages hours or work conditions." Thus, employees would reasonably conclude that the savings clause does not permit those activities. Moreover, the clause does not explain to a layperson what the right to engage in "concerted activity" entails. [Clearwater Paper Corp., Case 19-CA-064418]

Duty to Report 'Unsolicited' Electronic Communications Is Overbroad, But 'Unauthorized Postings' Provision Is Lawful

In this case, we found that the Employer unlawfully maintains an overly broad rule requiring employees who receive "unsolicited or inappropriate electronic communications" to report them. We found, however, that a prohibition on "unauthorized postings" is lawful.

The Employer is a nonprofit organization that provides HIV risk reduction and support services. The Employer's employee handbook contains an "Electronic Communications" policy, providing as follows:

> **Improper Use: Employees must use sound judgment in using [Employer's] electronic technologies. All use of electronic technologies must be consistent with all other [Employer] policies, including [Employer's] Professional Conduct policy. [Employer] management reserves the right to exercise its discretion in investigating and/or addressing potential, actual, or questionable abuse of its electronic technologies. Employees, who receive unsolicited or inappropriate electronic communications from persons within or outside [Employer], should contact the President or the President's designated agent.**

We concluded that the provision that requires employees to report any "unsolicited or inappropriate electronic communications" is overly broad under the second portion of the Lutheran Heritage test discussed above. We found that employees would reasonably interpret the rule to restrain the exercise of their Section 7 right to communicate with their fellow employees and third parties, such as a union, regarding terms and conditions of employment.

The policy also sets forth the following restriction on Internet postings:

> **No unauthorized postings: Users may not post anything on the Internet in the name of [Employer] or in a manner that could reasonably be attributed to [Employer] without prior written authorization from the President or the President's designated agent.**

We found that this provision is lawful. A rule that requires an employee to receive prior authorization before posting a message that is either in the Employer's name or could reasonably be attributed to the Employer cannot reasonably be construed to restrict employees' exercise of their Section 7 right to communicate about working conditions among themselves and with third parties. [Us Helping Us, Case 05-CA-036595]

Portions of Rules on Using Social Media and Contact with Media and Government Are Unlawful

In this case, we considered the Employer's rules governing employee use of social media, contact with the media, and contact with government agencies. We concluded that certain portions of these rules were unlawful as they would reasonably be interpreted to prohibit Section 7 activity.

Relevant portions of the Employer's rules are as follows:

> [Employer] regards Social Media---blogs, forums, wikis, social and professional networks, virtual worlds, user-generated video or audio---as a form of communication and relationship among individuals. When the company wishes to communicate publicly---whether to the marketplace or to the general public---it has a well-established means to do so. Only those officially designated by [Employer] have the authorization to speak on behalf of the company through such media.
>
> We recognize the increasing prevalence of Social Media in everyone's daily lives. Whether or not you choose to create or participate in them is your decision. You are accountable for any publication or posting if you identify yourself, or you are easily identifiable, as working for or representing [Employer].
>
> You need to be familiar with all [Employer] policies involving confidential or proprietary information or information found in this Employee Handbook and others available on Starbase. Any comments directly or indirectly relating to [Employer] must include the following disclaimer: 'The postings on this site are my own and do not represent [Employer's] positions, strategies or opinions.'
>
> You may not make disparaging or defamatory comments about [Employer], its employees, officers, directors, vendors, customers, partners, affiliates, or our, or their, products/services. Remember to use good judgment.
>
> Unless you are specifically authorized to do so, you may not:
>
> - Participate in these activities with [Employer] resources and/or on Company time; or
> - Represent any opinion or statement as the policy or view of the [Employer] or of any individual in their capacity as an employee or otherwise on behalf of [Employer].

> **Should you have questions regarding what is appropriate conduct under this policy or other related policies, contact your Human Resources representative or the [Employer]Corporate Communications Department. . . .**

We concluded that several aspects of this social media policy are unlawful. First, the prohibition on making "disparaging or defamatory" comments is unlawful. Employees would reasonably construe this prohibition to apply to protected criticism of the Employer's labor policies or treatment of employees. Second, we concluded that the prohibition on participating in these activities on Company time is unlawfully overbroad because employees have the right to engage in Section 7 activities on the Employer's premises during non-work time and in non-work areas. See Republic Aviation Corp. v. NLRB, 324 U.S. 793, 803 n.10 (1945).

We did not find unlawful, however, the prohibition on representing "any opinion or statement as the policy or view of the [Employer] or of any individual in their capacity as an employee or otherwise on behalf of [Employer]." Employees would not reasonably construe this rule to prohibit them from speaking about their terms and conditions of employment. Instead, this rule is more reasonably construed to prohibit comments that are represented to be made by or on behalf of the Employer. Thus, an employee could not criticize the Employer or comment about his or her terms and conditions of employment while falsely representing that the Employer has made or is responsible for making the comments. Similarly, we concluded that the requirement that employees must expressly state that their postings are "my own and do not represent [Employer's] positions, strategies or opinions" is not unlawful. An employer has a legitimate need for a disclaimer to protect itself from unauthorized postings made to promote its product or services, and this requirement would not unduly burden employees in the exercise of their Section 7 right to discuss working conditions.

We also considered the Contact with Media portion of the Employer's rules, which provides:

> **The Corporate Communications Department is responsible for any disclosure of information to the media regarding [Employer] and its activities so that accurate, timely and consistent information is released after proper approval. Unless you receive prior authorization from the Corporate Communications Department to correspond with members of the media or press regarding [Employer] or its business activities, you must direct inquiries to the Corporate Communications Department. Similarly, you have the**

> obligation to obtain the written authorization of the Corporate Communications Department before engaging in public communications regarding [Employer] of its business activities.
>
> You may not engage in any of the following activities unless you have prior authorization from the Corporate Communications Department:
>
> - All public communication including, but not limited to, any contact with media and members of the press: print (for example newspapers or magazines), broadcast (for example television or radio) and their respective electronic versions and associated web sites. Certain blogs, forums and message boards are also considered media. If you have any questions about what is considered media, please contact the Corporate Communications Department.
> - Any presentations, speeches or appearances, whether at conferences, seminars, panels or any public or private forums; company publications, advertising, video releases, photo releases, news releases, opinion articles and technical articles; any advertisements or any type of public communication regarding [Employer] by the Company's business partners or any third parties including consultants.
>
> If you have any questions about the Contact with Media Policy, please contact the [Employer] Corporate Communications Department . . . .

We concluded that this entire section is unlawfully overbroad. While an employer has a legitimate need to control the release of certain information regarding its business, this rule goes too far. Employees have a protected right to seek help from third parties regarding their working conditions. This would include going to the press, blogging, speaking at a union rally, etc. As noted above, Section 7 protects employee communications to the public that are part of and related to an ongoing labor dispute. An employer rule that prohibits any employee communications to the media or, like the policy at issue here, requires prior authorization for such communications, is therefore unlawfully overbroad.

Finally, we looked at the rules' provisions on contact with government agencies:

> Phone calls or letters from government agencies may occasionally be received. The identity of the individual contacting you should be verified. Additionally, the communication may concern matters involving the corporate office. The General Counsel

must be notified immediately of any communication involving federal, state or local agencies that contact any employee concerning the Company and/or relating to matters outside the scope of normal job responsibilities.

If written correspondence is received, notify your manager immediately and forward the correspondence to the General Counsel by PDF or facsimile and promptly forward any original documents. The General Counsel, if deemed necessary, may investigate and respond accordingly. The correspondence should not be responded to unless directed by an officer of the Company or the General Counsel.

If phone contact is made:

- Take the individual's name and telephone number, the name of the agency involved, as well as any other identifying information offered;
- Explain that all communications of this type are forwarded to the Company's General Counsel for a response;
- Provide the individual with the General Counsel's name and number . . . if requested, but do not engage in any further discussion. An employee cannot be required to provide information, and any response may be forthcoming after the General Counsel has reviewed the situation; and
- Immediately following the conversation, notify a supervisor who should promptly contact the General Counsel.

We concluded that this rule is an unlawful prohibition on talking to government agencies, particularly the NLRB. The Employer could have a legitimate desire to control the message it communicates to government agencies and regulators. However, it may not do so to the extent that it restricts employees from their protected right to converse with Board agents or otherwise concertedly seek the help of government agencies regarding working conditions, or respond to inquiries from government agencies regarding the same. [DISH Network, Case 16-CA-066142]

Employer's Entire Revised Social Media Policy--With Examples of Prohibited Conduct--Is Lawful

In this case, we concluded that the Employer's entire revised social media policy, as attached in full, is lawful. We thus found it unnecessary to rule on the Employer's social media policy that was initially alleged to be unlawful.

As explained above, rules that are ambiguous as to their application to Section 7 activity and that contain no limiting language or context to clarify that the rules do not restrict Section 7 rights are unlawful. In contrast, rules that clarify and restrict their scope by including examples of clearly illegal or unprotected conduct, such that they could not reasonably be construed to cover protected activity, are not unlawful.

Applying these principles, we concluded that the Employer's revised social media policy is not ambiguous because it provides sufficient examples of prohibited conduct so that, in context, employees would not reasonably read the rules to prohibit Section 7 activity. For instance, the Employer's rule prohibits "inappropriate postings that may include discriminatory remarks, harassment and threats of violence or similar inappropriate or unlawful conduct." We found this rule lawful since it prohibits plainly egregious conduct, such as discrimination and threats of violence, and there is no evidence that the Employer has used the rule to discipline Section 7 activity.

Similarly, we found lawful the portion of the Employer's social media policy entitled "Be Respectful." In certain contexts, the rule's exhortation to be respectful and "fair and courteous" in the posting of comments, complaints, photographs, or videos, could be overly broad. The rule, however, provides sufficient examples of plainly egregious conduct so that employees would not reasonably construe the rule to prohibit Section 7 conduct. For instance, the rule counsels employees to avoid posts that "could be viewed as malicious, obscene, threatening or intimidating." It further explains that prohibited "harassment or bullying" would include "offensive posts meant to intentionally harm someone's reputation" or "posts that could contribute to a hostile work environment on the basis of race, sex, disability, religion or any other status protected by law or company policy." The Employer has a legitimate basis to prohibit such workplace communications, and has done so without burdening protected communications about terms and conditions of employment.

We also found that the Employer's rule requiring employees to maintain the confidentiality of the Employer's trade secrets and private and confidential information is not unlawful. Employees have no protected right to disclose trade secrets. Moreover, the Employer's rule provides sufficient examples of prohibited disclosures (i.e., information regarding the development of systems, processes, products, know-how, technology, internal reports, procedures, or other internal business-related communications) for employees to understand that it does not reach protected communications about working conditions. [Walmart, Case 11-CA-067171]

## Social Media Policy

**Updated: May 4, 2012**

At [Employer], we understand that social media can be a fun and rewarding way to share your life and opinions with family, friends and co-workers around the world. However, use of social media also presents certain risks and carries with it certain responsibilities. To assist you in making responsible decisions about your use of social media, we have established these guidelines for appropriate use of social media.

This policy applies to all associates who work for [Employer], or one of its subsidiary companies in the United States ([Employer]).

Managers and supervisors should use the supplemental Social Media Management Guidelines for additional guidance in administering the policy.

## GUIDELINES

In the rapidly expanding world of electronic communication, *social media* can mean many things. *Social media* includes all means of communicating or posting information or content of any sort on the Internet, including to your own or someone else's web log or blog, journal or diary, personal web site, social networking or affinity web site, web bulletin board or a chat room, whether or not associated or affiliated with [Employer], as well as any other form of electronic communication.

The same principles and guidelines found in [Employer] policies and three basic beliefs apply to your activities online. Ultimately, you are solely responsible for what you post online. Before creating online content, consider some of the risks and rewards that are involved. Keep in mind that any of your conduct that adversely affects your job performance, the performance of fellow associates or otherwise adversely affects members, customers, suppliers, people who work on behalf of [Employer] or [Employer's] legitimate business interests may result in disciplinary action up to and including termination.

### Know and follow the rules

Carefully read these guidelines, the [Employer] Statement of Ethics Policy, the [Employer] Information Policy and the Discrimination & Harassment Prevention Policy, and ensure your postings are consistent with these policies. Inappropriate postings that may include discriminatory remarks, harassment, and threats of violence or similar inappropriate or unlawful conduct will not be tolerated and may subject you to disciplinary action up to and including termination.

### Be respectful

Always be fair and courteous to fellow associates, customers, members, suppliers or people who work on behalf of [Employer]. Also, keep in mind that you are more likely to resolved work-related complaints by speaking directly with your co-workers or by utilizing our Open Door Policy than by posting complaints to a social media outlet. Nevertheless, if you decide to post complaints or criticism, avoid using statements, photographs, video or audio that reasonably

could be viewed as malicious, obscene, threatening or intimidating, that disparage customers, members, associates or suppliers, or that might constitute harassment or bullying. Examples of such conduct might include offensive posts meant to intentionally harm someone's reputation or posts that could contribute to a hostile work environment on the basis of race, sex, disability, religion or any other status protected by law or company policy.

### Be honest and accurate

Make sure you are always honest and accurate when posting information or news, and if you make a mistake, correct it quickly. Be open about any previous posts you have altered. Remember that the Internet archives almost everything; therefore, even deleted postings can be searched. Never post any information or rumors that you know to be false about [Employer], fellow associates, members, customers, suppliers, people working on behalf of [Employer] or competitors.

### Post only appropriate and respectful content

- Maintain the confidentiality of [Employer] trade secrets and private or confidential information. Trades secrets may include information regarding the development of systems, processes, products, know-how and technology. Do not post internal reports, policies, procedures or other internal business-related confidential communications.
- Respect financial disclosure laws. It is illegal to communicate or give a "tip" on inside information to others so that they may buy or sell stocks or securities. Such online conduct may also violate the Insider Trading Policy.
- Do not create a link from your blog, website or other social networking site to a [Employer] website without identifying yourself as a [Employer] associate.
- Express only your personal opinions. Never represent yourself as a spokesperson for [Employer]. If [Employer] is a subject of the content you are creating, be clear and open about the fact that you are an associate and make it clear that your views do not represent those of [Employer], fellow associates, members, customers, suppliers or people working on behalf of [Employer]. If you do publish a blog or post online related to the work you do or subjects associated with [Employer], make it clear that you are not speaking on behalf of [Employer]. It is best to include a disclaimer such as "The postings on this site are my own and do not necessarily reflect the views of [Employer]."

### Using social media at work

Refrain from using social media while on work time or on equipment we provide, unless it is work-related as authorized by your manager or consistent with the Company Equipment Policy. Do not use [Employer] email addresses to register on social networks, blogs or other online tools utilized for personal use.

### Retaliation is prohibited

[Employer] prohibits taking negative action against any associate for reporting a possible deviation from this policy or for cooperating in an investigation. Any associate who retaliates against another associate for reporting a possible deviation from this policy or for cooperating in an investigation will be subject to disciplinary action, up to and including termination.

### Media contacts

Associates should not speak to the media on [Employer's] behalf without contacting the Corporate Affairs Department. All media inquiries should be directed to them.

## For more information

If you have questions or need further guidance, please contact your HR representative.