Ariana R. Levinson, *Social Media and the National Labor Relations Board*, in Research Handbook on Electronic Commerce Law (John A. Rothchild ed., Edward Elgar Pub. 2016)

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This chapter addresses the increasingly important issue of how the National Labor Relations Act ("NLRA" or "Act") applies to postings by employees on social media. It argues that in large part the National Labor Relations Board ("NLRB" or "Board") has correctly applied the decades-old concept of protected concerted activity to new technological meeting places. The legal concepts at issue are founded in longstanding precedent. This chapter buttresses the claim that Board regulation of social media policies is consistent with past practice and precedent by analogy to Board precedent governing employer policies on solicitation and distribution and on the wearing of insignia, which are similar to the social media policies currently being regulated. Despite differences in the use of an electronic meeting place from that of the water cooler, slight changes to the current doctrine, such as a clear explanation of when employees' activity is for mutual aid and protection, would place the Board on even sounder footing.

Some authors have summarized the existing but still developing law in this area,[1] and some have advised employers of what their social media policies should look like.[2] Other authors have argued that the Board precedent is inconsistent, confusing, or wrong, and proposed legal refinements, rulemaking, or legislative action.[3] This chapter updates the developing law and

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[1] *E.g.*, Michael Z. Green, *The NLRB as an Überagency for the Evolving Workplace*, 64 EMORY L.J. 1621 (2015); Christine Neylon O'Brien, *The National Labor Relations Board: Perspectives on Social Media*, 8 CHARLESTON L. REV. 411 (2014); Eric Raphan & Sean Kirby, *Policing the Social Media Water Cooler: Recent NLRB Decisions Should Make Employers Think Twice Before Terminating an Employee for Comments Posted on Social Media Sites*, 9 J. BUS. & TECH. L. 75 (2014); KIMBERLY A. HOUSER, LEGAL GUIDE TO SOCIAL MEDIA: RIGHTS AND RISKS FOR BUSINESSES AND ENTREPRENEURS 65-67 (2013); CONSTANCE E. BAGLEY, MANAGERS AND THE LEGAL ENVIRONMENT: STRATEGIES FOR THE 21ST CENTURY 378-79 (7th ed. 2013); Robert Sprague, *Facebook Meets the NLRB: Employee Online Communications and Unfair Labor Practices*, 14 U. PA. J. BUS. L. 957 (2012).

[2] *E.g.*, Molly Considine, *Exercising Caution Before Action: What Employers Need to Know Before Implementing the NLRB General Counsel's Approved Social Media Policy*, 36 HAMLINE L. REV. 517 (2013); ROBERT MCHALE & ERIC GARULAY, NAVIGATING SOCIAL MEDIA LEGAL RISKS: SAFEGUARDING YOUR BUSINESS, 74-83, 210-17 (2012).

[3] *E.g.*, Ryan Kennedy, *Sharing Is Airing: Employee Concerted Activity on Social Media After Hispanics United*, 12 DUKE L. & TECH. REV. 182 (2014); Regina Robson, *"Friending" the NLRB: The Connection Between Social Media, "Concerted Activities" and Employer Interests*, 31 HOFSTRA LAB. & EMP. L.J. 81, 85 (2013); Nicholas H. Meza, *A New Approach for Clarity in the Determination of Protected Concerted Activity Online*, 45 ARIZ. ST. L.J. 329 (2013); Lauren K. Neal, *The Virtual Water Cooler and the NLRB: Concerted Activity in the Age of Facebook*, 69 WASH. & LEE L. REV. 1715 (2012).

instead contends that the current Board precedent is largely correct, and that only a few small changes would place it on extremely solid footing.[4]

[4] *Cf.* Elizabeth Allen, *You Can't Say That on Facebook: The NLRA's Opprobriousness Standard and Social Media*, 45 WASH. U. J.L. & POL'Y 195, 200 (2014) (arguing that the opprobriousness standard used by the NLRB General Counsel and ALJ decisions "provides a strong framework" and should be adopted by the NLRB and courts with certain modifications); Robert Sprague & Abigail E. Fournier, *Online Social Media and the End of the Employment-at-Will Doctrine*, 52 WASHBURN L.J. 557, 558 (2013) (arguing that the NLRA is "more powerful" than the employment-at-will doctrine, and protection of social media activity may "spell the end of" the doctrine); William A. Herbert, *Can't Escape from the Memory: Social Media and Public Sector Labor Law*, 40 N. KY. L. REV. 427 (2013) (comparing NLRB treatment of social media in cases involving private sector employees to treatment of social media by the courts and other agencies in cases involving public sector employees).