

# WHEN IS EMPLOYEE BLOGGING PROTECTED BY SECTION 7 OF THE NLRA?

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## ABSTRACT

*The National Labor Relations Act forbids employers from retaliating against certain types of employee speech or intimidating those who engage in it. This iBrief examines how blogging fits into the current statutory framework and recommends how the National Labor Relations Board and the courts should address the unique features of employee blogs.*

## INTRODUCTION

¶1 Blogging has tremendous potential to shift the balance of power from employers to employees, as employees gain the ability to communicate their concerns to other employees, customers, neighbors, stockholders, and other parties interested in the employer.<sup>2</sup> While many businesses already communicate with the public through well-organized, well-funded marketing and public relations departments, employees now have an inexpensive way to get their own messages out to the public—a factor of rising importance in modern labor disputes.<sup>3</sup> While employers can

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<sup>2</sup> See, e.g., Doug Tsuruoka, *AOL Blogging Site Gathers Information on Popular Stocks*, INVESTOR'S BUS. DAILY, May 17, 2006, at A06 (describing a new website that tracks employee blogs to help investors evaluate stocks); EDELMAN & INTELLISEEK, TALKING FROM THE INSIDE OUT: THE RISE OF EMPLOYEE BLOGGERS 3 (2005), <http://www.edelman.com/image/insights/content/Edelman-Intelliseek%20Employee%20Blogging%20White%20Paper.pdf> (“The rise of the blogosphere has the potential to empower employees in ways not unlike the rise of labor unions in the late 19th and early 20th centuries.”); W-WAssociates, Welcome, <http://groups.msn.com/W-WAssociates/welcome.msnnw> (last visited Sept. 24, 2006) (“Customers are more than welcome here.”).

<sup>3</sup> See Melinda J. Branscomb, *Labor, Loyalty, and the Corporate Campaign*, 73 B.U. L. REV. 293, 294 (1993) (referring to “today’s corporate campaign, in which employees and their unions relentlessly advance by verbal warfare on the target employer and its agents for the purpose of enlisting the public as allies in their cause”).

already send messages to employees through their own communication channels, employees now have a new means of discussing issues with each other, regardless of the obstacles presented by differently-timed shifts, physically separated workplaces, and the operational demands of work.

¶2 Blogs allow an unprecedented visibility, participation, and volume of communication. A blogger can reach members of the public who do not visit the employer's business or walk by a protest. Also, a blogger can communicate with co-employees in different work locations<sup>4</sup> and even with employees of other employers<sup>5</sup> without having to obtain their contact information. The information posted on a blog can come from multiple sources because readers often post comments,<sup>6</sup> and large amounts of text and links to other sites make detailed information more accessible. Anyone reading the blog can see the factual support for or interest in any idea that is posted. Finally, the anonymity of the Internet allows employees to explore information about a labor dispute and test the waters without having to reveal their identities.<sup>7</sup>

¶3 As blogging has grown in popularity, employer concern about blogging has grown, and some employees have already been fired for their blogs.<sup>8</sup> Employees can disclose trade secrets,<sup>9</sup> confidential financial

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<sup>4</sup> See, e.g., W-WAssociates.com, *supra* note 2 (“If you are a Wal-Mart/Sam’s Club associate or former associate then this is the place for you to come and share your good and bad experiences about Wal-Mart.”).

<sup>5</sup> See, e.g., Washtech.org, Washington Alliance of Technology Workers, <http://www.washtech.org/> (last visited Sept. 24, 2006) (“From Silicon Valley to Boston, high-tech workers are joining our national network-to raise our voice and make a difference.”).

<sup>6</sup> See Mark Glaser, *What Really Makes a Blog Shine*, in REPORTERS WITHOUT BORDERS, HANDBOOK FOR BLOGGERS AND CYBER-DISSIDENTS 33, 34 (2005), [http://www.rsf.org/IMG/pdf/handbook\\_bloggers\\_cyberdissidents-GB.pdf](http://www.rsf.org/IMG/pdf/handbook_bloggers_cyberdissidents-GB.pdf).

<sup>7</sup> See Alison Young, *CDC Will Examine Fairness of Bonuses*, ATLANTA JOURNAL-CONSTITUTION, Sept. 19, 2006, at 1A, available at [http://www.ajc.com/metro/content/metro/atlanta/stories/2006/09/18/0919cdccas\\_h.html](http://www.ajc.com/metro/content/metro/atlanta/stories/2006/09/18/0919cdccas_h.html) (referring to anonymous employee postings on the cdchatter.net blog in reference to allegations of improper cash bonus awards to certain employees at the Centers for Disease Control, including a post calling upon “employees and others . . . to voice our utter disgust and stop this corruption”); cf. Snap-On Tools, Inc., 342 N.L.R.B. No. 2, 2004–2005 NLRB Dec. (CCH) ¶ 16,708, 2004 NLRB LEXIS 314, at \*33–\*34 (2004) (finding an unfair labor practice when an employer focused a surveillance camera on handbillers, which “prevented employees who desired to receive union literature anonymously from doing so”).

<sup>8</sup> See, e.g., PROOFPOINT, OUTBOUND EMAIL AND CONTENT SECURITY IN TODAY’S ENTERPRISE 2 (2006) (revealing that 7.1 percent of the large U.S. companies surveyed had fired at least one employee for violating blog or message board policies in the past year), cited in Del Jones, *Sun CEO Sees*

information,<sup>10</sup> or other internal documents;<sup>11</sup> put the employer in an embarrassing light by abusing its trademarks,<sup>12</sup> or projecting a negative or otherwise unprofessional attitude;<sup>13</sup> disrupt the workplace with public comments about other employees;<sup>14</sup> or offend the employer's customers by making racist, sexist, or otherwise inappropriate remarks.<sup>15</sup>

¶4 Despite these concerns, various laws limit an employer's control over what employees write, especially outside of working hours.<sup>16</sup> One such law is the National Labor Relations Act ("NLRA"), which protects

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*Competitive Advantage in Blogging*, USA TODAY, June 26, 2006, at 7B; EDELMAN & INTELLISEEK, *supra* note 2, at 12–13; Carson Strege-Flora, *Wait! Don't Fire That Blogger! What Limits Does Labor Law Impose on Employer Regulation of Employee Blogs?*, 2 SHIDLER J. L. COM. & TECH. 11, ¶ 4 (Dec. 16, 2005), <http://www.lctjournal.washington.edu/Vol2/a011Strege.html>; Konrad Lee, *Anti-Employer Blogging: Employee Breach of the Duty of Loyalty and the Procedure for Allowing Discovery of a Blogger's Identity Before Service of Process is Effected*, 2006 DUKE L. & TECH. REV. 0002, ¶¶ 20–22 (Jan. 17, 2006), <http://www.law.duke.edu/journals/dltr/articles/PDF/2006DLTR0002.pdf>.

<sup>9</sup> John P. Hutchins, *Beyond the Water Cooler: Does Corporate Blogging Change the Legal Landscape?*, COMPUTERWORLD, Nov. 14, 2005, at 45, 46.

<sup>10</sup> *Id.*; Ephraim Schwartz, *Bloggers and the Law*, INFOWORLD, May 3, 2005, [http://www.infoworld.com/article/05/05/03/19OPreality\\_1.html](http://www.infoworld.com/article/05/05/03/19OPreality_1.html).

<sup>11</sup> *See, e.g.*, Pratt & Whitney, 1999 NLRB GCM LEXIS 3 (Feb. 10, 1999), available at

[http://www.nlr.gov/nlr/shared\\_files/admemo/admemo/1021099\\_pratt19753.aspx](http://www.nlr.gov/nlr/shared_files/admemo/admemo/1021099_pratt19753.aspx) (relating that employee posted internal memorandum on his website).

<sup>12</sup> *See, e.g.*, EDELMAN & INTELLISEEK, *supra* note 2, at 13 (recounting that a flight attendant was fired for posting a picture of herself "in uniform . . . with her blouse unbuttoned far wider than the company's dress code specified").

<sup>13</sup> *See, e.g.*, Colin Randall, *Wrote Blog and Got the Sack. V Bad. Will Sue.*, DAILY TELEGRAPH, July 18, 2006, International, at 17 (describing the firing of a secretary who wrote a "Bridget Jones in Paris" blog about her work at an accounting firm); Fthisjob.com, <http://www.fthisjob.com/> (last visited Sept. 24, 2006) ("Welcome to fthisjob.com, the 'I hate my job' blogging community.").

<sup>14</sup> Sarah Vos & Jamie Gumbrecht, *Web Sites Personal, but Millions See Them*, LEXINGTON HERALD-LEADER (Kentucky), Mar. 30, 2006, at A1 ("[A] California auto club fired 27 people for comments made about other employees' weight and sexual orientation.").

<sup>15</sup> *See, e.g.*, Richard Wray, "Lefty Lexicon" Lands Orange Executive in Big Trouble, THE GUARDIAN, Aug. 17, 2006, at 13 (noting the suspension of a community affairs manager for posting anti-Islamic remarks); *Employee Blogs*, ADVANCE NEWS MAGAZINES FOR NURSE PRACTITIONERS, Nov. 1, 2005, available at <http://nurse-practitioners.advanceweb.com/common/editorial/PrintFriendly.aspx?CC=62666>.

<sup>16</sup> *See, e.g., id.*; Lee, *supra* note 8, at n.46 (referring to whistleblower protections).

certain activities by non-supervisory private sector employees.<sup>17</sup> Specifically, section 7 of the NLRA protects “the right . . . to form, join, or assist labor organizations . . . and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.”<sup>18</sup> Employers may not “interfere with, restrain, or coerce employees in the exercise of” their section 7 rights.<sup>19</sup> These provisions likely extend to employee blogs under certain circumstances.<sup>20</sup>

¶5 Blogs present courts with a new context in which to strike the balance between employee and employer rights. This iBrief focuses on employee blogging during personal time *without* the aid of an employer’s property. The iBrief recommends that courts recognize employees’ criticisms of their employer on blogs as protected concerted activity, and argues that existing case law examining unfair labor practices readily applies to the blogging context.

## I. PROTECTED CONCERTED ACTIVITY

### A. *What Kind of Activities Are Protected?*

¶6 The NLRA protects “concerted activities for . . . mutual aid or protection”<sup>21</sup> by most private-sector, non-supervisory employees.<sup>22</sup> These protections apply in unionized and non-unionized workplaces; no union or organizing campaign is necessary.<sup>23</sup> This section will summarize the basic law describing when employee activities are protected under section 7 of the NLRA.

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<sup>17</sup> 29 U.S.C. §§ 152(3), 160(a) (2000); *see also* Brian Christensen & David M. Kight, *Section 7 and the Non-Union Employer*, 60 J. MO. B. 312, 312 & nn.6–7 (2004).

<sup>18</sup> 29 U.S.C. § 157 (2000).

<sup>19</sup> *Id.* § 158(a).

<sup>20</sup> *See, e.g.*, Electronic Frontier Foundation, *Blogger’s FAQ: Labor Law*, <http://www.eff.org/bloggers/lg/faq-labor.php> (last visited Sept. 24, 2006); Lee, *supra* note 8, at n.47; Strege-Flora, *supra* note 8; *see also* W-WAssociates, <http://groups.msn.com/W-WAssociates/disclaimerlegalpage.mswnw> (informing Wal-Mart employees they are protected if they “are posting honestly what is going on at [their] store about [their] working conditions”) (last visited Sept. 24, 2006).

<sup>21</sup> 29 U.S.C. § 157 (2000).

<sup>22</sup> *Id.* § 152(2) (excluding federal, state, and municipal governments and unions from the definition of “employer”); *id.* § 152(3) (excluding “any individual employed as a supervisor” from the definition of “employee”).

<sup>23</sup> *NLRB v. Phoenix Mut. Life Ins. Co.*, 167 F.2d 983, 988 (7th Cir. 1948).

### 1. *What is Concerted Activity?*

¶7 For an employee's action to be "concerted," he or she must act with, or as authorized by, other employees.<sup>24</sup> The "definition of concerted activity . . . encompasses those circumstances where individual employees seek to initiate or to induce or to prepare for group action,"<sup>25</sup> sometimes including situations when an employee implies, but does not expressly state, a request for other employees to act.<sup>26</sup> Concertedness also exists when an employee's action is a "logical outgrowth" of previous group activity.<sup>27</sup>

### 2. *What is Mutual Aid or Protection?*

¶8 Concerted activities are protected only when done "for mutual aid or protection."<sup>28</sup> Historically, this has meant a "self-interested economic objective"<sup>29</sup> such as improved pay, hours, safety, or workload, rather than concerns such as product quality<sup>30</sup> or environmental damage.<sup>31</sup> However,

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<sup>24</sup> See, e.g., *Compuware Corp. v. NLRB*, 134 F.3d 1285, 1288 (6th Cir. 1998) ("[T]he relevant question is whether the employee acted with the purpose of furthering group goals."), quoted in William R. Corbett, *Waiting for the Labor Law of the Twenty-First Century*, 23 BERKELEY J. EMP. & LAB. L. 259, 292 (2002); see also *Int'l Transp. Serv., Inc. v. NLRB*, 449 F.3d 160, 166 (D.C. Cir. 2006) (denying protection to an employee who picketed for a one-person bargaining unit); *NLRB v. Hotel Employees Int'l Union Local 26*, 446 F.3d 200, 207 (1st Cir. 2006) ("To qualify as concerted activity, '[i]t is sufficient that the [complaining] employee intends or contemplates, as an end result, group activity which will also benefit some other employees.'" (quoting *Koch Supplies, Inc. v. NLRB*, 646 F.2d 1257, 1259 (8th Cir. 1981))).

<sup>25</sup> *Meyers Indus., Inc.*, 281 N.L.R.B. 882, 887 (1986).

<sup>26</sup> *Timekeeping Sys., Inc.*, 323 N.L.R.B. 244, 247–48 (1997) (finding that an employee's email to his coworkers about a proposed change in company vacation policy to be concerted activity because he "was attempting to correct any misimpression . . . and to arouse support for his own decision to oppose the proposal"); see also *Sprint/United Mgmt. Co.*, No. 17-CA-21603, 2002 NLRB LEXIS 485, at \*27 (Sept. 30, 2002) (holding employee's warning about anthrax risk in the workplace to be concerted), *aff'd* 339 N.L.R.B. 1012 (2003).

<sup>27</sup> *Every Woman's Place, Inc.*, 282 N.L.R.B. 413, 413 (1986) (finding employee's call to Department of Labor was concerted because she and her coworkers had already brought their concern to management's attention at least four times); see also *Five Star Transp., Inc.*, No. 1-CA-41158, 2004 NLRB LEXIS 329, at \*21 (June 23, 2004), available at [http://www.nlr.gov/nlr/shared\\_files/decisions/ALJ/JD-60-04.pdf](http://www.nlr.gov/nlr/shared_files/decisions/ALJ/JD-60-04.pdf) (finding that letters written by individual employees were a "logical outgrowth" of an earlier meeting).

<sup>28</sup> 29 U.S.C. § 157 (2000).

<sup>29</sup> Cynthia L. Estlund, *What Do Workers Want? Employee Interest, Public Interests, and Freedom of Expression Under the National Labor Relations Act*, 140 U. PA. L. REV. 921, 928 (1992); see also Corbett, *supra* note 24, at 282–83.

<sup>30</sup> Estlund, *supra* note 29, at 949.

courts sometimes look broadly at employee motives to find self interest even when concerns for customers, neighbors, or other employers' workers also exist and even predominate within the communication.<sup>32</sup>

### 3. *Exceptions to NLRA Protections*

¶9 “[E]mployee communications to third parties in an effort to obtain their support are protected where the communication indicate[s] it is related to an ongoing dispute . . . and the communication is not so disloyal, reckless or maliciously untrue as to lose the Act’s protection.”<sup>33</sup> Though the meaning of “disloyalty” is hotly debated,<sup>34</sup> certain categories of speech have emerged as being unprotected: (1) remarks that disparage the employer or its products,<sup>35</sup> (2) confidentiality breaches<sup>36</sup> and (3) recklessly or maliciously false accusations.<sup>37</sup>

¶10 Courts have applied different tests to determine when negative remarks about the employer or its products fall under section 7’s disparagement exception. In general, disparaging “appeals to third parties forfeit [section] 7 protection only if their connection to the employees’ working conditions is too attenuated or if they are unrelated to any

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<sup>31</sup> See *id.* at 956. Estlund provides a powerful critique of the historically narrow construction of “mutual aid or protection” based on the legislative history of the Wagner Act, the realities of modern work, and the public interest. See *id.* at 942–67.

<sup>32</sup> See, e.g., *Five Star*, No. 1-CA-41158, 2004 NLRB LEXIS at \*11, \*25–\*26 (holding that school bus drivers whose letters expressed concern for children’s safety were protected, so long as their letters also expressed concern for the bus drivers’ own wages and job security); Estlund, *supra* note 29, at 927–28, 936–38.

<sup>33</sup> *Am. Golf Corp.*, 330 N.L.R.B. 1238, 1240 (2000). The case widely cited as establishing the disloyalty exception is *NLRB v. Local Union No. 1229 (Jefferson Standard)*, 346 U.S. 464 (1953), in which a broadcasting station’s employees were unprotected when they passed out a handbill criticizing their employer’s programming. See, e.g., Branscomb, *supra* note 3, at 300–01.

<sup>34</sup> See, e.g., *Sierra Publ’g Co. v. NLRB*, 889 F.2d 210, 216 (9th Cir. 1989); Branscomb, *supra* note 3, at 295.

<sup>35</sup> 1 THE DEVELOPING LABOR LAW 211 (Patrick Hardin & John E. Higgins, Jr. eds., 4th ed. 2001) [hereinafter 1 DEVELOPING LABOR LAW].

<sup>36</sup> Nancy J. King, *Labor Law for Managers of Non-Union Employees in Traditional and Cyber Workplaces*, 40 AM. BUS. L.J. 827, 855 (2003); 1 DEVELOPING LABOR LAW, *supra* note 35, at 207

<sup>37</sup> 1 DEVELOPING LABOR LAW, *supra* note 35, at 210; see, e.g., *TNT Logistics N. Am., Inc.*, 347 N.L.R.B. No. 55, 2006 NLRB LEXIS 287, at \*7–\*8 (July 24, 2006), available at [http://www.nlr.gov/nlr/shared\\_files/decisions/347/347-55.pdf](http://www.nlr.gov/nlr/shared_files/decisions/347/347-55.pdf).

grievance which the workers may have.”<sup>38</sup> Although the tenor of the language seems to be a factor in the analysis,<sup>39</sup> several Courts of Appeals and the NLRB have found employee speech protected even when that speech uses harsh language.<sup>40</sup> The D.C. Circuit, however, recently held that an employee’s remarks lost the protection of section 7 when those remarks, which supported a union and protested recent layoffs, “constituted ‘a sharp, public, disparaging attack upon the quality of the company’s product and its business policies’ at a ‘critical time’ for the company.”<sup>41</sup>

¶11 The scope and rationale of the disparagement exception is unclear. Some courts seem to believe that only managers, and not employees, have a legitimate interest in product quality and the employer’s impact on the community.<sup>42</sup> Under that interpretation, any criticism must be framed as a concern about working conditions to be protected.<sup>43</sup> Another theory suggests that the exception arises from fear that employees will deceive the

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<sup>38</sup> *Sierra Publ’g Co.*, 889 F.2d at 216 (citing examples); *accord Am. Golf Corp.*, 330 N.L.R.B. at 1241 (finding unprotected an employee’s handbill suggesting that the town hire a different contractor because it did not mention the employee’s labor dispute with the contractor).

<sup>39</sup> *See, e.g., Sierra Publ’g Co.*, 889 F.2d at 217 (“[D]espite the criticisms voiced in the [employees’] letter, the tone was both constructive and hopeful.”).

<sup>40</sup> *See, e.g., id.* at 218 (citing examples); *Emarco, Inc.*, 284 N.L.R.B. 832, 834 (1987) (finding that when employees said to their employer’s client that the employer was “no damn good” and “couldn’t finish the job,” the employees were engaged in protected activity because they were explaining their strike to protest the fact they had not been paid for five months).

<sup>41</sup> *Endicott Interconnect Techs. v. NLRB*, 453 F.3d 532 (D.C. Cir. 2006) (quoting *NLRB v. Local Union No. 1229 (Jefferson Standard)*, 346 U.S. 464, 471 (1953)) (holding the employee’s remarks unprotected when he cast doubt on the struggling manufacturer’s continuing business viability, writing that the business was being “tanked” and its managers were going to “put it into the dirt”), *rev’g* 345 N.L.R.B. No. 28, 2004–2005 NLRB Dec. (CCH) ¶ 16,971, 2005 NLRB LEXIS 443, at \*20 (Aug. 27, 2005), *available at* [http://www.nlr.gov/nlr/shared\\_files/decisions/345/345-28.pdf](http://www.nlr.gov/nlr/shared_files/decisions/345/345-28.pdf) (holding that an employer’s “sensitivity to the possible impact” of an employee’s remarks does not “serve to limit [an employee’s] statutory right to appeal to the public”).

<sup>42</sup> *See Estlund, supra* note 29, at 949 (“Current doctrine is based on the premise that employees are not advancing their interests *as employees* when they criticize their employer’s products or services.”); *see also id.* at 930 (discussing *NLRB v. Local Union No. 1229 (Jefferson Standard)*, 346 U.S. 464 (1953), in which a handbill criticizing only the quality of the employer’s television and radio programming was unprotected).

<sup>43</sup> *See, e.g., Sierra Publ’g Co.*, 889 F.2d at 220 (“[S]uggestions that a company’s treatment of its employees may have an effect upon the quality of the company’s products, or may even affect the company’s own viability” may be protected.).

public into exerting economic pressure on their employer.<sup>44</sup> Therefore, a court may find unrelated product criticisms protected as long as the communication also reveals the employees' dispute with their employer.<sup>45</sup>

¶12 Breaches of confidentiality are another category of unprotected communication. Although employees cannot be prohibited from discussing their own working conditions,<sup>46</sup> they are not protected when disseminating information obtained in confidence or without authorization, even when it concerns terms and conditions of employment.<sup>47</sup>

¶13 False statements remain protected as long as the employee making the statements does so neither knowingly nor recklessly.<sup>48</sup> An employee who has no reason to question the information that he or she merely passes along from someone else has no duty to investigate its truthfulness because such a duty would unacceptably chill employee speech under section 7.<sup>49</sup> Yet employees have no right under the NLRA to propagate lies knowingly or recklessly.<sup>50</sup> Therefore, an overly excited employee who spreads

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<sup>44</sup> See Estlund, *supra* note 29, at 981 (“Objections to the purely tactical use of product disparagement and other ‘public-oriented’ criticism of the employer of the sort illustrated by *Jefferson Standard* [346 U.S. 464] may reflect as well a fear that the public may be unfairly duped into supporting labor’s cause.”).

<sup>45</sup> See *Sierra Publ’g Co.*, 889 F.2d at 217 (“[T]hird parties who receive appeals for support in a labor dispute will filter the information critically so long as they are aware it is generated out of that context.”), *quoted in* Estlund, *supra* note 29, at 935 n.74.

<sup>46</sup> See, e.g., *King*, *supra* note 36, at 857–59 (describing, *inter alia*, *Kinder-Care Learning Ctrs., Inc.*, 299 N.L.R.B. 1171, 1176 (1990) (daycare working conditions) and *Phoenix Transit Sys.*, 337 N.L.R.B. 510, 510 (2002) (sexual harassment complaints)); see also Matthew A. Edwards, *The Law and Social Norms of Pay Secrecy*, 26 BERKELEY J. EMP. & LAB. L. 41, 43 n.14 (2005) (listing cases discussing wage confidentiality policies).

<sup>47</sup> See *NLRB v. Brookshire Grocery Co.*, 919 F.2d 359 (5th Cir. 1990) (wage data stolen from supervisor’s office); *Lafayette Park Hotel*, 326 N.L.R.B. 824, 826 (1998) (“hotel-private” information such as “guest information, trade secrets, [and] contracts with suppliers”).

<sup>48</sup> See, e.g., *Konop v. Hawaiian Airlines*, 302 F.3d 868, 883 (9th Cir. 2002) (“Federal labor law protects even false and defamatory statements unless such statements are made with actual malice—*i.e.*, knowledge of falsity or with reckless disregard for the truth.” (citing *Old Dominion Branch No. 496 v. Austin*, 418 U.S. 264, 281 (1974) and *Linn v. United Plant Guard Workers*, 383 U.S. 53, 61 (1966))).

<sup>49</sup> See *KBO, Inc.*, 315 N.L.R.B. 570, 571 & n.6 (1994) (holding that an employee who “relay[ed] to [other employees] in good faith what he had been told” by another employee was protected by section 7, even though the information turned out to be false).

<sup>50</sup> See, e.g., *Sprint/United Mgmt. Co.*, 339 N.L.R.B. 1012, 1012 n.2 (2003); *KBO*, 315 N.L.R.B. at 570.

harmful and sensitive rumors that he or she should know are false will not be protected.<sup>51</sup>

### *B. How Courts Should Construe Protection of Blogging*

¶14 For blogging to be protected as section 7 activity, it must be concerted, for mutual aid or protection, and not within one of the exceptions discussed above. This section of the iBrief addresses how such standards should apply to blogs, finding considerable room to treat some blogging as a “concerted activity,” endorsing a broad scope for “mutual aid or protection,” and recommending that courts evaluate a blog as a whole, rather than post by post, when deciding whether statements on the blog are protected under the NLRA.

¶15 When evaluating concertedness, courts should continue to apply a broad standard, so that blogs where employees discuss work concerns meet this initial threshold criterion for protection. Certainly, if multiple employees create a draft together with the intent of posting it, then their activity is literally and obviously concerted,<sup>52</sup> and if two or more employees have been complaining about particular working conditions and one alerts the public by blogging about it, then this is a “logical outgrowth” of concerted activity. In addition, an employee who posts without previously consulting his co-workers could be seen as initiating group action by inviting his co-workers to share their concerns.<sup>53</sup> The presence of a comment feature on most blogs arguably implicitly invites others to participate in the discussion, but to find a blog protected, a court should have to find that the blog at least implies that co-employees are the intended

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<sup>51</sup> Although a nurse’s televised statements that hospital policies endangered patients did not spring from “an evil motive,” they were unprotected because they were “materially false and misleading” and “made her continued employment untenable” due to her co-workers’ outrage. *Id.* at 578–82; *see also Sprint*, 339 N.L.R.B. at 1015–16, 1018–19 (finding email warning co-workers of anthrax unprotected because sender was reckless with respect to the truth or falsity of three claims and “fabricated” two others).

<sup>52</sup> *See Ogiwara Am. Corp.*, No. 7-CA-47942, 2005 NLRB LEXIS 555, at \*10, \*42 (Nov. 3, 2005), available at [http://www.nlr.gov/nlr/shared\\_files/decisions/ALJ/JD-80-05.pdf](http://www.nlr.gov/nlr/shared_files/decisions/ALJ/JD-80-05.pdf) (finding that an employee’s sending of a letter he composed with feedback from other employees was concerted).

<sup>53</sup> *See Strege-Flora*, *supra* note 8, ¶ 12.

audience.<sup>54</sup> The presence of actual comments or links from other employees' blogs may also create concertedness.<sup>55</sup>

¶16 Unlike the analysis of concertedness, the analysis of the "mutual aid or protection" requirement does not depend upon the characteristics of blogging as a medium. How courts interpret the scope of protection will be critical in practice, though, so two particular issues merit discussion. First, it is currently unclear whether, outside the union context, distributing "political" literature about laws affecting working conditions is *always* unprotected, or whether the distribution is merely unprotected *at the workplace*.<sup>56</sup> Some employee bloggers will probably refer to political changes affecting their workplaces and include links to or material from political organizations in support of their position.<sup>57</sup> Such inclusion of political material, when related to employees' working conditions, furthers workers' mutual aid or protection.<sup>58</sup> Second, courts' current exclusion of

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<sup>54</sup> *Cf. id.* ("[I]f the blogger is promoting the blog to other workers or other workers are visiting the site, it may then fall under the protection of the NLRA . . .").

<sup>55</sup> *See* Timekeeping Sys., Inc., 323 N.L.R.B. 244, 248 (1997) (noting that concerted activity may have been created by another employee's response to the initial email, but that the case did not depend on this). Other employees' visits to the site may be necessary or even sufficient for concertedness. *See* Strega-Flora, *supra* note 8, ¶ 12.

<sup>56</sup> *See* Eastex, Inc. v. NLRB, 437 U.S. 556, 569–70, 575 (1978) (finding the distribution of a union newsletter with political content on employer property protected because the issues could affect the union's bargaining position); NLRB v. Motorola, Inc, 991 F.2d 278, 280, 285 (5th Cir. 1993) (denying protection to employees' onsite distribution of an outside organization's literature for a city ordinance against random drug testing of employees expressing fear of "authoriz[ing] any political splinter group with employee members to disseminate literature at the workplace as long as the group's agenda includes some issue relevant to that workplace"); Bill Hylan, Casenote, *NLRB v. Motorola: A Narrow Interpretation of the "Mutual Aid or Protection" Clause of the National Labor Relations Act*, 26 ARIZ. ST. L.J. 253, 260 (1994) (criticizing this policy rationale).

<sup>57</sup> *See* Hylan, *supra* note 56, at 261–62 (noting that *Motorola* may handicap corporate campaigns by denying section 7 protection to employees who use informational literature prepared by outside political advocacy organizations). Note that even under a very broad view of legitimate employee interests, discussion of some political issues, such as international military aid and reproductive rights, would remain unprotected in most workplaces. Estlund, *supra* note 29, at 969.

<sup>58</sup> *See* Hylan, *supra* note 56, at 258 ("The [*Motorola*] court made a fundamental error by emphasizing [the anti-drug-testing organization's] agenda in distributing literature at Motorola, rather than emphasizing the Motorola employees' agenda in distributing literature . . . . The workers were attempting to achieve 'mutual aid or protection' . . .").

concerns such as product quality and the natural environment “reflects an impoverished understanding of the meaning of work in our lives.”<sup>59</sup> Certainly, an employee may just write negative things to retaliate against a soon-to-be former employer or to blackmail an employer into making labor concessions.<sup>60</sup> But at a basic level, many employees want their employer to prosper so that they will keep their jobs and advance in them.<sup>61</sup> Perhaps more importantly, it is reasonable to believe many employees want to take pride in what they do and to be part of an organization with which they feel morally aligned.<sup>62</sup> As Professor Cynthia Estlund asks rhetorically, “[C]an it fairly be said, as a categorical matter, that the employer’s toxic contamination of the surrounding community or the quality of the collective work product is of less legitimate concern to employees than, for example, the price of soft drinks in employer-provided vending machines?”<sup>63</sup> Although the interpretation of “mutual aid or protection” does not depend on the characteristics of blogging, how courts resolve these open issues will profoundly influence the effectiveness of blogging as a tool for employee organizing.

¶17 Even with a broad reading of concertedness and “mutual aid or protection,” the multitude of posts and comments contained on blogs will present an analytical challenge. On nearly any blog where employees frankly discuss their jobs, some posts, examined individually, probably “disparage” the employer or its products without explicitly connecting the criticism to a labor dispute. Other gripes probably fall outside the scope of “mutual aid or protection” because they do not reveal the “specific objective” of changing a particular employment practice.<sup>64</sup> However, requiring each individual post to meet the standards for protected concerted activity would certainly chill communication.<sup>65</sup> Instead, if a post at issue does not meet the “mutual aid or protection” standard or is an instance of product disparagement, courts should consider the entire blog to evaluate whether a post is part of a campaign by employees to improve their employment conditions and whether readers would reasonably understand that purpose. Such information could be found in the blog’s “About” section, in a banner at the top of the blog, or in a “critical mass” of posts

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<sup>59</sup> Estlund, *supra* note 29, at 926.

<sup>60</sup> *See id.* at 930 (referring to “tactical” product disparagement).

<sup>61</sup> *Id.* at 949.

<sup>62</sup> *See id.* at 957 (“[E]mployees have a legitimate stake in being part of an enterprise that does good and not harm.”).

<sup>63</sup> *Id.* at 958.

<sup>64</sup> *See Timekeeping Sys.*, 323 N.L.R.B. at 248.

<sup>65</sup> *See* Alan Hyde, *Employee Caucus: A Key Institution in the Emerging System of Employment Law*, 69 CHI.-KENT L. REV. 149, 167–71 (1993) (describing how the “hypertechnical nature” of the doctrines associated with section 7 create “traps for the unwary”).

that would lead a reasonable reader of the site to understand that the blog presents concerns of employees about their working conditions.

¶18 In summary, there are good reasons to believe that employee blogs can and should be protected in many instances as concerted activities under section 7 of the NLRA. In light of that conclusion, blogs raise a number of special issues for employers, including surveillance, blogging policies, and anonymity.

## II. SPECIAL ISSUES IN NLRA PROTECTION OF BLOGGING

### *A. Prohibition of Employer Surveillance, Impression of Surveillance, or Interrogation*

¶19 Retaliation and discrimination on the basis of protected activity are obviously “unfair labor practices” under the NLRA,<sup>66</sup> but other actions also qualify. Interrogation that has a “coercive effect” when considered in context is an unfair labor practice.<sup>67</sup> Also, engaging in surveillance of union or organizing activity or creating the “impression of surveillance” of that activity is an unfair labor practice under some circumstances because it can facilitate later unfair labor practices, and if known to employees, it can intimidate them out of exercising their rights.<sup>68</sup> Although the case law addresses unions and organizing campaigns, the same rationales should logically apply to surveillance of other concerted activities.

¶20 The prohibition against surveillance limits how employers can respond even to activity that occurs in public. For example, in cases where supervisors spent hours every evening at the village drugstore watching handbill distribution<sup>69</sup> and where a supervisor abandoned his usual lunch restaurant to watch employees solicit union members in the cafeteria,<sup>70</sup> courts found unlawful surveillance. These were, however, relatively extreme cases involving tense union organizing situations. In most

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<sup>66</sup> See, e.g., *Timekeeping Sys.*, 323 N.L.R.B. at 244 (ruling that employer violated the NLRA by firing employee for protected activity).

<sup>67</sup> 51A C.J.S. *Labor Relations* § 475 (2005).

<sup>68</sup> See *Konop v. Hawaiian Airlines*, 302 F.3d 868, 884 (9th Cir. 2002) (“[E]mployer surveillance ‘tends to create fear among employees of future reprisal’ and, thus, ‘chills an employee’s freedom to exercise’ his rights under federal labor law.” (quoting *Cal. Acrylic Indus. v. NLRB*, 150 F.3d 1095, 1099 (9th Cir. 1998))); ROBERT A. GORMAN & MATTHEW W. FINKIN, BASIC TEXT ON LABOR LAW UNIONIZATION AND COLLECTIVE BARGAINING 213–14 (2d ed. 2004) (citing *Cannon Elec. Co.*, 151 N.L.R.B. 1465 (1965) and *Flexsteel Indus., Inc.*, 311 N.L.R.B. 257 (1993)).

<sup>69</sup> *NLRB v. Collins & Aikman Corp.*, 146 F.2d 454, 455 (4th Cir. 1944).

<sup>70</sup> *NLRB v. J.H. Rutter-Rex Mfg. Co.*, 229 F.2d 816, 818 (5th Cir. 1956).

instances when management watches open and public activity, no unfair labor practice will be found.<sup>71</sup>

¶21 Far from analogous to eavesdropping on a private conversation,<sup>72</sup> management's visiting a non-secure blog is more like reading an advertisement that employees have placed in the local newspaper. Information deliberately placed on the Internet is meant to be read, and it would be unreasonable to expect employers not to monitor websites where they know employees are posting openly and publicly and perhaps exposing the company to risk.

¶22 Even when observation is acceptable, however, recording employees' section 7 activity can be an unfair labor practice unless the employer has an objectively reasonable justification for doing so.<sup>73</sup> Therefore, if an employer starts to record the blog's content each day, it may need to provide an objectively reasonable justification for doing so. An employer will likely prevail with its justification if it documents daily posts to help management piece together the identity of an anonymous blogger who is spreading false rumors or leaking confidential information.<sup>74</sup> If, however, the anonymous blogger has shown no propensity to post forbidden subject matter, then keeping records of the blog may be analogous to an employer photographing employee unionizing activities "in the mere belief that something might happen," which is not allowed.<sup>75</sup>

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<sup>71</sup> GORMAN & FINKIN, *supra* note 68, at 215 ("[A]n employer is usually free to observe employees engaging in union or other concerted activity that is engaged in openly and in public.").

<sup>72</sup> See *Konop v. Hawaiian Airlines*, 302 F.3d 868, 884 (9th Cir. 2002) (comparing management's infiltration of the employee's website to an earlier case involving eavesdropping on a break-room conversation).

<sup>73</sup> See *Collins & Aikman Corp.*, 146 F.2d at 455. For example, videotaping peaceful union rallies for three months was held an unfair labor practice because no valid security interest outweighed the tendency of the cameras to chill protected activity. *Nat'l Steel & Shipbuilding Co.*, 324 N.L.R.B. 499, 501-02 (1997), *enforced*, 156 F.3d 1268 (D.C. Cir. 1998). In contrast, when picketers had large dogs and were packed shoulder to shoulder across the doors to the store, videotaping them and writing down their names was acceptable because the employer "had a reasonable basis to have anticipated misconduct that justified" the videotaping. *In re Strack & Van Til Supermarkets*, 340 N.L.R.B. No. 172, 2004-2005 NLRB Dec. (CCH) ¶16,621, 2004 NLRB LEXIS 13, at \*24-\*25 (2004), available at [http://www.nlr.gov/nlr/shared\\_files/decisions/340/340-172.pdf](http://www.nlr.gov/nlr/shared_files/decisions/340/340-172.pdf).

<sup>74</sup> See Alison Grant, *Look Out Below: Higher-ups Are Keeping an Eye on Workers*, PLAIN DEALER (Cleveland), Jan. 15, 2006, at G1.

<sup>75</sup> *In re Strack & Van Til*, 2004 NLRB LEXIS at \*23 (quoting *Nat'l Steel & Shipbuilding*, 324 N.L.R.B. at 499).

¶23 Employers might also be said to create an impression of surveillance by speaking to employees about what they read on employee blogs.<sup>76</sup> One administrative law judge found an impression of surveillance when a supervisor told an employee that he “liked her picture” the day after it was posted on the union’s website, because this “convey[ed] the impression that he was keeping track of her union activities.”<sup>77</sup> While this reasoning is superficially appealing, it should rarely be applied. Because employers are free to visit the site, to forbid them to notify employees that they read blogs would only foster employee carelessness. Also, if the blog can be read as a petition to management to change working conditions, then it is entirely appropriate for management to ask for details about the concerns expressed, especially if that request is directed towards employees as a group, rather than towards individuals. Therefore, courts should not find an unlawful impression of surveillance except in the narrow case when reasonable employees would infer that their individual protected activities are being tracked for retaliatory purposes. In considering the reasonableness of such an inference, a court would need to look at the history of the employer’s behavior towards concerted activities, the individualized nature of the remarks, and the lack of legitimate reasons for the employer to comment. Given the public nature of the Internet and the legitimate reasons employers have for monitoring what is written about them, employer visits to blogs should rarely generate findings of unfair labor practices.

#### *B. Employee Blogger’s Duty to Screen Comments*

¶24 The comment feature of blogs raises an entirely different set of issues. One blog may contain writing from people with different agendas, ethical codes, and levels of self-restraint. Therefore, comments posted to the blog may cause harm that the original blogger never intended, including the posting of falsehoods or confidentiality breaches.

¶25 Someone who merely posts to a blog in no way inviting criticism of his employer is probably not engaged in section 7 activity. However, the employer should normally see no reason to penalize him or her for

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<sup>76</sup> Cf. *Fred’k Wallace & Son, Inc.*, 331 N.L.R.B. 914, 914 (2000) (finding an unlawful impression of surveillance when a supervisor asked two employees about their conversations with the union organizers who had visited them at the jobsite earlier that day).

<sup>77</sup> *Magna Int’l, Inc.*, No. 7-CA-43093(1), 2001 NLRB LEXIS 134, at \*61–\*62 (Mar. 9, 2001) (citing *Fred’k Wallace & Son, Inc.*, 331 N.L.R.B. 914 and *Flexsteel Indus., Inc.*, 311 N.L.R.B. 257, 257 (1993), which explains that “an employer creates an impression of surveillance by indicating that it is closely monitoring the degree of an employee’s union involvement,” regardless of whether “the employee intended his involvement to be covert”).

unsolicited blog comments unless the employee refuses to take down the objectionable material.

¶26 On the other hand, a blogger who invites criticism of his or her employer (e.g., by criticizing the employer, debating the employer's critics, or asking for others' opinions of the employer) should foresee that others will post false accusations or comments that breach confidentiality agreements. Therefore, such a blogger would be negligent not to pre-screen comments and should lose protection for those not screened.<sup>78</sup> Moreover, falsehoods and confidentiality breaches can cause too much harm to allow the blogger to avoid liability with a mere disclaimer.<sup>79</sup> The problem is that if the duty to screen comments is too onerous, an employee blogger is likely to turn off the comment feature or not to blog at all, and the employee organizing benefits of blogs will be lost. Existing case law, which considers whether an employee has reason to doubt that information he or she passes along is false, already balances employers' interests and employee speech.<sup>80</sup> Courts should apply this standard to comments that an employee blogger screens and extend the standard to confidentiality breaches as well as falsehoods.

### C. Employer Blogging Policies

¶27 In response to concerns about inappropriate blog postings, some employers have created policies to tell employees what is prohibited.<sup>81</sup> While it is obviously reasonable to warn employees not to disclose trade secrets<sup>82</sup> or confidential financial information<sup>83</sup> and to require employees to

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<sup>78</sup> In the case of confidentiality breaches, a blogger may argue that because he did not make the original breach of the employer's confidence, he is not responsible for the subsequent dissemination of the information. However, courts should interpret the blogger's duty of loyalty to prevent him or her from magnifying the impact of the breach on the employer. For a discussion of the duty of loyalty, see Lee, *supra* note 8, ¶¶ 11–23.

<sup>79</sup> Cf. Hutchins, *supra* note 9, at 46 (noting liability for comment content as a concern for companies that put up their own blogs and suggesting a disclaimer).

<sup>80</sup> See discussion *supra* ¶ 13.

<sup>81</sup> See, e.g., EDELMAN & INTELLISEEK, *supra* note 2, at 13–14 & app. (discussing blog policies from a variety of employers, including Apple and Sun Microsystems); NewPR Wiki, BloggingPolicy, <http://www.thenewpr.com/wiki/pmwiki.php?pagename=Resources.BloggingPolicy> (last visited Sept. 24, 2006). For a comparison of several policies, see Posting of Fredrik Wackå to Corporateblogging.Info, <http://www.corporateblogging.info/2005/06/policies-compared-todays-corporate.asp> (June 6, 2005) [hereinafter Wackå].

<sup>82</sup> See, e.g., Sun.com, Sun Policy on Public Discourse, <http://www.sun.com/aboutsun/media/blogs/policy.html> (last visited Sept. 24,

post a disclaimer saying that they do not blog on the company's behalf,<sup>84</sup> not all policies that regulate employee speech are acceptable under the NLRA. This section will describe the general rules regarding such policies and then examine a few examples of actual or potential blogging policies.

¶28 In general, promulgating a policy that "would reasonably tend to chill employees in the exercise of their Section 7 rights" is an unfair labor practice.<sup>85</sup> Policies previously ruled unlawful in non-blogging contexts include "confidentiality" policies that forbid employees from discussing terms and conditions of employment with each other or customers<sup>86</sup> and policies forbidding union solicitation in the workplace during non-working time, even without evidence that employees are unable to communicate outside of the workplace.<sup>87</sup> Still, particular prohibitions on "profane language,"<sup>88</sup> "harassment,"<sup>89</sup> and "slandrous or detrimental statements"<sup>90</sup> in the workplace have been upheld on the grounds that a reasonable employee would see such rules as directed to the employer's legitimate concerns, rather than as a bar on protected activity.<sup>91</sup> In *Adtranz ABB Daimler-Benz Transportation, N.A. v. NLRB*,<sup>92</sup> the D.C. Circuit held that

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2006) ("[I]t's perfectly OK to talk about your work and have a dialog with the community, but it's not OK to publish the recipe for one of our secret sauces.").

<sup>83</sup> See, e.g., *id.* ("Talking about revenue, future product ship dates, roadmaps, or our share price is apt to get you, or the company, or both, into legal trouble."); see also Wackâ, *supra* note 81.

<sup>84</sup> See, e.g., Feedster, Corporate Blogging Policy, (Mar. 7, 2005), [http://feedster.blogs.com/corporate/2005/03/corporate\\_blogg.html](http://feedster.blogs.com/corporate/2005/03/corporate_blogg.html) ("Please make it clear to your readers that the views you express are yours alone and that they do not necessarily reflect the views of Feedster.").

<sup>85</sup> *Lafayette Park Hotel*, 326 N.L.R.B. 824, 825 (1998), *enforced*, 203 F.3d 52 (D.C. Cir. 1999). Employers also may not enforce a facially valid policy in a way that discriminates against protected concerted activities. See 1 DEVELOPING LABOR LAW, *supra* note 35, at 106 (explaining this for no-solicitation rules).

<sup>86</sup> See, e.g., *Kinder-Care Learning Ctrs., Inc.*, 299 N.L.R.B. 1171, 1172 (1990) ("We, therefore, conclude that the judge erred in failing to find that the Respondent's rule [is an unfair labor practice] because it restricts employees' Section 7 rights to communicate not only with the employee-parents, but with all parents."); King, *supra* note 36, at 859 (predicting that such policies will also be prohibited in the Internet context).

<sup>87</sup> See *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 798–99 (1945), *interpreted in* *Eastex, Inc. v. NLRB*, 437 U.S. 556, 570–71 (1978).

<sup>88</sup> *Martin Luther Mem'l Home, Inc.*, 343 N.L.R.B. No. 75, 2004–2005 NLRB Dec. (CCH) ¶16,786, 2004 NLRB LEXIS 664, at \*6–\*7 (2004).

<sup>89</sup> *Id.* at \*14.

<sup>90</sup> *Tradesmen Int'l*, 338 N.L.R.B. 460, 462 (2002).

<sup>91</sup> *Cf. King*, *supra* note 36, at 856 (applying similar logic to confidentiality policies).

<sup>92</sup> 253 F.3d 19 (D.C. Cir. 2001).

employers may prohibit “abusive or threatening” language at work,<sup>93</sup> but acknowledged that discriminatory enforcement of such a policy could be an unfair labor practice.<sup>94</sup>

¶29 A company might want to forbid its employees to discuss the employer on the Internet at all, but this is almost certainly unlawful.<sup>95</sup> Because other means of communication are not nearly equivalent to blogging, the employer’s rule could easily be described as an “unreasonable impediment to self-organization”<sup>96</sup> that denies employees “an essential component of . . . communication.”<sup>97</sup>

¶30 One company’s proposed blogging policy states, “You may not post any material that is obscene, defamatory, profane, libelous, threatening, harassing, abusive, hateful or embarrassing to another person or . . . entity.”<sup>98</sup> This policy has much in common with the one in *Adtranz*, except that in *Adtranz*, the restrictions applied only to the workplace, but this policy applies to speech outside of work. The balancing of employer and employee interests is likely to be similar, however, because the policy is facially neutral towards section 7 activity. Employees can blog about working conditions without using outrageous language, and employers have legitimate interests in not having their public image tarnished or the relationships between their employees damaged by inappropriate material that employee bloggers post on the Internet. Moreover, a reasonable employee is likely to understand the rationale for the policy and thus not see it as a prohibition of protected activity. The only major concern is the word “embarrassing” because any public criticism of the employer is arguably

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<sup>93</sup> *Id.* at 28 (“[T]he Board’s position that the imposition of a broad prophylactic rule against abusive and threatening language is unlawful on its face is simply preposterous.”).

<sup>94</sup> *Id.* at 27–28.

<sup>95</sup> Apple Computer has been rumored to have such a policy. EDELMAN & INTELLISEEK, *supra* note 2, at 13; Think Secret, Inside Apple Retail: Pixel Policy, Price Matching, Employee Restrictions, <http://www.thinksecret.com/news/0508retail.html> (Aug. 5, 2005).

<sup>96</sup> See *Republic Aviation Corp.*, 51 N.L.R.B. 1186, 1187 (1943) (“[I]n the absence of special circumstances, a rule prohibiting union activity on company property outside of working time constitutes an unreasonable impediment to self-organization . . .”).

<sup>97</sup> See Bureau of National Affairs, No. 5-CA-28860, 2000 NLRB GCM LEXIS 68, at \*18–\*19 (Oct. 3, 2000), available at [http://www.nlr.gov/nlr/shared\\_files/admemo/admemo/z100300\\_bureauofnatio nal.asp](http://www.nlr.gov/nlr/shared_files/admemo/admemo/z100300_bureauofnatio nal.asp) (discussing why the availability of other forms of communication failed to justify an employer’s ban on email solicitations).

<sup>98</sup> Plaxoed!, Plaxo’s Communication (Blogging) Policy, <http://blog.plaxoed.com/?p=41> (Mar. 29, 2005).

embarrassing. The validity of this particular prohibition is likely to depend upon whether it is, in fact, applied to prevent section 7 activities.

¶31 Another company, Sun Microsystems, warns employees that “using your weblog to trash or embarrass the company, our customers, or your co-workers, is not only dangerous but stupid.”<sup>99</sup> Courts examine policy provisions in their overall context,<sup>100</sup> and this particular remark comes after a description of the harm the company would suffer if a prospective customer were to read an employee post saying that a Sun product “sucks.”<sup>101</sup> Employees complaining about their working conditions could certainly be seen as “trashing” the company, and the tone of the language is somewhat threatening, but the example given and the title of the section (“Think About Consequences”) indicate that Sun is interested in warning employees not to post thoughtless, “amateurish” remarks.<sup>102</sup> While the validity of this provision, standing alone, might be a closer call than the previous two examples, the provision is probably acceptable under the NLRA when viewed in the context of the overall policy.

¶32 Finally, an employer probably cannot mandate that employees utilize other channels of communication before blogging,<sup>103</sup> especially when employees are “legitimately concerned about reprisals,”<sup>104</sup> because management does not have the prerogative to dictate how concerted activity will be performed.<sup>105</sup> The existing doctrines that control employer restrictions on employee communications are thus easily adaptable to the analysis of blogging policies.

#### *D. Employers Seeking an Anonymous Blogger’s Identity*

¶33 Anonymous blogging raises issues that NLRA case law has not yet addressed thoroughly. Many bloggers and comment posters take more or less elaborate strategies to conceal their identities, such as pseudonyms, public computers, proxy servers, or even encrypted email to an anonymous

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<sup>99</sup> Sun Policy on Public Discourse, *supra* note 82.

<sup>100</sup> *See, e.g.*, *Tradesmen Int’l*, 338 N.L.R.B. 460, 462 (2002).

(“Employees would not reasonably believe that an expectation that they represent the Company in a ‘positive and ethical manner,’ in the context of a prohibition on conflicts of interest, would prohibit Section 7 activity.”).

<sup>101</sup> Sun Policy on Public Discourse, *supra* note 82.

<sup>102</sup> *Id.*

<sup>103</sup> *Cf. Plaxoed!*, *supra* note 98 (“Voicing concerns about Plaxo publicly without first communicating such concerns to your management and co-workers is counterproductive and inadvisable.”).

<sup>104</sup> *Ogihara Am. Corp.*, No. 7-CA-47942, 2005 NLRB LEXIS 555, at \*44 (Nov. 3, 2005), available at [http://www.nlr.gov/nlr/shared\\_files/decisions/ALJ/JD-80-05.pdf](http://www.nlr.gov/nlr/shared_files/decisions/ALJ/JD-80-05.pdf).

<sup>105</sup> *Id.* at \*47–\*48.

hosting company.<sup>106</sup> An employer may sue an anonymous blogger and subpoena Internet service providers (ISPs) to get the IP address and the location of the blogger's computer,<sup>107</sup> but if the lawsuit is groundless, and the post is protected concerted activity, the suit will be an unfair labor practice.<sup>108</sup> Also, because filing a lawsuit is time-consuming, expensive, and possibly ineffective, some employers will likely use strategies such as surveillance and interrogation to determine bloggers' identities. Although an employer may want to know who is raising concerns, the value of anonymity in allowing employees to communicate without fear of reprisals should cause courts to view critically the employer's motivations for interrogations, lawsuits, and other tactics to uncover bloggers' identities.

¶34 *Ogihara America Corp.*<sup>109</sup> vividly demonstrates an employer's aggressive offline tactics to find the source of an anonymous communication. In that case, an employer subpoenaed a Kinko's security tape to learn the identity of an employee who had sent an anonymous FedEx on behalf of himself and two co-workers complaining about their supervisor's incompetence.<sup>110</sup> The manager's questioning of employees regarding the anonymous package was an unfair labor practice because the questions showed management to be "hostile to" the concerted activity,<sup>111</sup> especially coming "in the midst of a hotly contested union campaign."<sup>112</sup> The employee's denial that he sent the letter did not justify firing him because "an employee is under no obligation to respond to questions that seek to uncover his protected activities."<sup>113</sup> Similarly, interrogation of employees and the use of drastic measures to uncover bloggers' identities are likely to be unfair labor practices when the posts are protected concerted

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<sup>106</sup> See Zuckerman, *How to Blog Anonymously*, in HANDBOOK FOR BLOGGERS AND CYBER-DISSIDENTS, *supra* note 6, at 55, 57–62; see also Electronic Frontier Foundation, *How to Blog Safely (About Work or Anything Else)* (Apr. 6, 2005), <http://www.eff.org/Privacy/Anonymity/blog-anonymously.php> (describing Invisiblog.com, Tor, and Anonymizer.com).

<sup>107</sup> See, e.g., *John Doe No. 1 v. Cahill*, 884 A.2d 451, 454–55 (Del. 2005); Lee, *supra* note 8, ¶¶ 30–40; Zuckerman, *supra* note 106, at 57. Courts balance the First Amendment protection of anonymous speech against the rights of victims of defamation, breach of the duty of loyalty, and other torts. See *Cahill*, 884 A.2d at 461; Lee, *supra* note 8, ¶¶ 24–35.

<sup>108</sup> See *Konop v. Hawaiian Airlines, Inc.*, 302 F.3d 868, 885 (9th Cir. 2002) ("An employer's filing or threatened filing of a lawsuit against an employee concerning union organizing activities may, under certain circumstances, violate the RLA [Railway Labor Act]."). Note that the RLA is closely analogous to the NLRA. *Strega-Flora*, *supra* note 8, ¶ 7.

<sup>109</sup> No. 7-CA-47942, 2005 NLRB LEXIS 555.

<sup>110</sup> *Id.* at \*20–\*21.

<sup>111</sup> *Id.* at \*61.

<sup>112</sup> *Id.* at \*51.

<sup>113</sup> *Id.* at \*45.

activity and the court infers a motive to retaliate against those engaged in protected activities. How courts respond to employer attempts to obtain the identities of anonymous bloggers will be one of the most interesting developments in this area of the law.

### *E. The Structure of the Workplace*

¶35 One final idea merits discussion. The NLRB has analyzed the structure of the individual workplace in recent technology cases, including general counsel memoranda about employer email and cell phone policies<sup>114</sup> and a Board decision about whether an employer must furnish a union with a list of employee email addresses.<sup>115</sup> It might be argued that courts should also consider the structure of a given workplace when deciding how vigorously to protect a particular instance of employee blogging. Obviously, when employees are spread across many locations, or when they spend little or no time at employer facilities, the Internet may be the only practicable way for them to communicate.<sup>116</sup> In those cases, the employee's interest in section 7 activities is clearly strong relative to the employer's interest in avoiding damage to its reputation. In contrast, employees who work mostly in the same physical location may simply be

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<sup>114</sup> See, e.g., *Banca Di Roma*, No. 13-CA-41283-1, 2004 WL 3093490, at \*2 (Nov. 26, 2004), available at [http://www.nlr.gov/nlr/shared\\_files/admemo/admemo/13-CA-41283-1\(11-26-04\).htm](http://www.nlr.gov/nlr/shared_files/admemo/admemo/13-CA-41283-1(11-26-04).htm) (upholding employer ban on cell phones in workplace because employer's concern about distractions outweighed employee section 7 concerns in workplace where employees could often speak to each other in person); *Encompass Servs. Corp.*, No. 17-CA-20907, 2001 NLRB GCM LEXIS 1, at \*6 (Jan. 18, 2001), available at [http://www.nlr.gov/nlr/shared\\_files/admemo/admemo/s011801\\_encompass.asp?bhcp=1](http://www.nlr.gov/nlr/shared_files/admemo/admemo/s011801_encompass.asp?bhcp=1) (finding that construction employees who "do not use email or the Internet to be productive" can be subject to ban on email solicitation); *Pratt & Whitney*, No. 12-CA-18446, 1998 WL 1112978, at \*2, \*4 (Feb. 23, 1998) (finding that employees' extensive use of email made the email system a "work area," and thus, that employer could not completely forbid non-business emails), available at [http://www.nlr.gov/nlr/shared\\_files/admemo/admemo/l022398\\_pratt.asp](http://www.nlr.gov/nlr/shared_files/admemo/admemo/l022398_pratt.asp).

<sup>115</sup> See *Tech. Serv. Solutions*, 332 N.L.R.B. 1096, 1102-03 (2000) (Fox, J., dissenting) (arguing that "the structural isolation" of customer service representatives who worked from their homes and cars across eight states made it necessary to require the employer to give an outside union a list of employee email addresses).

<sup>116</sup> See *The Prudential Ins. Co. of Am.*, No. 22-RC-12173, 2002 NLRB LEXIS 551, at \*14-\*15 (N.L.R.B. Div. of Judges Nov. 1, 2002) (describing the difficulty a union faced in communicating with dispersed potential members); Elena N. Broder, Note, *(Net)workers' Rights: The NLRA and Employee Electronic Communication*, 105 YALE L.J. 1639, 1657 (1996).

airing dirty laundry that they could discuss in private to accomplish the same goals.

¶36 Such a distinction for the structure of the workplace, which would add yet another layer of complexity to the concerted activity doctrines, is unnecessary and undesirable. All employees have an interest in a blog's ability to reach the public, to archive commentary, and to link to further resources on the Internet. It would be very difficult to apply a rule protecting employees' concerted appeals when they are directed at the public, but protecting concerted activities directed at other employees only when the Internet is essential for the communication.

#### CONCLUSION

¶37 Blogs will add a new twist to established concerted activity doctrine as courts will have to strike the balance between employee and employer rights. Courts should strongly protect all employee bloggers as they engage in legitimate concerted activity, but they should also require that bloggers bear some responsibility in exercising those rights by identifying themselves as employees and screening comments for obvious falsehoods and confidentiality breaches. Existing standards of protection against interference with protected rights often extend readily into the blogging context. Though highly fact-specific, these standards must be applied conscientiously to protect employees' legitimate appeals to the public and attempts to discuss employment issues, while avoiding unreasonable restrictions on employers' needs to monitor what is said about them and promulgate policies to protect their legitimate business interests.