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Exercising Caution Before Action: What Employers Need to Know Before Implementing the NLRB General Counsel's Approved Social Media Policy

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**EXERCISING CAUTION BEFORE ACTION:
WHAT EMPLOYERS NEED TO KNOW BEFORE
IMPLEMENTING THE NLRB GENERAL COUNSEL’S
APPROVED SOCIAL MEDIA POLICY**

*Molly Considine**

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I. INTRODUCTION

Social media use continues to grow exponentially among employees, and employers are struggling to draft policies that both effectively protect their business while not impinging upon employees' rights to engage in protected concerted activities.¹ Numerous entities are articulating new standards to deal with the growing use of social media.² The General

¹ See *infra* text accompanying note 45 (detailing attempts by employers to draft policies that govern employees' online conduct).

² See *infra* text accompanying notes 30–31, 188–189, 195, 203–204, 210 (explaining that the GC issued three memos analyzing social media specific cases, in addition to a memo focusing exclusively on social media policies. In addition, the Federal Trade

Counsel (GC) of the National Labor Relations Board (NLRB) is taking an active interest in employees' use of social media to discuss working conditions.³ The GC recently released three memoranda analyzing whether employees' social media activities are protected concerted activity under the National Labor Relations Act (NLRA).⁴ In the most recent memo, the GC focused exclusively on social media policies.⁵ The GC analyzed overly broad policies attempting to address a variety of issues, including protected concerted activity, insider trading, and employer endorsements.⁶ Additionally, for the first time ever, the GC approved an entire social media policy as lawful and included a copy of the policy for employers.⁷ However, employers continue struggling to develop effective social media policies despite the availability of the GC's advice memos.⁸

In addition to the GC providing protection to employees' online conduct, individual state legislation is also providing protection to employees who engage in social media activities.⁹ Specific states have off-duty protection statutes providing protection to employees for off-duty conduct, and in 2013, several states enacted employment-specific social media legislation, while others continue work to enact similar legislation.¹⁰ Employers must also consider whether their business is located in a state requiring termination for good cause or having anti-bullying legislation.¹¹ Thus, the breadth of restrictions employers need to consider is quite broad

Commission issued new rules to regulate internet endorsements, and the FBI recently funded a dedicated task force to scour social media for insider trading violations).

³ See *infra* text accompanying notes 45–47 (discussing three memos published by the GC specifically focusing on the social media's impact in the employment context).

⁴ See *infra* text accompanying notes 30–31, 188–189, 195 (discussing these three memos. The GC's memo shows employers continue to struggle drafting lawful policy provisions because the GC's memo dedicates 20 pages to analyzing unlawful policy provisions).

⁵ See *infra* text accompanying note 46 (explaining that the GC's memo addressed only social media policies and whether the provisions were lawful or unlawful).

⁶ See *infra* text accompanying notes 57–66, 69–72, 84–92, 102–103, 106–109, 122–127, 172–174, 177–181, 190–194, 198, 202, 209, 216–219 (providing the overly broad policy language embracing protected concerted activity and attempting to address insider trading, employer product, or service endorsements).

⁷ See *infra* text accompanying note 47 (detailing why the GC approved an entire social media policy and incorporating a copy of the approved policy).

⁸ See *supra* note 3 and accompanying text (stating that employers continue to struggle to draft lawful social media policies).

⁹ See *infra* text accompanying notes 227–229 (detailing the states with off-duty protection statutes or acts specifically addressing social media in the employment context).

¹⁰ See *infra* text accompanying notes 227–229 (discussing state off-duty protection statutes).

¹¹ See *infra* text accompanying notes 231, 261 (explaining that Montana requires termination for good cause and other states have anti-bullying statutes).

and extends further than just the GC's concerns for protected concerted activity.¹²

This comment provides an in-depth analysis of the GC's first approved social media policy in light of the GC's recent application of labor laws to the social media policy context and other restrictions employers must consider when drafting a policy.¹³ This comment reviews both the approved policy and the GC's analysis setting forth why he deemed it lawful, and describes why other policy provisions are lawful.¹⁴ Comparing the approved policy with other lawful policy provisions demonstrates that the GC consistently analyzes certain policy provisions and provides employers some reliable tools to use when drafting a social media policy.¹⁵ However, not all the approved policy provisions warranted the GC's seal of approval.¹⁶

Many of the approved policy provisions are inadequate because individual state legislation is not properly incorporated, and the GC's inconsistency in evaluating specific social media policy provisions warrants consideration before implementation.¹⁷ Additionally, the policy does not incorporate off-duty protection statutes or new legislation specifically governing social media in the employment context.¹⁸ The GC is also inconsistent in his analysis of many policy provisions, including veiled threats against employees, provisions requiring honesty and accuracy, provisions encouraging employees to utilize internal procedures, and provisions attempting to limit discussions of confidential information in violation of insider trading regulations.¹⁹ The highlighted deficiencies are not without remedies, but require employers to engage in thoughtful, thorough consideration to cure the approved policy's weaknesses.²⁰

¹² See *infra* text accompanying notes 203–204, 227–231, 261 (describing additional FTC regulations, termination for good cause, anti-bullying statutes, and insider trading considerations employers need to consider).

¹³ See *infra* text accompanying notes 30–32, 44–45, 132–135 (detailing the old labor laws being applied in the social media context, both for protected concerted activity and employer surveillance).

¹⁴ See *infra* text accompanying notes 276–277, 281–282, 285–287, 291–292, 298–306 (analyzing why additional provisions of the approved policy are lawful).

¹⁵ See *infra* text accompanying notes 66–68, 73–75, 278–295 (providing the analysis as to why the approved policy provisions are lawful).

¹⁶ See *infra* text accompanying notes 334, 337, 341, 347, 355 (arguing the GC should have invalidated some of the policy provisions because the provisions violate the GC's general test for social media policies).

¹⁷ See *infra* text accompanying notes 314–325, 331–355 (describing the off-duty protection statutes, which the approved policy failed to incorporate, and the inconsistencies in the GC's analysis).

¹⁸ See *infra* text accompanying notes 315–329 (describing off-duty protection statutes and recent social media legislation).

¹⁹ See *supra* note 16 and accompanying text (describing the approved policy's failures and inconsistencies).

²⁰ See *infra* text accompanying note 274 (stating the approved policy's deficiencies can be fixed by referring to the GC's general test for social media policies).

This comment provides solutions to the approved policy's inadequacies and inconsistencies based on careful analysis of the GC's policy provision evaluations and review of relevant case law and GC advice memos.²¹ Employers must tailor their social media policies to their particular industry and use the approved policy only as a guide as its application is limited to a specific industry.²² The GC provides reliable guidance to employers by consistently rejecting the use of a savings clause and consistently treating limiting language favorably.²³ Thus, when reviewing an employer's policy, employers can reasonably infer the GC will favorably view use of limiting language and absence of a savings clause.²⁴ However, the GC's inconsistency in evaluating specific policy provisions means employers must look to previous memos and the approved policy language to craft lawful policy provisions.²⁵ Employers must also recognize that the approved policy does not reference all the important areas employers need to consider, such as off-duty protection statutes, recent social media legislation, unlawful surveillance restrictions, and notifying employees of how the policy is monitored and enforced.²⁶ The areas the policy fails to address warrant consideration and must be incorporated into an employer's social media policy.²⁷ Finally, this comment encourages employers to conduct an investigation before terminating an employee for online conduct in violation of an employer's social media policy because the employer risks liability for terminating an employee lawfully engaged in protected concerted activity.²⁸

The approved policy is an excellent resource for employers, but as this comment argues below, it can only serve as a template because the

²¹ See *infra* text accompanying notes 360–362 (describing recommended changes employers must make to correct the deficiencies of the approved policy).

²² See *infra* text accompanying notes 364–368 (detailing why employers need to tailor the policy to their specific industry because this policy was drafted for a specific company within a specific industry).

²³ See *infra* text accompanying notes 369–377 (analyzing the tests employers can reasonably rely on because the GC is consistent in its favorable treatment of limiting language and its rejection of a savings clause).

²⁴ See *infra* text accompanying notes 369–373 (arguing the GC's analysis of limiting language and absence of a savings clause are features employers can reasonably rely on when drafting a social media policy).

²⁵ See *infra* text accompanying notes 374–390 (referring to the advice memos and previous policies to correct the errors of the approved policy when the GC is inconsistent in its analysis).

²⁶ See *infra* text accompanying notes 314–330, 391–398, 403 (describing areas the approved policy fails to incorporate).

²⁷ See *supra* note 26 and accompanying text (arguing the approved policy's failures, in addition to omitted provisions, require employers to diligently correct the mistakes of the approved policy and draft additional provisions to ensure their policy is comprehensive).

²⁸ See *infra* text accompanying notes 408–410 (recommending employers conduct an investigation before terminating an employee for violations of an employer's social media policy).

interplay between social media, employers, and employees continues to grow, and many areas are left unaddressed.²⁹ Properly protecting an employer's business through a valid social media policy, while recognizing employees' lawful rights, requires a clear understanding of the current state of the law.

II. BACKGROUND

A. Protected Concerted Activity under Section 7 of the National Labor Relations Act (NLRA)

Employers must understand the history and interpretation of the NLRA in order to understand how the GC applies the law to social media. The history of employees engaging in concerted activity to improve their working conditions is extensive and ever-evolving, beginning with Section 7 of the NLRA, which provides protection to employees engaging in concerted activities.³⁰ NLRA gives employees the right to work in concert for mutual aid and protection to improve the terms and conditions of employment.³¹ Employees' guaranteed right to engage in concerted activities is protected from an employer's interference, restraint, or coercion because the employer's unlawful interference is an unfair labor practice.³²

In *Meyers Industries v. NLRB*, the NLRB created the *Meyers* test to define concerted activity, and the test is cited throughout the GC social media memos.³³ The NLRB defined activity as concerted when an employee acts with the authority of other employees or on behalf of those employees, and the employee is not acting solely for himself.³⁴ The NLRB reasoned that concerted activity included circumstances where individual employees seek to initiate, induce, or prepare for group action, including when employees

²⁹ See *infra* text accompanying notes 399–407 (describing areas of the law that are left unresolved).

³⁰ 29 U.S.C. § 157 (2006); see also 29 U.S.C. § 152 (2006) (providing that the NLRA covers employers whose business affects interstate commerce with the exception of agricultural and domestic workers, independent contractors, employees of a parent or a spouse, and supervisors).

³¹ See 29 U.S.C. § 157 (“Employees shall have the right to engage in . . . concerted activities for the purpose of . . . mutual aid or protection.”).

³² 29 U.S.C. § 158 (2006).

³³ See Advice Memorandum From the NLRB Office of the Gen. Counsel to All Reg'l Dirs., Officers-In-Charge, and Resident Officers, Memorandum 12–31, *Report of the Acting Gen. Counsel Concerning Social Media Cases* (Jan. 24, 2012), available at <http://mynlrb.nlr.gov/link/document.aspx/09031d45807d6567> [hereinafter Jan. 2012 NLRB Memo]; Advice Memorandum From the NLRB Office of the Gen. Counsel to All Reg'l Dirs., Officers-In-Charge, and Resident Officers, Memorandum 11–74, *Report of the Acting Gen. Counsel Concerning Social Media Cases* (Aug. 18, 2011), available at <http://mynlrb.nlr.gov/link/document.aspx/09031d458056e743> [hereinafter Aug. 2011 NLRB Memo].

³⁴ Jan. 2012 NLRB Memo, *supra* note 33, at 4.

discuss concerns together prior to any specific plan to engage in group action.³⁵ The NLRB found an individual's actions may receive protection under the NLRA if the employee can show the actions or concerns are the logical outgrowth of other employees' apprehensions.³⁶ However, the NLRB excludes protection under concerted activity when the individual acts for his or her own benefit.³⁷

Washington Aluminum Company changed labor relations and how employers responded to employee actions by expanding the NLRA to non-union settings.³⁸ In *Washington Aluminum Company*, seven employees walked off the job because they could not work in the shop due to its cold temperature, and previous complaints to management had proved unsuccessful.³⁹ The employees were discharged for violating the company policy that forbade leaving the shop without permission.⁴⁰ The Court found the employees engaged in concerted activity because they worked together to improve their working conditions.⁴¹ The Court reasoned the policy was unlawful because the policy prohibited employees from engaging in concerted activities to improve working conditions and violated the employees' rights.⁴² The employees' right to engage in protected concerted activity was of paramount importance because "[t]hey had no bargaining representative and, in fact, no representative of any kind to present their grievances to their employer. Under these circumstances, they had to speak for themselves as best they could."⁴³ The impact of *Washington Aluminum Company* expanded the NLRA's coverage for employees' protected concerted activities to include non-union settings, resulting in the NLRA's application to unionized workplaces, workplaces engaged in a union campaign, and non-union workplaces.⁴⁴

³⁵ Advice Memorandum from the NLRB Office of the Gen. Counsel to Wanda Pate Jones, Reg'l Dir. of Region 27, *Pub. Serv. Credit Union*, No. 27-CA-21923, 2011 WL 5822506, at 3 (Nov. 1, 2011), available at <http://mynlrb.nlr.gov/link/document.aspx/09031d45806fc018> [hereinafter Public Service Credit Union Advice Memo].

³⁶ *NLRB v. Mike Yurosek & Son*, 53 F.3d 261, 265 (1995).

³⁷ Public Service Credit Union Advice Memo, *supra* note 35, at 4.

³⁸ See *NLRB v. Wash. Aluminum Co.*, 370 U.S. 9, 14 (1962); see also Robert Sprague, *Facebook Meets The NLRB: Employee Online Communications And Unfair Labor Practices*, 14 U. PA. J. BUS. L. 957, 959 (2012) [hereinafter Sprague, *Employee Online Communications*]; Ann C. McGinley & Ryan P. McGinley-Stempel, *Beyond the Water Cooler: Speech and the Workplace in an Era of Social Media*, 30 HOFSTRA LAB. & EMP. L.J. 75, 88 (2012) (stating that many employers believe the NLRA only governs behavior in private unionized workplaces or workplaces in the midst of union drives).

³⁹ *Wash. Aluminum Co.*, 370 U.S. at 10–11. The employees worked in the shop producing aluminum products. The shop was not insulated and the only source of heat was an oil furnace in the adjoining building. On the day in question, the oil furnace was broken and the temperatures were 11 degrees with a high of 22 with unusually high winds. *Id.*

⁴⁰ *Id.* at 16.

⁴¹ *Id.* at 14.

⁴² *Id.* at 14–15.

⁴³ *Id.* at 14.

⁴⁴ McGinley & McGinley-Stempel, *supra* note 38, at 88.

The GC applies the NLRB's protected concerted activity precedent to the social media context and periodically issues summary memoranda of the cases the GC reviews.⁴⁵ The GC recently released a memo specifically analyzing six unlawful social media policy provisions and detailing why the policy provisions are overly broad.⁴⁶ The GC also analyzed Wal-Mart's (a national corporation) social media policy and concluded all its provisions were lawful.⁴⁷ The approved policy acts as a template for employers seeking to draft employment policies with lawful social media provisions; however, employers are encouraged to exercise great care in drafting a social media policy and to conduct an investigation into any employees' conduct to determine whether the employees' actions are protected concerted activity before concluding disciplinary action, including termination, is warranted.⁴⁸

B. The GC's Tests for Lawful Social Media Policies

Employers are encouraged to learn the contours of the term "concerted activity" to avoid drafting social media policies that ultimately

⁴⁵ See Jan. 2012 NLRB Memo, *supra* note 33; Aug. 2011 NLRB Memo, *supra* note 33; Advice Memorandum From the NLRB Office of the Gen. Counsel to All Reg'l Dirs., Officers-In-Charge, and Resident Officers, Memorandum 12-59, *Report of the Acting Gen. Counsel Concerning Social Media Cases* (May 30, 2012), available at <http://mynlrb.nlr.gov/link/document.aspx/09031d4580a375cd> [hereinafter May 2012 NLRB Memo]; see also *The General Counsel*, NAT'L LAB. REL. BOARD, <http://www.nlr.gov/who-we-are/general-counsel> (last visited Apr. 6, 2013) (describing the GC as independent from the NLRB and acting as the agency's top investigative and prosecutorial position which includes exercising supervisory authority over all the NLRB's field offices. The GC guides policy by issuing complaints, seeking injunctions, and enforcing the Board's decisions).

⁴⁶ May 2012 NLRB Memo, *supra* note 45, at 2-20; see also Kevin Bogardus, *Obama Nominates NLRB Members Who Were Ruled Invalid in Court*, (Feb. 13, 2013, 12:47 PM), <http://thehill.com/blogs/on-the-money/1007-other/282833-obama-re-nominates-nlrb-members-who-were-ruled-invalid-in-court> (stating that the D.C. Circuit Court invalidated Obama's recess appointments to the NLRB, and stating lawmakers are challenging the NLRB's decisions since January 2012, including the social media memo with the approved policy provision. Whether the social media memo will survive the challenge or whether the decisions will be adopted by the new appointees is unknown).

⁴⁷ May 2012 NLRB Memo, *supra* note 45, at 20-24; see also Advice Memorandum From the NLRB Office of the Gen. Counsel to Chip Harrell, Reg'l Dir. of Region 11, *Walmart*, No. 11-CA-067171, at 1 (May 30, 2012), available at <http://www.nlr.gov/case/11-CA-067171>.

⁴⁸ Ariana Green, *Using Social Networking To Discuss Work: NLRB Protection for Derogatory Employee Speech and Concerted Activity*, 27 BERKELEY TECH. L.J. 837, 887 (2012); see also Christopher J. Pyles, *NLRB General Counsel Summarizes 3rd Social Media Guidance Memo*, 17 No. 7 N.H. EMP. L. LETTER 1, 1 (2012) (reminding employers the approved policy is a helpful guide, but drafting a social media policy requires a great deal of care); Susan C. Hudson & Karla K. Roberts (Camp), *Drafting and Implementing an Effective Social Media Policy*, 18 TEX. WESLEYAN L. REV. 767, 795 (2012) (stating an employer must take the time to investigate any alleged violations of a social media policy).

violate employees' rights to engage in such activity.⁴⁹ Employers must also learn the GC's test for determining whether a policy provision violates employee rights.⁵⁰ The GC applies a two-prong inquiry when reviewing employers' social media policies.⁵¹ Under the first prong of the inquiry, the GC evaluates whether the provision explicitly restricts protected concerted activities.⁵² If the policy expressly restricts protected concerted activities, the policy is invalid. The second prong of the inquiry is reached if the provision does not explicitly restrict the activities but: (1) employees may reasonably construe the language to prohibit protected concerted activity; (2) the rule was promulgated in response to union activity; or (3) the rule was applied to restrict the exercise of concerted activity.⁵³ The GC deems a policy unlawful, under the second prong of the inquiry, when the ambiguous language may reasonably be construed to prohibit protected concerted activity because it is not clarified by sufficiently limiting language.⁵⁴ Using the two-prong inquiry, the GC found an entire social media policy lawful because it did not explicitly restrict concerted activities and, according to the GC, was written in such a way that employees would not reasonably construe the policy language to include protected concerted activity.⁵⁵

C. The GC's Approved Policy Addresses Many Inadequacies of Previously Invalidated Provisions.

The GC's approved policy attempts to address inadequacies of employers' invalid social media policies.⁵⁶ The policy begins with a "guidelines" section to notify employees that engaging in any conduct covered by the social media policy may result in disciplinary action or termination, provided the employee's actions adversely affect the employee's job performance, the performance of co-workers, or organizations or individuals affiliated with the employer.⁵⁷ The policy goes on to include a "Be Respectful," provision just like other policies have attempted to

⁴⁹ See Hudson & Roberts, *supra* note 48, at 779–80 (stating public and private employers must grant unionized and non-unionized employees the unequivocal right to engage in concerted activity).

⁵⁰ See *id.* at 780 (explaining that the GC released a memorandum detailing what the GC considered "protected concerted activity" in the social media context).

⁵¹ May 2012 NLRB Memo, *supra* note 45, at 3.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.* at 20.

⁵⁶ *Id.* at 2.

⁵⁷ See May 2012 NLRB Memo, *supra* note 45, at 22 ("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.").

incorporate.⁵⁸ The policy language requires employees to always be fair and courteous to fellow co-workers, customers, members, suppliers, or third-parties working on behalf of the employer.⁵⁹ The policy language also encourages employees to utilize the open door policy to resolve work related disputes, but does not prevent employees from posting criticisms online; however, employees are precluded from posting criticisms or complaints in the form of statements, photographs, video, or audio that may be construed as malicious, obscene, threatening, intimidating, harassing, disparaging or defamatory to customers, co-workers, and third-parties working on behalf of the employer.⁶⁰ The policy includes examples of offensive posts, such as “posts meant to intentionally harm someone’s reputation” and posts about a person’s sex, creed, religion, or disability that contribute to a hostile work environment.⁶¹

The approved policy language also instructs employees to be completely accurate and honest when posting online.⁶² For example, employees are required to always be honest and accurate when posting information or news, and quickly correct any mistakes.⁶³ In the same provision requiring honesty and accuracy, the employer reminds employees the internet archives almost everything, and therefore even deleted posts may be recovered.⁶⁴ Employees are further instructed never to post any information the employee knows to be false or misleading information about the employer, associates, or third-parties working on behalf of the employer.⁶⁵

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.* at 22–23. The policy language states:

[K]eep in mind that you are more likely to resolve 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.

Id.

⁶¹ *See id.* at 23 (“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.”).

⁶² May 2012 NLRB Memo, *supra* note 45 at 23. One policy provision heading is “Be Honest and Accurate.” *Id.*

⁶³ *See id.* (“Make sure you are always honest and accurate when posting information or news, and if you make a mistake, correct it quickly.”).

⁶⁴ *See id.* (“Remember that the Internet archives almost everything; therefore, even deleted postings can be searched.”).

⁶⁵ *See id.* (“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.”).

The GC provided some guidance by explaining why the “Be Respectful” provision of the approved policy is lawful.⁶⁶ First, the GC noted the “Be Respectful” provision could be overly broad, but did not violate the GC’s two-prong inquiry because the policy contained sufficiently limiting language to exclude protected concerted activity.⁶⁷ Secondly, a reasonable employee is not likely to read the “Be Respectful” provision as interfering with protected concerted activity.⁶⁸

The GC’s analysis of the approved social media policy also addresses employers’ trade secret and confidential information concerns.⁶⁹ The approved policy requires employees maintain confidential or private information and trade secrets.⁷⁰ In addition, the approved provision provides examples of trade secrets and additional information that an employee may not post.⁷¹ The approved policy also requires employees to respect financial disclosure laws and addresses recent Federal Trade Commission (FTC) regulations.⁷²

The GC provides minimal guidance explaining why the trademark and confidential information provisions are lawful.⁷³ First, the GC finds the trade secret policy provision lawful because employees do not have a protected right to disclose trade secrets.⁷⁴ Second, the GC found

⁶⁶ See *id.* at 20 (“[W]e concluded the Employer’s revised social media policy is not ambiguous because it provides sufficient examples of prohibited conduct . . .”).

⁶⁷ May 2012 NLRB Memo, *supra* note 45, at 20.

⁶⁸ See *id.* (“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 so that employees would not reasonably construe the rule to prohibit [protected concerted activity].”).

⁶⁹ See *id.* at 23 (describing the heading of the policy provision “Post Only Appropriate and Respectful Content”).

⁷⁰ See *id.* (“Maintain the confidentiality of [Employer] trade secrets and private or confidential information.”).

⁷¹ See *id.* (“Trade 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.”).

⁷² See *id.* (“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.”). The provision further states:

Do not create a link from your blog, website or other social networking site to a [Employer] website without first 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] If you do publish a blog or a 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].”

May 2012 NLRB Memo, *supra* note 45, at 23.

⁷³ *Id.* at 20.

⁷⁴ *Id.*

“confidential information” is accompanied by sufficiently limiting examples to exclude protected concerted activity.⁷⁵

The GC does not provide any guidance regarding why the complete restriction on social media at work is lawful.⁷⁶ The employer explicitly prohibits employees from using social media during work time or on work equipment without authorization.⁷⁷ The employer also prohibits employees from using work email addresses to register for personal social media use.⁷⁸ Until the GC provides firm policy guidance on this issue, employers may have to rely on the sparse case law and scholarly commentary.⁷⁹

D. Unlawful Social Media Policy Provisions Prompting the Release of an Approved Policy for Guidance

The GC issued two previous summary memoranda including discussions of social media cases and social media policies.⁸⁰ The memos show a pattern of repeated failures by employers to draft lawful policy

⁷⁵ *Id.*

⁷⁶ *See id.* at 23 (providing no guidance in the “Using Social Media At Work” provision).

⁷⁷ *See id.* (“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.”).

⁷⁸ *See* May 2012 NLRB Memo, *supra* note 45, at 23 (“Do not use [Employer] email addresses to register on social networks, blogs or other online tools utilized for personal use.”).

⁷⁹ *See* Hudson & Roberts 774–76 (providing and discussing four options for employers when regulating social media use); Robert Sprague, *Invasion of the Social Networks: Blurring the Line Between Personal Life and the Employment Relationship*, 50 U. LOUISVILLE L. REV. 1, 34 (2011) [hereinafter Sprague, *Invasion of the Social Networks*] (suggesting employers regulate and monitor employees’ work-related online conduct); *see also* City of Ontario v. Quon, 130 S.Ct. 2619, 2630 (2010) (stating a clearly communicated policy will help define an employee’s reasonable expectations of privacy when it comes to monitoring communication activity); Stengart v. Loving Care Agency, Inc., 990 A.2d 650, 660 (2010) (examining the reasonable expectations of non-governmental employees when determining whether a former a non-governmental employee exchanged emails with her attorney on a work laptop about a discrimination lawsuit. The court noted that the 4th Amendment search and seizure “reasonable expectation of privacy” does not apply to non-governmental employees, but stated that common law reasonable expectations of privacy with regard to attorney-client privilege were applicable); *but see* Aventa Learning, Inc. v. K12, Inc., 830 F. Supp. 2d 1083, 1109–11 (W.D. Wash. 2011) (declining to follow *Stengart* when a non-governmental employee claimed a reasonable expectation of privacy for attorney-client communications saved and emails sent on a company laptop. The employer’s policy was broad and applied to all resources used for electronic communications and reserved the company’s right to access, search, or disclose any file or stored communication. The employee’s communications were encompassed within the policy, and therefore the employee did not have a reasonable expectation of privacy and waived his privilege with regard to the communications).

⁸⁰ *See generally* Aug. 2011 NLRB Memo, *supra* note 33; Jan. 2012 NLRB Memo, *supra* note 33.

provisions with sufficiently limiting language to exclude protected concerted activity.⁸¹

1. Overly Broad Policy Provisions Deemed Invalid for Lack of Sufficiently Limiting Language

There are several instances where the GC declares employment policies invalid when social media provisions explicitly restrict protected concerted activity.⁸² For example, the GC found the following policy language unlawful: “Don’t release confidential guest, team member or company information.”⁸³ The GC found the language explicitly prohibited protected concerted activity because a reasonable employee might interpret the language as preventing a discussion about employment terms and conditions with other employees.⁸⁴ The GC also invalidated a provision for encouraging employees to use internal procedures, rather than social media, to resolve their disputes.⁸⁵ The GC reasoned an employer may suggest an employee utilize internal procedures to address work conditions; however, telling employees to utilize internal procedures will likely preclude, or at least inhibit, employees from engaging in protected activity in alternative forums like social media.⁸⁶ In both instances, the GC used the first prong of the test to determine the policy explicitly restricted protected concerted activity and struck down the policy as invalid.⁸⁷

⁸¹ See generally Jan. 2012 NLRB Memo, *supra* note 34; May 2012 NLRB Memo, *supra* note 45 (describing various unlawful and lawful social media policy provisions).

⁸² See Aug. 2011 NLRB Memo, *supra* note 33; Jan. 2012 NLRB Memo, *supra* note 33; May 2012 NLRB Memo, *supra* note 45.

⁸³ May 2012 NLRB Memo, *supra* note 45, at 4.

⁸⁴ *Id.*; see also Jan. 2012 NLRB Memo, *supra* note 33, at 13 (declaring a policy provision unlawful because it failed to use sufficiently limiting language or specific examples in defining confidential, material, or nonpublic information); Aug. 2011 NLRB Memo, *supra* note 33, at 20 (failing provide sufficiently limiting language for “confidential, company, or team-member information” to exclude protected concerted activity).

⁸⁵ May 2012 NLRB Memo, *supra* note 45, at 11.

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.

Id. (alterations in original).

⁸⁶ *Id.*

⁸⁷ See *id.* (stating the rule had the probable effect of precluding or inhibiting protected concerted activity. The GC did not discuss whether a reasonable employee may construe the provision as encompassing protected activity, which is the second step of the GC’s test for social media policies).

The GC also provided an example of an invalid, overly broad social media policy provision that employees might reasonably interpret as prohibiting protected concerted activity.⁸⁸ The policy provision attempted to limit sharing confidential information.⁸⁹ The policy stated:

You also need to protect confidential information when you communicate it . . . You should never share confidential information with another team member unless they have a need to know the information to do their job . . . 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.⁹⁰

The policy language is invalid because employees might reasonably interpret the provision as restricting employee discussions about the terms and conditions of employment at home, in the break room, or in other public places.⁹¹ As such, policy language attempting to limit discussions about employment terms does not contain sufficiently limiting language and is declared invalid.⁹²

Even when employers attempt to use limiting language to exclude protected concerted activity, the GC may decide the qualifying language fails to exclude protected concerted activity because a reasonable employee may construe it to include discussions about the terms and conditions of employment.⁹³ The unlawful policy provision qualified the terms “material non-public information” and “confidential or proprietary information” as “company performance, contracts, customer wins or losses, customer plans, maintenance, shutdowns, work stoppages, cost increases, customer news or business related travel plans or schedules.”⁹⁴ The GC first concluded the terms “material non-public information” and “confidential or proprietary information” were too vague, and an employee may reasonably construe the language as encompassing protected concerted activity.⁹⁵ The GC then moved on to the limiting language and concluded all the terms may reasonably encompass protected concerted activity because information about company performance, cost increases, and customer wins or losses is potentially relevant in union negotiations for employees’ wages and benefits.⁹⁶ The limiting language about contracts, without sufficient

⁸⁸ *Id.* at 4–5.

⁸⁹ *Id.*

⁹⁰ May 2012 NLRB Memo, *supra* note 45, at 4.

⁹¹ *Id.* at 5.

⁹² *Id.*

⁹³ *Id.* at 12.

⁹⁴ *Id.*

⁹⁵ *Id.* at 13.

⁹⁶ May 2012 NLRB Memo, *supra* note 45, at 13.

clarification, can also be reasonably interpreted to include union contracts.⁹⁷ Therefore, the entire policy provision, even with limiting language, fails because the terms lack enough clarity to prevent an employee from reasonably construing the terms to include protected concerted activity.⁹⁸

The GC also declared policies requiring complete accuracy in online posts unlawful because such a requirement is overly broad and fails to protect employees' right to engage in protected concerted activity.⁹⁹ Requiring accuracy in online posts may reasonably relate to employees' discussion of an employer's labor policies and an employer's treatment of employees.¹⁰⁰ For example, the GC found a motor vehicle manufacturer's social media policy to be overly broad where the policy stated, "you must also be sure that your posts are completely accurate and not misleading."¹⁰¹ The GC reasoned that an employer's policy requiring complete accuracy was unlawful for lack of limiting language excluding protected concerted activity and may reasonably be interpreted to include discussions about the terms and conditions of employment.¹⁰² Therefore, the GC found the policy provision overly broad because the policy language encompassed protected concerted activities.¹⁰³

2. Overly Broad Policies Preventing Employees From Posting Music, Photos, or Videos with an Employer's Logo Violate Employees' Rights to Engage in Protected Concerted Activity.

The GC finds employment policies unlawful when an employee may reasonably interpret the language to restrict the employee's ability to post photos, music, or videos to the internet.¹⁰⁴ For example, unlawful policies include those prohibiting employees from posting images, music, video, quotes, or the personal information of others without the owner's consent and assurances the content may legally be shared.¹⁰⁵ Unlawful policies also

⁹⁷ *Id.* at 12.

⁹⁸ *Id.*

⁹⁹ *Id.* at 6–7.

¹⁰⁰ *Id.* at 6.

¹⁰¹ *Id.*

¹⁰² May 2012 NLRB Memo, *supra* note 45, at 6–7. The NRLA does protect criticisms and discussions about an employer's employment terms and conditions, but the NRLA does not extend protections to employees who post maliciously false information. *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 7; *see also* Jan 2012 NLRB Memo, *supra* note 33, at 14 (describing an invalid policy prohibiting use of the company name or company logo without permission); Aug. 2011 NLRB Memo, *supra* note 33, at 6, 22 (declaring a policy invalid for restricting employees from posting images depicting themselves and the company in any media, including the internet, in company uniform or corporate logo and declaring a policy prohibiting the posting of images with the company logo or company store).

¹⁰⁵ May 2012 NLRB Memo, *supra* note 45, at 7 ("The Employer's policy also unlawfully prohibits employees from posting photos, music, videos, and the quotes and

include those forbidding employees from using an employer's logos or trademarks.¹⁰⁶ Both provisions are unlawful because employees may interpret the provisions as prohibiting posting images or video of concerted activity.¹⁰⁷ To illustrate, an employee may lawfully post photos or videos of co-workers with picket signs that contain an employer's logo as protected concerted activity.¹⁰⁸ Thus, policy provisions preventing employees from posting images with an employer's logo or trademark are invalid because they explicitly restrict an employee's ability to engage in protected concerted activity.¹⁰⁹

Even though employers may have a proprietary interest in trademarks, the GC states that employers' interests in trademark law are not impinged by an employee's use of the logo in protected concerted activity, such as paper leaflets, cartoons, or picket signs protesting the employment terms and conditions.¹¹⁰ The GC declares employees' non-commercial use of the logos or trademarks cannot be restricted in social media policies, reasoning the activity does not infringe on the employers' interests.¹¹¹ Thus, the GC finds the employers' proprietary interests are not placed at risk by the employees' non-commercial use of trademarks in connection with concerted activity.¹¹²

3. The Use of a Savings Clause Will Not Cure a Policy's Ambiguities.

Many employer social media policies contain what has become known as a "savings clause."¹¹³ In the employment context, a savings clause is a clause inserted into an employment policy for the purpose of curing ambiguities in the policy that may result from the intentional use of overly broad language or boilerplate language to correct unintentionally ambiguous language.¹¹⁴ Employers frequently phrase savings clauses to suggest that

personal information of others without obtaining the owner's permission and ensuring that the content can be legally shared . . .").

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*; see also Aug. 2011 NLRB Memo, *supra* note 33, at 6, 22 (detailing an employee's right to carry a picket sign with an employer's name or wear a t-shirt portraying the employer's logo in connection with a protest involving employment terms and conditions).

¹⁰⁹ See Aug. 2011 NLRB Memo, *supra* note 33, at 6, 22 (stating that the policy provisions violate Section 8(a)(1) of the NLR Act because an employer is restricting the employees' ability to engage in protected concerted activity).

¹¹⁰ Jan. 2012 NLRB Memo, *supra* note 33, at 14 (explaining that employers' interests in trademarks may include the good reputation associated with the mark, the public's interest in not being misled as to the product's source, or the employers' interest in entering a related commercial field).

¹¹¹ May 2012 NLRB Memo, *supra* note 45, at 7.

¹¹² Jan. 2012 NLRB Memo, *supra* note 33, at 14.

¹¹³ See, e.g., *id.* at 8; May 2012 NLRB Memo, *supra* note 45, at 9.

¹¹⁴ May 2012 NLRB Memo, *supra* note 45, at 9.

their policies are being administered in accordance with the NLRA.¹¹⁵ However, in reality, the policies may not align with the NLRA.¹¹⁶ In fact, the GC rejects employers' use of savings clauses for two specific reasons. First, employees may refrain from engaging in protected concerted activity rather than determine if his or her conduct is covered.¹¹⁷ Second, the savings clause is an employer's attempt to escape the consequences of an overly broad provision.¹¹⁸

4. The GC Deems Employment Policies Requiring Respect and Prohibiting Disparaging Remarks as Overly Broad.

Under the NLRA, employers may not restrain employees from discussing the terms and conditions of employment and overly broad policies are unlawful when reasonably interpreted to restrain an employee's right to engage in protected concerted activity.¹¹⁹ The GC deems employment policies requiring respect and prohibiting disparaging remarks as overly broad.¹²⁰ An example of an overly broad social media policy prohibiting disparaging remarks includes the following language: "offensive, demeaning, abusive, or inappropriate remarks are as out of place online as they are offline, even if they are unintentional."¹²¹ The GC reasoned the policy failed for over-breadth because the provision may reasonably be construed to encompass a broad range of communications, some of which may include protected criticisms of an employer's labor policies or work conditions.¹²²

¹¹⁵ *Id.* The savings clause stated that the "[p]olicy will be administered in compliance with applicable laws and regulations (including Section 7 of the National Labor Relations Act)." *Id.*

¹¹⁶ *See id.* (explaining that employers cannot rely on the savings clause to cure any ambiguities within the policy).

¹¹⁷ Advice Memorandum from the NLRB Office of the Gen. Counsel to Rochelle Kentov, Reg'l Dir. of Region 12, *Flagler Hospital*, No. 12-CA-27031, 2011 WL 5115074, at 5 (May 10, 2011), available at <http://mynlrb.nlr.gov/link/document.aspx/09031d45806bab9c>.

¹¹⁸ *See generally* May 2012 NLRB Memo, *supra* note 45, at 9, 12 (rejecting two social media policies with savings clauses); Jan. 2012 NLRB Memo, *supra* note 33, at 8 (rejecting the use of a savings clause).

¹¹⁹ *See* Aug. 2011 NLRB Memo, *supra* note 33, at 12 (describing as invalid a policy provision informing employees they are subject to discipline for inappropriate discussions about the company, management, and/or co-workers because the provision may restrict protected concerted activity).

¹²⁰ May 2012 NLRB Memo, *supra* note 45, at 8.

¹²¹ *Id.* *See also* Jan. 2012 NLRB Memo, *supra* note 33, at 7–8 (declaring a policy invalid for requiring employees to discuss terms and conditions of employment in an appropriate manner, but failing to define appropriate with sufficiently limiting language or specific examples); Aug. 2011 NLRB Memo, *supra* note 33, at 12 (declaring a provision invalid for prohibiting inappropriate discussions because it lacked sufficiently limiting language to exclude protected concerted activity).

¹²² May 2012 NLRB Memo, *supra* note 45, at 8.

The GC also deems provisions requiring employees to adopt a friendly, professional tone while conversing online as overly broad because such provisions are reasonably construed to include protected concerted activity.¹²³ For example, a policy was invalid because it instructed employees to stay away from objectionable or inflammatory statements, such as politics or religion.¹²⁴ The GC analogized discussions about politics and religion to discussions about unionism or working conditions, finding both contain the same potential to become heated.¹²⁵ Preventing employees from posting objectionable or inflammatory comments may be construed to limit heated discussions about unionism or working conditions.¹²⁶ The policy was also invalid because the provision did not contain sufficient examples of what types of communication constitute “objectionable” or “inflammatory,” and thus employees may reasonably have construed this provision to include protected concerted activities.¹²⁷

In addition to the policy language, the GC evaluates the context surrounding the conversation giving rise to the disparaging remarks to determine whether the employees’ conversation may reasonably encompass concerted activity.¹²⁸ For example, three hospital employees posted disparaging remarks regarding patients and the employees’ willingness to provide patient care.¹²⁹ The GC did not find the employees engaged in protected concerted activity, reasoning the postings were not related to employment terms and conditions because the employees suggested they may not provide appropriate care to the employer’s patients.¹³⁰

E. Surveillance in Violation of the NLRA

Under NLRA Section 8(a)(1), an employer must not give the impression it is engaging in surveillance of concerted activity because

¹²³ *Id.* at 10. One invalid provision stated “[a]dopt a friendly tone when engaging online. Don’t pick fights. . . . Remember to communicate in a professional tone. . . .” *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*; see also Advice Memorandum From the NLRB Office of the Gen. Counsel to Jonathan B. Kreisberg, Reg’l Dir. of Region 34, *Am. Med. Response of Conn., Inc.*, No. 34-CA-12576, at 3–5, 9 (Oct. 5, 2010), available at <http://mynlrb.nlr.gov/link/document.aspx/09031d458055b9c4> (stating an employee was denied union representation and later proceeded to call her boss a “dick” and a “scumbag” on Facebook and the GC found this concerted activity because it related to terms and conditions of employment).

¹²⁶ May 2012 NLRB Memo, *supra* note 45, at 10.

¹²⁷ *Id.*

¹²⁸ Advice Memorandum From the NLRB Office of the Gen. Counsel to Director J. Michael Lightner, Reg’l Dir. of Region 22, *MONOC*, No. 22-CA-29008, et al., 2010 WL 4685855, at 2 (May 5, 2010), available at <http://mynlrb.nlr.gov/link/document.aspx/09031d45803f7e3b>.

¹²⁹ *Id.*

¹³⁰ *Id.* at 5 (explaining some of the postings may have included protected activity, but the postings creating the grounds for termination did not relate to the terms and conditions of employment).

surveillance constitutes unlawful interference by preventing employees from feeling free to participate in union activities and causing employees to fear management is watching the employees' activities.¹³¹ An employee's activities are under surveillance when the employer reveals specific information about protected concerted activity that is generally not known, and the employer does not reveal its source.¹³² However, no impression of surveillance is created when the employer explains the information came from a co-worker and was unsolicited by the employer.¹³³

Specific to the social media context, unlawful surveillance does not exist when an employer's agent has been invited to observe an employee's social media page, when the activities are not related to a union or for mutual aid and protection, and when the employer did not direct the surveillance or the employer did not make the surveillance its express purpose.¹³⁴ Employer surveillance creates tension in its application to social media because more employees are "friending" or "connecting" with their bosses on Facebook, Twitter, and LinkedIn.¹³⁵ Several cases address this tension.

The GC's Buel Advice Memo is one illustration of the tension between an employer's alleged surveillance and the employee's suggestion that he engaged in protected concerted activity.¹³⁶ In the Buel Advice Memo, an employee truck driver was friends on Facebook with the employer's operations manager.¹³⁷ The employee's Facebook post complained about one of the employer's dispatcher's unavailability and unresponsiveness to a road closure.¹³⁸ The employer's operations manager commented on the employee's Facebook post, triggering an exchange of comments between the employee and operations manager.¹³⁹ The employee claimed that when he returned to work, he was stripped of his lead operations status and forced to resign.¹⁴⁰ The employee contended the employer engaged in unlawful surveillance by monitoring his Facebook page.¹⁴¹

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.* at 6.

¹³⁴ Advice Memorandum from the NLRB Office of the Gen. Counsel to Jane North, Acting Reg'l Dir. of Region 11, *Buel, Inc.*, No. 11-CA-22936, 2011 WL 3793671, at 4 (July 28, 2011), available at <http://mynlrb.nlr.gov/link/document.aspx/09031d45805fa7fc> [hereinafter Buel Truck Memo].

¹³⁵ Sprague, *Employee Online Communications*, *supra* note 38, at 957 (suggesting that "the nature of social media technologies raises new issues of unlawful employer surveillance").

¹³⁶ Buel Truck Memo, *supra* note 134, at 2; see also Jan. 2012 NLRB Memo, *supra* note 33, at 32.

¹³⁷ Buel Truck Memo, *supra* note 134, at 2.

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.* 2–3.

¹⁴¹ *Id.* at 3.

The GC rejected the employee's claim and found the employer did not engage in unlawful surveillance for three reasons.¹⁴² The GC did not find unlawful surveillance in this instance because when the employee "friended" his supervisor, he invited the operations manager to legally view his page, the employee's posts were not union or concerted activity, and the employer did not request its operations manager to monitor the employee's Facebook page.¹⁴³ The GC's memo suggests unlawful surveillance may occur if an employer is on Facebook, or directs an employee or an agent to use Facebook for the sole purpose of monitoring employees' postings.¹⁴⁴

Another illustration of the tension between employer surveillance and protected concerted activity involved Intermountain Specialized Abuse and Treatment Center.¹⁴⁵ The employee was a director and therapist at the Center and led group therapy discussions.¹⁴⁶ In response to reports of poor performance, a supervisor announced at a staff meeting the employee was to be replaced by another therapist at specific therapy sessions.¹⁴⁷ Following the meeting, the employee posted a status update on her Facebook page stating she hated staff meetings, prompting a co-worker to comment on her post.¹⁴⁸ Fellow co-workers subsequently reported the Facebook posts to management.¹⁴⁹ Several days later, and after additional reports of poor performance, the employee was discharged.¹⁵⁰ The employee alleged the employer engaged in unlawful surveillance of her Facebook page in violation of her rights.¹⁵¹ The treatment facility responded by arguing the employer did not engage in unlawful surveillance because the employer's determination to

¹⁴² *Id.*

¹⁴³ Buel Truck Memo, *supra* note 134, at 3–4 (stating there was no indication the employee's gripes were a continuation of concerted activity or sought to induce or prepare for group action. The GC found the employee expressed his individual gripes and frustration).

¹⁴⁴ *Id.* at 5.

¹⁴⁵ Advice Memorandum from the NLRB Office of the Gen. Counsel to Wanda Pate Jones, Reg'l Dir. of Region 27, *Intermountain Specialized Abuse Treatment Center*, No. 27-CA-065577, 2011 WL 6543306, at 1 (Dec. 6, 2011), available at <http://mynlrb.nlr.gov/link/document.aspx/09031d458077b79d> [hereinafter ISATC Memo]. The therapy center provides services to families, offenders, and others affected by domestic violence. *Id.*

¹⁴⁶ *Id.* at 2.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 3. The employee posted, "I hate staff meeting [sic] at work. I feel like I'm taking crazy pills." *Id.* Some co-workers "liked" the comment and the following conversation ensued with a co-worker:

Co-worker: "Is this where we can complain about work? I was so fried yesterday . . . that I probably did not make sense."

Co-worker: "But I'll have what you're having."

Charging Party: "Yeah, I guess this is the place. You too? I'm done trying to understand our boss . . . And what is it we do for a living again?"

Co-worker: "yeah the sooner you're done with that the better. We're therapists."

ISATC Memo, *supra* note 145, at 3.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 4.

¹⁵¹ *Id.* at 1.

terminate the employee could not reasonably have been construed to suggest the employee's Facebook page was under surveillance.¹⁵²

The GC rejected the employee's argument of unlawful surveillance because the Facebook posts were presented to management by a co-worker, and the posts did not involve concerted activity.¹⁵³ Therefore, the employee's termination was lawful and the employer did not engage in unlawful surveillance.¹⁵⁴

A third illustration involved the Public Service Credit Union.¹⁵⁵ The employee was a member service representative and provided customer service to the credit union's customers.¹⁵⁶ A customer approached the employee asking if he could change his PIN at the ATM; the employee replied it was not possible at that branch, but another ATM ten minutes away would allow the customer to change his PIN.¹⁵⁷ The customer stated his intent to drive to Fort Collins, Colorado and asked if that Credit Union's ATM would allow the customer to also change his PIN; the employee replied both ATMs allowed for a PIN change.¹⁵⁸ The employee's supervisor approached him later in the day because the customer called complaining that the employee directed the customer to drive to Fort Collins and the supervisor requested the employee provide better customer service.¹⁵⁹ The employee posted to his Facebook page a series of negative comments out of frustration with the customer and with regard to how the supervisor addressed the issue.¹⁶⁰ The employee was Facebook "friends" with nine workers and one supervisor, and his Facebook settings made his page only visible to his Facebook "friends."¹⁶¹ Several days after the incident, the employee was called into a meeting with the Branch Manager and Human Resources Officer, and the employee was terminated.¹⁶² The Human Resources Officer showed the employee copies of his Facebook posts but refused to identify how the employer received the information.¹⁶³ The employee claimed he was unlawfully discharged and that the employer engaged in unlawful surveillance.¹⁶⁴

¹⁵² See *id.* at 3 (stating the employer did not solicit the information).

¹⁵³ *Id.* at 4–6 (stating the employee knew which co-worker presented her Facebook posts to management. The statements were personal gripes and did not indicate she sought to induce group action or change anything at work).

¹⁵⁴ ISATC Memo, *supra* note 145, at 4–6.

¹⁵⁵ Public Service Credit Union Advice Memo, *supra* note 35, at 1.

¹⁵⁶ *Id.* at 1.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 1–2.

¹⁶¹ Public Service Credit Union Advice Memo, *supra* note 35, at 1.

¹⁶² *Id.* at 2.

¹⁶³ *Id.*

¹⁶⁴ *Id.*

The GC dismissed the employee's complaint and concluded the employer did not engage in unlawful surveillance.¹⁶⁵ The GC analogized this case to a previous case where it was found that an employer did not create the impression of surveillance when the employer mentioned a union website posting forwarded by an employee and the employer failed to disclose its source.¹⁶⁶ In that case, the website was only accessible to other subscribers, so the employee could reason another subscriber provided the information to the employer rather than conclude that the employer had engaged in surveillance of the website.¹⁶⁷ In the Credit Union case, the GC reasoned the employee's Facebook postings were only visible to the employee's Facebook "friends," and therefore the information provided to the employer came from a "friend" rather than through surveillance of the employee's Facebook page.¹⁶⁸ Further, the GC dismissed the employer's failure to identify the source because the employee's privacy restrictions allowed the employee to reason (albeit correctly) that a "friend" supplied a copy of the posting.¹⁶⁹ Thus, an employer does not engage in unlawful surveillance and does not need to reveal its source when an employee's Facebook privacy settings are restricted only to friends because the employee can reasonably conclude the information came from a friend rather than through an employer's surveillance.¹⁷⁰

1. Invalid Social Media Policies Attempting to Incorporate Rules from Unlawful Surveillance Advice Memoranda

The GC analyzed, and declared invalid, several specific provisions of social media policies that attempted to incorporate rules from the advice memoranda prohibiting employer surveillance.¹⁷¹ One policy the GC found unlawful specifically stated:

[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: [r]eport any unusual or inappropriate internal social media activity to the system administrator."¹⁷²

¹⁶⁵ *Id.* at 1.

¹⁶⁶ *Id.* at 4; *see also* Frontier Tel. of Rochester, Inc., 344 N.L.R.B. 1270, 1275–76 (2005), *enforced*, 181 F. App'x 85 (2d Cir. 2006).

¹⁶⁷ Public Service Credit Union Advice Memo, *supra* note 35, at 4.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ May 2012 NLRB Memo, *supra* note 45, at 6–8.

¹⁷² *Id.* at 8 (alterations in original).

The GC held the policy language was invalid for encouraging employees to report to management the union activity of other employees, even though the provision did not specifically authorize employees to engage in unlawful surveillance on behalf of the employer.¹⁷³ The GC reasoned the language was unlawful because protected concerted activity was discouraged.¹⁷⁴

A second policy provision declared invalid by the GC required the employer's permission before an employee posts a comment when the employee is unsure whether the post would violate the employer's policy.¹⁷⁵ Even though the GC did not expressly find the employer's provision violated the prohibition on employer surveillance, the GC invalidated the provision, reasoning that any provision requiring employees to obtain permission before engaging in protected activity is unlawful.¹⁷⁶

A third example of invalid policy language incorporating unlawful surveillance rules warns employees to "[t]hink carefully about 'friending' co-workers . . . on external social networking 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."¹⁷⁷ The GC reasoned the provision was unlawful because the language discouraged communications among co-workers and interfered with the employees' right to engage in protected concerted activities.¹⁷⁸

The final example of an unlawful social media policy provision contained a veiled threat to employees.¹⁷⁹ The policy provision instructed employees that internal consequences could result from a violation of the employer's policies, and consequences could also occur externally with outside individuals or entities.¹⁸⁰ The GC reasoned the social media language pertaining to internal and external consequences was unlawful because the provision discouraged online postings that could include protected concerted activities.¹⁸¹

¹⁷³ *Id.* at 9.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at 7.

¹⁷⁶ *Id.*

¹⁷⁷ May 2012 NLRB Memo, *supra* note 45, at 8.

¹⁷⁸ *Id.* at 8–9.

¹⁷⁹ *Id.* at 11 (“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.”).

¹⁸⁰ *Id.*

¹⁸¹ *Id.* at 11–12.

2. *Unresolved Issues Concerning an Employee's Right to Privacy and an Employer's Monitoring System*

Besides *drafting* lawful social media policies, one of the biggest concerns facing employers is *enforcement* of social media policies.¹⁸² Under the unlawful surveillance standard, an employer cannot monitor and enforce a policy for illegal or coercive purposes.¹⁸³ However, what remains unclear is whether an employer engages in unlawful surveillance if an employee's posts become available simply because the employer is a "friend-of-a-friend" of the employee on Facebook.¹⁸⁴ Also, it is unclear whether the employer is monitoring concerted activity if the employer follows an employee on Twitter or learns of the information from an employee's publicly visible account.¹⁸⁵ Furthermore, the employer may only have a right to monitor activities for which the employee lacks a reasonable expectation of privacy.¹⁸⁶

F. Social Media Policies, Trade Secrets, Confidential Information and the NLRA

The GC declares employees do not have a protected right to disclose trade secrets and confidential information.¹⁸⁷ However, like the concerted activity provisions, the social media policy must contain sufficiently limiting language to ensure the provision cannot reasonably be construed to chill protected concerted activities, outlined by the GC's test for ambiguity.¹⁸⁸ Such a provision may appear easy to draft, but the GC analyzed several policy provisions prohibiting disclosure of confidential information and found each provision unlawful.¹⁸⁹

For example, a policy forbidding employees from discussing any confidential information is overly broad and unlawful because the language may reasonably be construed to prohibit discussions about the terms and conditions of employment.¹⁹⁰ A provision stating "[d]on't release confidential guest, team member, or company information" is unlawful

¹⁸² Hudson & Roberts, *supra* note 48, at 793.

¹⁸³ *Id.* at 794.

¹⁸⁴ Sprague, *Employee Online Communications*, *supra* note 38, at 1009.

¹⁸⁵ *Id.* at 1010–11. Robert Sprague suggests that an employer who purposefully follows an employee on Twitter is engaged in surveillance but this has not been expressly addressed by the GC. *Id.*

¹⁸⁶ Hudson & Roberts, *supra* note 48, at 793.

¹⁸⁷ May 2012 NLRB Memo, *supra* note 45, at 20.

¹⁸⁸ Jan. 2012 NLRB Memo, *supra* note 33, at 12 (stating a policy provision incorporating both unprotected conduct (disclosure of trade secrets) and protected conduct (confidential information) without sufficiently limiting the language is unlawful for overbreadth).

¹⁸⁹ May 2012 NLRB Memo, *supra* note 45, at 4–7.

¹⁹⁰ *Id.* at 4–5.

because the language can reasonably be construed to prohibit employees from discussing the terms and conditions of employment, which is considered protected concerted activity.¹⁹¹ The right to engage in concerted activity is protected by the NLRA, and without sufficiently limiting language to exclude protected concerted activities, the provision is overly broad and unlawful.¹⁹²

Another example of an invalid policy contained language allowing the release of confidential information on a need to know basis.¹⁹³ The provision stated, “You also need to protect confidential information when you communicate it. . . . 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.”¹⁹⁴ The GC found this provision unlawful, reasoning the provision prohibits employees from engaging in the employees’ right to discuss the terms and conditions of employment.¹⁹⁵

A third employer received partial approval from the GC for a provision restricting the release of trade secrets and confidential information.¹⁹⁶ The policy stated:

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.¹⁹⁷

The GC found part of the provision potentially lawful because the provision urged employees to respect pertinent copyright and intellectual property laws.¹⁹⁸ However, the GC ultimately deemed the provision unlawful because requiring employees to seek permission may interfere with an employee’s right to take and post images of a picket line or video of employees working in unsafe conditions.¹⁹⁹ The employer’s permission requirement caused the GC to find the entire provision unlawful.²⁰⁰

¹⁹¹ *Id.* at 4.

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ May 2012 NLRB Memo, *supra* note 45, at 5.

¹⁹⁶ *Id.* at 10–11.

¹⁹⁷ *Id.* (alterations in original).

¹⁹⁸ *Id.* at 11.

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

Finally, the GC declared a policy provision unlawful because the term “material non-public information” was overly broad and vague.²⁰¹ The GC deemed “material non-public information” overly broad; absent clarification, the term could reasonably be interpreted to restrict employees’ social media postings about employment terms and conditions.²⁰²

Federal agents are reminding employers to consider financial disclosure laws and employers should anticipate developments in this area when reviewing social media policies.²⁰³ The FBI announced a specific taskforce designed to search social media websites in an effort to ferret out insider trading violations.²⁰⁴ Present case law does not address whether a posting via social media qualifies as a whistleblower “report” under federal or state statutes.²⁰⁵ Absent clear guidance, employers should evaluate the employees’ statements and conduct a complete investigation to determine if the employees’ statements are covered under whistleblower or anti-retaliation laws.²⁰⁶

G. Federal Trade Commission Rules, Social Media Policies, and Review by the GC

The GC lends support to the FTC rules for employers’ product or services endorsements on the internet.²⁰⁷ Such inter-agency support is critical because employers risk liability for employees’ violations of the new FTC

²⁰¹ May 2012 NLRB Memo, *supra* note 45, *Id.* at 13.

²⁰² *See id.* (stating that the provision is invalid because it contains examples such as company performance, cost increases, and customer wins or losses that may be relevant to collective bargaining negotiations and those examples encompass protected concerted activity).

²⁰³ *See generally* Matthew Goldstein & Jennifer Ablan, *FBI Uses Twitter, Social Media to Look for Securities Fraud*, REUTERS, Nov. 26, 2012, http://www.reuters.com/article/2012/11/26/net-us-investment-summit-fbi-idUSBRE8AP0EX20121126?feedType=RSS&feedName=technologyNews&utm_source=dlvr.it&utm_medium=twitter&dlvrit=56505 (stating the FBI views social media as a potential area for securities fraud and is dedicated to reviewing social media for violations).

²⁰⁴ *Id.*

²⁰⁵ Hudson & Roberts, *supra* note 48, at 796; *see also* Advice Memorandum From the NLRB Office of the Gen. Counsel to Ronald K. Hooks, Reg’l Dir. of Region 26, *TAW, Inc.*, No. 26-CA-63082, at 1 (Nov. 22, 2011), *available at* <http://mynlrb.nlr.gov/link/document.aspx/09031d4580755f55> (describing an employee post on Facebook alleging her employer was fraudulent in an audit and the employee was terminated for her social media statements. GC found the employee did not engage in concerted activity because she was informed the employer did not engage in fraud; yet, the employee refused to remove the posting).

²⁰⁶ Hudson & Roberts, *supra* note 48, at 796.

²⁰⁷ Jan. 2012 NLRB Memo, *supra* note 33, at 17–18 (describing a lawful policy provision prohibiting publishing of promotional conduct and stating it is lawful because includes preface and refers to FTC regulations); *see also* May 2012 NLRB Memo, *supra* note 45, at 16.

rules.²⁰⁸ Employers must ensure employees receive proper notification in the social media policy detailing how to comply with the FTC guidelines, while simultaneously ensuring employees will not reasonably construe the policy language to include protected concerted activity.²⁰⁹

The FTC's revised rules for internet reviews are contained in the FTC's Guide Concerning the Use of Endorsements and Testimonials in Advertising.²¹⁰ The new rules are intended to protect consumers by creating guidelines to distinguish employer product or service endorsements from consumer endorsements.²¹¹ Under the FTC's new guidelines, an employer's social media policy must explain how to adhere to the FTC's new standards if an employee is using social media to endorse an employer's products or services.²¹² The FTC requires an endorsement to "reflect the honest opinions, findings, beliefs, or experience of the endorser."²¹³ A lawful social media policy (according to the FTC) requires the employee to disclose any connection to the employer and use a clear and conspicuous disclaimer.²¹⁴ The FTC states both the endorser and employer risk liability if the FTC finds a violation of the Federal Trade Commission Act guidelines.²¹⁵

The GC analyzed two policy provisions attempting to incorporate the new FTC endorsements, and the GC declared the provisions lawful, supporting the FTC's goal of protecting consumers from misrepresented endorsements.²¹⁶ The GC reviewed two provisions requiring employees to abide by the FTC regulations.²¹⁷ The first policy provision stated: "Unless you are specifically authorized to do so, you may not: . . . [r]epresent any opinion or statement as the policy or view of the [Employer] or of any

²⁰⁸ J. Thomas Rosch, Comm'r, Fed. Trade Comm'n, Endorsement and Testimonials Guide at the American Conference Institute's Regulatory Summit for Advertisers and Marketers 2–3 (June 25, 2009), available at <http://www.ftc.gov/speeches/rosch/090625roschendorsementspeech.pdf>.

²⁰⁹ See generally Jan 2012 NLRB Memo, *supra* note 33, at 17–18, May 2012 NLRB Memo, *supra* note 45, at 16 (discussing two policy provisions addressing promotional concerns and attempting to draft the provisions in lawful ways so the provisions are not construed to include protected concerted activity).

²¹⁰ 16 C.F.R. § 255.5 (2011).

²¹¹ *Id.*

²¹² Hudson & Roberts, *supra* note 48, at 787.

²¹³ 16 C.F.R. § 255.1 (2011).

²¹⁴ See Rosch, *supra* note 208, at 5–6 (cautioning a blogger to fully disclose he received a system for free because generally readers will not expect the blogger received the system in exchange for a review and material relationships between the employer and endorser must be disclosed).

²¹⁵ *Id.* at 2–3.

²¹⁶ See Jan. 2012 NLRB Memo, *supra* note 33, at 17–18 (describing a policy provision prohibiting the publishing of promotional conduct that was found lawful because it included a preface and referred to the FTC regulations); May 2012 NLRB Memo, *supra* note 45, at 16–17 (describing a policy provision requiring employees to use a disclaimer when posting about the employer as lawful because it protects the employer from unauthorized postings promoting its products or services).

²¹⁷ May 2012 NLRB Memo, *supra* note 45, at 15–16.

individual in their capacity as an employee or otherwise on behalf of the [Employer].”²¹⁸ The second provision stated: “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 permission from the President or the President’s designated agent.”²¹⁹

The GC found both provisions lawful because employees will not reasonably construe the provisions to limit comments about employee working conditions or employment.²²⁰ Further, the GC acknowledged that employers have a legitimate need for such a disclaimer to prevent unauthorized postings about its products or services.²²¹ The GC’s finding provides support for the FTC’s goal of protecting consumers from misrepresented endorsements.²²² The GC allows social media policies to prohibit employees from making unauthorized posts about an employer’s products or services.²²³

H. Define Use of Social Media During Work Hours

Scholars strongly suggest employers’ policies should define the scope of social media during work hours and should notify employees regarding how the policy is enforced.²²⁴ An employer’s ability to monitor an employee’s personal social media use at work is subject to NLRA and off-duty protection statutes.²²⁵

Recent developments, outside the GC, suggest employee posts on social media websites may be protected from misuse by an employer’s monitoring system.²²⁶ Colorado, New York, and North Dakota have broad off-duty protection statutes that provide protection to employees for off-duty

²¹⁸ *Id.* at 16.

²¹⁹ *Id.* at 15.

²²⁰ *Id.* at 15, 17; *see also* Jan. 2012 NLRB Memo, *supra* note 33, at 17 (finding a policy provision lawful when prohibiting employees from posting information related to “embargoed information” related to launch and release dates and pending reorganization because employees do not have a protected right to disclose).

²²¹ *See* May 2012 NLRB Memo, *supra* note 45, at 15, 17 (paraphrasing the two policy provisions as notifying employees that only officials designated by the employer have the authority to speak on behalf of the employer and explaining the GC’s decisions to declare both policy provisions lawful because employees will not reasonably construe the policy to prohibit concerted activity, but rather will interpret the language as prohibiting employees from falsely representing their employer).

²²² *See* Jan. 2012 NLRB Memo, *supra* note 33, at 17–18 (reasoning a policy provision is lawful for prohibiting publishing of promotional conduct because it includes a preface and refers to FTC regulations).

²²³ May 2012 Memo, *supra* note 45, at 15, 17.

²²⁴ *See* Hudson & Roberts, *supra* note 48, at 774; Sprague, *Invasion of the Social Networks*, *supra* note 79, at 34 (suggesting employers regulate and monitor employees’ work-related online conduct).

²²⁵ Hudson & Roberts, *supra* note 48, at 773.

²²⁶ *See id.* at 793 (explaining that courts are not tolerant of an employer’s use of a monitoring system to access employees’ personal social media absent a work related purpose).

activities.²²⁷ Generally, the courts in off-duty protection states do not provide clear guidance on the breadth or narrowness of some of the statutory terms when determining whether an employee's actions are covered.²²⁸ Scholars

²²⁷ Joseph Lipps, Note, *State Lifestyle Statutes and the Blogosphere: Autonomy For Private Employees in the Internet Age*, 72 OHIO ST. L.J. 645, 654 (2011); see also N.D. CENT. CODE § 14-02.4-01 (2009) ("It is the policy of this state to prohibit discrimination . . . with regard to marriage or public assistance, or participation in lawful activity off the employer's premises during nonworking hours which is not in direct conflict with the essential business-related interests of the employer."); N.Y. LAB. LAW § 201-d(b) (McKinney 2009) (prohibiting discrimination for recreational purposes, which is defined as "any lawful, leisure-time activity, for which the employee receives no compensation and which is generally engaged in for recreational purposes, including but not limited to sports, games, hobbies, exercise, reading and the viewing of television, movies and similar material."); COLO. REV. STAT. ANN. § 24-34-402.5(1) (2010) ("It shall be a discriminatory or unfair employment practice for an employer to terminate the employment of any employee due to that employee's engaging in any lawful activity off the premises of the employer during nonworking hours . . .").

²²⁸ See Lipps, *supra* note 227, at 656–61 (2011) (explaining that the Colorado statute applies only to terminations but other state statutes embrace both terminations and disciplinary actions). North Dakota's decision in *Fatland v. Quaker State* means decreasing goodwill may be covered by the statute and therefore the statute may be interpreted narrowly, but later North Dakota courts failed to affirmatively hold that an employee masturbating in a public stall was outside the confines of the off-duty protection statute, thus suggesting the court may take a broad view when interpreting the statute. *Id.* See also *Marsh v. Delta Air Lines, Inc.* 952 F. Supp. 1458, 1461, 1464 (D. Colo. 1997) (when an employee sought relief after being terminated for writing a letter to the editor criticizing the employer's hiring practices, the Colorado court interpreted "bona fide occupational requirement" to include a duty of loyalty and failed to provide the employee relief); *Watson v. Pub. Serv. Co. of Colo.*, 207 P.3d 860, 863–64 (Colo. Ct. App. 2008) (restricting the "duty of loyalty" to the facts in *Marsh* by indicating that no other Colorado court has followed *Marsh's* decision, and by taking a broad view of the statute, finding it applied to all off-duty activities, even if related to work); *Fatland v. Quaker State Corp.*, 62 F.3d 1070, 1072–73 (8th Cir. 1995) (arguing that *Fatland's* discussions about opening up a lube business represented a violation of Quaker's policy requiring specific employees to disclose potential conflicts of interests with Quaker, and, as such, *Fatland's* job of marketing Quaker's products represented a conflict of interest even though the activities occurred after hours and *Fatland* was not protected by North Dakota's off-duty protection statute); *Kolb v. Camilleri*, No. 02-CV-0117A(Sr), 2008 WL 3049855, at *13 (W.D.N.Y. Aug. 1, 2008) (concluding that picketing does not fall within the definition of "recreational activities" under the New York off-duty protection statute); *McCavitt v. Swiss Reins Am. Corp.*, 237 F.3d 166, 169–70 (2d Cir. 2001) (McLaughlin, J., concurring) (suggesting the Judge believes the "recreational activities" should be construed broadly by stating "[i]t is repugnant to our most basic ideals in free society that an employer can destroy an individual's livelihood on the basis of whom he is courting, without first having to establish that the employee's relationship is adversely affecting the employer's business interests"); *State of New York v. Wal-Mart Stores, Inc.*, 207 A.D.2d 150, 152–53 (concluding that "dating" is not covered under "recreational activities" in New York's off-duty protection statute); *but see* a dissenting opinion:

In my view, given the fact that the Legislature's primary intent in enacting Labor Law § 201-d was to curtail employers' ability to discriminate on the basis of activities that are pursued outside of work hours, and that have no bearing on one's ability to perform one's job, and concomitantly to guarantee employees a certain degree of freedom to conduct their lives as

suggest employees may receive some protection for social networking activities, depending on how the courts interpret each individual statute.²²⁹ In addition, six states, California, Delaware, Illinois, Maryland, Michigan, and New Jersey, enacted legislation preventing an employer from requiring an employee to disclose their username or password to social media accounts.²³⁰ There is no general protection for off-duty conduct except for specific states' statutory provisions, and Montana's requirement that employee termination be for good cause.²³¹ How the courts will address policy provisions incorporating termination for good cause, off-duty protection statutes, or social media legislation is unclear because the courts have not addressed any employer's social media policy provisions applying a state's employee protection statutes or the newly enacted social media legislation.²³²

In *City of Ontario v. Quon*, the Supreme Court followed Justice O'Connor's plurality opinion from a previous case to determine whether a government employer's search of an employee's pager messages was a violation of the Fourth Amendment.²³³ The Court first evaluated the operational realities of the workplace in order to determine whether an employee's Fourth Amendment rights are implicated by an employer's monitoring efforts.²³⁴ The "operational realities" analysis included an evaluation of whether the employee had a reasonable expectation of privacy.²³⁵ If the employee had a reasonable expectation of privacy, the Court moved to the second evaluation—the reasonableness under all the

they please during nonworking hours, the narrow interpretation adopted by the majority is indefensible.

Wal-Mart Stores, 207 A.D.2d at 153 (Yesawich Jr., J., dissenting).

²²⁹ See Lipps, *supra* note 227, at 664 (stating that in Colorado, a court would likely find an employee's blog or social networking activity is neither a conflict of interest nor related to employment responsibilities, but the future effect of the statute depends on whether there is still an implied "duty of loyalty." In North Dakota, given the unwillingness of the Court to affirmatively hold masturbating in a private stall falls outside the confines of the off-duty protection statute, a North Dakota court will likely protect less offensive acts like blogging or Facebook posts. Based on the New York courts' analysis of off-duty protection statutes, it is possible that internet activities are covered by the statute's term "hobbies," but there exists disagreement in whether the courts should interpret the statute narrowly or broadly).

²³⁰ *Employer Access to Social Media Username and Passwords: 2012 Legislation*, NAT'L CONF. OF ST. LEGISLATURES (Jan. 17, 2013), <http://www.ncsl.org/issues-research/telecom/employer-access-to-social-media-passwords.aspx> [hereinafter *Employer Access*].

²³¹ Lipps, *supra* note 227, at 654–55; MONT. CODE ANN. § 39-2-903 (2009). Montana is the only state that requires termination for "good cause," meaning a reasonable job-related dismissal for failure to satisfactorily perform job duties. Lipps, *supra* note 227, at 649–50; MONT. CODE ANN. § 39-2-903(5).

²³² See Lipps, *supra* note 227, at 649–53 (explaining that there is little precedent applying these statutes to internet activity); *Employer Access*, *supra* note 230 (explaining that the legislation was released in 2012 and only some states have enacted it).

²³³ *City of Ontario v. Quon*, 130 S.Ct. 2619, 2628 (2010).

²³⁴ *Id.*

²³⁵ *Id.*

circumstances of the employer's intrusion for non-investigatory, work-related purposes, and investigations for work-related misconduct.²³⁶

The Court went on to suggest the plurality opinion used to decide this case may not have been the correct approach, and the Court was reluctant to reach a broad holding implicating future cases that may not be decided.²³⁷ The Court further noted that many employers expect or at least tolerate personal internet use on employer equipment.²³⁸ The Court stated a clearly communicated, robust, and specific social media policy is a mechanism employers must use to confine employees' reasonable expectations of privacy.²³⁹

Scholars suggest governmental and non-governmental employers have the option to elect one of three provisions to satisfy the *Quon* test.²⁴⁰ First, employers may elect to ban all personal use of social media during working hours.²⁴¹ Employers face two challenges with an outright ban on social media.²⁴² First, enforcing and monitoring a ban on social media is expensive.²⁴³ Second, employers must prove to a court the operational realities of the workplace require that employees do not use social media at work.²⁴⁴ If the policy and the operational realities are inconsistent, employers risk the policy being nullified.²⁴⁵ Some agencies and major companies

²³⁶ *Id.*

²³⁷ *Id.* at 2630. The Court stated that, even if it was certain the plurality opinion was the correct approach, the Court cannot predict how employees' privacy expectations will be shaped by changes in society and a broad holding may have unforeseen implications. *Id.*

²³⁸ *Quon*, 130 S.Ct. at 2629.

²³⁹ *See id.* at 2630 (stating that clearly communicated policies related to electronic communications will help shape the reasonable expectations of government employees); *see also* *Stengart v. Loving Care Agency, Inc.*, 990 A.2d 650, 660 (2010) (looking at the reasonable expectations of non-governmental employees when determining whether a former a non-governmental employee exchanged emails with her attorney on a work laptop about a discrimination lawsuit. The court noted that the 4th Amendment search and seizure "reasonable expectation of privacy" does not apply to non-governmental employees, but common law reasonable expectations of privacy with regard to attorney-client privilege were applicable); *but see* *Aventa Learning, Inc. v. K12, Inc.*, 830 F. Supp. 2d 1083, 1109–11 (W.D. Wash. 2011) (declining to follow *Stengart* when a non-governmental employee claimed a reasonable expectation of privacy for attorney-client communications saved and emails sent on a company laptop. The employer's policy was broad and applied to all resources used for electronic communications, and reserved the company's right to access, search, or disclose any file or stored communication. The employee's communications were encompassed within the policy, and therefore the employee did not have a reasonable expectation of privacy and waived the privilege with regard to the communications).

²⁴⁰ *See* *Hudson & Roberts, supra* note 48, at 774–76 (describing three options employers may choose from).

²⁴¹ *Id.* at 774.

²⁴² *See id.* (stating the policy must be strictly enforced, the employer must strictly monitor employee use of social media, and employer must prove to the court it is within the operational realities of the workplace that employees do not use social media).

²⁴³ *Id.*

²⁴⁴ *Id.*

²⁴⁵ *Id.* at 773.

continue to ban social media use, although most employers have elected not to completely ban social media use in their social media policies.²⁴⁶

The second option strikes a middle ground by allowing personal use of social media, but only at specific times and places.²⁴⁷ Allowing restricted use of social media reflects the actual use of personal social media by employees and attempts to balance it with the company's legitimate business interests.²⁴⁸ Cases reviewed by the GC indicate employees regularly use smartphones or other devices to access social media during work hours and suggest employers currently attempt to balance employees' social media use by limiting the use to breaks.²⁴⁹ Companies allowing for restricted use of social media accept employees' use of social media during working hours, but limit its use to breaks or prohibit its use during customer interactions.²⁵⁰

The third option requires employers to allow employees unrestricted use of personal social media during work hours.²⁵¹ Encouraging social media use is beneficial because of increased company exposure through employees' posts, tweets, or other social media use (subject to FTC regulations), and allowing social media eliminates the expenses involved with implementing and monitoring a social media policy.²⁵² However, by allowing unrestricted social media use during work hours, the employer risks the loss of employee productivity in the workplace.²⁵³ Additionally, failure to monitor employees' social media use may expose the employer to liability, for example, if an employee fails to use a disclaimer for an FTC endorsement.²⁵⁴

The GC has not specifically analyzed any policies restricting, prescribing, or prohibiting the personal use of social media during working

²⁴⁶ See Lothar Determan, *Social Media @ Work—Checklist for Global Business*, BLOOMBERG SOC. MEDIA L. & POL'Y REP. (May 21, 2012), <http://www.bloomberglaw.com/document/XLJOEFG5GVG0> (stating larger companies are banning social media at work).

²⁴⁷ *Id.*

²⁴⁸ *Id.*

²⁴⁹ See Advice Memorandum From the NLRB Office of the Gen. Counsel to Wayne Gold, Reg'l Dir. of Region 5, *Children's National Medical Center*, No. 05-CA-36658, 2011 WL 6009620, at 1 (Nov. 14, 2011), available at <http://mynlrb.nlr.gov/link/document.aspx/09031d45806fc01d> (describing an employee using her iPhone during working hours to post a complaint about a co-worker); Jan. 2012 NLRB Memo, *supra* note 33, at 2 (describing an employee using her phone on her lunch break to post an expletive with the store name on Facebook).

²⁵⁰ See, e.g., *Social Networking Policy and Guidelines*, U. OF WASH. SCH. OF NURSING (Sept. 26, 2011), <http://nursing.uw.edu/sites/default/files/files/SoN-Social-Networking-Policy.pdf>.

²⁵¹ See Susan Rush, *How Zappos Makes Social Media a Part of its Company Culture*, SMARTBLOG ON SOC. MEDIA (Jan. 10, 2011), <http://smartblogs.com/social-media/2011/01/10/how-zappos-makes-social-media-a-part-of-its-company-culture> (quoting a Zappos executive who stated, “[o]ur social media policy is be yourself and don't be stupid”).

²⁵² Hudson & Roberts, *supra* note 48, at 774.

²⁵³ *Id.*

²⁵⁴ *Id.*

hours.²⁵⁵ Scholars, however, continue to provide guidance for employers on this issue.²⁵⁶ Regardless of the policy adopted, employers must provide clear notice to employees specifying an employer's stance on social media.²⁵⁷ The clear notice defines the employees' reasonable expectations of privacy and an employee's expectation is important because it is one of the factors a court may use to evaluate whether the employees' rights are violated by an employer's monitoring system.²⁵⁸ The employer must also consistently monitor and enforce its policy to prevent courts from nullifying the policy's enforcement.²⁵⁹

Finally, employers are encouraged to notify employees that the same anti-harassment and anti-discrimination standards in the workplace apply to online conduct if it creates a hostile work environment, regardless of whether it occurred during working hours or off-duty.²⁶⁰ Many states are adopting statutes prohibiting specific types of conduct.²⁶¹ Employers must remember these provisions are subject to employees' rights to discuss employment terms and conditions until the GC analyzes a policy provision and provides more detailed guidance.²⁶²

²⁵⁵ See generally Aug. 2011 NLRB Memo, *supra* note 33; Jan. 2012 NLRB Memo, *supra* note 33; May 2012 NLRB Memo, *supra* note 45.

²⁵⁶ See, e.g., Hudson & Roberts, *supra* note 48, at 773–76; Sprague, *Invasion of the Social Networks*, *supra* note 79, at 34.

²⁵⁷ See Sprague, *Invasion of the Social Networks*, *supra* note 79, at 34 (stating an employee is on actual notice when an employee acknowledges receiving an employee manual with a clear provision stating the employer is monitoring computer activity).

²⁵⁸ See *City of Ontario v. Quon*, 130 S.Ct. 2619, 2630 (2010) (stating a clearly communicated policy will help shape an employee's reasonable expectation of privacy).

²⁵⁹ Hudson & Roberts, *supra* note 48, at 774–75. The policy is only as good as its enforcement and failure to consistently enforce the policy may render it ineffective when the employer attempts to enforce it against a specific employee. *Id.*

²⁶⁰ See *id.* (stating the policy should include a provision prohibiting harassment and discrimination through social media when it creates a hostile work environment); see also *Blakey v. Cont'l Airlines, Inc.*, 164 N.J. 38, 45 (2000) (holding the employer may be directly liable if the employer fails to remedy harassment of a co-worker after the employer was put on notice and the harassment was sufficiently connected to the workplace).

²⁶¹ See, e.g., TEX. PENAL CODE ANN. § 33.07(b)(3) (West 2011) (“A person commits an offense if the person sends an electronic mail, instant message, text message, or similar communication that references a name, domain address, phone number, or other item of identifying information belonging to any person . . . with the intent to harm or defraud any person”). Delaware also enacted a specific statute:

A person is guilty of harassment when, with intent to harass, annoy or alarm another person . . . [that person] [c]ommunicates with a person by telephone, telegraph, mail or any other form of written or electronic communication in a manner which the person knows is likely to cause annoyance or alarm including, but not limited to, intrastate telephone calls initiated by vendors for the purpose of selling goods or services.

DEL. CODE ANN. tit. 11, § 1311(a)(2) (2007).

²⁶² Hudson & Roberts, *supra* note 48, at 778.

III. ANALYSIS

The approved policy is a useful template for employers because many of its provisions consistently reflect the improvements from previous policies invalidated by the GC.²⁶³ The policy does not explicitly or implicitly restrict employees' rights to engage in protected concerted activity because it allows employees to "friend" co-workers through social media, and employees may post images without obtaining employer approval first.²⁶⁴ In addition, the approved policy effectively utilizes sufficiently limiting language narrow enough to define specific categories of prohibited photos, statements, video, or audio, but broad enough so as not to limit protected concerted activity.²⁶⁵ The approved policy provides helpful guidance to employers attempting to incorporate a lawful FTC provision because the policy language addresses FTC regulations and trademark provision concerns of the employers.²⁶⁶ However, some of the provisions within the approved policy warrant caution before implementation.

Employers cannot automatically implement the approved policy without revisions because the GC is inconsistent in his analysis of numerous provisions. The GC is inconsistent in his analysis and conclusions regarding specific policy provisions, such as financial disclosure provisions, accuracy in online provisions, veiled threat provisions, and internal procedure provisions.²⁶⁷ The approved policy is also inadequate because it fails to notify employees regarding how the social media policy is monitored or enforced.²⁶⁸ For example, the approved policy may violate state off-duty protection statutes and new social media legislation.²⁶⁹ The inadequacies are not without remedies so long as the employer engages in thoughtful drafting of policy provisions.²⁷⁰

²⁶³ See *supra* text accompanying notes 67–68, 72, 216–220 (describing the approved policy's use of limiting language to exclude protected concerted activity and the approved policy's FTC provision in comparison to previously reviewed FTC policies).

²⁶⁴ See *supra* text accompanying notes 59–61 (describing the approved policy's "Be Respectful" provision, which encourages employees to utilize the open door policy but does not prohibit employees from using social media so long as postings are not egregious).

²⁶⁵ See *supra* text accompanying note 60 (providing the exact approved policy language, which states employees are precluded from posting videos, photographs, or audio that fits into specified categories).

²⁶⁶ See *supra* text accompanying notes 70–72 (providing the exact approved policy language for trademark and FTC provisions).

²⁶⁷ See *supra* notes 62–64, 75 and accompanying text (providing examples of approved policy language); *but see supra* text accompanying notes 83–84, 90–91, 93–98, 180–181 (providing examples of provisions declared unlawful).

²⁶⁸ See *supra* text accompanying note 224 (explaining that employers should notify employees how their social media policy is enforced).

²⁶⁹ See *supra* text accompanying notes 227–230 (describing the states that enacted off-duty protection statutes and the states that recently enacted social media legislation).

²⁷⁰ See *supra* text accompanying note 48 (arguing the approved policy is a great template for employers, but employers must exercise great care when drafting the employer's own policy).

The deficiencies of the approved policy are corrected after the policy is carefully tailored to an employer's business.²⁷¹ Businesses need to determine if they operate in a state with off-duty protection statutes, social media statutes, or statutes limiting termination for good cause.²⁷² Next, employers must use limiting language and reject the use of a savings clause as boilerplate policy language because the GC is consistent in his analysis of limiting language and in rejecting the use of a savings clause, thus providing two assurances employers can rely on when drafting social media policy provisions.²⁷³ Finally, employers can overcome the GC's inconsistencies in analysis and the overly broad provisions of the approved policy by testing a drafted policy against the GC's general test for social media policies.²⁷⁴

A. The Approved Policy Provision Satisfies the NLRA, Trademark, FTC, and Financial Disclosure Requirements.

The GC provides some explanation describing why specific provisions of the approved policy are lawful, but further analysis proves additional approved policy provisions are valid.²⁷⁵ For example, many of the approved provisions do not chill protected concerted activity because communications about employment terms and conditions are not restricted.²⁷⁶ In addition, the trademark and FTC provisions are lawful because the language of both approved policy provisions is consistent with the GC's previous analysis of similar policy provisions.²⁷⁷

²⁷¹ See *supra* text accompanying note 47 (stating the approved policy was drafted for Wal-Mart, a national corporation).

²⁷² See *supra* text accompanying notes 227–230 (explaining the statutory purpose and providing citations to the exact statutory language).

²⁷³ See *supra* text accompanying notes 47, 113–118 (comparing the approved policy with the GC's prior analysis on savings clauses); see also *supra* text accompanying notes 67–68, 75, 90–92, 94–98, 101–102, 120–127 (citing a variety of approved policy provisions and unlawful policy provisions and demonstrating the GC's reliance on sufficiently limiting language to either approve the policy or declare the provision unlawful).

²⁷⁴ See *supra* text accompanying notes 51–53 (detailing the GC's general test for social media policy provisions).

²⁷⁵ See *supra* text accompanying notes 67–68, 74–75 (detailing the GC's analysis for finding specific provisions lawful).

²⁷⁶ See *supra* text accompanying note 275 (explaining the provisions contain sufficiently limiting language to exclude discussions about employment terms and conditions).

²⁷⁷ See *supra* text accompanying notes 69–72, 110–112, 216–223 (providing the approved policy language for the FTC and trademark provisions and comparing the text with that from previously lawful provisions).

1. The Approved Policy Does Not Explicitly Restrict Protected Concerted Activity and Contains Sufficiently Limiting Language to Exclude Protected Concerted Activities in the NLRA, FTC, and Trademark Provisions.

Under the GC's approved policy, employees are not prevented from representing themselves through protected concerted activity.²⁷⁸ The approved policy is valid because the approved language uses sufficiently limiting language to ensure the policy does not embrace protected concerted activity, thereby curing the defects afflicting previous unlawful policies.²⁷⁹ Previous policies have prevented co-workers from "friending" each other on Facebook, required an employer's permission before posting, and prohibited employees from using social media to discuss the terms and conditions of employment.²⁸⁰ Unlike unlawful policy provisions that failed to use limiting language in provisions addressing images and video, the approved policy's provisions successfully prohibit employees from posting specific categories of statements, photos, or videos by identifying that prohibited posts are those that are discriminatory, threatening, intimidating, or malicious.²⁸¹ Thus, the provision clearly applies only to egregious conduct, such as malicious actions or threats of harm, making the approved policy superior to other unlawful policies.²⁸²

The approved policy is superior because egregious conduct cannot reasonably be interpreted by employees to include a picket line or criticisms of the terms and conditions of employment.²⁸³ Egregious conduct describes a hostile work environment, not the types of activities employees intend to use to improve terms and conditions of employment.²⁸⁴ Limiting language satisfying anti-bullying statutes requires employers to prohibit conduct intending to harm or create a hostile work environment, and the approved

²⁷⁸ See *supra* text accompanying note 61, 67–68, 75 (detailing the limiting language of the approved policy).

²⁷⁹ See *supra* note 60 and accompanying text (providing the approved limited policy language); *but see supra* text accompanying notes 177–178, 180–181 (providing unlawful policy provisions).

²⁸⁰ See *supra* text accompanying notes 83, 86, 90–91, 177, 197, 199 (providing examples of unlawful policy provisions preventing discussions about protected concerted activity, requiring permission before a post, and discouraging employees from "friending" each other on Facebook).

²⁸¹ See *supra* text accompanying notes 60, 67 (providing the approved limited policy language); *but see supra* text accompanying notes 104–109 (providing an example of an unlawful policy without sufficiently limiting language).

²⁸² See *supra* text accompanying note 61 (describing what type of conduct falls within the provision).

²⁸³ See *supra* text accompanying note 61 (describing activity by employees that is egregious in the approved policy).

²⁸⁴ See *supra* text accompanying notes 61, 68 (stating the approved policy language and stating it is not unlawful because it describes egregious conduct).

policy effectively prohibits this type of conduct while preserving the employees' rights to engage in protected concerted activity.²⁸⁵

The GC also approved the policy because the policy does not rely on a "savings clause," whereas other policies relied on the use of a savings clause to cure the provisions' ambiguities.²⁸⁶ Instead, the approved policy relies on limiting language to cure its ambiguities, as required by the GC's general test for social media policies.²⁸⁷ In addition, the approved policy is successful because it does not attempt to restrict the type of conversations in which employees may engage on the internet.

The "Be Respectful" provision does not require a friendly tone or require employees to avoid picking fights, which is an improvement from previous unlawful policies.²⁸⁸ Conversations about unionism have the potential to become heated and may require the use of an unfriendly tone, which is why it is necessary to have policy provisions that do not prohibit unfriendly tones.²⁸⁹ For example, referring to one's boss as a "dick" and a "scumbag" qualifies as an unfriendly tone, but the GC deemed the discussion as lawful because it related to the terms and conditions of employment.²⁹⁰ The risk that employees might construe the approved policy provision as preventing heated or unfriendly discussions about working conditions is minimal because the provision defines inappropriate postings as discriminatory, harassing, or intentionally malicious.²⁹¹ These categories do not prevent employees from fighting about union activities or engaging in a heated discussion about the terms and conditions of employment because such discussions will generally fall short of discriminatory, harassing, or intentionally malicious standards.²⁹²

The GC allows social media policies to prohibit employees from posting unauthorized statements on behalf of the employer, and that

²⁸⁵ See *supra* text accompanying notes 61, 261 (comparing the policy language to the types of activities covered in anti-bullying statutes).

²⁸⁶ See *supra* text accompanying notes 115–118 (describing why savings clauses are invalid).

²⁸⁷ See *supra* text accompanying notes 53, 67–68, 75 (describing how limiting language is used in the approved policies).

²⁸⁸ See *supra* notes 59–60 and accompanying text (providing the exact language of the approved policy); see also *supra* text accompanying notes 124–126 (describing an unlawful policy reasonably construed to prevent heated discussions about unionism).

²⁸⁹ See *supra* text accompanying notes 124–126 (supplying the GC's rationale for invalidating policy provisions precluding employees from engaging in heated discussions).

²⁹⁰ See *supra* note 125 and accompanying text (noting that these terms were lawful because they related to the terms and conditions of employment).

²⁹¹ See *supra* notes 59–61 and accompanying text (providing the approved policy language); see also *supra* text accompanying notes 120–127 (illustrating how the limiting language operates in comparison to an overly broad policy).

²⁹² See *supra* text accompanying notes 58–61 (providing the approved policy language); see also *supra* text accompanying notes 120–122 (describing why the GC invalidated a similar policy and applying that same analysis to the approved policy language).

prohibition is clearly articulated in the approved policy.²⁹³ For example, the GC concluded that a policy provision that restricted all employees from making statements on behalf of the employer was unlawful, and the approved policy incorporates language substantially similar to the lawful provisions.²⁹⁴ The approved policy satisfies the GC's general test because the language cannot reasonably be construed to include protected concerted activity and the GC recognizes an employer's legitimate interest in protecting against unauthorized postings on behalf of the employer.²⁹⁵ The provision is not at risk because the limiting language allows employees to create a blog or post related to working terms and conditions, provided the employees identify the statement as their own opinion and not on behalf of the employer. The approved policy language, like other previously lawful policies, clearly notifies employees they are not authorized to represent the employer and they may only make representations on personal interests. Thus, the provision effectively excludes protected concerted activity and protects against construing the language as interfering with an employee's right to discuss employment terms and conditions.

2. The Approved Policy Provision Addressing FTC Regulations and Trademark Provisions is Lawful Because the Policy Will Not Reasonably be Construed to Include Protected Concerted Activity.

The GC acknowledges an employer's legitimate need for disclaimers, like the one in the approved policy, to prevent unauthorized postings about products or services, provided the provision cannot reasonably be construed to encompass concerted activity.²⁹⁶ The GC's approved policy conforms with the FTC requirements because both the FTC and the approved policy recommend the use of a sample disclaimer and require the employee to only express her opinions and disclose the employee's relationship to the employer.²⁹⁷ The FTC requires an employee to only express her personal opinions, beliefs, findings, or experiences about an employer's products or services, as opposed to representing the statement is on behalf of the employer or representing a neutral consumer, and the approved policy conforms to this requirement by requiring an employee's

²⁹³ See *supra* text accompanying note 221 (explaining employers have a legitimate need to prevent unauthorized postings).

²⁹⁴ See *supra* text accompanying notes 72, 221 (comparing the approved policy language with a paraphrased lawful policy provision).

²⁹⁵ See *supra* text accompanying note 221 (explaining why the GC approved policy language limiting unauthorized postings).

²⁹⁶ See *supra* text accompanying note 221 (stating the GC's reasoning for approving the use of disclaimers).

²⁹⁷ See *supra* note 72 and accompanying text (explaining the new FTC requirements and providing the approved policy language).

post to reflect only her opinion.²⁹⁸ The FTC also requires an employee to disclose her connection to the employer because the FTC has an interest in protecting consumers from misrepresented endorsements of an employer's products or services.²⁹⁹ The approved policy adequately addresses the FTC's concerns by requiring an employee to disclose that she is the employer's associate, effectively eliminating any concern an employee may misrepresent an endorsement of the employer's products or services on a blog or other website.³⁰⁰ The FTC also requires a clear and conspicuous disclaimer and the approved policy mirrors this requirement by encouraging employees to use a disclaimer; it even provides a sample disclaimer to incorporate in an employee's posting.³⁰¹ Therefore, this policy effectively incorporates the new FTC standards by notifying the employee how to appropriately endorse the employer's products and services on the internet and reduces the employer's and the employee's potential liability for unlawful FTC endorsements.³⁰²

Unlike previous unlawful policies attempting to prohibit employees from posting trade secrets online, the approved policy effectively precludes employees from disclosing trade secrets and provides sufficiently limiting language to exclude protected concerted activity.³⁰³ The GC recognizes employees do not have a right to disclose trade secrets, but policies aimed at preventing such disclosures have been invalidated for using overly broad language that encompasses protected concerted activity.³⁰⁴ The approved policy remedies this problem by including sufficiently limiting language so as not to infringe on protected concerted activity.³⁰⁵ The approved policy's use of sufficiently limiting language for trade secrets (development of systems, processes, products, know-how, and technology) warrants the GC's support because it satisfies the second prong of the GC's social media test by insuring employees cannot reasonably construe "trade secrets" to include protected concerted activity.³⁰⁶ Thus, the approved policy cures the defects of

²⁹⁸ See *supra* notes 72, 213 and accompanying text (describing endorsement requirements).

²⁹⁹ See *supra* text accompanying note 214 (telling employees they must disclose their relationship to the employer).

³⁰⁰ See *supra* note 72 and accompanying text (showing that the approved policy language requires employees to disclose their relationship to the employer).

³⁰¹ See *supra* notes 72, 214 and accompanying text (requiring employees to use a clear and conspicuous disclaimer to comply with FTC regulations and the approved policy also provides a disclaimer).

³⁰² See *supra* text accompanying note 208 (explaining that the employer and the employee risk liability for an endorsement failing to meet the FTC guidelines).

³⁰³ See *supra* text accompanying notes 73–74, 187 (explaining that the GC declared employees do not have a right to disclose trade secrets).

³⁰⁴ See *supra* text accompanying note 187 (explaining the GC stated employees do not have a right to disclose trade secrets).

³⁰⁵ See *supra* text accompanying notes 73–74, 128 (comparing the GC's previous analysis to the approved policy).

³⁰⁶ See *supra* text accompanying notes 53–54, 73–74 (referring to the GC's social media test and comparing it to the approved policy language).

previous unlawful policies by relying on sufficiently limiting language to exclude protected concerted activity.

B. The Approved Policy is Insufficient Because it Fails to Consider Off-Duty Protection Statutes and New Social Media Legislation. In Addition, the Approved Policy is Insufficient Because it is an Unfair Labor Practice to Threaten Employees and Social Media Use is Expressly Prohibited Without Notification to Employees of How the Policy is Enforced.

The GC's approved social media policy fails to consider many important issues related to employers. First, the GC's approved policy fails to recognize specific state statutes giving employees additional protections.³⁰⁷ Second, the policy language contains a veiled threat to employees, which legitimate social media policies cannot do because so doing constitutes an unfair labor practice.³⁰⁸ Third, the GC is inconsistent in his analysis of specific policy provisions.³⁰⁹ Finally, the policy fails to consider whether an absolute prohibition on social media is a workable standard.³¹⁰

1. The Approved Policy Violates Off-Duty Protection Statutes Because it Fails to Incorporate the Appropriate Standards.

The approved policy violates off-duty protection statutes by threatening termination for lawful activities conducted off an employer's premises and containing a lower standard justifying termination than the off-duty statutes.³¹¹ The courts have not analyzed any provision attempting to incorporate off-duty protection statutes into the policy language, which is likely why the employer failed to incorporate similar provisions in the

³⁰⁷ See *supra* note 227 and accompanying text (discussing the different off-duty protection statutes).

³⁰⁸ See *supra* text accompanying notes 32, 64 (stating it is an unfair labor practice to restrict or coerce employees in the exercise of protected concerted activity and providing the approved policy language acted as a veiled threat to employees by reminding employees the internet archives everything).

³⁰⁹ See *supra* text accompanying notes 64, 180–181 (providing the approved policy language in comparison to overly broad policy language acting as a threat to employees); see also *supra* text accompanying notes 63, 101–102 (comparing the approved policy language requiring complete accuracy in online posts with a previously invalidated policy); see also *supra* text accompanying notes 72, 190–202 (analyzing the approved policy language forbidding the release of confidential information in comparison to previously unlawful policies); see also *supra* notes 60, 85–86 and accompanying text (comparing the approved policy language to a provision previously deemed unlawful).

³¹⁰ See *supra* text accompanying note 77 (explaining to employees that social media is prohibited at work).

³¹¹ See *supra* notes 57, 227–229 and accompanying text (arguing the sample policy language has a lower standard for termination and discipline than how the off-duty protection statutes have been interpreted).

approved policy.³¹² All off-duty protection statutes protect an employee's conduct outside of work.³¹³ If an employee is terminated or disciplined under the approved policy, the "adverse effect" language may conflict with Colorado, North Dakota, or New York's off-duty protection statutes, which is why employers need to consider the statutes' effect when drafting social media policies provisions.³¹⁴

For example, Colorado protects an employee from being fired so long as she is engaging in lawful activity during nonworking hours and off the premises of the employer, unless it is reasonably and rationally related to an employer's business—but the approved policy does not adequately meet the requirements of Colorado's statute.³¹⁵ First, the approved policy threatens employees with either disciplinary action or termination for actions that adversely affect the employer, but the statute protects employees from termination and extends protection to all off-duty activities, even if related to work.³¹⁶ Based on case law, scholars believe the Colorado courts will protect an employee's off-duty social networking conduct because it is neither a conflict of interest nor related to employment responsibilities, whereas the approved policy restricts employees' off-duty activities by threatening termination based solely on an "adverse effect."³¹⁷ Thus, the approved policy is overly broad in comparison to employees' off-duty protections awarded under the statute because both the statute and the NLRA will protect the employees' off-duty, work-related social media conduct so long as the activity is lawful or classified as protected concerted activity.

North Dakota protects employees from termination or discipline when the employee engages in a lawful activity off an employer's premises—but the approved policy infers a lower standard may be used to justify termination.³¹⁸ An employee may be terminated or disciplined for lawful activity that has an "adverse effect" on a legitimate business interest under the approved policy, meaning an employee may be unlawfully terminated for actions protected by North Dakota's statute.³¹⁹ Scholars

³¹² See *supra* note 232 and accompanying text (explaining there is little precedent applying the statutes to policies).

³¹³ See *supra* note 227 and accompanying text (providing examples of off-duty protection statutes).

³¹⁴ See *supra* notes 57, 227 and accompanying text (describing statutes providing protection to employees outside the NLRA).

³¹⁵ See *supra* note 227 and accompanying text (describing Colorado's off-duty protection statute).

³¹⁶ See *supra* notes 57, 228 and accompanying text (comparing the off-duty protection statute language to the approved policy provision requirement of "adverse effect").

³¹⁷ See *supra* notes 57, 229 and accompanying text (comparing commentary on the off-duty protection statute to the approved policy provision requirement of an "adverse effect").

³¹⁸ See *supra* notes 57, 227 and accompanying text (describing the statutory language of North Dakota's off-duty protection statute and the approved policy language).

³¹⁹ See *supra* notes 57, 227, 229 and accompanying text (comparing the approved policy provision language to North Dakota's off-duty protection statutes and commentary on

suggest North Dakota's broad view of lawful activity protects employee actions such as blogging and social media posts, and thus the approved policy's view that any activity, including activity off the employer's premises, which adversely affects the employer is too broad and embraces protected employee conduct.³²⁰

Finally, the New York statute may be interpreted quite broadly to afford employees a wide breadth of protection, whereas the approved policy restricts employees' protection from termination for online conduct.³²¹ Although New York courts have interpreted the statute narrowly, at least two judges have concluded a narrow interpretation undermines the legislature's intent, and the term "recreational activities" must be interpreted broadly.³²² The courts may interpret the statutory language to include employees' blogging, Tweeting, or Facebook as "recreational activity" or a "hobby," but the approved policy threatens either discipline or termination of an employee if an employee's action has an adverse effect on the business.³²³ Therefore, the approved policy is flawed, as it may encompass a breadth of employee activity protected by New York's off-duty protection statute.³²⁴ Absent additional judicial interpretation broadening the term "recreational activities" or "hobby" to social media posts and employee termination, the approved policy language may reasonably include protected employee conduct.³²⁵

Employers operating in states with off-duty protection statutes must ensure their social media policies do not impinge on employees' protected concerted activity rights, and employees' rights protected under the off-duty protection statutes.³²⁶ Thus, employers must not adopt the approved policy's standard of "adverse effect" for determining whether to discipline or

how North Dakota courts may apply the off-duty protection statute in the social media context).

³²⁰ See *supra* notes 57, 228 and accompanying text (arguing the approved policy language is overly broad in comparison to the case law and providing scholarly commentary on North Dakota's off-duty protection statute).

³²¹ See *supra* note 227 and accompanying text (stating New York's off-duty protection statute).

³²² See *supra* notes 57, 228–229 and accompanying text (detailing the interpretations by the NY courts and the potential for the statutory terms to embrace social media activity).

³²³ See *supra* notes 57, 228–229 and accompanying text (arguing that the approved policy provision may not be overly broad in New York because both a concurrence and dissent suggested the off-duty protection statute must be interpreted broadly).

³²⁴ See *supra* notes 57, 228–229 and accompanying text (providing the approved policy language and describing disagreements among New York judges about the proper interpretation of New York's off-duty protection statute).

³²⁵ See *supra* notes 228–229 and accompanying text (describing the different opinions of "recreational activities" and suggesting it may be extended to blogging because the terms have the potential to be interpreted broadly).

³²⁶ See *supra* notes 30–32, 227–228 and accompanying text (explaining off-duty protection statutes may provide additional protection to employees from an employer's disciplinary or termination procedures for lawful activity conducted "off-the-clock," in addition to the protections provided by the NRLA).

terminate an employee because so doing could cause an employer to run afoul of off-duty protection statutes.

2. The Approved Policy May Also Violate New Statutes Specifically Governing Social Media.

The off-duty protection statutes are not the only legislation providing employees protection; several states recently enacted legislation specifically addressing social media in the employment context, but the approved policy fails to recognize these advancements in the law.³²⁷ California, Illinois, Maryland, and Michigan now forbid employers from requiring employees to provide employers with their social media usernames and passwords, but the approved policy fails to notify employees of their right to refuse to divulge their username and passwords.³²⁸ How the courts will interpret and apply these statutes to employees will certainly develop in the coming years.³²⁹ The approved policy fails to incorporate recent statutory enactments, and employers operating within states enacting social media specific statutes must ensure any social media policy does not violate employee rights protected by the statute.³³⁰

3. The GC is Inconsistent in His Analysis and Conclusions about Provisions Containing Veiled Threats to Employees, Employers' Requirement of Complete Honesty and Accuracy, Employers' Limiting Language for Confidential Information, and Employers' Encouragement to Employees to Use the Open Door Policy.

The approved policy tells employees that the internet archives almost anything, which effectively threatens employees with a clear message that any activity can be retrieved and used as grounds for termination.³³¹ The GC is inconsistent in evaluating veiled threats to employees because he found a policy similar to the approved provision unlawful.³³² The unlawful policy

³²⁷ See *supra* notes 230–233 and accompanying text (describing the states that recently enacted legislation and demonstrating the date of the approved policy was 2012).

³²⁸ See *supra* text accompanying note 230 (describing the states that recently enacted social media legislation).

³²⁹ See *supra* note 233 and accompanying text (stating the legislation was enacted in 2012).

³³⁰ See *supra* notes 230–233 and accompanying text (demonstrating the approved policy does not incorporate the recent social media legislation, and showing four states have enacted social media legislation, while other states are currently considering social media legislation).

³³¹ See *supra* notes 57, 64 and accompanying text (showing that the approved policy guidelines clearly state employees are subject to termination or disciplinary action for violations of the policy and the approved policy later reminds employees the internet archives almost everything).

³³² See *supra* text accompanying notes 64, 178–181 (providing an example of an unlawful policy provision in comparison to the approved policy provision).

also reminds employees there are consequences for social media activities when they violate the employer's policies, and the approved policy uses similar threatening language when it states anything posted online in violation of the policy is retrievable, even if deleted.³³³ The GC found the unlawful provision chilled protected concerted activities, and the approved policy should be equally invalid because the approved policy explicitly discourages employees from engaging in protected concerted activity, and as such, violates the first prong of the GC's social media test.³³⁴

Alternatively, the approved policy also fails under the second prong of the GC's test because reasonable employees will construe the provision as limiting discussions about terms and conditions of employment by suggesting the employer may retrieve information without a report from a co-worker or without a specific invitation to view the information.³³⁵ The unlawful policy reminded employees that consequences could result from policy violations, and likewise, the approved policy suggests to employees that the employer can retrieve specific information about the employees without an invitation or revealing a source and with a result such as discipline or termination for violations.³³⁶ The GC's inconsistency in evaluating the validity of provisions sounding as veiled threats reduces the credibility of the GC's decision in rendering this policy provision lawful.³³⁷ Therefore, employers should not simply copy and paste the GC's approved policy because it contains flaws that restrict employees' rights to engage in protected concerted activity.

The GC is also inconsistent in his evaluations and ultimate conclusions regarding provisions requiring complete honesty and accuracy in online posts.³³⁸ The GC held a provision unlawful for requiring employees to be completely honest and not misleading, and the approved policy contains similar language requiring the employees to always be honest and accurate

³³³ See *supra* text accompanying notes 64, 180–181 (comparing the approved policy language to an unlawful policy provision reminding employees there are internal and external consequences for an employee's behavior online).

³³⁴ See *supra* text accompanying notes 53, 64, 178–180 (analogizing the approved policy provision to an unlawful policy provision and comparing the approved policy provision to the general GC test).

³³⁵ See *supra* text accompanying notes 53, 64, 132–133, 142 (inferring from the GC's general test for social media policy that the approved policy language may reasonably be construed to include unlawful surveillance activity).

³³⁶ See *supra* notes 64, 179 and accompanying text (stating the approved policy language, in comparison to the unlawful provision, and explaining that employers engage in unlawful surveillance by revealing specific information that is not generally known and the employer does not reveal its source.).

³³⁷ See *supra* notes 64, 179 and accompanying text (showing that the inconsistency between the outcome and the language of the two policies makes the GC's analysis suspect).

³³⁸ See *supra* text accompanying notes 62–63, 101–102 (comparing the approved policy language with a policy provision the GC previously declared unlawful).

when posting information or news.³³⁹ The GC reasoned the unlawful policy was overly broad and encompassed protected concerted activity, whereas the GC failed to provide guidance as to why the approved policy was lawful.³⁴⁰ The GC should have reasoned the approved policy was unlawful for the same reasons it deemed previous policies unlawful—employees may reasonably construe it as a limitation on discussions about the employer’s labor policies and its treatment of employees.³⁴¹ Therefore, the approved policy provision is as overly broad as the unlawful policy, and employers should be aware of this.³⁴²

The GC is also inconsistent in his analysis of the approved provision prohibiting the release of private or confidential information because the approved policy’s limiting language fails to exclude protected concerted activity.³⁴³ The GC typically invalidates social media provisions failing to use limiting language to define “confidential company” or “material” information because the terms are vague and can reasonably encompass protected concerted activity, but the approved policy is substantially similar to, if not worse than, the language used in provisions previously found unlawful.³⁴⁴ The approved policy unsuccessfully attempts to qualify the vague term “confidential information” with limiting language by restricting the term to mean “internal reports, policies, procedures, or other internal business-related confidential communications,” but these terms are more vague than language previously invalidated by the GC.³⁴⁵ The GC’s inconsistency is most apparent when comparing the two provisions’ limiting language because the unlawful provision is more precise, using terms like “company performance,” “cost increases,” and “customer wins,” while the approved policy’s language uses vague terms like “internal reports,”

³³⁹ See *supra* text accompanying notes 62–63, 101–102 (comparing the approved policy language with the unlawful policy language).

³⁴⁰ See *supra* text accompanying notes 45, 102 (providing the citation to the entire social media policy to demonstrate there is no analysis on why the policy provision is lawful; however, in the same memo the GC declared the policy provision invalid).

³⁴¹ See *supra* text accompanying notes 53, 62–63, 102 (demonstrating the approved policy provision meets the GC’s second prong and, therefore, the same analysis applied to the unlawful provision should apply the approved provision).

³⁴² See *supra* text accompanying notes 62–63, 101–102 (arguing the two policy provisions are sufficiently similar to warrant the same analysis and conclusion as the unlawful provision).

³⁴³ See *supra* text accompanying notes 68–71, 92–97, 190–202 (comparing the approved policy language with its limiting language to policy provisions the GC previously declared unlawful).

³⁴⁴ See *supra* text accompanying notes 70, 189–190, 194–195, 201–202 (comparing the approved policy language of “confidential information” with previously invalidated provisions also using the term “confidential” or “material” information).

³⁴⁵ See *supra* note 71 and accompanying text (quoting the approved policy language); see *supra* text accompanying notes 94–98 (discussing a previously invalidated provision which attempted to use limiting language).

“policies,” and “procedures.”³⁴⁶ The GC should have concluded the approved policy provision’s limiting language embraces communications relevant to union negotiations; both provisions are reasonably construed to include protected concerted activity because the limiting language is overly broad.³⁴⁷ The approved policy terms were so vague that they enveloped the unlawful policy terms, and therefore deserved the same conclusion the GC reached with regard to the unlawful provision: the limiting language is unlawful because it is relevant to union negotiations related to employees’ wages and benefits.³⁴⁸

Furthermore, the GC previously struck down the term “contract” when it was used as limiting language for the term “confidential information,” but the GC found lawful the broad and vague term “internal business-related confidential communications” in the approved policy.³⁴⁹ The GC should have concluded the approved policy’s attempt at limiting language was invalid because, like the unlawful policy, “internal business communications” may include collective bargaining agreements. The GC is inconsistent in his evaluation of confidential information, especially when employers attempt to use limiting language.³⁵⁰

Finally, the GC is inconsistent in his analysis and conclusion of provisions encouraging employees to utilize internal procedures rather than vent on social media websites.³⁵¹ The GC came to inconsistent conclusions regarding the approved policy and an unlawful provision even though both provisions explicitly encouraged employees to resolve work-related disputes by working through internal resources rather than posting complaints on the internet.³⁵² The GC reasoned the unlawful policy had the probable effect of precluding or inhibiting protected concerted activity, and the approved policy

³⁴⁶ See *supra* text accompanying notes 71, 94–98 (arguing the GC’s analysis of the approved policy’s limiting language and the analysis applied to the unlawful limiting language warrants the conclusion the approved policy is unlawful).

³⁴⁷ See *supra* text accompanying notes 96–97 (explaining the GC’s analysis for invalidating the previous policy’s limiting language and arguing the same analysis should apply to the approved policy’s limiting language).

³⁴⁸ See *supra* text accompanying notes 71, 94–98 (comparing the GC’s analysis in the previous unlawful provision to the approved provision and concluding both should be unlawful).

³⁴⁹ See *supra* note 71 and accompanying text (quoting the approved policy language); see *supra* text accompanying note 95 (comparing the approved policy provision’s term to a previously invalidated term used in a provision’s limiting language).

³⁵⁰ See *supra* text accompanying notes 71, 94–98 (arguing the GC’s analysis is inconsistent because the approved and unlawful provisions are substantially similar).

³⁵¹ See *supra* notes 60, 85–86 and accompanying text (comparing the approved policy provision to a previously invalidated provision encouraging employees to communicate with co-workers, supervisors, and managers rather than posting complaints on the internet).

³⁵² See *supra* notes 60, 85–87 and accompanying text (showing that both the approved policy and an unlawful policy encouraged employees to utilize internal procedures to resolve work disputes, but the GC only invalidated one of the provisions).

has the same probable effect.³⁵³ In both instances the employer discourages the employee from posting work-related criticisms online, and both encourage the employee to use internal procedures for redress in work-related disputes.³⁵⁴ In this case, the GC should have concluded the approved policy provision was invalid as a violation of the second prong of the GC's test because the provision may reasonably be interpreted to include protected concerted activity.³⁵⁵

4. The Approved Policy Bans Employees from Using Social Media During Work Without Notification of How the Policy is Enforced or Monitored.

Finally, under the approved policy, the employees are completely banned from using social media without any notification of how the policy is monitored or enforced, which means the social media policy is not clear or robust enough to restrict employees' reasonable expectations of privacy.³⁵⁶ The approved policy language attempts to restrict employees' reasonable expectations of privacy by expressly forbidding the use of social media during work hours, unless authorized by a manager. However, the policy language fails to notify the employee how the social media policy is monitored, and the employee may have a reasonable expectation of privacy until the employer provides notice that a monitoring system is in place.³⁵⁷ In addition, employees regularly use social media in today's workplace by using their smartphone or other personal devices, making it unreasonable to completely ban social media use at a person's place of employment.³⁵⁸ Thus, unless the employer can clearly show associates are not using social media at

³⁵³ See *supra* notes 60, 85–86 and accompanying text (comparing the similarities between the approved policy language and the unlawful policy and concluding the GC's analysis applies to both provisions).

³⁵⁴ See *supra* notes 60, 85–86 and accompanying text (showing GC should have applied the same conclusion to the approved policy and the unlawful policy because the provisions are substantially similar).

³⁵⁵ See *supra* text accompanying notes 53, 60, 85–86 (showing the GC's general test for social media and the GC's conclusion regarding a substantially similar provision warranted a conclusion the approved policy was unlawful).

³⁵⁶ See *supra* notes 77, 239 and accompanying text (stating that the approved policy prohibits the use of social media during work and the Supreme Court and other state court cases have stated a clear robust policy may help to confine an employee's reasonable expectation of privacy).

³⁵⁷ See *supra* text accompanying notes 53, 236 (providing the test used in *Quon* and other state court cases to determine whether the employee had a reasonable expectation of privacy).

³⁵⁸ See *supra* text accompanying notes 238, 249 (stating the Supreme Court recognizes many employers at least tolerate personal internet use and the GC further recognizes employees' regular use of social media).

work, the policy will fail.³⁵⁹ The employer should have acknowledged most employees use social media and prescribed its use.

C. Employers May Rely on the Approved Policy as a Template, But Must Not Adopt it Without Giving Consideration to its Limitations.

Employers must tailor the approved policy and not merely supplant the policy's boilerplate language. First, employers must evaluate the operational realities within their own state or industry, consider off-duty protection statutes and social media statutes when applicable, and clearly notify employees of how a policy is monitored and enforced to constrain employees' reasonable expectations of privacy.³⁶⁰ Second, the GC's inconsistency in his analysis of specific provisions undermines the validity and reliability of many of the approved policy provisions and requires employers to return to the GC's general test for guidance.³⁶¹ Third, employers cannot reasonably expect the approved policy to remain current, as clearly illustrated by the recent and pending enactment of social media legislation and agencies' increased attention on the impact of social media on product endorsements, insider trading, and protected concerted activity.³⁶² This is a growing area of law and any social media policy will require regular revisions to remain current and lawful. Finally, employers need to conduct a reasonable investigation before terminating an employee for his or her online postings that relate to the terms and conditions of employment to prevent against allegations of unlawful terminations.³⁶³ The GC's approved policy is a suitable template and can act as a checklist for employers when drafting or revising a social media policy after employers acknowledge the approved policy's limitations.

³⁵⁹ See *supra* text accompanying note 245 (explaining the social media policy must mirror the operational realities of the workplace; otherwise, the employer risks the policy being nullified).

³⁶⁰ See *supra* text accompanying notes 227–230, 234–235 (requiring social media policies to reflect the operational realities of the workplace and describing legislation that may impact social media policies).

³⁶¹ See *supra* notes 60, 63–64, 71, 85–86 and accompanying text (quoting the relevant lawful and unlawful policy language); see *supra* text accompanying notes 94–98, 101–102, 178–180 (comparing a variety of provisions previously reviewed by the GC).

³⁶² See *supra* text accompanying notes 185–186, 203–206, 210 (identifying ambiguities in the interaction between social media and employment law social media policies).

³⁶³ See *supra* text accompanying notes 48, 237 (inferring that changes in society may change an employee's reasonable expectations of privacy when monitoring and enforcing a policy).

1. The Approved Policy was Drafted for a National Retail Organization and is Not Suitable for Single-State Businesses or Small to Medium Multi-State Businesses.

The approved policy does not adequately address the needs of local businesses, single-state enterprises, or other industries. The approved policy is limited in its application to every business because the policy was drafted and tailored to a specific industry, a national retail organization.³⁶⁴ For example, single-state companies need to re-draft their social media provisions to consider state law such as off-duty protection statutes, termination for good cause, anti-bullying statutes, or social media statutes.³⁶⁵ The policy also does not appropriately address the social media needs of financial institutions or hospitals.³⁶⁶ Hospitals must incorporate social media provisions addressing HIPAA and notifying employees they are subject to termination for posts suggesting appropriate medical care will not be provided when necessary, both of which are not covered in the approved policy.³⁶⁷ Financial institutions must provide a more detailed discussion about financial disclosure laws and what types of conduct violates insider trading laws because the Federal Bureau of Investigation recently announced that a dedicated taskforce will search social media websites in an effort to ferret out insider trading violations.³⁶⁸ Employers cannot rely on the approved policy to adequately address every company's needs and, therefore, employers are encouraged to rely on experts within the employment industry to help tailor the approved policy to the employer's specific industry and needs.

2. The GC Provides Employers with Some Reliable Tools by Consistently Highlighting the Importance of Limiting Language and Emphasizing His Continued Rejection of a Savings Clause.

The approved social media policy demonstrates the GC's consistent reliance on limiting language to clarify any ambiguities within the policy and

³⁶⁴ See *supra* text accompanying note 47 (identifying Wal-Mart as the company that drafted the policy).

³⁶⁵ See *supra* text accompanying notes 227–231 (identifying additional considerations employers need to take into account before implementing the policy).

³⁶⁶ See *supra* text accompanying notes 129–130, 203 (identifying additional considerations, including financial disclosure and issues specific to the health care industry).

³⁶⁷ See *supra* text accompanying notes 129–130 (discussing the GC's decision that drafting disparaging posts suggesting appropriate medical care may not be rendered is not protected concerted activity).

³⁶⁸ See *supra* note 203 and accompanying text (noting that the FBI created a dedicated task force to ferret out insider trading violations).

the GC's continued rejection of a savings clause.³⁶⁹ The GC's approval of a policy that heavily relies on limiting language clearly demonstrates to employers the importance of using limiting language to clarify any ambiguities within the policy.³⁷⁰ Based on the GC's continued focus on limiting language in his three memos and the approval of a policy with plenty of limiting language, employers should infer the GC will favorably review policies utilizing sufficiently limiting language to qualify vague terms in an employment policy.³⁷¹ Along similar lines, the GC's continued rejection and the GC's subsequent approval of a policy without a savings clause means employers must not incorporate a savings clause into their social media policy, regardless of whether its purpose is boilerplate language or to cure policy ambiguities.³⁷² The GC's consistent analysis in the area of limiting language and disapproval of a savings clause provides employers reliable guidance on curing social media policy deficiencies.³⁷³

3. Employers Must Look to the GC's General Test as Guidance When the GC is Inconsistent in His Analysis or When the Approved Policy Provision is Overly Broad.

The GC's inconsistency in evaluations and conclusions related to provisions attempting to restrict employees from posting confidential information makes drafting a lawful provision difficult. Employers must instead rely on the GC's test for social media policies to effectively draft a provision to prohibit insider trading by using limiting language to exclude protected concerted activity.³⁷⁴ Also, when selecting the necessary limiting language, employers cannot select vague terms, such as "company performance," "contract," or "internal business communications," to define terms like "confidential" or "material information" because those terms are reasonably construed to encompass terms and conditions of employment.³⁷⁵

³⁶⁹ See *supra* text accompanying notes 113–118 (discussing the GC's continued rejection of savings clauses and the fact that a lack of a saving clause in the approved policy means the GC disapproves of savings clauses).

³⁷⁰ See *supra* notes 60–61, 67, 71 and accompanying text (detailing the limiting language used in the approved policy provisions).

³⁷¹ See *supra* text accompanying notes 60–61, 71, 91–98, 101–102, 120–127 (reviewing the GC's analysis of overly broad policies and inferring the GC requires limiting language).

³⁷² See *supra* text accompanying notes 113–118 (inferring that the emphasis on limiting language and the rejection of savings clauses suggest the GC only wants limiting language to cure a policy's ambiguities).

³⁷³ See *supra* text accompanying notes 60–61, 71, 91–98, 101–102, 113–118, 120–127 (showing the GC's consistent analysis throughout all the GC memos as it relates to the GC's emphasis on limiting language and rejection of a savings clause).

³⁷⁴ See *supra* text accompanying notes 52–53 (describing the GC's general test for a social media policy).

³⁷⁵ See *supra* text accompanying notes 94–97 (explaining the terms used are overly broad and include protected concerted activity).

The GC requires clear, robust limiting language to restrict the terms “material” or “confidential” information.³⁷⁶ Employers, for example, could meet the GC’s test for limiting language by stating:

Employees must maintain the confidentiality of the employer’s material non-public information. Material non-public information includes providing a tip based on inside information for the purchase and sale of securities. Material non-public information does not include employees’ protected discussions about the terms and conditions of employment, collective bargaining agreements, or union activities.³⁷⁷

The GC’s inconsistency highlights the importance of tailoring any insider trading policy provision rather than adopting the approved policy provision verbatim.

The GC is inconsistent in his evaluation and conclusions related to complete accuracy in online postings.³⁷⁸ The GC failed to analyze why the approved policy’s command of accuracy is lawful; therefore, employers must rely on the GC’s general test for social media policies to draft an appropriate provision.³⁷⁹ Employers should encourage, rather than require, employees to post only accurate and honest information because “encourage” connotes a lower standard than “require,” and therefore is not reasonably construed to prohibit concerted activity.³⁸⁰ In addition, employers must notify employees they are only subject to discipline or termination for statements that are maliciously false because employees do not receive protection under the NLRA for maliciously false statements.³⁸¹ Thus, a lawful provision will state:

³⁷⁶ See *supra* text accompanying 94–97, 191–195, 201–202 (inferring that the policy’s attempt to incorporate limiting language is not sufficiently clear to exclude protected concerted activity and other policies governing confidential information are overly broad).

³⁷⁷ See *supra* text accompanying notes 53, 72, 96–97, 138–143, 147–154, 190, 194, 201 (citing the GC’s general test for a social media policy requiring limiting language and a couple of sample cases that demonstrate the importance of notifying employees that only certain activity is protected because not all employee discussions involve protected concerted activity).

³⁷⁸ See *supra* text accompanying notes 61, 101–103 (inferring the GC is inconsistent because the GC approved a provision requiring accuracy and honesty in the approved policy, but deemed a substantially similar provision unlawful).

³⁷⁹ See *supra* text accompanying notes 47, 52–53 (referencing the approved social media policy’s failure to disclose why the approved provision is lawful and highlighting the GC’s general social media test).

³⁸⁰ See *supra* text accompanying note 102 (explaining the GC invalidates policies requiring honesty and accuracy because, without sufficiently limiting language, the policies embrace protected concerted activity).

³⁸¹ See *supra* text accompanying notes 53, 102 (explaining that comments amounting to maliciously false statements are not protected by the NLRA).

Employees are prohibited from making statements on behalf of the employer unless authorized. Employees making statements about their personal beliefs or opinions on social media websites are encouraged to be honest and accurate, but employees will be subject to discipline, including termination, for maliciously false statements or posts about a person's sex, creed, religion, or disability that contribute to a hostile work environment.³⁸²

Employers must recognize that the GC's inconsistency in analysis related to the accuracy and honesty provisions means the approved policy's honesty and accuracy provision is suspicious and warrants revision before implementation.

The GC is also inconsistent in his analysis of provisions recommending employees use internal policy procedures to resolve work related disputes.³⁸³ Employers clearly cannot explicitly require that employees use internal procedures to resolve disputes because this violates the first prong of the GC's test as an explicit restriction on protected concerted activities.³⁸⁴ The GC is inconsistent when evaluating whether provisions encouraging the use of internal procedures are reasonably construed to encompass protected concerted activity and, therefore, whether employers should instead draft provisions with some derivative of the term "suggest" because the term is arguably weaker when compared to drafting terms such as "recommend" or "encourage."³⁸⁵ The weaker language cannot reasonably be construed to preclude or inhibit employees from pursuing protected concerted activity on alternative forums, like social media, because a suggestion does not connote penalties, but rather advice that may be freely taken or discarded.³⁸⁶ Just like other inconsistent opinions by the GC, employers must recognize the GC's inconsistent analysis makes the GC's

³⁸² See *supra* text accompanying notes 52–53, 68, 102, 221 (inferring from the GC's test and other policy provisions that an employer may lawfully forbid an employee from making statements on behalf of the employer without authorization. Further, the GC prevented employers from requiring complete honesty and accuracy, but the GC reasoned in other policy provisions that maliciously false statements or egregious comments are not protected or reasonably considered to be part of protected concerted activity so there should be limiting language in a policy provision).

³⁸³ See *supra* notes 60, 85–86 and accompanying text (comparing the policy provisions to demonstrate the GC's inconsistency).

³⁸⁴ See *supra* text accompanying notes 52, 86–87 (stating that the GC applies the first part of the analysis to invalidate provisions requiring employees to utilize internal procedures over posting criticisms online, but the GC states an employer may *suggest* the employees use internal procedures rather than social media).

³⁸⁵ See *supra* text accompanying note 85–86 (explaining an employer may suggest an employee use internal procedures, while invalidating a provision that used the term "encourage").

³⁸⁶ See *supra* text accompanying note 86 (stating that an employer may "suggest" employee actions).

approval of the social media provision suspicious, and employers must test any policy provision against the GC's general test for social media policies.³⁸⁷

Finally, the GC acknowledged that some of the approved provisions are overly broad without the use of limiting language.³⁸⁸ For example, the GC stated that "Be Respectful" is overly broad without the limiting language and, therefore, any effort to tailor the approved policy by revising the limiting language must be carefully reviewed to ensure the new language meets the GC's test for social media policies.³⁸⁹ If an employer fails to reevaluate the revised policy provision after editing the limiting language, the employer risks the GC classifying the provision as overly broad because employees may reasonably construe the policy as encompassing protected concerted activity.³⁹⁰

4. A Social Media Policy Needs to Notify Employees How the Policy is Enforced and How the Approved Policy is Limited in its Guidance to Employers.

The approved policy is limited in its application to every business because the approved policy does not reflect the operational realities of most employers.³⁹¹ The approved policy fails to notify employees of how the policy is enforced and only reflects the operational realities of a particular organization; therefore, it needs to be tailored to the organizational structure of each business.³⁹² Small businesses need to evaluate the expense involved with monitoring and enforcing a prohibition on social media.³⁹³ Small businesses may find it more cost-effective to allow the use of social media during work hours because allowing social media eliminates the expense of monitoring employees.³⁹⁴ The downside of allowing social media means

³⁸⁷ See *supra* text accompanying notes 52–53, 60, 86–87 (referencing the GC's general social media test in light of the inconsistent analysis of the approved and unlawful policy provision).

³⁸⁸ See *supra* text accompanying notes 67–68 (stating the policy is overly broad but the limiting language saves the provision).

³⁸⁹ See *supra* text accompanying notes 67–68 (stating the policy is overly broad but the limiting language saves the provision and prevents a reasonable employee from interpreting the language to prohibit protected concerted activity).

³⁹⁰ See *supra* text accompanying notes 52–53 (suggesting that the GC's general test deems policies unlawful that do not include sufficient limiting language to exclude protected concerted activity).

³⁹¹ See *supra* text accompanying note 47 (stating the policy was drafted for a specific national retail organization).

³⁹² See *supra* text accompanying notes 47, 234–235 (inferring the policy does not identify how it is enforced or monitored).

³⁹³ See *supra* text accompanying notes 241–245, 252–254 (describing the costs involved with different approaches to monitoring).

³⁹⁴ See *supra* text accompanying note 252–252 (explaining that allowing social media eliminates some of the cost of monitoring and enforcement).

employees have a more reasonable expectation of privacy because the employer does not actively limit social media use.³⁹⁵ However, some companies may elect to proscribe the use of social media during working hours because there is sufficient revenue to cover the monitoring and enforcement expenses.³⁹⁶ Regardless of the policy adopted, employers must draft a clear and robust policy to restrict employees' reasonable expectations of privacy in the event the employer conducts work-related investigations for misconduct.³⁹⁷ Thus, it is important for the employer to notify employees about the monitoring system and only implement a policy that reflects the operational realities of the business.³⁹⁸

5. The Law Continues to Develop and the Approved Policy Does Not Address All the Important Areas of Law Employers Need to Consider, such as Unlawful Surveillance and What Constitutes Whistleblowing Online.

Employers must continue to update their social media policies because the approved policy only reflects the GC's current efforts to clarify the law as it relates to protected concerted activity.³⁹⁹ However, many questions are left unresolved.⁴⁰⁰ For example, the GC has not clarified whether an employer engages in unlawful surveillance if a post is available because the employer is a friend-of-a-friend, the employer engages in surveillance by following a Twitter user, or the employer finds the information on a publicly visible account.⁴⁰¹ When these issues become resolved, the employer may need to revise its social media policies to reflect the GC's current interpretation and ensure the employer is not impinging on employees' rights to engage in concerted activity.⁴⁰² Employers should refrain from asking employees or agents to view an employee's Facebook or Twitter on behalf of the employer until the GC clarifies his interpretation of the law in these areas because such actions traditionally constitute unlawful

³⁹⁵ See *supra* text accompanying note 239 (stating that a clear and robust policy shapes employees' reasonable expectations of privacy and thus, a policy allowing social media will result in employees expecting a high degree of privacy).

³⁹⁶ See *supra* text accompanying notes 241–242 (detailing the costs involved in enforcing social media policies).

³⁹⁷ See *supra* text accompanying note 236 (encouraging employers to conduct an investigation before action).

³⁹⁸ See *supra* text accompanying notes 224, 257 (recommending to employers to provide a clear policy notifying employees how the policy is enforced and monitored).

³⁹⁹ See *supra* note 45 and accompanying text (citing the GC's only three memos analyzing social media use in the employment context).

⁴⁰⁰ See *supra* text accompanying notes 184–186, 205, 227–230 (describing current ambiguities in the social media context).

⁴⁰¹ See *supra* text accompanying note 184–186 (identifying these ambiguities in unlawful surveillance).

⁴⁰² See *supra* text accompanying note 48 (reminding employers the approved policy is a template and drafting a social media policy requires a great deal of care).

surveillance.⁴⁰³ Also, an employer is advised to reveal the source of any reported social media policy violations when disciplining or terminating an employee for his or her online conduct because not every employee's social media settings are limited to "friends" only, and traditionally, an employer engaged in unlawful surveillance by failing to reveal its source.⁴⁰⁴

Additionally, case law continues to develop in the area of whistleblowing and anti-retaliation, and the approved policy does not offer guidance for employers on this issue.⁴⁰⁵ Employers do not have a clear case to rely on to draft a policy provision, so whether a report of social media qualifies as whistleblowing or a report of bad conduct is uncertain.⁴⁰⁶ Until these issues are resolved, employers are encouraged to complete a full investigation on any potential whistleblowing or anti-retaliation conduct by an employee *before* taking any disciplinary action or terminating the employee.⁴⁰⁷

6. Employers Must Conduct a Reasonable Investigation Before Terminating an Employee for Online Actions and the Employer Must Determine Whether the Posts are Reasonably Related to the Employment Terms and Conditions.

Finally, the policy should notify employees that a reasonable investigation will be conducted before any employee is terminated for online posts related to employment terms and conditions.⁴⁰⁸ Employers may risk liability for terminating an employee over social media discussions with other co-workers because the posts may be employees working in concert for mutual aid and protection, but employers do not risk liability when the posts amount to personal gripes, egregious conduct, or actions for personal benefit because such conduct is not protected by the NLRA.⁴⁰⁹ Employers must reference the GC's previous memos for guidance in differentiating between

⁴⁰³ See *supra* text accompanying notes 131–133 (describing traditional actions amounting to unlawful surveillance).

⁴⁰⁴ See *supra* text accompanying notes 132, 160–170 (stating the general rule requires unlawful surveillance but, in some limited circumstances, the employer does not have to reveal its source when viewing the employee's posts limited only to "friends" because the employee can reason a "friend" reported the postings to management).

⁴⁰⁵ See *supra* text accompanying note 205–206 (identifying an ambiguous area of the law related to whistleblowing and anti-retaliation).

⁴⁰⁶ See *supra* text accompanying note 205 (stating that no case law addresses whether a social media posting qualifies as a whistleblowing report).

⁴⁰⁷ See *supra* text accompanying note 206 (stating that employers are encouraged to conduct an investigation before termination).

⁴⁰⁸ See *supra* text accompanying note 48 (stating employers must investigate any violations of a social media policy).

⁴⁰⁹ See *supra* text accompanying notes 31–32, 137–170 (detailing the types of activities the NLRA protects and further describing three scenarios where the employee alleged he or she engaged in protected concerted activity so the employer needed to demonstrate the terminations were not in response to protected concerted activity).

protected and non-protected postings because an employer risks a court or the GC concluding the employee was unlawfully discharged.⁴¹⁰ However, employers must remember the NLRA's application to social media is just beginning, and the full parameters of that application have not been identified because the GC continues to review cases addressing social media in the employment context.

IV. CONCLUSION

The approved policy is a useful resource for employers, but it should not be blindly implemented without additional considerations.⁴¹¹ The approved policy provisions are lawful where the employer understands the current state of the law and drafts appropriate, limiting provisions.⁴¹² However, the approved policy contains many gaps, which employers must identify and correct before implementing the entire approved policy.⁴¹³ For example, employers with single-state enterprises must identify whether their state has an off-duty protection statute, specific social media legislation, and other statutes protecting employees, such as good-cause termination or anti-bullying statutes.⁴¹⁴ Further, employers must also correct the approved policy's threat to employees, the GC's inconsistencies, and be sure to draft policy language that clearly notifies employees how the policy is monitored and enforced.⁴¹⁵ While this comment provides policy language recommendations for specific social media provisions, in order to implement successful social media policies, employers must stay abreast of changes in

⁴¹⁰ See *supra* text accompanying note 45 (setting forth the GC's three memos that give employers guidance on what types of conduct constitutes protected concerted activity).

⁴¹¹ See *supra* text accompanying notes 364–368 (arguing the approved policy was designed for a specific area and requires tailoring to each employer's business).

⁴¹² See *supra* text accompanying notes 206–306 (arguing some of the approved policy provisions are lawful because of sufficiently limiting language, sufficiently meeting the FTC requirements, and not incorporating a savings clause).

⁴¹³ See *supra* text accompanying notes 307–310 (articulating some of the failures of the approved policy).

⁴¹⁴ See *supra* text accompanying notes 226–232, 311–330, 365 (describing the states with specific legislation, arguing the approved policy violates the statutory tests of off-duty protection statutes, and reminding employers to consider state specific legislation when drafting their policy provisions).

⁴¹⁵ See *supra* text accompanying notes 267–268, 308, 331–337 (arguing the approved policy contains a veiled threat to employees); see also *supra* 356–359, 391–398 (arguing the approved policy fails because it doesn't notify employees how the policy is enforced or monitored and recommending employers consider drafting language addressing how the policy is monitored and enforced within their social media policy); see also *supra* text accompanying notes 331–355, 374–387 (describing the GC's inconsistency in his analysis and arguing the inconsistency may be corrected by careful analysis of previous memos).

the law, frequently update their social media policies, and always conduct a reasonable investigation before disciplining or terminating an employee.⁴¹⁶

⁴¹⁶ *See supra* text accompanying note 408–410 (arguing employers must conduct a reasonable investigation because the law continues to develop and there are still ambiguities in the law).