

**Employee Blogs and Social Capital:  
A Time for State Legislative Action**

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## **Employee Blogs and Social Capital: A Time for State Legislative Action**

### **Abstract**

This Article addresses the issue of employee blogging and the interplay between such blogging and the asserted recent decline in American “social capital.” Relying on the recent work of Harvard political scientist Robert Putnam, we argue that blogging by employees can play an important role in helping reverse the decline in social capital but that current legal structures impede that goal. The Article proposes state legislative reforms to ameliorate this situation.

We begin Part I by developing the argument that there is an important relationship between employee blogging and American social capital. Part II presents a review of blogs and the blogging phenomena. Part III discusses blogs in the context of Professor Putnam’s path-breaking work, and examines the special place employment and the workplace have in the social capital story. Part IV more specifically analyzes the role blogs play as generators of social capital, particularly in the employment context. Part V looks at the protections afforded employee bloggers under the National Labor Relations Act. Part VI then examines the issue in the context of both state common and statutory law. In Part VII we review various options for legal reform in the area, and ultimately recommend as the best approach specific state legislative action, i.e., the amendment of state statutes protecting off-duty tobacco usage to also protect off-duty employee blogging. Part VIII concludes our work.

## I. Introduction

Blogs have become a very important part of American life, and especially its “online culture”.<sup>1</sup> Over 8 million Americans have blogs and that number is increasing exponentially on an ongoing basis.<sup>2</sup> This Article examines blogs in the context of Harvard Professor Robert D. Putnam’s recent seminal book *Bowling Alone: The Collapse and Revival of American Community*.<sup>3</sup> More specifically, it examines blogs by workers in the context of Putnam’s work.<sup>4</sup>

Putnam avers that there has been a quite sharp decline in community/social connectedness, or what he calls “social capital”, in the United States in recent decades.<sup>5</sup> Dual career families,<sup>6</sup> increased mobility,<sup>7</sup> and long commutes to work,<sup>8</sup> have all, among

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<sup>1</sup> See Pew Internet & American Life Project, *The State of Blogging*, January 2005, [http://www.pewinternet.org/pdfs/PIP\\_blogging\\_data.pdf](http://www.pewinternet.org/pdfs/PIP_blogging_data.pdf).

<sup>2</sup> *Id.* The impact that blogs are having in all aspects of our lives is beginning to catch the attention of leading legal scholars. Richard A. Posner, Book Review, *Bad News*, N.Y. TIMES, July 31, 2005, at 1 (noting how blogs are challenging existing paradigms in American politics, journalism and culture); Cass R. Sunstein, *Group Judgments: Statistical Means, Deliberation and Information Markets*, 80 N.Y.U. L. REV. 962, 1022-23 (2005) (describing the use of blogs in information sharing and information processing by groups); Michael J. Gerhardt, *Review Essay, The First Amendment’s Biggest Threat, How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity*, 89 MINN. L. REV. 1798, 1819 (2005) (describing the impact of blogs in both First Amendment and Intellectual Property law developments); R. Polk Wagner, *On Software Regulation*, 78 S. CAL. L. REV. 457, 476 (2005) (describing the explosion of blogs and its effects on the software regulation).

<sup>3</sup> Robert D. Putnam, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* (2001).

<sup>4</sup> See also Robert D. Putnam & Lewis M. Feldstein, *BETTER TOGETHER, RESTORING THE AMERICAN COMMUNITY* (2003).

<sup>5</sup> See Putnam, *supra* note 3 at 170.

<sup>6</sup> *Id.* at 194-203.

<sup>7</sup> *Id.* at 204-215.

other factors arguably contributed to the sharp American social capital decline. According to Putnam the precipitous decrease in the percentage of Americans belonging to private sector labor unions, to now only 7.8% of the workforce,<sup>9</sup> is also part of this phenomenon.

This Article argues that for many employees blogs have become the new “union hall”.<sup>10</sup> Blogs give employees the ability to communicate easily with other employees about work.<sup>11</sup> Blogs also provide employees with the opportunity to mix discussions

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<sup>8</sup> See *Extreme Commuting*, BUSINESS WEEK, Feb. 21, 2005 at 80, 81 (citing the work of Prof. Putnam).

<sup>9</sup> See *Union Members in 2004*, U.S. BUREAU OF LABOR STATISTICS, Press Release, Jan. 27, 2005.

<sup>10</sup> “Our virtual union hall is where we can simply “hang out” with our colleagues in the struggle and “carry on” about anything from world events to labor issues to home cooking recipes.” Thomas A. Santora, *The Virtual Union Hall*, 181, in THE CYBERUNION HANDBOOK: TRANSFORMING LABOR THROUGH COMPUTER TECHNOLOGY, Arthur B. Shostak (ed.) (2002) (describing the use of computer technology in efforts by unions in organizing new members). Traditionally the union hall was a place where employees gathered both to conduct the business of the union, but also to socialize and to build community.

<sup>11</sup> Employees might blog in order to obtain feedback from fellow employees about work-related issues. For example, employees might blog about technical aspects of their jobs and to share information, or seek advice regarding the substantive aspects of what they do. Bloggers of this type can be found in a variety of professions such as law, (Legal Blogs, <http://law-library.rutgers.edu/resources/lawblogs.html/>, (last visited March 1, 2006)); accounting, Accountants Who Blog, [http://accountant.intuit.com/practice\\_resources/practice\\_development/articles/ss\\_accountantswhoblog.aspx/](http://accountant.intuit.com/practice_resources/practice_development/articles/ss_accountantswhoblog.aspx/) (last visited August 1, 2005); medicine, DB’s Medical Rants, <http://www.medrants.com/index.php/>, (last visited March 1, 2006); as well as in other industries such as the construction industry, (Construction Web Logs, <http://www.greatpossibilities.com/blogs/index.php/>, (last visited March 1, 2006). Similarly, employees might blog to share stories about their jobs, and to keep their co-workers informed about issues of collective concern. An example of the latter is *LANL: The Real Story*, a blog established by a group of scientists at the Los Alamos National Laboratory in response to a decision by the Laboratory’s Director to shut down the operation due to concerns about security and safety violations. The blog was created in order to “provide an uncensored forum where those concerned about the future of LANL may express their views.” LANL: The Real Story, <http://www.lanl-the-real->

about work with pleasure, i.e., to create something of a sense of personal community with their co-workers.<sup>12</sup> As such, blogs may provide employees with a potential real antidote to our society's increasingly "go it alone"/ "bowling alone" culture.<sup>13</sup>

The question then becomes what legal protections are afforded employees that blog? This question has received heightened attention during the past couple of years as various high-profile cases of employees being fired for blogging activities have come to the public's attention.<sup>14</sup>

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[story.blogspot.com/](http://story.blogspot.com/). The blog recently became the focus of Congressional hearings, with various parties arguing about the propriety of the venture.

<sup>12</sup> See Haya El Nasser, *Beyond Kiwanis: Internet Builds New Communities*, USA TODAY, June 2, 2005, at A1. An example of this type of blogger includes Heather B. Armstrong who was fired from her web design job in 2002 for writing about work and colleagues on her blog, *Dooce.com*. Armstrong was terminated almost precisely one year after she began blogging. In one of her earlier postings she lists the reasons why she "should not be allowed to work from home." The list include: "Too many cushiony horizontal surfaces prime for nappage; 13 bowls of cereal today, all within a two hour period; Oprah; Total Request Live; Horizontal surfaces; Rabid Naked IMing; Shower? Why?; Porn; Have you seen my couch and it's lovely horizontal surface?; That box of Wheaties is GONE; Passions; The nap after Passions; Too much time alone with two jars of Jif Peanut Butter; The nap to recover from all the naps; I can lie down underneath my desk and no one is going to know. No one.; Justin Timberlake." *Dooce.com*, [http://www.dooce.com/archives/daily/06\\_27\\_2001.html/](http://www.dooce.com/archives/daily/06_27_2001.html/), (June 27, 2001).

Perhaps the best known work related blogger of this kind is Ellen Simonetti. Before her termination in October 2004, Ms. Simonetti, also known as the "Queen of Sky", told her readers the "semi-fictitious account of life as a flight attendant." Queen of Sky, [http://queenofsky.journalspace.com/?\\_cmd=displaycomments&dcid=471&entryid=471/](http://queenofsky.journalspace.com/?_cmd=displaycomments&dcid=471&entryid=471/), (Dec. 1, 2004). As with other bloggers in this group, Ms. Simonetti's blog blended work and private aspects of her life. In an article she wrote following her termination, Ms. Simonetti noted that she had started her blog "as a form of therapy. I had lost my mother in September 2003 to cancer and that hit me hard. It was much easier to write about my feelings than talk about them." Ellen Simonetti, *I Was fired For Blogging*, CNET NEWS.COM, Dec., 16, 2004, [http://news.com.com/I+was+fired+for+blogging/2010-1030\\_3-5490836.html?tag=nefd.ac&tag=nl.e540-2](http://news.com.com/I+was+fired+for+blogging/2010-1030_3-5490836.html?tag=nefd.ac&tag=nl.e540-2).

<sup>13</sup> See Putnam, *supra* note 3 at 88.

<sup>14</sup> See Christine Negroni, *Fired Flight Attendant Finds Blogs Can Backfire*, N.Y. TIMES, November 16, 2004, at C9; Krysten Crawford, *Have a Blog, Lose Your Job?*, CNN/Money, Feb. 15, 2005, <http://money.cnn.com/2005/02/14/>

Although not widely recognized,<sup>15</sup> most employees in the United States are “employees-at-will”, i.e., they can be fired by their employer at any time for essentially any reason.<sup>16</sup> Put another way, employers have generally been legally free to fire employees for blogging.<sup>17</sup>

Somewhat ironically, the most comprehensive statutory legal protection currently afforded employee bloggers is probably the 1935 National Labor Relations Act (NLRA),<sup>18</sup> the law that gives workers the right to form private sector unions. This Article

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[news/economy/blogging/?cnn=yes](http://news/economy/blogging/?cnn=yes). A group of those employees who have been terminated have started The Bloggers’ Rights BLOG. The Bloggers’ Rights BLOG provides,

*“We, the inhabitants of the Blogosphere, do hereby proclaim that bloggers everywhere are entitled to the following basic rights:*

*Freedom To Blog.*

*Freedom From Persecution And Retaliation Because Of Our Blogs...*

*1.) If an employer wishes to discipline an employee because of his/her blog, it must first establish clear-cut blogging policies and distribute these to all of its employees.*

*2.) Blogging employees shall be given warning before being disciplined because of their blogs.*

*3.) NO ONE shall be fired because of his/her blog, unless the employer can prove that the blogger did intentional damage to said employer through the blog.*

*Blogophobic companies, who violate the Bloggers’ Bill of Rights, will be blacklisted by millions of bloggers the world over.”* (emphasis in the original)

The Bloggers’ Rights BLOG, <http://rights.journalspace.com/> (last visited March 1, 2006).

<sup>15</sup> See Pauline T. Kim, *Bargaining with Imperfect Information: A Study of Worker Perceptions of Legal Protection in an At-Will World*, 83 CORNELL L. REV. 105, 106 (1987) (discussing the lack of knowledge individuals have regarding their rights, or absence of legal protections at work).

<sup>16</sup> See *infra* notes 189 to 191 and accompanying text.

<sup>17</sup> *Id.*

<sup>18</sup> 29 U.S.C. §§ 157-169 (2003).

argues, however, that for a variety of reasons the NLRA is proving ineffective in protecting the rights of employee bloggers.<sup>19</sup> The Article will further aver that state common law exceptions to the doctrine of employment-at-will are also not providing much redress to employees fired or otherwise disciplined for blogging activities.<sup>20</sup> Thus despite the arguably considerable social capital merits to employee blogging, on a de facto basis employee bloggers currently engage in such activity very much at their own peril.

This Article strongly argues for state legislative reform in this area. The template for such reform currently exists. Over the past two to three decades the vast majority of states have, at the behest of the tobacco industry, enacted state statutes protecting the off-duty activities of employees at least to the extent such activity involves the off-duty use of tobacco products.<sup>21</sup> Grounded on the notion of social capital, we argue, that the social value of employee off-duty blogging is at least as high as that of employee smoking. We recommend that state level off-duty conduct statutes should thus be amended to provide explicit protection for this activity.<sup>22</sup>

Part II presents a review of blogs and the blogging phenomena. Part III discusses blogs in the context of Professor Putnam's path-breaking work and the arguable decline in American social capital. It also examines the special place employment and the workplace have in the social capital story. Part IV more specifically analyzes the role

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<sup>19</sup> See *infra* notes 107 to 188 and accompanying text.

<sup>20</sup> See *infra* notes 194 to 231 and accompanying text.

<sup>21</sup> See Jessica Jackson, *Colorado's Lifestyle Discrimination Statute: A Vast and Muddled Expansion of Traditional Employment Law*, 67 COLO. L. REV. 143, 153-54 (1996).

<sup>22</sup> See *infra* notes 275 to 283 and accompanying text.

blogs play as generators of social capital, particularly in the employment context. Part V looks at the protections afforded employee bloggers under the National Labor Relations Act. Part VI then examines the issue in the context of both state common and statutory law. In Part VII we review various options for legal reform in the area, and ultimately recommend as the best approach specific state legislative action, the amendment of state statutes protecting off-duty tobacco usage to also protect off-duty employee blogging. Part VIII concludes our work.

## II. Blogs: A Primer

### A. What is a Blog?

*“A blog, you see, is a little First Amendment machine.”*<sup>23</sup>

Webster’s Dictionary defines a blog as “an online diary; a personal chronological log of thoughts published on a Web page.”<sup>24</sup> While accurate as far as it goes, this definition is by no means complete. In fact, the very incompleteness of the definition reflects the very fast changing nature of the blogosphere.

Not that long ago, blogs were associated with personal online diaries “typically concerned with boyfriend problems or techie news.”<sup>25</sup> Writing about his early experiences in blogging, Andrew Sullivan, noted that to a large extent blogs were,

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<sup>23</sup> See Jay Rosen, PRESSTHINK, [http://journalism.nyu.edu/pubzone/weblogs/pressthink/2005/01/15/berk\\_pprd.html/](http://journalism.nyu.edu/pubzone/weblogs/pressthink/2005/01/15/berk_pprd.html/), (January 15, 2005, 19:55 EST).

<sup>24</sup> See *Webster's New Millennium Dictionary of English, Preview Edition* (2003).

<sup>25</sup> See O'REILLY WEB DEVCENTER, <http://www.oreillynet.com/pub/a/javascript/2002/06/13/megnut.html/> (June 13, 2002) (discussing some of the common features among weblogs).

“quirky, small, often solipsistic enterprises.”<sup>26</sup> He singled out the site of an earlier blog pioneer for discussing “among other things, his passion for sex and drugs,”<sup>27</sup> and summarized his early impressions of blogs by noting that “reading them is like reading someone else’s diary over their shoulder.”<sup>28</sup>

At some point between the terrorists attacks of September 11, 2001, and the beginning of the war against Iraq, however, blogs became more than “streams of blurts about the writer’s day.”<sup>29</sup> Both of these events generated a search for a new form of communication. According to Sullivan,

“The blog almost seemed designed for this moment. In an instant, during the crisis, the market for serious news commentary soared. But people were not just hungry for news, I realized. They were hungry for communication, for checking their gut against someone they had come to know, for emotional support and psychological bonding. In this world, the very personal nature of blogs had far more resonance than more impersonal corporate media products. Readers were more skeptical of anonymous news organizations anyway, and preferred to supplement them with individual writers they knew and liked.”<sup>30</sup>

This account suggests that the dramatic events of the first few years of the new century created a need not only for information, but for a more interactive and personal form of

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<sup>26</sup> Andrew Sullivan, *A Blogger Manifesto: Why Online Weblogs Are One Future For Journalism*, Feb. 24, 2002, [http://www.andrewsullivan.com/main\\_article.php?artnum=20020224](http://www.andrewsullivan.com/main_article.php?artnum=20020224).

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> See Rebecca Blood, *THE WEBLOG HANDBOOK*, 1 (2002).

<sup>30</sup> See Sullivan, *supra* note 26. Blogs have proliferated at an incredible rate. Towards the end of the 1990s there were, perhaps, a dozen blogs. By the end of 2004, a reported 8 million people indicated having created blogs, and another 32 million people reported being regular readers. See Hugh Hewitt, *BLOG: UNDERSTANDING THE INFORMATION REFORMATION THAT’S CHANGING YOUR WORLD*, 70 (2005).

getting information -- a form of communicating that generated trust. Blogs provided that form.<sup>31</sup>

Parallel developments were taking place during that same period which illustrated not only the personal and interactive nature of blogs, but also their “muscle.” Between December 2002, and November 2004, the power of blogs was evidenced by one key event after another. Blogs are believed to have been primarily responsible for generating the charges that led to the resignations of Trent Lott as U.S. Senate majority leader and Howard Raines as editor of *The New York Times*.<sup>32</sup> Blogs became a major part of the 2004 campaigns for president by both major political parties. Law professor, political commentator, and blogger Hugh Hewitt, refers to these events as “blog swarms.” He notes: “When many blogs pick up a theme or begin to pursue a story, a blog swarm forms. A blog swarm is an early indicator of an opinion storm brewing, which, when it breaks, will fundamentally alter the general public’s understanding of a person, place, product, or phenomenon.”<sup>33</sup>

What factors might explain the ability of blogs to generate such immense amount of trust, and perhaps paradoxically, so much power? Commentators have suggested that the answer lies, not in the content of blogs, but in their format. In particular, commentators note four aspects of the format in which blogs are published that have played an important role in their fast growing influence and popularity: reverse chronological order, the use of “links”, their interactive nature, and low entry costs.

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<sup>31</sup> According to Professor Hewitt, “Most visitors to my site came because they believed I had something unique to offer them. They trusted me.” See Hewitt *supra* note 30 at xv.

<sup>32</sup> See Posner, *supra* note 2 at 10.

<sup>33</sup> See Hewitt *supra* note 30 at 1.

The first two features are ubiquitous. Unlike earlier web pages, “bulletin boards” and “discussion groups”, the comments, or posts, appear in a blog in reverse chronological order. Most recent commentary appears at the top of the blog. This simple format characteristic creates an expectation on the reader’s part that the blog will be updated regularly, and thus, that it should be visited time and time again, potentially several times the same day. And the updates are expected to add value, to be important and timely, and thus they are placed right at the top, the first thing the reader sees when opening a blog.

Value can be added in many different ways, and certainly, the posting of commentary, opinion and analysis is an important part of that. Bloggers have found, though, a new source of value: the “link.” A link is simply a way of pointing the readers to a different site. In the 1990s as the Internet developed, the objective of commercially driven websites was to capture their visitors’ attention by getting them to stay on their websites.<sup>34</sup> The focus was on providing comprehensive websites which included every possible type of information wanted by the reader. It was common for the websites to prohibit the use of any external link.<sup>35</sup> Blogs are based on precisely the opposite model. Blogs link to “anything and everything.”<sup>36</sup> Thus, as somewhat counterintuitive as it may seem from an old-media perspective, “weblogs attract regular readers precisely because they regularly point readers away.”<sup>37</sup>

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<sup>34</sup> See Blood, *supra* note 29 at 9.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 6.

<sup>37</sup> *Id.* at 19.

Links have thus become the blogs' currency. Links allow blogs to add value in various ways. By linking to the sources of their commentary, the bloggers provide readers a context in which to place the blogger's comments.<sup>38</sup> By contextualizing information, links also generate transparency. Links allow the reader to access the very sources used by the blogger, and evaluate the blogger's interpretation and analyzes.<sup>39</sup> The blogger's selection of links also serves a filtering function. Commentators argue that blogs represent a very useful and adept instrument in what perhaps is the key challenge individuals face in the information economy, i.e., to develop avenues to information that genuinely enhance our understanding and screen out the rest.<sup>40</sup> Because the reader "gets to know" the blogger, and his or her point of view, the reader can delegate to the blogger's judgment the job of keeping the reader informed.<sup>41</sup>

A third characteristic of blogs which have enabled them to concurrently generate considerable trust and power is their interactivity. The technical feature that facilitates this function is the "comment system."<sup>42</sup> The comment system allows readers to comment on the bloggers' posts. The comments become part of blog, and can be accessed not only by the blogger, but also by other readers. More fundamentally,

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<sup>38</sup> The comments posted by bloggers become just part of the communication, with the links, and the information they convey, providing the context. The context could very well include data relevant to the issue, or other current reports on the same issue. Providing context, however, is likely to include previous stories. *Id.*

<sup>39</sup> The information is instantly available to the reader without any additional effort. Not only can the reader evaluate the strength of the blogger's argument, but the selection of links or how the blogger tries to support the argument also allows the reader to evaluate the blogger. Knowing the blogger's biases allows the reader to better evaluate the information being conveyed in the blog. *Id.*

<sup>40</sup> *Id.* at 12.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

however, the blogs invite interactivity. Bloggers frequently invite their readers to comment, or to offer additional context on a particular issue.<sup>43</sup>

Finally, the quick explosion in blogs, and their corresponding power, has been in part fueled by the very low entry costs associated with starting a blog. Getting a blog up and running is relatively easy and inexpensive.<sup>44</sup> Once in place, the blogger is totally in control of the content, tone and direction of the blog. “Suddenly” notes an article in *Fortune Magazine*, “everyone’s a publisher and everyone’s critic.”<sup>45</sup>

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<sup>43</sup> Again, Andrew Sullivan’s experience is instructive: “In October of 2000, I started my fledgling site, posting pieces I had written, and then writing my own blog, publishing small nuggets of opinion and observation at least twice a day about this, that and the other. I thought of it as a useful vanity site – and urged my friends and their friends to read it. But within a couple of weeks, something odd started happening. With only a few hundred readers, a few started writing back. They picked up on my interests, and sent me links, ideas and materials to add to the blog. Before long, around half the material on my site was suggested by readers. Sometimes, the readers knew far more about any subject than I could.” See Sullivan, *supra* note 30.

<sup>44</sup> “If you own a computer or have access to a computer (at your local library, for example) and have an Internet connection, then you pretty much know everything you need to know to start a personal blog. There are a ton of blog hosting services today, and each of them provides easy registration, templates, and online support to guide you through the process of setting up a personal blog. One of the most popular blog hosts is LiveJournal.com. LiveJournal offers users a simple-to-use, customizable blogging tool. Registration at the basic level is free, but you can upgrade for a fee and gain access to a wider selection of tools and features.” Blog Tips, <http://blog.lifetips.com/>, (last visited March 1, 2006).

<sup>45</sup> See David Kirkpatrick & Daniel Roth, *Why There’s No Escaping the Blog*, FORTUNE, Dec. 27, 2004, at 44. See also, Hewitt, *supra* note 30 at 154 (noting that, “Now that writers and reporters, pundits and everyone with a key board have access to publishing technology, there are no gates to keep, no power to say no to anyone.”)

### III. Blogs and the Stock of Social Capital

#### A. Social Capital

Professor Putnam in his seminal writing has noted the sharp decline in American social capital. He puts it as follows:

“For the first two-thirds of the twentieth century a powerful tide bore Americans into ever deeper engagement in the life of their communities, but a few decades ago – silently, without warning - that tide reversed and we were overtaken by a treacherous rip current. Without at first noticing, we have been pulled apart from one another and from our communities over the last third of the century.”<sup>46</sup>

Numerous factors have contributed to this development including dual career families,<sup>47</sup> moves to suburbia and long commute in to work,<sup>48</sup> increased mobility and frequent solo travel by automobile.<sup>49</sup> That said, there is extensive evidence that Americans today are less likely to belong to face-to-face civic organization, or even participate in informal community activities such as getting together with neighbors for dinner or a game of cards.<sup>50</sup> Americans today are also less likely to vote, to attend public political meetings, to engage in party politics, or even to voice their views on public affairs.<sup>51</sup> Moreover, it appears that this decline in community engagement has been accompanied by a decline in social norms of reciprocity, trust, and honesty. People in the

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<sup>46</sup> See Putnam, *supra* note 3 at 27.

<sup>47</sup> *Id.* at 194-203.

<sup>48</sup> *Id.* at 204-215, Extreme Commuting, *supra* note 11.

<sup>49</sup> See Putnam, *supra* note 3 at 194-203.

<sup>50</sup> *Id.* at 78.

<sup>51</sup> *Id.* at 46.

United States today trust one another less, and are more likely than in the past to engage in acts of incivility.<sup>52</sup>

This decline in societal connectedness or social capital has come at a cost. The cooperation and coordination needed to resolve collective action<sup>53</sup> and other problems<sup>54</sup> is often missing. Without the so-called “bonding” function of social capital, organizations may operate less efficiently, and there may be less concern for those not as fortunate as others.<sup>55</sup> In addition, Americans have in many respects lost the informational benefits afforded by the “bridging” aspects of social capital networks.<sup>56</sup> Put another way, career and other discussions over a drink at a neighborhood tavern after work are generally less likely to occur today than they may have in the past.<sup>57</sup> In sum, there appears to be strong evidence of a significant decline in American social capital in recent decades, and this decline has had a marked effect on various aspects of American society.

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<sup>52</sup> More aggressive driving habits, for example, have been cited as one example of this phenomenon. *Id.* at 142-43.

<sup>53</sup> See Jason Mazzone, *When Courts Speak Social Capital and Law's Expressive Function*, 49 SYRACUSE L. REV. 1039, 1056-57 (1999)

<sup>54</sup> See generally Robert D. Putnam, MAKING DEMOCRACY WORK: CIVIC TRADITIONS IN MODERN ITALY 135-37, 167 (1994) (discussing the important social capital function of reducing transactions costs and letting people resolve problems without the need for formal contracts).

<sup>55</sup> See Putnam, *supra* note 3, at 22 (noting that social capital allows individuals to identify the many things we share in common.)

<sup>56</sup> *Id.* at 22-23. See also Mark S. Granovetter, GETTING A JOB (1974) (discussing the benefits of such bridging social capital networks in job-seeking).

<sup>57</sup> This situation, of course, is much different even today in some European countries like Greece with its more communal outside spaces such as sidewalk cafes. See “Tinelli on Leadership,” June 24, 2005, (on file with authors).

## **B. The Workplace as a Place Where Social Capital is Created**

In theory, the workplace should serve as an important focal point in the production of social capital. The very activity of work provides a multiplicity of opportunities for social engagement, opportunities that are scarce in other venues of social interaction.<sup>58</sup> Performing one's job almost by definition requires individuals to engage in activities that form the core of social capital. "Work itself," notes Columbia Law Professor Cynthia Estlund, "involves intense social engagement, cooperation, and trust."<sup>59</sup> Work allows individuals to develop the kind of 'civic skills' that are so important in the formation of social capital. At the workplace, notes Estlund, individuals are constantly practicing "skills of communication, cooperation, compromise, and decision making."<sup>60</sup>

Not only is work an intensely social activity, but more Americans are participating in the labor force, and are also spending more time working than ever before. With Americans marrying later, divorcing more, living alone more, and working more, there is some evidence that work has become the new center of American community, or that we have simply transferred "our community ties from the front porch to the water cooler."<sup>61</sup> The workplace is perhaps becoming the place where we enjoy most of our social interactions.

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<sup>58</sup> Cynthia Estlund, *WORKING TOGETHER: HOW WORKPLACE BONDS STRENGTHEN A DIVERSE DEMOCRACY*, 30-31 (2003).

<sup>59</sup> *Id.* at 30.

<sup>60</sup> *Id.*

<sup>61</sup> Putnam, *supra* note 3, at 85. See also Estlund, *supra* note 58 at 30 (noting that the workplace is "the single most important site of cooperative interaction and sociability among adult citizens outside the family.")

Such an assertion, though, would be somewhat specious. While certain aspects of the modern American workplace have encouraged social capital formation<sup>62</sup>, it seems these aspects have been outweighed by overall trends which mirror general societal developments, and have led to a decline in American workplace social capital. Today's workplace is hardly one of low risk and certainty.<sup>63</sup> Spurred in part by U.S. free trade accords<sup>64</sup> and increased technology/global communications systems, American manufacturing jobs have systematically been moving to lower-wage countries like Mexico and China.<sup>65</sup> Moreover, "outsourcing" of work has recently become a significant

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<sup>62</sup> As Wharton Professor Peter Capelli has put it "[m]uch of contemporary American society has been built on stable employment relationships characterized by predictable career advancement and steady growth in wages." Indeed, this lack of "risk and uncertainty on the job" in many respects helped fuel home ownership, community ties and other key elements in the growth in American social capital which occurred after World War II. See Peter Capelli, *THE NEW DEAL AT WORK! MANAGING THE MARKET-DRIVEN RELATIONSHIP* 14 (1999). Somewhat more recent examples of managerial practices consistent with the social capital formation goals include, team-based/participatory work arrangements, which have become prevalent in many workplaces. See *CIVIC ENGAGEMENT IN AMERICAN AND THE WORKPLACE*, KENNEDY SCHOOL OF GOVERNMENT, Harvard University, [www.ksg.harvard.edu/saguro/mtg6.html](http://www.ksg.harvard.edu/saguro/mtg6.html).

<sup>63</sup> See Capelli, *supra* note 62; Peter Capelli, *Rethinking Employment*, 33 *BRITISH J. OF IND. REL.* 563 (1995) (describing the new terms of the "new" employment contract); Charles Heckscher, *WHITE COLLAR BLUES: MANAGEMENT LOYALTIES IN AN AGE OF CORPORATE RESTRUCTURING* (1995) (describing how changes in business practices have altered human relations practices for managerial employees); Ken Hudson, *The Disposable Worker*, 52 *MONTHLY REV.* 43 (2001) (describing the employment relationship in the age of corporate downsizing); Paul Osterman, *SECURING PROSPERITY: THE AMERICAN LABOR MARKET HOW IT HAS CHANGED AND WHAT TO DO ABOUT IT* (1999) (describing the changes in the employment relationship in the post-internal labor market era).

<sup>64</sup> See Leonard Bierman and Jason Campbell, *Negotiating a Template for Labor Standards: The U.S. – Chile Free Trade Agreement*, Harvard Law School, Program on Negotiation, 2004; Regina Abrami and Leonard Bierman, *The New Tools of Trade*, 83 *HARVARD BUS. REV.* 26 (2005).

<sup>65</sup> See e.g., *Does the Future Belong to China*, *TIME MAGAZINE*, May 9, 2005; John Lyons, *CAFTA is No Cure – All for Central America*, *WALL ST. J.*, July 18, 2005 at A2, col. 5.

development even in the white-collar work arena.<sup>66</sup> Ongoing worldwide consolidations/mergers and acquisitions have left many enterprises and managerial employees without local roots.<sup>67</sup> Companies like IBM no longer tell employees that once they come aboard they are members “of the corporate family for life.”<sup>68</sup> Indeed, many major corporations are filling a large part of their workforce with only temporary, contingent, or independent contractor workers.<sup>69</sup>

The upshot of all this is that American workers have generally been feeling less trust and social connectedness at work than in the past.<sup>70</sup> While they have “ties” to their jobs and co-workers, these ties have increasingly become what the eminent sociologist Professor Mark Granovetter would call “weak ties”.<sup>71</sup> American workers no longer expect to have one place of employment and one general set of co-workers for life. Instead, they expect to have many jobs and perhaps live in many different communities during their lifetimes.<sup>72</sup> As a result on their current jobs they tend to instinctively be

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<sup>66</sup> See Stephanie Armour and Michelle Kessler, *USA’s New Money – Saving Export: White-Collar Jobs*, USA TODAY, Aug. 8, 2003.

<sup>67</sup> See *Civic Engagement in America*, *supra* note 62.

<sup>68</sup> Putnam, *supra* note 3, at 13.

<sup>69</sup> *Id.* at 90; Arne L. Kallenberg, *Nonstandard Employment Relations: Part-time, Temporary, and Contingent Work*, 26 ANN. REV. OF SOCIOLOGY 341 (2000).

<sup>70</sup> Putnam, *supra* note 3, 90-92; *Civic Engagement in America*, *supra* note 62.

<sup>71</sup> Mark S. Granovetter, *The Strength of Weak Ties*, 78 AM. J. OF SOCIOLOGY 1360 (1973). See also Mark S. Granovetter, *The Impact of Social Structure and Economic Outcomes*, 19 J. ECON. PERSP. 33 (2005).

<sup>72</sup> See generally Putnam, *supra* note 3, at 204 (discussing how a significant percentage of Americans move within a given five year period). Sharon Jayson, *Wedding Bells Aren’t Ringing, But Neither Are Phones of Divorce Lawyers*, July 18, 2005, (discussing the lack of commitment in American’s current relationships).

putting their “heads down” and focusing more and more narrowly on their own job.<sup>73</sup> Or, as one middle manager recently put it about his own employment: “We’re all alone out here. It’s been very stressful.”<sup>74</sup> Thus, in many respects American workers today are unfortunately frequently “bowling alone”.

### **C. Declining Workplace Social Capital and the Law**

Employees need to be able to speak out and speak to each other about working (and other) conditions for workplace social capital to really flourish.<sup>75</sup> But as with other workplace developments,<sup>76</sup> Putnam notes that current legal rules regarding rights of free speech are “to put it mildly, insecure in the workplace.”<sup>77</sup> The source of this insecurity, we aver, is twofold.

First, over the last several decades, notes Putnam, the ability of employees to engage in speech at work free of monitoring and control has decreased considerably.<sup>78</sup> During the last century, and for a large segment of the American labor force, labor unions represented the principal means with which individuals could affect the terms and conditions of their employment. That is, labor unions provided employees a “voice.”<sup>79</sup> Union organizing activities helped make employees aware of their rights under the

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<sup>73</sup> See Putnam, *supra* note 3 at 88.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* See also, Cynthia Estlund, *Free Speech and Due Process in the Workplace*, 71 IND. L. J. 101 (1996).

<sup>76</sup> See notes 63 to 69 and accompanying text.

<sup>77</sup> Putnam, *supra* note 3 at 92.

<sup>78</sup> *Id.* at 91.

<sup>79</sup> See Richard Freeman & Jones Medoff, *WHAT DO UNIONS DO?*, 7-11 (2000).

National Labor Relations Act<sup>80</sup> to engage in “concerted activities” including talking to each other about pay and other working conditions.<sup>81</sup> Upon winning a National Labor Relations Board (NLRB) labor certification election, unions and employers engaged in collective bargaining, a process which as Stanford Business School Professor Jeffrey Pfeffer has recently put it “institutionalizes communication between bosses and workers”.<sup>82</sup> Union collective bargaining contracts acted as a check on employer unilateral action which might have “chilled” employee interaction, free speech, and communication.<sup>83</sup>

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<sup>80</sup> 29 U.S.C. §§ 157-169 (2003).

<sup>81</sup> 29 U.S.C. §§ 157 (2003).

<sup>82</sup> Collective bargaining agreements between companies and unions tend to be quite comprehensive in nature covering a very wide range of workplace issues, including even explicit bans on employer race, sex and other discrimination against employees. These agreements generally provide employees broad opportunities to speak with each other and to speak out regarding working conditions. Indeed, virtually all collective bargaining agreements have formal employee grievance procedures culminating in labor arbitration. In addition, virtually all union collective bargaining agreements, as noted above, mandate that employers must show “just cause” before disciplining or firing an employee. *See* Terry L. Leap, COLLECTIVE BARGAINING & LABOR RELATIONS, 10 (1995).

<sup>83</sup> For example, on July 5, 2005, the U.S. Court of Appeals for the District of Columbia Circuit held in a case involving a unionized plant of the Anheuser-Busch Beer Company, that the company could not unilaterally install hidden surveillance cameras in employee break areas. The appeals court held that such company monitoring of employees was subject to collective bargaining between the company and the employee’s union. Had the given Anheuser-Busch workplace been non-unionized, however, such a limitation on employer activity would not have existed. *Brewers & Malters Loc. Union No. 6 v. N.L.R.B.*, No. 04-1278, 2005 C.A.D.C. Westlaw 1560399 (CADC July 5, 2005).

Similarly, while the NLRA clearly protects the right of workers in both unionized and non-unionized workers to talk to each other about their pay, the virtual absence of private sector labor unions or even the threat of such unionization has led to widespread ignorance of this right. Thus today roughly one-third of U.S. employers have formal or informal pay secrecy/confidentiality rules, i.e., rules that under threat of discipline prohibit employees from talking to each other about their compensation. *See* Rafael Gely

As Professor Putnam has noted, unions, like other voluntary associations, historically “both created and depended upon social capital—that is, networks of reciprocity.”<sup>84</sup> Today, however, for private sector workers at least, the “solidarity of union halls” is virtually gone.<sup>85</sup> The precipitous decline in private sector unionization to currently only about 7.8 percent of the labor force,<sup>86</sup> has led to increased employee job insecurity if only for the fact that traditional union collective bargaining agreement “just cause” protection, i.e., you can only be fired from a job for “just cause”, has been generally replaced by the doctrine of “employment-at-will”.<sup>87</sup> With some caveats, this latter legal doctrine affords private sector employers broad rights to fire employees for most any reason.<sup>88</sup>

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& Leonard Bierman, *The Law and Economics of Employee Information Exchange in the Knowledge Economy*, 12 GEORGE MASON L. R. 651, 684 - 85 (2004).

<sup>84</sup> See Putnam, *supra* note 3, at 81

<sup>85</sup> *Id.*

<sup>86</sup> See *Union Members in 2004*, U.S. BUREAU OF LABOR STATISTICS, Press Release, Jan. 27, 2005.

<sup>87</sup> See Paul S. Gutman, *Say What?: Blogging and Employment Law in Conflict*, 27 Colum. J. L. & ARTS 145 (2003) (describing the lack of legal protections available to employees that are terminated for blogging at work); Cynthia L. Estlund, *How Wrong Are Employees About Their Rights, and Why Does It Matter?*, 77 N. Y. U. L. REV. 6 (2002) (describing the lack of knowledge by employees regarding their rights under the employment at will doctrine); Leonard Bierman and Stuart A. Youngblood, *Interpreting Montana's Pathbreaking Wrongful Discharge from Employment Act: A Preliminary Analysis*, 53 MONT. L. REV. 53 (1992) (analyzing the effects of Montana's statutory modification of the employment at will doctrine).

<sup>88</sup> The strongest exception to the doctrine of employment-at-will is the “public policy” exception which prevents employers from firing employees from serving on jury duty and engaging in other similar types of activities which clearly promote public policy. See Gutman, *supra* note 87, at 161-65; *Nees v. Hock*, 536 P. 2d 512, 516 (Or. 1978). But the scope of this exception has historically been rather limited. Gutman, *supra* note 87, at 161-65. It should be noted that one state in the United States, the state of Montana, has statutorily overruled the employment-at-will doctrine. Mont. Code Ann. §§ 39-2-903 et seq. (2000). See *infra* notes 189 to 193 and accompanying text.

Paradoxically, this period of declining unionization rates and the corresponding replacement of “just cause” provisions by the “at will” doctrine, has also been characterized by an unprecedented level of intervention at the federal level in the enactment of civil rights legislation starting with Title VII of the Civil Rights Act of 1964,<sup>89</sup> the Age Discrimination in Employment Act,<sup>90</sup> and more recently the American with Disabilities Act.<sup>91</sup> Various scholars have pointed out that these laws, while having the laudable goals of protecting the rights of groups that have been for years the subject of abuse and discrimination, have had the unintended effect of creating what Yale Law Professor Vicki Schultz calls today’s “sanitized” workplace.<sup>92</sup> In the sanitized workplace employers have further clamped down on worker conversations and interactions. Concerned about ever-increasing individual employee lawsuits, employer implementation of “anti-fraternization” and related policies has not been uncommon.<sup>93</sup> Consider the example of harassment law. Professor Estlund argues that current law creates an incentive on employers to censor a wide range of speech and limit, via “zero tolerance” and “anti-fraternization policies”, social interactions among their employees. This result, argues Estlund, runs contrary to the goals of social capital formation. Estlund asserts:

Given all we have learned about the importance of workplace conversations in civic and social life, it is deeply troubling that the law encourages employers to be so censorious and so vigilant in policing co-worker conversations and interactions. It is no answer to say – as

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<sup>89</sup> 42 U.S.C. §§ 2000e to 2000e17 (2003).

<sup>90</sup> 29 U.S.C. §§ 621-634 (2003).

<sup>91</sup> 42 U.S.C. §§ 12101-12213 (2003).

<sup>92</sup> Vicki Schultz, *The Sanitized Workplace*, 112 YALE L. J. 2061 (2003).

<sup>93</sup> See Estlund, *supra* note 58 at 158. Indeed, the NLRB recently explicitly upheld an employer’s anti-fraternization policy in the case of Guardmark LLC, 344 N.L.R.B. No. 97 (2005).

defenders of harassment law sometimes do – that “the workplace is for work.” As we have seen, the workplace is for much more than work, both in the lives of individual workers and in the society as a whole. The law should not adopt as its motto a proposition that would so impoverish social life.”<sup>94</sup>

In sum, both directly through losing the “voice” provided through collective bargaining, and indirectly, through the effects of the “sanitized” workplace, the legal environment does not support the creation of social capital.

#### **IV. Blogs as a Generator of Social Capital**

Do employees whose speech rights at work have been chilled simply forget about their concerns? Does such employer chilling simply have no further consequences? As Nobel Prize winning economist Professor George A. Akerlof has recently insightfully pointed out, employees that lack a sense of “community” in this regard at work will frequently seek alternative outlets for such community and speech.<sup>95</sup> We contend that the blogosphere has become a new space where the voices of employees and other individuals can be heard at a very low cost, and unimpeded by the hierarchical barriers that sometimes are present at work and in other social settings.

Thus, it is not at all surprising that employees are increasingly turning to the Internet, especially blogs, to talk about work.<sup>96</sup> Recent survey data indicates that 5

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<sup>94</sup> *Id.* at 158.

<sup>95</sup> See George A. Akerlof & Rachel E. Kranton, *Identity and the Economics of Organizations*, 19 J. ECON. PERSP. 9, 20-21 (2005).

<sup>96</sup> See Todd Wallack, *Beware if Your Blog is Related to Work*, SAN FRANCISCO CHRONICLE, Jan. 24, 2005, at C1 (noting that blogging is going “mainstream” and as it does millions of Americans logging details of their everyday lives, including their work lives).

percent of American workers currently maintain a blog.<sup>97</sup> Content analysis of blogs indicates that individuals increasingly individuals are using blogs to talk about their jobs. A recent study of comments posted on blogs over a six month period, found that up to 9 percent of people posted to blogs, either others' or their own, to comment about their jobs and their employers.<sup>98</sup> Interestingly, the survey data suggests that the blogging employees do about their jobs, employers and coworkers, tends to be generally positive.<sup>99</sup> This finding seems to confirm the notion that employees are increasingly looking to blogs as a means of creating a positive sense of social capital/community about their work.

Indeed blogs by employees appear to create the rough equivalent of what Professor Putnam has termed “cyberclubs” or Internet-based clubs or groups with shared interests.<sup>100</sup> Blogs of this kind provide employees with low-cost opportunities to interact and communicate. Moreover, they allow employees to transcend the time and space boundaries of the physical workplace in an open and transparent manner, and to easily reach all fellow employees, even those that work only on a part-time or contingent basis. Finally and significantly, blogs of this kind provide nearly every employee, even non-traditional employees such as women and minorities, with generally the same “voice” as

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<sup>97</sup> See Employment Law Alliance, *Blogging and The American Workplace*, [http://www.employmentlawalliance.com/pdf/ELABloggersPoll1\\_31\\_2006.pdf](http://www.employmentlawalliance.com/pdf/ELABloggersPoll1_31_2006.pdf).

<sup>98</sup> Edelman and Intelliseek, TALKING FROM THE INSIDE OUT: THE RISE OF EMPLOYEE BLOGGERS, 6, 7 (2005).

<sup>99</sup> For example the Edelman/Intelliseek Survey finds that “the overall tone expressed in employee blogs is generally positive” with phrases like “love my job”, “or derivates outnumbering phrases like “hate my job” or derivatives by a margin of 2-to-1. *Id.* at 7. Similarly, the Employment Law Alliance Survey found that only 16% of the surveyed individuals noted to have posted information that could be considered negative or critical regarding their employer, supervisors, co-workers, customers or clients. See *supra* note 96.

<sup>100</sup> See Putnam, *supra* note 3 at 172-73.

those employees who have traditionally enjoyed positions of authority.<sup>101</sup> In sum, employee blogs have considerable potential with respect to promoting employee free speech and work-related social capital.

As noted above,<sup>102</sup> employee blogs have become the new “union hall”. Employees can via blogs meet to discuss work-related issues and concerns, and/or to just socialize. Blogs give employees a new place to get together, to build trust and a sense of community, to even set up *group* dates to go bowling! As such, just as most aspects of union hall activities of old,<sup>103</sup> it appears that employee blogging activities are clearly deserving of legal protection. Indeed, given the assertions of Professor Putnam and others regarding the need to reverse the precipitous decline in American social capital, employee blogging may be particularly deserving of legal protections.<sup>104</sup>

In this context, and as will be developed more fully below,<sup>105</sup> it is somewhat ironic that the 1935 National Labor Relations Act enacted by Congress to protect private sector unions is the statute which technically probably provides the most legal protection to employee bloggers. Unfortunately and as also will be developed below,<sup>106</sup> while the technical statutory language of the NLRA provides decent protection to employee

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<sup>101</sup> *Id.* at 178

<sup>102</sup> *See supra* notes 10 to 13 and accompanying text.

<sup>103</sup> *See Stevedoring Services of America v. Director*, 297 F.3d 797 (C.A. 9, 2002) (dealing with the ability of the union hall to serve as an employment agency for employees); *Wackenhut v. NLRB*, (C.A. C.D., 1999) (noting that union halls can provide assistance to newly formed unions).

<sup>104</sup> *See supra* notes 95 to 101 and accompanying text.

<sup>105</sup> *See infra* notes 118 to 186 and accompanying text.

<sup>106</sup> *See infra* notes 187 to 188 and accompanying text.

bloggers, practical enforcement problems result in the NLRA being a rather weak platform on which employee bloggers can legally stand.

## **V. Employee Blogging and the National Labor Relations Act**

### **A. Overview**

For over seventy years the National Labor Relations Act has represented a major federal statutory exception to the common law “employment-at-will” doctrine. Not only does the NLRA sanction the existence of private sector labor unions and collective bargaining contracts which generally contain employee “just cause” and related employee protections,<sup>107</sup> the Act itself directly protects employees against myriad possible adverse employment actions by their employers. For example, employers clearly can not fire an employee for union organizing activities.<sup>108</sup>

Moreover, the NLRA in section 7 provides private sector employees with some umbrella-like general protections for their actions. Specifically, section 7 states that employees have the right to engage in “concerted activity for the purpose of . . . mutual aid or protection.”<sup>109</sup> Interestingly, and quite significantly, the section 7 rights apply to *all* private sector workers—unionized and non-unionized.<sup>110</sup> Thus, for instance, the NLRA has been interpreted as prohibiting non-unionized employers from adopting rules

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<sup>107</sup> COLLECTIVE BARGAINING NEGOTIATIONS AND CONTRACT MANUAL, BNA (2005).

<sup>108</sup> See Robert A. Gorman & Matthew W. Finkin, LABOR LAW: UNIONIZATION AND COLLECTIVE BARGAINING, 149-154 (2004) (discussing the general contours of section 8(a)(1)).

<sup>109</sup> 29 U.S.C. §§ 158(1).

<sup>110</sup> See Charles J. Morris, *NLRB Protection in the Nonunion Workplace: A Glimpse at a General Theory of Section 7 Conduct*, 137 U. PA. L. REV. 1673 (1989).

that prohibit employees from talking to each other about their pay rates (so-called pay secrecy/confidentiality rules) since employee discussions of this kind have been uniformly interpreted by the NLRB and federal courts as constituting employee “concerted activity for the purpose of . . . mutual aid or protection.”<sup>111</sup>

Thus, to the extent employee blogging can be seen as “concerted activity” which is for “mutual aid or protection,” it will likely be protected by the NLRA. As a result, there is a high probability that to the extent employees blog to co-workers (concerted activity) about specific conditions of work, (mutual aid or protection) such as blogging will be directly and broadly protected by the Labor Act.

As will be more fully developed below,<sup>112</sup> however, there are important problems with the NLRA’s protections in this regard. First, very few employees in non-unionized settings have any idea that they are afforded protections under the NLRA.<sup>113</sup> Or, as one legal scholar has recently put it, the application of the NLRA in non-union settings is “one of the best-kept secrets” of employment law.<sup>114</sup> Second, even with respect to those employees that know about their rights under the NLRA, these rights are often not easy ones to effectively enforce,<sup>115</sup> and the U.S. Congress has fiercely resisted amending the

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<sup>111</sup> See Leonard Bierman and Rafael Gely, “Love, Sex and Politics? Sure. Salary? No Way”: *Workplace Social Norms and the Law*, 25 BERKELEY J. OF LAB. & EMPL. L. 167, 188-89 (2004).

<sup>112</sup> See *infra* notes 187 to 188 and accompanying text.

<sup>113</sup> See Morris, *supra* note 110 at 1675.

<sup>114</sup> See William R. Corbett, *Wanting for the Labor Law of the Twenty-First Century: Everything Old is New Again*, 23 BERKELEY J. LAB. & EMPL. L. 259, 267 (2002).

<sup>115</sup> “The NLRA mode of dealing with employers or unions who violate the rights of workers under the Act is remedial or reparative. There are stiffer sanctions available to employees whose rights are violated under most federal and state employment laws.”

law to help improve statutory enforcement.<sup>116</sup> Finally, even in a best case scenario, the NLRA only protects employee blogging to the extent such blogging involves discussions of working conditions/terms of conditions of employment. While the NLRB and courts have been fairly liberal in their interpretations of what constitutes “working conditions” in this regard,<sup>117</sup> employee blogging about purely personal matters would almost surely fall outside the ambit of the NLRA’s protection. To the extent *all* employee blogging, even employee blogging about purely personal matters, can be seen as positively contributing to social capital formation, such employee blogging would appear to be deserving of meaningful legal protection. The NLRA does not provide such protection.

## **B. Blogs as Concerted Activity**

Concerted activities are activities undertaken together by two or more employees,<sup>118</sup> or by one on behalf of others.<sup>119</sup> Thus, when two or more employees together lodge a complaint with a supervisor, such an activity will meet the requirement

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FACT FINDING REPORT, COMMISSION ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS, 73, (May 1994).

<sup>116</sup> See Elliot Bredhoff, *Labor Law Reform: A Labor Perspective*, 20 B.C. L.R. 27, 53-59 (1978); Andrew Kramer, *Labor Law Reform: A Management Perspective*, 20 B.C. L. R. 4, 22-26 (1978).

<sup>117</sup> See *infra* notes 148 to 157 and accompanying text.

<sup>118</sup> See *NLRB v. Washington Aluminum Co.*, 370 U.S. 9 (1962) (where seven employees who walked off their jobs to protest the cold temperatures existing at the shop floor were found to be engaged in concerted activity).

<sup>119</sup> See *Esco Elevators*, 276 NLRB 1245 (1985) (finding of concerted activity where union officer raised safety complaint).

of “concert” under Section 7.<sup>120</sup> On the other hand, when an employee in the non-unionized workplace acting alone without consulting with fellow employees, lodges exactly the same complaint, the concert requirement is not met and the employee can thus be terminated without raising a NLRA violation.<sup>121</sup>

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<sup>120</sup> See *Atlantic Pacific Constr. Co. v. NLRB*, 52 F. 3d 260 (9<sup>th</sup> Cir. 1995) (finding concerted activity where a group of employees wrote a group letter protesting the selection of an un-popular co-worker as new supervisor).

<sup>121</sup> See *Joanna Cotton Mills Co. v. NLRB*, 176 F. 2d 749 (4<sup>th</sup> Cir. 1949) (no concerted activity found. Here a petition for removal of a supervisor was being circulated by an individual with a personal grudge against the supervisor and the individual was not acting for mutual aid or protection). However, it should be noted that there are actually some situations in which an employee acting alone might meet the concerted activity requirement. The easier cases involve situations in which an individual employee claims a right under an existing collective bargaining agreement. The National Labor Relations Board (“NLRB”), with U. S. Supreme Court approval, has consistently held such activity to involve concerted action. See *NLRB v. City Disposal Systems*, 465 U.S. 822 (1984). According to the NLRB, actions taken by individual employees intended to implement the terms of a collective bargaining agreement is “but an extension of the concerted activity giving rise to that agreement.” See *Burney Bros. Constr. Co.*, 139 NLRB 1516 (1962). A second type of case involves those situations in which an individual employee claims an employment right under state or federal laws. Initially, the NLRB treated these cases the same as those involving individuals invoking a collective bargaining right. The NLRB found the necessary link to other employees’ interests in the statutory mandate of the law the individual employee was seeking to enforce. Accordingly, the NLRB held that “in the absence of any evidence that fellow employees disavow” the actions of the single employee, there was “implied consent.” See *Alleluia Cushion Co.*, 221 NLRB 999, 1000 (1975). Years later, though, the NLRB reversed this broad interpretation. In a dispute involving an employee who refused to drive a truck which had been involved in an accident after having complained to his employer and to a state transportation agency about a known defect with the truck, the NLRB held that concerted activity requires the individual employee to act “with or on the authority of” fellow workers, and not only on his or her own behalf. The NLRB distinguished cases involving the assertion of a statutory right from those involving the assertion of a right grounded in a collective bargaining agreement. Under this approach, concerted activity will only be found where an individual employee is, although acting alone, trying to initiate group action, or acting for or on behalf of other workers after having discussed the matter with fellow workers. See *Meyers Industries (Meyers I)*, 268 NLRB 493 (1984), and *Meyers Industries (Meyers II)*, 281 NLRB 882 (1986). The NLRB today thus generally refuses to find concerted activity where an individual employee acts on his or her own behalf.

Under what conditions blogging might be considered protected concerted activity pursuant to the NLRA? In order to answer this question, we need first consider the nature of the activity that is subject to the protected concerted classification, i.e., an employee posting comments in a blog about the workplace.

Blogging can be analogized to a conversation. At first blush, a conversation will clearly appear to be concerted activity. By definition a conversation involves at least two individuals--the speaker and the listener. As such it appears to meet the concertedness requirement of Section 7. Indeed, the NLRA and various courts have recognized for a long time that “a conversation may constitute concerted activity although it involves only a speaker and a listener.”<sup>122</sup>

However, the NLRB has, also required that “to qualify as [concerted activity] it must at very least appear that [the activity] was engaged in with the object of initiating or inducing, or preparing for group action or that [the activity] had some relation to group action in the interest of the employees.”<sup>123</sup> In so holding the NLRB has been particularly concerned that without a requirement that the activity had the object of initiating, inducing, or preparing for group action, every conversation by employees would have come within the ambit of activities protected by the NLRA. That view, according to the NLRB, would be mistaken.<sup>124</sup>

Thus, conversations present a somewhat difficult scenario in the application of the protected concerted activity question, and in fact have led to results characterized by a

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<sup>122</sup> See *Mushroom Transportation Co. v. NLRB*, 330 F. 2d 683 (3<sup>rd</sup> Cir. 1964).

<sup>123</sup> *Id.* at 685.

<sup>124</sup> *Id.* Although it preceded *Meyers (I)* and *(II)*, this view of concerted activity was cited approvingly by the Board in *Meyers II*. *Meyers (II)* at 887.

leading labor law treatise as “otherworldly.”<sup>125</sup> While clearly involving two or more employees, conversations are subject to the general requirement of group action. This requirement can be hard to apply in some situations, particularly given that the NLRB has recognized that the Section 7’s protections may “extend to concerted activity which in its inception involves only a speaker and a listener, for such activity is an indispensable preliminary step to employee self-organization.”<sup>126</sup>

Consequently, conversations could be concerted activity if they are intended to lead towards group action, even if group action does not immediately follow. On the other hand, if the purpose of the conversation is only to “advise an individual as to what he could do without involving fellow workers or union representation to protect or improve his status or working position, it is an individual, not concerted activity, and if it looks forward to no action at all, it is more than likely to be mere ‘griping’.”<sup>127</sup>

The difficulties in applying these somewhat unclear standards are apparent. Consider the situation in *Adelphi Institute Inc.*,<sup>128</sup> where an employee who had been placed on probation approached a co-worker and inquired if the co-worker had been ever placed on probation.<sup>129</sup> The employee was terminated and then argued that her termination was a Section 8(a)(1) violation since her conversation with a co-worker was protected concerted activity.<sup>130</sup> The NLRB found against the employee, holding instead

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<sup>125</sup> Robert A. Gorman & Matthew W. Finkin, *BASIC TEXT ON LABOR LAW: UNIONIZATION AND COLLECTIVE BARGAINING*, 401 (2004).

<sup>126</sup> *See* *Root-Carlin Inc.*, 92 NLRB 1313, 1314 (Cited in *Meyers II* at 887).

<sup>127</sup> *Mushroom Transportation Co.*, at 685.

<sup>128</sup> 287 NLRB 1073 (1988).

<sup>129</sup> *Id.* at 1073.

<sup>130</sup> *Id.*

that there had not been concerted activity. According to the majority opinion, nothing in the record supported the conclusion that the employee was initiating, inducing, or preparing for group action when she asked her co-worker if he had ever been on probation.<sup>131</sup>

In response to a dissenting opinion that concerted activity could be found when looking at the subject matter of the conversation,<sup>132</sup> the majority reminded the dissent that “subject matter alone ... is not enough to find concert.”<sup>133</sup> Similarly, the majority also rejected the dissent’s other rationale for finding concerted activity. According to the dissent it must have been the case that the employee was seeking the aid of her co-worker in determining the impact of probation, which according to the dissent indicated the concerted nature of her activity.<sup>134</sup> The majority rejected this argument noting that the record was absent of any indicia that the purpose of the conversation was what the dissent contended.<sup>135</sup> Thus, according to the majority, while contacting this particular co-worker might have been an indication of a desire to engage in group action, it was also consistent with a uniquely personal motive, such as inquiring if the co-worker had anything to do with the disciplinary action.<sup>136</sup>

Finally, the dissent and the majority disagreed as to whether the employer’s actions amounted to an unwritten rule banning any employee discussion relating to terms and conditions of employment. The dissent argued that the employer had failed to show

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<sup>131</sup> *Id.*

<sup>132</sup> *Id.* at 1075.

<sup>133</sup> *Id.* at 1074.

<sup>134</sup> *Id.* at 1075.

<sup>135</sup> *Id.* at 1074.

<sup>136</sup> *Id.* at 1074.

any legitimate and substantial business justification for the rule.<sup>137</sup> The majority refused to fully consider this argument noting that the dissent's theory was not addressed by the parties.<sup>138</sup> In any event, noted the majority, it was not clear that the employer's statement amounted to a rule, and further, "not every discussion of terms and conditions of employment constitutes protected concerted activity."<sup>139</sup>

More recently, however, and in the context of electronic communications, the NLRB has interpreted employee section 7 rights more broadly than it did in *Adelphi Institute. Timekeeping Systems* involved an unfair labor practice charge by an employee who was terminated after sending a lengthy email message to all the employees, responding to an employer's message regarding a proposed vacation policy change.<sup>140</sup> The email message by the employee, which according to the Board contained, "some flippant and rather grating language,"<sup>141</sup> sought to prove that the proposed vacation policy change was not to the advantage of the employees. The employer's stated reason for terminating the employee was for the employee's failure to treat others with courtesy and respect, the tone of the email, and the "ramifications of that tone."<sup>142</sup>

In finding in favor of the employee, the Board first noted that the employee's emails, "clearly 'constitute concerted activity.'"<sup>143</sup> The Board conceded that "mere talk"

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<sup>137</sup> *Id.* at 1075.

<sup>138</sup> *Id.* at 1074.

<sup>139</sup> *Id.*

<sup>140</sup> 323 NLRB 244 (1997).

<sup>141</sup> *Id.* at 246.

<sup>142</sup> *Id.* at 247.

<sup>143</sup> *Id.*

amounts to concerted activity “only when it is looking toward group action.”<sup>144</sup> The Board noted, however, that “the object of inducing group action need *not* be express.”<sup>145</sup> The Board found that the charging employee had sent his email with the objective of helping others to understand the implications of the proposed vacation policy change. This objective, while not express, was manifested in the record.

Because of their conversation-like features, it is not entirely clear how would the NLRB would apply these rules to employees’ blogs. One key characteristic which binds together all blogs is their format. The posting of comments in reverse chronological order, the interactivity, the use of links, and the low entry costs, define to a large extent what blogs have become.<sup>146</sup> This format appears to take workplace blogs a long way towards making the use of blogs by employees fit the concerted activity definition.<sup>147</sup>

### **C. Blogs as Involving Mutual Aid or Protection**

In addition to finding the activity to be concerted, there must be a showing that the activity was for the purpose of “mutual aid or protection” before a finding of NLRA protected concerted activity is made. In deciding whether the concerted activity is for “mutual aid or protection” the focus has been on the purpose of the employee’s action.

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<sup>144</sup> *Id.*

<sup>145</sup> *Id.* (reviewing authority) (emphasis added).

<sup>146</sup> *See supra* note 34 and accompanying text.

<sup>147</sup> Consider for example, both the reverse chronological order and interactive nature of blogs. These two characteristics clearly define the blog as a “two-way” form of communication. Bloggers post their most recent comments first as an indication that they are seeking to keep the reader informed of the most recent or most important developments. This format invites the reader to visit the blog frequently. Bloggers also expect readers to respond, by commenting on a specific post, or otherwise providing the blogger with links and information on a particular subject.

The Supreme Court has clearly recognized that the “mutual aid or protection” language in the NLRA is intended to include activities other than those associated with self-organization and collective bargaining (which are mentioned specifically in Section 7).<sup>148</sup> For instance, the Court has held that section 7 covers concerted activities by employees “in support of employees of employers other than their own,”<sup>149</sup> as well as encompassing activities by employees whose objective is “to improve terms and conditions of employment or otherwise improve their lot as employees through channels outside the immediate employee-employer relationship.”<sup>150</sup> The Court, however, has made clear that while broad there are limits to the “mutual aid or protection” language of Section 7. According to the Court, “at some point the relationship [between the activity and the interests of employees as employees] becomes so attenuated that an activity cannot fairly be deemed to come within the ‘mutual aid or protection’ clause.”<sup>151</sup> The “mutual aid or protection” requirement thus means that underlying activity must be connected to terms and conditions of employment.

The NLRB, however, has been fairly liberal in defining the “mutual aid or protection” language.<sup>152</sup> For example, the NLRB has protected employees’ protests

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<sup>148</sup> See *Eastex Inc. v. NLRB*, 437 U.S. 556 (1978) (distribution of newsletter containing discussion of right-to-work legislation and minimum wage federal legislation protected activity).

<sup>149</sup> *Id.* at 564.

<sup>150</sup> *Id.* at 565.

<sup>151</sup> *Id.* at 567-68. The Court left the task of delineating the extent of the “mutual aid or protection” clause to the Board.

<sup>152</sup> See generally, Patrick Hardin & John E. Higgins, Jr., *THE DEVELOPING LABOR LAW*, 184-88 (2001).

regarding the discharge or appointment of supervisory personnel.<sup>153</sup> The NLRB has found that where the decision regarding supervisory changes are likely to adversely affect the employees' working conditions, the employees' protest is for "mutual aid or protection."<sup>154</sup> Similarly, the Board held that a group of engineers, who wrote a letter to several legislators expressing their opposition to changes in immigration laws that could affect the supply of engineers in the U.S., were engaged in protected activity even though the employer did not have direct control over the employees' concerns.<sup>155</sup>

Whether an employee terminated for blogging will be able to establish the protected nature of his or her activity, thus, appears to depend to a very large extent on the content of the message the employee is sending. An employee like Steve Olafson, a reporter for *The Houston Chronicle*, who was fired from his job for writing in his blog about the local politicians that he covered as a newspaper reporter probably would not be protected under the NLRA.<sup>156</sup> Mr. Olafson, who blogged under the name of "Banjo Jones," frequently ridiculed the same subjects about whom he was profiling in his *Chronicle* columns.<sup>157</sup> His comments appeared to be very tenuously related to the

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<sup>153</sup> *Bob Evans Farms v. NLRB*, 116 F. 3d 1012 (7<sup>th</sup> Cir. 1998). *Cf.* *Joanna Cotton Mills Co. v. NLRB*, 176 F. 2d 749 (4<sup>th</sup> Cir. 1949) (holding that circulating a petition for removal of a supervisor was not protected activity when a particular individual when the motivation for the petition was a personal dispute with a specific supervisor).

<sup>154</sup> *Bob Evans v. NLRB*, 116 F. 3d at 1014.

<sup>155</sup> *See Kaiser Engineers*, 213 NLRB 752 (1974).

<sup>156</sup> *See Richard Connelly, Banjo Blues: A Chronicle Writer Gets Canned for Running a Web Site*, August 8, 2002, HOUSTON PRESS.

<sup>157</sup> In his blog, for example, he referred to a local state senator, as "the state senator with the Hair Club for Men wig" and referred to a local council which had problems complying with a request for information disclosure, as a "Taliban-like Nest of Lawbreakers." *Id.*

interest of other employees as employees, and thus likely outside the protection of Section 7.

#### **D. Blogs as Abusive, Insubordinate, or Disloyal Conduct**

The Board and courts interpreting the NLRA have also found that otherwise protected activity might lose its protection by being abusive, insubordinate, or disloyal. The leading case on this issue is *NLRB v. IBEW Local 1229 (Jefferson Standards)*.<sup>158</sup> In that case, the U. S. Supreme Court found that a handbill distributed by employees that were involved in a negotiating dispute regarding the renewal of an arbitration provision in which the employees sharply criticized the quality of the employer's product was not protected activity. According to the Court, the employees' actions were disloyal. Since "the legal principle that insubordination, disobedience or disloyalty is adequate cause for discharge is plain enough", the Court found that the employer's decision to terminate the employees who had distributed the handbill was not a violation of the NLRA.

The *Jefferson Standards* holding has proven to be highly controversial. As the dissenting opinion by Justice Frankfurter noted, most types of concerted activities could be considered to be "disloyal."<sup>159</sup> Accordingly, later cases have limited the potential applicability of *Jefferson Standards*. The Ninth Circuit decision in *Sierra Publishing Co. v. NLRB* is illustrative.<sup>160</sup> In ordering the reinstatement of a group of newspaper editorial employees who were fired for writing a letter to the newspaper's advertisers criticizing the paper's operations, the court noted:

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<sup>158</sup> 346 U.S. 464 (1953).

<sup>159</sup> *Id.* (Frankfurter, J., dissenting opinion)

<sup>160</sup> 889 F. 2d 210 (1989).

“[T]he disloyalty standard is at base a question of whether the employees' efforts to improve their wages or working conditions through influencing strangers to the labor dispute were pursued in a reasonable manner under the circumstances. Product disparagement unconnected to the labor dispute, breach of important confidences, and threats of violence are clearly unreasonable ways to pursue a labor dispute. On the other hand, suggestions that a company's treatment of its employees may have an effect upon the quality of the company's products, or may even affect the company's own viability are not likely to be unreasonable, particularly in cases when the addressees of the information are made aware of the fact that a labor dispute is in progress. Childish ridicule may be unreasonable, while heated rhetoric may be quite proper under the circumstances. Each situation must be examined on its own facts, but with an understanding that the law does favor a robust exchange of viewpoints. The mere fact that economic pressure may be brought to bear on one side or the other is not determinative, even if some economic harm actually is suffered. The proper focus must be the manner by which that harm is brought about.”<sup>161</sup>

In addition to the disloyalty cases, employees' otherwise protected activities have been challenged for being abusive and insubordinate. The Board has found that some concerted activity can be expressed in so intolerable manner as to lose the protection of Section 7. While unpleasantries uttered in the course of otherwise protected activity do not generally “strip away the Act's protection,”<sup>162</sup> the Board has declined to invoke the Act's protection where the concerted behavior has been truly insubordinate or disruptive of the work process.”<sup>163</sup>

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<sup>161</sup> *Id.* at 219.

<sup>162</sup> *Timekeeping Systems*, at 249.

<sup>163</sup> *Will & Baumer Candle Co.*, 206 NLRB 772 fn. 1 (1973). Thus, for example, in a case where an employee designed and sent to a manager a cartoon for a T-shirt suggesting someone with low intelligence as a protest to the manager's alleged statement at a NLRB hearing, the Fifth Circuit found the employee's behavior to be protected activity. The court agreed with the NLRB's characterization of the employee's action as a “mildly sarcastic response” to the manager's statement. According to the court, the employee's statements were “not fraught with malice, obscene, violent, extreme or wholly unjustified.” *Reef Industries v. NLRB*, 952 F. 2d 830, 837 (1991). However, in a case involving a “mocking letter” prepared by two employees about free ice cream supplied by the employer in appreciation of a new contract with a supplier, the Fourth

This issue of disloyalty and insubordination is likely to be a critical one regarding the application of NLRA protections to employee bloggers. The very nature of blogs as a spontaneous form of communication is likely to result in language and comments which at times push the envelope in terms of what may be considered to be appropriate workplace etiquette. For instance, some of the early workplace bloggers were rather direct and blunt. The comments of Amy Norah Burch, a former secretary at Harvard University, are illustrative: “Work is aggravating me. I am one shade lighter than homicidal today. I am two snotty e-mails from professors away from bombing the entire Harvard campus.”<sup>164</sup> Adding to the abrasive nature of these comments, Burch referred to her supervisors by first name, and commented on their “random freaking out” and “anal retentive control freakishness.”<sup>165</sup> However, NLRA caselaw makes clear that the threshold for losing section 7’s protections is rather high. The Board has refused to disqualify from statutory protection language characterizing acting supervisors as “a-holes,”<sup>166</sup> a letter describing management with such words as “hypocritical,” “despotic,” and “tyrannical,”<sup>167</sup> and even a statement to other employees describing the chief

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Circuit refused to find the activity to be protected. According to the court, although “criticisms of working conditions by satiric letters or other conduct can be protected activity”, the letter was not intended to “enlist the support and assistance of other employees for the purpose of correcting what the workers thought to be an inadequacy in working conditions.” The court characterized the employees’ intent as “belittling the company’s gesture” and not in any way “intended to resolve or call attention to conditions of employment.” *New River Industries v. NLRB*, 945 F. 2d 1290, 1295 (1991).

<sup>164</sup> See Leon Neyfakh, *Online Weblog Leads to Firing*, THE HARVARD CRIMSON ONLINE EDITION, May 26, 2004, <http://www.thecrimson.com/printerfrindly.aspx?ref=502702>.

<sup>165</sup> *Id.*

<sup>166</sup> *Postal Service*, 241 NLRB 389 (1979).

<sup>167</sup> *Harris Corp.*, 269 NLRB 733 (1984).

executive officer as a “cheap son of a bitch.”<sup>168</sup> Courts have recognized that employees engaging in Section 7 activity may acceptably also engage in some “impropriety,”<sup>169</sup> and thus Section 7 protection will be lost only if the questioned activity is “of such serious character as to render the employee unfit for further service.”<sup>170</sup>

### **E. Employers’ Interests Under the NLRA**

If an employee’s blogging activities are clearly NLRA protected, the issue then becomes whether the employer can advance a “legitimate and substantial business justification” for disciplinary action against such activities.<sup>171</sup> In making this determination the NLRB will apply a “balancing test” to determine whether the employees’ section 7 rights outweigh the employer’s business justification.<sup>172</sup> If employers are challenged under the NLRA for disciplining or terminating a blogger, or even for establishing a policy limiting the rights of employees to blogs, one can expect them to possibly raise at least two rebuttal arguments.

First, employers could potentially make a confidentiality argument. The NLRB has found a legitimate business justification to exist in cases where employees have been disciplined for disclosing information that the employer deemed confidential. For example, in *International Business Machines Corp.*,<sup>173</sup> the employer required all employees to sign upon their hire an agreement not to disclose to anyone outside the

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<sup>168</sup> Churchill’s Restaurant, 276 NLRB 775 (1985).

<sup>169</sup> Timekeeping Systems at 249.

<sup>170</sup> Dreis & Krump Mfg. Co, 554 F. 2d 320 329 (7<sup>th</sup> Cir. 1976).

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> 265 NLRB 638 (1982).

company, or use in other than company business, any confidential information.<sup>174</sup> This rule prohibited the distribution of wage data that the employer had compiled and classified as confidential.<sup>175</sup> An employee was terminated after he had distributed to other employees salary information that he had received in the course of his employment.<sup>176</sup> In upholding the discharge, the NLRB noted that the employee knew that the documents at the center of the disclosure had been classified as confidential, and that he had no reason to believe that their dissemination was authorized.

Similarly, in *K-Mart & United Food And Commercial Workers Union, Local 870*,<sup>177</sup> the NLRB found that a rule which appeared in the employee handbook providing that company business and documents were considered to be confidential and prohibiting disclosure of such information did not constitute a section 8(a)(1) violation.<sup>178</sup> The NLRB did not find that such a rule was likely to “chill” employees’ rights by requiring employees who wish to discuss information about employment terms and conditions to risk discipline or in the alternative to forgo their Section 7 rights. The NLRB instead concluded that the rule found in the employee manual “would likely be reasonably understood by employees not as restricting discussion of terms and conditions of employment but, rather, as intended to protect solely the legitimate confidentiality of the [employer’s] private business information.”<sup>179</sup>

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<sup>174</sup> *Id.* at 641.

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> 330 NLRB 263 (1999).

<sup>178</sup> *Id.* at 263.

<sup>179</sup> *Id.* at 623-24.

Second, employers might also argue that a prohibition against blogging could be justified in order to maintain order and discipline in the workplace. The NLRB, and reviewing courts, have given employers some leeway “to maintain production, reduce employee dissension or distractions from work, or maintain employee safety and discipline,”<sup>180</sup> particularly in the context of issuing non-solicitation workplace rules. Thus, for example, rules prohibiting solicitation during working time have been found to be presumptively valid on the grounds that they are necessary to maintain safety and efficiency.<sup>181</sup> On similar grounds, the Board has sustained company rules that bar distribution of literature in working areas at all times.<sup>182</sup> According to the Board, a “no-distribution” rule is justified because the distribution of union literature in working areas could result in a littering hazard, which in turn is likely to have negative impact on productivity.<sup>183</sup>

The leeway given to employers regarding non-solicitation and non-distribution rules, however, is not absolute. For example, the Board and reviewing courts have refused to allow employers to ban the wearing by employees of union pins, buttons and insignias while on the job. The United States Supreme Court has held that employees have a presumptive right to wear, for example, a union insignia, unless the employer is able to establish that a special circumstance exist which justify banning such insignia.<sup>184</sup> Such a special circumstance can be established by a showing that the employers’

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<sup>180</sup> *Meijer v. NLRB*, 130 F. 3d 1209, 1213 (1997).

<sup>181</sup> *Republic Aviation v. NLRB*, 324 U.S. 793 (1945).

<sup>182</sup> *Stoddard-Quirk Mfg. Co.*, 138 NLRB 615 (1962).

<sup>183</sup> *Id.*

<sup>184</sup> *Republic Aviation*, 324 U.S. at 803-04.

restriction is necessary “to maintain production, reduce employee dissension or distractions from work, ... maintain employee safety and discipline,... [or where] the employer makes an affirmative showing that the union insignia that the employee seeks to wear will negatively impact a certain public image that the employer seeks to protect.”<sup>185</sup> For example, an employer might argue that the comments such as those posted by Rachel Mosteller, referring to the “stupid little awards that are supposed to boost company morale,”<sup>186</sup> could create tension among employees and supervisors, as well as among employees. These types of comments, employers could argue, are in no way constructive, and could potentially lead to severe conflict among employees. Thus, to the extent employers aver that employee blogs involve proprietary workplace information or that a prohibition of such blogging is clearly necessary to maintain workplace order and discipline, they may be able to outlaw what would otherwise be NLRA-protected employee blogging activity.

## F. Summary

In sum, the NLRA does appear to offer considerable legal protection to employee bloggers whose blogging is of a work-related nature. A lot of such blogging is likely to

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<sup>185</sup> *Meijer v. NLRB*, 130 F. 3d at 1217.

<sup>186</sup> Rachel Mosteller is the reporter for the *Herald Sun*, a North Carolina’s newspaper, who alleges to have been terminated for complaining in her blog about the “stupid little awards” being given at work to boost company morale. See Amy Joyce, *When Blogging Gets Risky, Bad Mouthing Job Leads to Firings*, WASH. POST, Feb. 11, 2005, <http://www.msnbc.msn.com/id/6949377/>. In February 2004, Mosteller wrote in her blog: “I really hate my place of employment... they have these stupid little awards that are supposed to boost company morale... so you go and do something ‘spectacular’ (most likely, you’re doing your JOB) and then someone says ‘Why golly, that was spectacular,’ then they sign your name on some paper, they bring you chocolate and some balloons.... *Id.*”

fall within the ambit of that statute’s “concerted activity” and “mutual aid or protection” coverage. It is important to point out, though, that the NLRA’s section 7 “concerted” requirement does appear to generally exclude employee blogging involving individual work-related complaints or claims. Employer disciplinary interests may also trump employee section 7 protections where, for example, the employee’s blog contains arguably confidential or proprietary information. Moreover, and as noted above,<sup>187</sup> while the NLRA’s protection of employee blogging clearly covers both unionized and non-unionized American workers, it appears that non-unionized workers generally have little knowledge of such protection.<sup>188</sup> In addition, effective enforcement has been a problem under the NLRA even for those employees clearly covered by its protections. Finally, and most significantly, the NLRA clearly does *not* protect employees whose blogging is *non-work* related. Protection may exist for such employees, however, under state rather than federal law.

## **VI. State Law Protections for Bloggers**

### **A. State Common Law**

As discussed earlier,<sup>189</sup> the basic common law rule governing employment in the United States today is that of employment-at-will. Or, as the Tennessee Supreme Court put it in the classic case of *Payne v. Western & Atlantic Railroad*<sup>190</sup> employers are free to

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<sup>187</sup> See *supra* note 110 and accompanying text.

<sup>188</sup> *Id.*

<sup>189</sup> Under the employment-at-will rule, an employer may dismiss an at-will employee at any time for a good reason, a bad reason, or for no reason at all. See *generally*, Henry H. Perritt, *EMPLOYEE DISMISSAL LAW AND PRACTICE*, 4<sup>th</sup> Ed. 3 (1998).

<sup>190</sup> 81 Tenn. 507, 523, 526-27 (1884).

“discharge or retain employees at-will for good cause or for no cause, or for even bad cause without thereby being guilty of an unlawful act.”<sup>191</sup> To date, only one state in the nation, Montana, has statutorily altered this construct by enacting the Montana Wrongful Discharge from Employment Act<sup>192</sup> which gives all employees in the state protection from discharge without “just cause”.<sup>193</sup>

State court judges, though, in virtually every state in the country, have during the past three decades been actively creating judicial exceptions to the employment-at-will doctrine.<sup>194</sup> Of particular possible relevance to employee bloggers are the judicially created “implied contract” and “public policy” exceptions.

Under the implied-contract exception, representations made by employers regarding job security, disciplinary procedures, and other employee privileges have been treated by state courts as enforceable provisions even in the absence of an express employment contract.<sup>195</sup> Employees raising this exception have relied on employee

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<sup>191</sup> For a historical discussion of the development of the doctrine see Jay M. Feinman, *The Development of the Employment at Will Rule*, 20 AM. J. OF LEGAL HISTORY 118 (1976).

<sup>192</sup> See Mont. Code Ann. §§ 39-2-901-39-2-914.

<sup>193</sup> Section 4 of the Montana statute provides that, “A discharge is wrongful only if: (1) it was in retaliation for the employee’s refusal to violate public policy or for reporting a violation of public policy; (2) the discharge was not for good cause and the employee had completed the employer’s probationary period of employment; or (3) the employer violated the express provision of its own written personnel policy.”

<sup>194</sup> Our treatment of the employment-at-will doctrine here is limited to its application to employees that suffered adverse employment consequences because of their blogging activities. The literature on the at-will doctrine is extensive and rich. For a doctrinal overview of the doctrine *See generally* Perritt *supra* note 189.

<sup>195</sup> *See* Mark A. Rothstein et al., EMPLOYMENT LAW, 2<sup>nd</sup> Ed. 671-94 (1999). The implied contract exception includes both cases based on written or oral communications, *see, e.g.*, Chiodo v. General Waterworks Corp., 413 p. 2d 891 (Sup. Ct. Utah 1967) (finding that a contract for a specific time period included implied terms that employee would conform to the usual standards of performance); *Wooley v. Hoffman-La Roche*,

manuals/handbooks and oral statements made by supervisory personnel as the contractual basis for an implied promise of some form of job security.<sup>196</sup> Thus, to the extent employers have set forth general policies regarding employee blogging in employee handbooks or other materials, state courts may find these policies to be binding on employers, even if they don't formally constitute contracts between the employer and employee.<sup>197</sup> With blogging still in its nascent stages, however, employer guidelines of this kind are not all that common,<sup>198</sup> minimizing the possible protection afforded employees under the implied-contract exception.

The public policy exception involves situations in which the termination of the employee contravenes some explicit, well-established public policy.<sup>199</sup> Initially, the public policy exception focused on protecting employees who were fired for engaging in behavior which directly benefited the public welfare. For example, courts protected

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Inc., 491 A. 2d 1257, modified 499 A. 2d 515 (Sup. Ct. NJ 1985) (finding that absent a clear and prominent disclaimer, an implied promise contained in an employment manual that an employee will be fired only for cause may be enforceable against an employer even when the employment is for an indefinite term); and cases based on conduct, *see, e.g.,* Grouse v. Group Health Plan Inc., 306 N.W. 2d 114 (Sup. Ct. Minn. 1981) (holding that the doctrine of promissory estoppel allows a plaintiff to sue employer who withdrew job offer after plaintiff had accepted, but before plaintiff had began job).

<sup>196</sup> *See e.g.,* Small v. Spring Indus., 357 S. E. 2d 452, 454-55 (S.C. 1987) (noting that it would be unfair to allow employers to treat statements of this kind as gratuitous or nonbinding).

<sup>197</sup> *See* Armour & Kessler, *supra* note 66.

<sup>198</sup> According to one survey, nearly 70 percent of companies have no policies regarding employees bloggers, *see Edelman & Intelliseek Survey*, *supra* note 98. However, companies are certainly becoming increasingly aware of the importance of blogs, *Wal-Mart Enlists Bloggers in P.R. Campaign*, N.Y. TIMES, March 7, 2006, at C1. (describing Wal-Mart's efforts to enlist employees as bloggers in their aggressive public relations campaign).

<sup>199</sup> *See e.g.,* Nees v. Hocks, 536 P.2d 512 (S.Ct. Or. 1975) (finding a violation of public policy in a case involving an employee who was discharge for jury service).

employees who had been fired for serving on jury duty or refusing to follow orders to commit an illegal act.

Recently, plaintiff's lawyers have attempted to expand the reach of the public policy exception. In particular, the public policy exception, it has been argued, should apply not only in those narrow situations in which an employee is fired for performing a civic duty, but also in cases in which employers were engaging in actions that encroached on employees' personal autonomy. This argument has been especially raised regarding employer efforts to limit the off-duty activities of employees with regard to employees' political activities,<sup>200</sup> personal relationships,<sup>201</sup> and behavior and lifestyle outside of work.<sup>202</sup> The approaches the courts have developed in each of these areas provide some insight into how state courts might look at similar types of challenges by employees who are terminated because of their blogging activities.

In a number of cases employees have argued that their decisions to participate (or not participate) in specific political activities have been the basis for their terminations, and thus, claimed that the terminations are contrary to public policy. In general, employees making this argument have argued that the public policy in favor of free

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<sup>200</sup> See, Rothstein, et al., *supra* note 195. See also, Bell v. Faulkner, 75 S.W.2d 612 (Mo. App. 1934) (finding against an employee who was discharge for refusing to vote or campaign for certain candidates favored by the employer).

<sup>201</sup> Rulon-Miller v. IBM Corp., 162 Cal. App. 3d 241 (1984) (finding in favor of plaintiff on various grounds where the employer fired the plaintiff for her off-duty dating activities).

<sup>202</sup> Brunner v. Al Attar, 786 S.W.2d 784 (Tex. App. 1990) (upholding lower court decision against employee who was terminated for her volunteering off-duty work with an AIDS foundation).

speech, as found in the federal or corresponding state constitution, was violated by the employer's action.<sup>203</sup>

For example, this argument was successfully raised in the case of *Novosel v. Nationwide Ins. Co.*,<sup>204</sup> where the United States Court of Appeals for the Third Circuit found an insurance company to have acted illegally when it fired an employee for refusing to lobby the Pennsylvania House of Representatives in support of a company sponsored piece of insurance reform legislation. According to the court, the key question was "whether a discharge for disagreement with the employer's legislative agenda or a refusal to lobby the state legislature on the employer's behalf sufficiently implicates a recognized facet of public policy."<sup>205</sup> The court answered this question affirmatively, noting that "the protection of an employee's freedom of political expressions would appear to involve no less compelling a societal interest than the fulfillment of jury service or the filing of a worker's compensation claim."<sup>206</sup>

A second type of off duty conduct that has been raised in wrongful discharge against public policy cases relates to employees' dating practices. In these cases courts have generally sided with employers, especially where supervisor-subordinate relationships were involved, and have been wary of employee attempts to argue discharges of this kind are in any way violative of "public policy". Thus, in a case involving the discharge of an employee for bringing a woman other than his wife to an

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<sup>203</sup> *Chavez v. Manville Products Corp.*, 777 P.2d 371 (S.Ct. N.M. 1989) (finding that alleged oral representations made to employee could not create enforceable contractual obligations.)

<sup>204</sup> 721 F.2d 894 (3rd Cir. 1983).

<sup>205</sup> *Id.* at 899.

<sup>206</sup> *Id.*

employer banquet, a court explicitly rejected employee arguments regarding "freedom of association". The court held that the right to associate with a non-spouse at an employer banquet was not a threat to a recognized aspect of public policy of the kind which merited an exception to the traditional doctrine of employment-at-will.<sup>207</sup> Similarly, an Illinois court refused to overturn an employer's decision to terminate an employee for marrying a co-worker on the basis that the state's interest in promoting marriage created a "public policy" exception to the at-will doctrine.<sup>208</sup> Finally, in the case of *Patton v. J. C. Penney Co.*, the Supreme Court of Oregon directly held that the employment-at-will doctrine gave the retailer the right to fire an employee for dating a co-worker, and that any interference with the employee's "personal lifestyle" in this regard did not "trigger the public policy exception to the employment-at-will doctrine."<sup>209</sup>

Employees have been equally unsuccessful when challenging adverse employment actions based on other aspects of their private life, such as their behavior and lifestyles. For example, in *Graebel v. American Dynate Corporation*,<sup>210</sup> the plaintiff was fired after a local newspaper's article "memorialized [the employee's] racially-biased attitudes and opinions regarding the effect of the increased Asian immigration" in the

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<sup>207</sup> *Staats v. Ohio National Life Insurance Co.*, 620 F. Supp. 118 (DC Pa. 1985).

<sup>208</sup> *McCluskey v. Clark Oil and Refining Co.*, 147 Ill. App. 3d 822 (Ill. 1 Dist. 1986).

<sup>209</sup> *Patton v. J. C. Penney Co.*, 719 P.2d 854 (S.Ct. Or. 1986). In one isolated but prominent case involving the IBM Corporation, however, a California court did overturn the discharge of an employee for having a romantic relationship with an employee at a rival office products firm. The plaintiff in *Rulon-Miller v. International Business Machines Com.*, 162 Cal. App. 3d 241 (1984), was terminated for dating an ex-employee. The California Court of Appeals ruled IBM's discharge of her to be unlawful. While acknowledging the traditional doctrine of employment-at-will, the court's decision interestingly turned almost solely on two internal IBM policy documents.

<sup>210</sup> 604 N.W.2d 35, 1999 WL 693460 (1999) (unpublished disposition).

local area. The plaintiff argued that his termination “for speaking from the confines of his home on a matter of public concern unrelated to his employment” constituted a wrongful discharge in violation of the state constitution and the common laws of the state.<sup>211</sup> In finding against the employee, the Wisconsin Court of Appeals noted the very narrow nature of the public policy exception to the at-will doctrine.<sup>212</sup> While recognizing the “importance of one’s free speech rights,”<sup>213</sup> the court refused “to include an employee’s complaint that he was discharged as a result of oral or written complaints made concerning some matter that is related to a public policy,” concluding then, that “the public policy exception may not be used to extend constitutional free speech protection to private employment.”<sup>214</sup>

The Idaho Supreme Court recently reached a similar result in the case of *Edmoson v. Shearer Lumber Products*.<sup>215</sup> The plaintiff, an employee at a lumber mill, was terminated after making public statements criticizing a project involving his employer and a local civic group regarding the managing of a local national forest. The plaintiff argued that he had been wrongfully terminated because he exercised his constitutionally protected rights of free speech and association. The Idaho Supreme Court upheld the summary judgment finding against the employee, clearly indicating that “an employee does not have a cause of action against a private sector employer who terminates the

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<sup>211</sup> *Id.* at \*\*\*1.

<sup>212</sup> *Id.* at \*\*\*5. In particular, under Wisconsin law the court noted, the exception is limited to cases covering “an employee’s refusal to obey his or her employer’s command to violate public policy as established by: (1) statutory or constitutional provision; (2) the spirit of a statutory provision; or (3) administrative rules.

<sup>213</sup> *Id.* at \*\*\*5.

<sup>214</sup> *Id.*

<sup>215</sup> 75 P.3d 733 (2003).

employee because of the exercise of the employee’s constitutional right of free speech.”<sup>216</sup>

A few courts, though, have been willing to entertain the argument that an employer action which limits the employees’ freedom of speech and association might serve as the basis for a wrongful discharge claim. Even when the courts have entertained the argument, however, plaintiffs have generally been unsuccessful.

*Wiegand v. Motiva Enterprises, LLC* is illustrative.<sup>217</sup> In *Wiegand*, the plaintiff was a Texaco gas station supervisor who operated a website that sold Neo-Nazi paraphernalia.<sup>218</sup> Wiegand began working for Texaco in 1994.<sup>219</sup> Upon being hired, he received and signed an employee handbook that indicated his at-will employee status.<sup>220</sup> In 1999, Wiegand informed his immediate supervisor that he sold “non-mainstream CDs and flags,” but the supervisor did not look into Wiegand’s activities because Wiegand’s work was not affected.<sup>221</sup> In addition, his supervisor claimed he “did not care about what plaintiff [Wiegand] did in his free time.”<sup>222</sup> Two years later, the website was revealed in two newspaper articles.<sup>223</sup> Although the newspaper articles did not reveal where

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<sup>216</sup> *Id.* at 739.

<sup>217</sup> 295 F. Supp.2d 465 (2003).

<sup>218</sup> Items sold in Wiegand’s website included “‘underground music and records’ that are ‘racist and/or offensive to some people,’ such as swastika flags, music advertised as ‘the most popular and funniest Nigger-hatin’ songs ever written’ and t-shirts with sayings like ‘Skinheads’ and ‘Blue-Eyed Devil.’” *Id.*

<sup>219</sup> *Id.* at 467.

<sup>220</sup> *Id.*

<sup>221</sup> *Id.*

<sup>222</sup> *Id.* at 468.

<sup>223</sup> *Id.*

Wiegand worked,<sup>224</sup> he was soon terminated because Texaco deemed Wiegand's actions as "violat[ing] the company's 'core value' of 'respect for all people.'"<sup>225</sup>

Wiegand challenged his termination arguing that his employer could not terminate his employment because of his right to exercise free speech. Wiegand alleged that "an employee, whether public or private, should not have to be fearful about expressing his personal views in his own home, on his own time. He should not have to worry about losing his job because of his exercise of his first amendment rights in such a private manner that does not affect his employer."<sup>226</sup> The United States District Court in New Jersey noted that under New Jersey law, at-will employees "may sustain a claim for wrongful termination if [they] can show [their] discharge was 'contrary to a clear mandate of public policy.'"<sup>227</sup> The court also noted that matters of public policy are determined from both United States and state constitutions, federal, state, and administrative rules and regulations, and common law.<sup>228</sup>

The court, however, found against the plaintiff. According the court, Wiegand had failed to establish that the employer's termination decision was contrary to a clear mandate of public policy, since the plaintiff's speech was not clearly protected by the First Amendment due to its nature as commercial hate speech.<sup>229</sup>

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<sup>224</sup> *Id.* at 469.

<sup>225</sup> *Id.* at 466.

<sup>226</sup> *Wiegand*, 295 F.Supp.2d at 474.

<sup>227</sup> *Id.* at 473 citing *Pierce v. Ortho Pharm. Corp.*, 84 N.J. 58, 72 (1980).

<sup>228</sup> *Wiegand*, 295 F.Supp.2d at 473 citing *MacDougall v. Weichert*, 144 N.J. 380, 391 (1996).

<sup>229</sup> *Wiegand*, 295 F. Supp. at 475.

In sum, employee bloggers are also likely to enjoy rather limited protection under the public policy exception to the doctrine of employment-at-will. Historically, state courts have permitted this exception only where private sector employee speech clearly touches on matters of “public concern”.<sup>230</sup> This has, as Cornell Law School Dean Stewart J. Schwab has noted, resulted in a rather narrow application of this legal exception.<sup>231</sup> As a result, employee bloggers are unlikely to find much legal protection in this regard.

## **B. State Statutory Protections**

While state courts have been rather hesitant to find ways of protecting employees against adverse employment actions taken as the result of the employees’ off-duty conduct, legislatures in various states have been more forceful. In the late 1980’s the tobacco industry began aggressively lobbying state legislatures to pass laws protecting the rights of employees and prospective employees to smoke while off-duty. In various of these states, however, the narrow nature of the proposed legislation, i.e., simply protecting the rights of smokers, drew sharp opposition.<sup>232</sup>

Consequently, in a number of states the proposed legislation was broadened to protect employee/prospective employee use of “lawful products” or “lawful consumable

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<sup>230</sup> *Nees v. Hocks*, 536 P.2d 512 (S.Ct. Or. 1975).

<sup>231</sup> See Stewart J. Schwab, *Wrongful Discharge Law and the Search for Third-Party Effects*, 74 TEX. L. REV. 1943, 1957-58 (1996).

<sup>232</sup> See Marisa A. Pagnattaro, *What Do You Do When You Are Not At Work? Limiting the Use of Off-Duty Conduct as the Basis For Adverse Employment Decisions*, 6 U. PENN. J. LAB & EMP. L. 625, 641 (2004). See also, Jackson, *supra* note 21 at 145.

products" during non-work hours away from employer premises.<sup>233</sup> In such states, for example, an employer could not discharge an employee for his or her vacation-time consumption of alcohol. Moreover, the state legislatures in three states, Colorado,<sup>234</sup> New York,<sup>235</sup> California,<sup>236</sup> and North Dakota,<sup>237</sup> have gone even a step further protecting not only employee off-duty use of lawful products (tobacco, alcohol, etc.) but also providing protection against employee discharge for or "lawful activities" off the employer's premises during non-working hours. In total, over thirty states have passed legislation protecting the off-duty rights of employee smokers, and of these, about seven states have gone a step further protecting employee off-duty use of all lawful products, while the aforementioned four states have gone two steps further providing protections for employees with regard to all off-duty lawful activity.<sup>238</sup>

Moreover, considerable differences exist among the statutes in the four states which broadly protect all lawful employee off-duty conduct. The Colorado statute, for example, appears to only protect current employees from termination,<sup>239</sup> while the statutes in New York, California, and North Dakota<sup>240</sup> appear to protect both job

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<sup>233</sup> See Jackson, *supra* note 21 at 144.

<sup>234</sup> Colo. Rev. Stat. § 24-34-402.5 (1995).

<sup>235</sup> N.Y. Lab. Law § 201-D (1996).

<sup>236</sup> Cal. Lab. Code § 96 (k) (2002).

<sup>237</sup> N. Dakota Cent. Code § 14.02.4-03 (1995).

<sup>238</sup> Terry Morehead Dworkin, *It's My Life – Leave Me Alone: Off-The-Job Employee Associational Privacy Rights*, 35 AM. BUS. L.J. 47 (1997).

<sup>239</sup> See Col. Rev. Stat. § 24-34-402.5.

<sup>240</sup> See N.Y. Lab. Law § 201(d); Cal. Lab. Code § 96 (k); N. Dakota Cent. Code § 14.02. 4-03.

applicants and employees from any adverse employment action or “discrimination” (e.g., demotion, transfer, and failure to hire/promote) due to their lawful off-duty conduct.

In addition, the afore-mentioned four states have different provisions regarding “conflict of interest” exemptions from statutory coverage. The North Dakota statute, for example, explicitly protects employee “lawful activity off of the employer’s premises during nonworking hours” so long as this activity is not in “direct conflict with the essential business-related interests of the employer.”<sup>241</sup> In contrast, the Colorado statute does not apply if the employee’s off-duty activities present a “conflict of interest” or “the appearance of . . . a conflict of interest”.<sup>242</sup> Thus, employees blogging off-duty currently appear to enjoy broader protection for their blogging activities in North Dakota than in Colorado.

Finally, the enforcement schemes of the four broad statutes vary markedly. The Colorado statutes specifically states that the “sole remedy” for aggrieved individuals under its off-duty conduct statute is a civil lawsuit in state district court for lost wages and benefits, although such aggrieved individual is explicitly required by the statute “to mitigate his damages”.<sup>243</sup> The relevant North Dakota statute, in contrast, is embedded in the state’s Human Rights Act which is enforced by the Human Rights Division of the North Dakota Department of Labor.<sup>244</sup> The remedies under the North Dakota law appear

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<sup>241</sup> N. Dakota Cent. Code § 14.02.4-03.

<sup>242</sup> Colo. Rev. Stat. § 24-34-402.5 (1) (b). The Colorado law also gives employers the right to restrict employee lawful activity if it [r]elates to a bona fide occupational qualification, among other things. *See Id.* at 24-34-402.5 (1) (a).

<sup>243</sup> Colo. Rev. Stat. § 24-34-402.5 (2) (a).

<sup>244</sup> *See* N. Dakota Code Chapter § 14-02-4 (1995). *See also How To File A Discrimination Complaint in North Dakota, Human Rights Division*, North Dakota

to include wide-ranging equitable relief, including injunctions.<sup>245</sup> In addition, the North Dakota Human Rights Division, similar to the approach taken by the U.S. Equal Employment Opportunity Commission (EEOC) in enforcing Title VII of the U.S. Civil Rights Act,<sup>246</sup> places considerable emphasis on using alternative dispute resolution methods, especially mediation/conciliation, in resolving complaints brought under the North Dakota Human Rights Act.<sup>247</sup>

The New York State off-duty activities statute is actually embedded in a law giving that state's Labor Commissioner the power to regulate workplace health and safety.<sup>248</sup> Consequently, it appears that the New York law is enforced in significant measure by means of having the state Labor Commissioner impose monetary fines on employers for statutory violations.<sup>249</sup> Finally, California's employee off-duty conduct law is part of that state's wage and hour laws, with the California Labor Commissioner empowered to help employees collect "loss of wages" resulting from adverse employer

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Department of Labor, [www.nd.gov/labor/services/humanrights](http://www.nd.gov/labor/services/humanrights) (last visited March 1, 2006).

<sup>245</sup> *Id.*

<sup>246</sup> According to the Equal Employment Opportunity Commission website:

Mediation is a *fair* and *efficient* process to help you resolve your employment disputes and reach an agreement. A neutral mediator assists you in reaching a voluntary, negotiated agreement. Choosing mediation to resolve employment discrimination disputes promotes a better work environment, reduces costs and works for the employer *and* the employee.

<http://www.eeoc.gov/mediate/index.html> (last visited, March 1, 2006).

<sup>247</sup> *See How To File a Discrimination Complaint, supra note 179.*

<sup>248</sup> *See* N.Y. Labor code § 200.

<sup>249</sup> *Id.* at §§ 201-d, 211 & 213.

action due to lawful employee off-duty conduct.<sup>250</sup> Thus, procedurally aggrieved employees file a complaint with the California Department of Labor for lost wages due to adverse employment actions taken because of their lawful off-duty activities. The California Labor Commissioner then has statutory authority to investigate said complaint and if necessary hold a formal “hearing” on this matter.<sup>251</sup> After said hearing the California Labor Commissioner is empowered to issue an enforceable order regarding the complaint, although the Commissioner’s order is appealable to state trial court.<sup>252</sup>

In sum, the majority of states in the United States currently have state statutes protecting the off-duty activities of employees at least to the extent said off-duty activity involves the lawful usage of tobacco. The ostensible reason behind these statutes was the key social value/importance of tobacco usage/smoking.<sup>253</sup> Four states, including two of the nation’s largest states (i.e., California and New York) have significantly expanded the off-duty tobacco usage template to protect, albeit with various conflict of interest exceptions, all lawful off-duty employee conduct. All four states, however, have very different schemes for enforcing said statutes ranging from making them enforceable only in state trial court to having them subject to elaborate state labor department wage and hour administrative enforcement mechanisms. Lawfully blogging employees in the states of California, New York, Colorado, and North Dakota thus appear to currently enjoy some legal protection although the degree of protection and the ease/effectiveness of its enforcement varies quite a bit.

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<sup>250</sup> See Cal. Lab. Code §§ 96, 98, 98.3, & 98.6.

<sup>251</sup> *Id.* at § 98.

<sup>252</sup> *Id.*

<sup>253</sup> See Jackson, *supra* note 21 at 153.

## VII. Possible Avenues for Reform: The Appealing “Bright Lines” of State Legislative Action

### A. Overview

Current law places employees who blog in a difficult position. First, under state common law rules, there is for all practical purposes no protection. Courts have been rather reluctant to expand existing exceptions to the at-will doctrine to cover off-duty related activities of employees, and blogging would appear to fare not differently. Second, only a handful of states have enacted comprehensive statutes protecting lawful employee off-duty activities such as blogging, and even in those few states there are both substantive and practical procedural limitations on the scope of said protection. Finally, under the NLRA, employees’ blogging activity can be protected provided the blogging meets the requirements of concertedness and mutual aid or protection. These requirements are likely to apply, though, only in situations where the blog is focused primarily, if not exclusively, on wages, hours and other terms and other conditions of employment. Moreover, outside of unionized settings, employees are unlikely to know about their rights under the NLRA, and even where employees are aware of such rights the NLRA often presents considerable enforcement challenges.<sup>254</sup> The upshot of all this is that the safest approach for employees currently probably is, as a July 24, 2005 editorial column in the *New York Times* advised,<sup>255</sup> not to blog at all.

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<sup>254</sup> See Bierman & Gely *supra* note 111 at 189.

<sup>255</sup> See Matt Villano, *Write All About It (At Your Own Risk)*, N.Y. TIMES, July 24, 2005, at 10.

However, to the extent that blogging, as we argue above, has considerable value as a generator of social capital, not only does the individual employee suffer, but so does society at large. Thus, the question arises whether realistic legal rules could be devised that improve the current regime?

The answer to the above question appears to be an equivocal “yes”. There appear to be three principal possible avenues for reform: (a) expand the protections of the NLRA; (b) expand the protections for employee bloggers under state common law, particularly under the public policy exception to the doctrine of employment-at-will; and/or (c) expand state legislative protections for employee bloggers, most logically using the existing template of protections for off-duty smokers. What follows is a brief review of these possible avenues for reform, with a recommendation for the adoption of above-listed option (c). Given the millions of current employee bloggers, with new millions being added literally each year, targeted “bright line” standards of the kind afforded by amending existing state off-duty conduct statutes appear to offer the best and most appropriate legal reform solution.

## **B. NLRA Reform**

As noted earlier,<sup>256</sup> the NLRA does provide fairly comprehensive protection for employees blogging about clearly work-related issues where some connection or linkage (“concertedness”) with/to other workers is also fairly clear. There is, however, a major “notice” problem under the NLRA, in that very few non-unionized employees have even

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<sup>256</sup> *See supra* notes 118 to 147 and accompanying text.

the slightest idea that the Labor Act affords them any protection in this regard.<sup>257</sup> Unlike other agencies enforcing employment statutes, the NLRB has no field inspection/enforcement staff – rights under the NLRA get triggered only when an aggrieved employee specifically files a charge with the NLRB and asks the agency to get involved.<sup>258</sup> In addition, as numerous observers have pointed out,<sup>259</sup> the remedial provisions of the NLRA are weak and it can literally take years for employees to obtain redress under the Labor Act.

All of the above issues were last grist for major congressional reform consideration about thirty years ago during the Labor Law Reform Act of 1977-78 debates.<sup>260</sup> Despite the existence of a pro-union Democratic President supporting NLRA reform legislation, and pro-union Democratic majorities in both the U.S. House of Representatives and the U.S. Senate, the legislative proposal after being passed by the House of Representatives ended up being successfully filibustered in the U.S. Senate.<sup>261</sup> In today's political context of a Republican President, and Republican majorities in the U.S. House and U.S. Senate significant NLRA reform seems extremely unlikely, particularly given the fact that the AFL-CIO and labor unions generally are in a much weaker economic/political position today than they were back in 1977-78.<sup>262</sup>

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<sup>257</sup> See Bierman & Gely, *supra* note 111 at 188-89.

<sup>258</sup> *Id.* at 188.

<sup>259</sup> *Id.* at 188-89.

<sup>260</sup> See, Comment, *Labor Law Reform: The Regulation of Free Speech and Equal Access in NLRB Representation Elections*, 127 U. PA. L. REV. 755 (1979).

<sup>261</sup> *Id.*

<sup>262</sup> The precarious situation faced by the AFL-CIO has become somewhat more pronounced in recent months as a coalition of seven unions, known as the Change to Win Coalition, representing seven million union workers and 20 percent of the AFL-CIO's

Indeed, even minor administrative agency reforms in this area appear unlikely. For example, Emeritus Law Professor Charles Morris of Southern Methodist University Law School has for the last decade had a rulemaking petition pending before the NLRB which would require all private sector employers (unionized and non-unionized) to put up a poster in their workplaces setting forth employee/employer rights under the NLRA.<sup>263</sup> The NLRB, however, has yet to act on this petition,<sup>264</sup> and without being unduly cynical, it appears unclear at best to what extent having such posters on workplace rest area bulletin boards would mark a meaningful shift in making non-unionized aware of (and willing to exercise) their rights under the NLRA.

Finally, it must be noted that at its heart the NLRA protects only work-related rights. Markedly improving notice, enforcement, and remedies of these rights even if speculatively possible would not deal with the fact that the NLRA does not protect non-work-related employee activities such as non-work-related employee blogging. While Congress at least hypothetically could expand the NLRA into the non-work-related arena, such an expansion would not only be extraordinarily unlikely,<sup>265</sup> it would also cut directly

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annual budget, has recently left the Federation. Unions like the Service Employees International Union and UNITE-HERE, which represent workers in service industries, are dissatisfied with the AFL-CIO's lack of commitment toward organizing activities. They argue that the AFL-CIO has failed to follow the work, and propose shifting organizing to service sectors of the economy, which are experiencing growth, citing employers such as Wal-Mart and Fed-Ex as examples. Steven Greenhouse, *4 Major Unions Plan to Boycott A.F.L.-C.I.O Event*, THE NEW YORK TIMES, at A1, A16 (July 25, 2005).

<sup>263</sup> See *Rulemaking Petition of Professor Charles J. Morris to the National Labor Relations Board* (Feb. 9, 2003) (on file with the authors).

<sup>264</sup> *Id.*

<sup>265</sup> See *infra* notes 261 to 262 and accompanying text.

against the constitutional and legislative history underpinnings of the NLRA.<sup>266</sup> In sum, the NLRA appears to be an unlikely avenue for the meaningful expansion of rights for employee bloggers.

### C. State Common Law Reform

As noted above,<sup>267</sup> historically state courts have permitted a public policy exception to the doctrine of employment-at-will only where private sector speech clearly touches on matters of “public concern”. For all practical purposes this has left employee bloggers with little protection.

Cornell Law School Dean Stewart J. Schwab, however, has argued for a significant expansion of the public policy exception to the employment-at-will doctrine to broadly protect what he calls “third party effects.”<sup>268</sup> According to Dean Schwab, more focus is necessary in this area of the law on the harm to third parties of not adequately protecting employees from adverse employment actions.<sup>269</sup> Thus, for example,

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<sup>266</sup> NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).

<sup>267</sup> See *supra* notes 199 to 201 and accompanying text.

<sup>268</sup> See Schwab *supra* note 231 at 1957-58.

<sup>269</sup> *Id.* at 1950. According to Professor Schwab, the focus should be on what he refers to as the “third-party effect”, that is, the extent to which refusing to protect the employee against the adverse employment action is likely to result in some harm to third parties. The third party effect is stronger, and thus it is appropriate for the court to allow a wrongful discharge claim, in cases where employees are terminated for “refusing to perform and illegal act, fulfilling a public duty, or acting as an external whistleblower.” *Id.* at 1945. On the other hand, where employees are fired for exercising a statutory right (such as filing a workers’ compensation claim), the third-party effect is lacking and thus, it is less appropriate for a court to find in the employee’s favor in a wrongful discharge against public policy claim. *Id.* at 1955.

employees serving on jury duty create “public goods”,<sup>270</sup> and absent common law doctrine protecting them from being fired for their service on jury duty these “public goods” will be under-produced and various third parties will be unduly harmed.<sup>271</sup>

If, as we strongly assert in this Article, employee blogging helps create the “public good” of social capital formation, Dean Schwab’s analysis provides at least a theoretical basis for its broad protection under the state public policy common law exception. Put another way, why can not all employee blogging be seen as involving matters of “public concern” deserving of public policy exception protection?

Despite its theoretical appeal, however, judicial creation of such a broad public policy exception to the doctrine of employment-at-will realistically appears highly unlikely. It’s one thing for state courts to say that employees can’t be fired for being on jury duty, and virtually all do so,<sup>272</sup> and quite another to say that employees can not be fired for anything related to a very broadly construed notion of “public concern”. As we have seen in the State of Montana,<sup>273</sup> state legislatures are more than free if they so desire

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<sup>270</sup> See Mancur Olson, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* (1971). Public-goods are likely to be under-produced, unless incentives are restructured. The wrongful discharge cause of action accomplishes this by protecting employees against terminations, and thus providing the necessary incentives for both employers and employees to take into account the third-party effects of their actions.

<sup>271</sup> See Schwab *supra* note 231 at 1951. The costs of the employer’s actions are borne not by the employer but by third parties, i.e., society at large. It does not hurt the employer much to make it more difficult for the judicial system to empanel a jury by making it more difficult for employees to fulfill their civic duty. In some cases, as where the employer asks the employee to commit an illegal act, not only the employer bears no cost, but actually obtain a benefit at the expense of the public. On the employee side, in this type of cases, the employee receives little benefit from confronting the employer or refusing to follow the employer’s orders.

<sup>272</sup> See Perrit, *supra* note 189 at Vol. 2, p. 77.

<sup>273</sup> See Mont. Code Ann. §§ 39-2-901-39-2-914.

to statutorily overrule the doctrine of employment-at-will. State court expansion of the public policy exception to that doctrine of the kind we might suggest, though, would seem to be coming very close to judicial wholesale over-turning of the at-will doctrine, thus in appropriately placing state judges in the role of state legislators.<sup>274</sup>

#### **D. State Legislative/Off-Duty Conduct Statutory Reform**

Given the above, the best approach to the expansion of rights for employee bloggers appears to be at the state legislative level. It must be made clear that state legislatures do not have to adopt Montana-like comprehensive legislation overturning the “at-will” doctrine to attain reform in this area. The vast majority of states already have, as discussed earlier,<sup>275</sup> targeted legislation in this area protecting the rights of employee off-duty smokers, legislation which could easily be amended to also protect the rights of employee off-duty bloggers.

To the extent state off-duty employee smoking statutes were enacted in part to compensate employees for the ability of employers to regulate their ability to use tobacco during the working day,<sup>276</sup> similar arguments also seem to exist with respect to employee blogging. For example, the states of Kentucky,<sup>277</sup> Mississippi,<sup>278</sup> New Mexico,<sup>279</sup> and

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<sup>274</sup> “[The] perception and declaration of relevant public policy ... are best and more appropriately explored and resolved by the legislative branch of our government... If the rule of nonliability for termination of at-will employment is to be tempered, it should be accomplished through a principled statutory scheme, adopted after opportunity for public ventilation, rather than in consequence of judicial resolution of the partisan arguments of individual adversarial litigants.” *Murphy v. American Home Products*, 448 N.E.2d 86, 89-90 (N.Y. 1983).

<sup>275</sup> *See supra* notes 232 to 253 and accompanying text.

<sup>276</sup> *See Jackson, supra* note 21 at 145.

<sup>277</sup> Ky. Rev. Stat. §§ 61.165; 438.050; 344.03 et seq. (2005).

Tennessee,<sup>280</sup> all have specific language in their off-duty employee tobacco use protection statutes referring to the need for employees to be able to smoke off-duty in return for their compliance with possible employer rules prohibiting smoking while on the job. Regardless of the general “social capital” value of employee blogging, it would seem that employers should virtually always have the right to regulate employee computer usage during the working day,<sup>281</sup> and thus especially insuring the rights of employees to use their computers as they see fit off-duty appears arguably deserving of special legislative protection.

Moreover, without entering the debate regarding the pros and cons of tobacco usage, it would appear that the “social value” of employee blogging is at least on a par with that of smoking, and that thus adding protection of this activity to extant state statutes protecting off-duty tobacco usage is philosophically entirely reasonable and appropriate. Such legislative action would, like the original legislation protecting tobacco usage, address an important social concern in a limited and targeted manner. Further, adding employee blogging protection to existing statutes would avoid the practical need to formulate new off-duty employee protection enforcement/remedial schemes. Existing “conflict of interest” and related provisions in the off-duty tobacco usage states would also simply apply as well with regard to employee blogging.

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<sup>278</sup> Miss. Code § 71-7-33 (2005).

<sup>279</sup> N.M. Stat. Ann. §§ 24-16-1 et seq.; 50-11-1 (2005).

<sup>280</sup> Tn. Code §§ 39-17-1604 et seq; 39-17-1551; 50-1-304 (2005).

<sup>281</sup> Michael Selmi, *Privacy for the Working Class*, 66 La. L. R. \_\_ (2006) (on file with the authors) (arguing that the employer should have broad control to monitor the employee while at the workplace).

One additional issue, though, may be worthy of state legislative consideration in this regard. There is increasing empirical and other evidence<sup>282</sup> with respect to the value of mediation/conciliation as a first step in the resolution of employee discharge and related cases. Thus adoption of the North Dakota model<sup>283</sup> to the extent it initially requires mediation/conciliation in an attempt to resolve cases involving off-duty employee conduct/blogging would seem to make logical sense, and this would be a very simple “add on” to existing off-duty statutory protection language.

In sum, amendment of existing state statutes protecting off-duty employee tobacco usage appears to be the best avenue for reform in this area. State legislation of this kind would be limited and targeted in nature, but also involve clear “bright lines”, i.e., employees in given states would clearly know their rights in this regard. It would put the role of partially overturning the doctrine of employment-at-will where it seems to most belong -- in the hands of elected state representatives. Most significantly, such legislation would protect *all* off-duty employee blogging, regardless of whether such blogging involves extensive discussion of the workplace, or not. As such, legislation of this kind would clearly and directly recognize the important social value of employee blogging, and particularly its key role in helping reverse the decline in American “social

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<sup>282</sup> See Leonard Bierman, et al., *Making Disputes Over Dismissals ‘Win-Win’ Situations*, 63 HARV. BUS. REV. 160 (1985) (discussing empirical evidence on the use of mediation practices in the employment context); Leonard Bierman & Stuart A. Youngblood, *Employment-At-Will: A Mediatory Approach*, 40 ARB. J. 48 (1985) (same).

<sup>283</sup> See N. Dakota Code Chapter § 14-02-4 (1995). See also *How To File A Discrimination Complaint in North Dakota*, Human Rights Division, North Dakota Department of Labor, [www.nd.gov/labor/services/humanrights](http://www.nd.gov/labor/services/humanrights) (last visited March 1, 2006).

capital”. Off-duty employee blogging if given strong legal protection can play an important role in helping re-create a sense of American “community”.

### **VIII. Conclusion**

As Professor Robert Putnam has amply documented, there has been a sharp decline in American “social capital” in recent decades. Employee blogs are already playing a significant role in helping overcome this decline, and the potential of such blogs in this regard is somewhat exponential as millions of new individuals enter the blogosphere each year. In many respects employee blogs are the new union hall connecting individuals together on both work and non-work matters.

That said, however, most of today’s employee bloggers do not enjoy the legal protections afforded by the union hall of old. For one, private sector employee bloggers are highly unlikely to be unionized workers covered by the “just cause” protections of collective bargaining agreements. However, even if they are not union members, if the discussions in their blogs are very focused on work they may still enjoy protections under the National Labor Relations Act. There is an extremely strong probability, though, that they are not even aware of these protections, and reform of the NLRA to more clearly and expansively protect employee bloggers appears increasingly unlikely.

To the extent private sector employee bloggers discuss matters of critical “public concern” in their blogs, they may enjoy protection under the state common law public policy exception to the doctrine of employment-at-will. Such protections, though, are highly limited in nature. Moreover, while there are theoretical bases for expansion of the

public policy exception to better protect employee bloggers, any truly meaningful actions of this kind would effectively be putting state court judges in the role of state legislatures.

Thus, overall, it seems best to leave reform in this area to state legislatures themselves. The template for such reform already exists as the vast majority of state legislatures have previously enacted special legislation protecting the rights of employees to consume tobacco products during non-working hours. Since the special social value of employee off-duty blogging seems to be at least as high as that of employee off-duty smoking, adding protection of this activity to existing statutes appears to make sense. Such “bright line” legislative protection will allow employees to enter the union hall of the new millennium without fear, and to blog openly about work, non-work, or a mixture thereof as they see fit. With such protected blogging, American workers will no longer be “bowling alone”.