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# Unsocial Network

## What happens when workers flame bosses online?

**BY DAN SCHWARTZ**

In 1935, Babe Ruth retired from baseball. A gallon of gas cost 10 cents. Igor Sikorsky was still working on developing the helicopter in Connecticut. And we were still 10 years away from even ideas like Dick Tracy's Two-Way Wrist Radio.

There were no computers. No Facebook. No smartphones. "Social networking" was still done mostly in bars.

In other words, with due respect to some of my colleagues and family members, it was a long time ago.

Now flash forward to today. A gallon of gas is $3.20 (if you still know where to look). Smart phones allow you to have a video conference on Skype anywhere at anytime around the world at virtually zero cost. And more than 500 million people (far above the population of the United States) use something called "Facebook" to share over 30 *billion* pieces of content. Each month.

Nostalgia over gas prices aside, I'm not sure that there are many people that would want to go back to where we were in 1935.

Yet, when it comes to our nation's labor laws, we're still stuck in the 1930s. The National Labor Relations Act (NLRA) was developed in the midst of the Great Depression as a way to protect the rights of employees and employers, to encourage collective bargaining, and to curtail certain private sector labor and management practices, ostensibly that can harm workers, businesses and the economy. While it was amended (and weakened) in 1947 with the passage of the Taft-Hartley amendments, it has remained virtually untouched.

The NLRA isn't the only law stuck in the 1930s. Many of the nation's wage and hour laws were also created in the 1930s and still contain an overtime exemption for switchboard operators.

### 'Protected Concerted Activity'

For employers, the collision between the 21st-century workplace and 20th-century laws is something that they have to confront on a daily basis. And when the lines between the workplace and the "outside" world blur, trouble happens.

In Connecticut, the regional office of the National Labor Relations Board (NLRB) made headlines in 2010 with word that they were bringing a complaint against an employer for violating Section 7 of the NLRA. That section prohibits employers from interfering with employees' efforts to work together to improve the terms and conditions of their workplace. In other words, employees engaged in "protected concerted activity" have rights that cannot be violated.

Throughout much of the NLRA's history, "protected concerted activity" usually (though not always) involved employees complaining at work about their wages or a particular practice of an employer. But in this new case brought by the NLRA, the employee's status update on her personal Facebook page after work hours is alleged to be the key trigger for unlawful action.

(Though to be fair, the complaint also claims that the employer denied union representation to the employee during investigation of an incident of a customer complaint about the employee. The company has denied the allegations.)


Daniel A. Schwartz

Central to the NLRB's argument was the idea that the employer's Internet policy (on which it relied upon for the decision) was too restrictive because it prevented employees from making disparaging remarks when discussing the company or its supervisors.

Taken to its logical end, the NLRB's argument would allow employees to discuss in a public forum – without repercussions – how bad the employer and its supervisors are to work for. This isn't simply water cooler talk anymore. With Facebook and YouTube, videos and comments can go viral in a matter of hours.

No matter what you think about the facts of that particular case, it's hard to imagine that the drafters of the NLRA in 1935 had this type of conduct in mind.

### Building A Consensus

So what can be done?

Obviously, the easiest fix for this is also the hardest – introduce legislation to update and modernize our workplace laws. But the obstacles in trying to craft a bipartisan bill on a federal level in this political climate would seem insurmountable.

So, to the enterprising legislator, in the absence of introducing a bill, how about holding hearings to discuss the parameters of today's workplace? Build a consensus. Educate the public and fellow legislators.

*Daniel A. Schwartz practices in the Labor and Employment Section at Pullman & Comley LLC and is the author of the Connecticut Employment Law Blog.*

Ask and tackle difficult questions such as: At what point is off-duty conduct off-limits to employers? Should employees have the unfettered ability to talk about work and their boss anyplace or anytime? Is checking a Blackberry during off-work hours to be considered "work"? Can employers check an employee's e-mail at work?

At a minimum, get people talking about the issues rather than the facts of the particular case before the NLRB. Solicit input from Chambers of Commerce and from union leaders. After 75 years, isn't it time to at least acknowledge that some laws need a freshening up?

In the absence of legislative work, the alternatives are more limited. State and federal agencies can use their rule-making authority to provide guidance on some of these issues. Or at a minimum, advisory opinions can be written to suggest to employers and employees how certain rules may be interpreted in today's modern workplace.

But doing nothing will not make the issue go away. Courts will come down with decisions and the issues will only get thornier and trickier. Yes, we have large issues to tackle in the legislature with the looming budget battle among them. But updating the workplace laws that affect everyone on a day-to-day basis can help everyone in the long run. ■