

SOCIAL MEDIA POLICIES, CORPORATE CENSORSHIP AND THE RIGHT TO BE FORGIVEN: A PROPOSED FRAMEWORK FOR FREE EXPRESSION IN AN ERA OF EMPLOYER SOCIAL MEDIA MONITORING

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ABSTRACT

This Article examines the censorship by business organizations of employee social media speech in the context of evolving and uncertain standards for legal employer surveillance and proposes a risk mitigation strategy that enhances employee freedom of expression. Corporate censorship of employee speech on social media continues despite the United States Supreme Court’s declaration that social media occupies a critically important venue for the exercise of free speech. The business rationale for this censorship, increasingly conducted through the use of social media policies that enforce employer restrictions for online employee speech, include brand protection, the securing of property rights, and legal risk mitigation. However, this form of social media censorship faces increasing legal scrutiny under executive, legislative, and judicial action at both the federal and state levels, requiring business organizations to navigate a complicated and uncertain legal environment. This Article investigates these evolving legal risks to business organizations that engage in censorship of employee social media speech. This Article also advances a framework that mitigates employer risk associated with employee social media misuse while enhancing employees’ freedom of expression.

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I. INTRODUCTION

*While in the past there may have been difficulty in identifying the most important places (in a spatial sense) for the exchange of views, today the answer is clear. It is cyberspace—the “vast democratic forums of the internet” in general, and social media in particular.*¹

Social media²—ushered into the hallowed halls of United States

1. See *Packingham v. North Carolina*, 137 S. Ct. 1730, 1735 (2017) (quoting *Reno v. ACLU*, 521 U.S. 844, 868 (1997)) in which the United States Supreme Court discusses communication through internet use in the context of a First Amendment challenge to provisions of the Communications Decency Act of 1996, 47 U.S.C. § 223 (2019) (citation omitted).

2. Broadly defined, social media are “forms of electronic communication (such as websites for social networking and microblogging) through which users create online communities to share information, ideas, personal messages, and other content (such as videos).” Rachel E. VanLandingham, *Jailing the Twitter Bird: Social Media, Material Support to Terrorism, and Muzzling the Modern Press*, 39 *CARDOZO L. REV.* 1, 10 (2017) (quoting *Social Media*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/s>

Supreme Court First Amendment jurisprudence through the sweeping language of *Packingham*—now constitutes part of the critical infrastructure that ensures the flow and exchange of information, ideas, and viewpoints.³ This infrastructure facilitates freedom of speech, which as both a value and a right is inextricably entwined with other liberty interests, specifically an individual’s freedom from coercion and control.⁴ Censorship of social media speech infringes upon these foundational liberty interests in order to advance other competing interests viewed by the censor to be more compelling than the freedom of expression. If the censor is a social media platform, these countervailing interests range from policing online terrorism and criminal activity to combatting hateful, cruel or insensitive speech.⁵ Social media companies conduct censorship of social media speech on their platforms through content policies⁶ with the motivation of

ocial%20media [https://perma.cc/V2SC-8UZ9] (last visited July 25, 2019)); see Cressinda D. Schlag, *The NLRB’s Social Media Guidelines A Lose-Lose: Why the NLRB’s Stance on Social Media Fails to Fully Address Employer’s Concerns and Dilutes Employee Protections*, 5 AM. U. LABOR & EMPL. L.F. 89, 90 (2015) (defining social media as “a virtual community or network that allows people to connect via the internet and create, share, or exchange information”).

3. Kathleen McGarvey Hidy, *Social Media Use and Viewpoint Discrimination: A First Amendment Judicial Tightrope Walk with Rights and Risks Hanging in the Balance*, 102 MARQ. L. REV. 1045, 1058 (2019).

4. See UNIVERSAL DECLARATION OF HUMAN RIGHTS, ARTICLE 19, https://www.un.org/en/universal-declaration-human-rights/ [https://perma.cc/7TFS-F8RF] (last visited June 19, 2019) (“Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.”); Richard Wike, *Americans More Tolerant of Offensive Speech than Others in the World*, PEW RES. CTR. (Oct. 12, 2016), https://www.pewresearch.org/fact-tank/2016/10/12/americans-more-tolerant-of-offensive-speech-than-others-in-the-world/ [https://perma.cc/2WL8-DMJW] (last visited July 25, 2019) (stating that data exists that freedom of expression as a globally embraced ideal does not translate to universally held cultural free speech norms. The Pew Research Center reported cultural variances in its free expression index study of 38 nations, with the United States reporting the highest level of support for free expression in the study); *Letter of George Washington to Officers of the Army, March 15, 1783*, NATIONAL ARCHIVES, https://founders.archives.gov/documents/Washington/99-01-02-10840 [https://perma.cc/2Y47-C6ZV] (last visited June 18, 2019) (“... for if Men are to be precluded from offering their sentiments on a matter, which may involve the most serious and alarming consequences, that can invite the consideration of Mankind; reason is of no use to us—the freedom of Speech may be taken away—and, dumb & silent we may be led, like sheep, to the Slaughter.”).

5. Facebook and Twitter censor social media speech on their platforms pursuant to content policies. *Community Standards*, FACEBOOK, https://www.facebook.com/communitystandards/ [https://perma.cc/3UAG-WFKR] (last visited June 19, 2019); *The Twitter Rules*, TWITTER, https://help.twitter.com/en/rules-and-policies/twitter-rules [https://perma.cc/N6LG-BVVQ] (last visited June 19, 2019).

6. Sofia Grafanaki, *Platforms, the First Amendment and Online Speech: Regulating the Filters*, 39 PACE L. REV. 112, 117–18 (2018). The author explains that social media

upholding corporate social responsibility values and securing economic interests.⁷ If the censor is a business organization targeting employee social media speech, an employee's freedom of expression is subjugated to the employer's interest in brand protection, property rights, and legal risk mitigation.⁸ Corporate social media policies enact this strategy by policing employees' social media posts and enforcing standards of online conduct, even when employees' expressive activity occurs off-duty.⁹

This Article examines the impact of business organizations' censorship of employee social media speech on employees' freedom of expression and proposes a framework that mitigates the business organizations' risk while maximizing the freedom of employees to engage in expressive activity. This Article is the first¹⁰ in academic scholarship¹¹ to

providers "curate or govern" social media speech in two ways. First, through content moderation policies that act as speech censors by restricting or suppressing speech; second, through content navigation algorithms that order and direct speech to users' attention.

7. Kate Klonick, *The New Governors: The People, Rules, and Processes Governing Online Speech*, 131 HARV. L. REV. 1598, 1625–27 (2018). The author traces the censorship of social media speech by social media companies such as Facebook, Twitter, and YouTube to content moderation policies that advance corporate social responsibility concerns as well as economic interests vested in users' expectations and their correlation to advertising revenue.

8. Jessica K. Fink, *In Defense of Snooping Employers*, 16 U. PA. J. BUS. L. 551, 572–79 (2014).

9. *Id.* at 577.

10. Two published law review notes discuss *Packingham*'s impact on employee social media speech in the context of public sector employees' First Amendment right to engage in social media speech. See Frank E. Langan, *Likes and Retweets Can't Save Your Job: Public Employee Privacy, Free Speech, and Social Media*, 15 U. ST. THOMAS. L.J. 228 (2018); Alexis Martinez, *The Right to Be an Asshole: The Need for Increased First Amendment Public Employment Protections in the Age of Social Media*, 27 AM. U. J. GENDER SOC. POL'Y & L. 285 (2019).

11. Extensive scholarship prior to the *Packingham* decision focused on employers' use and justification of social media surveillance and employer censorship of employees as well as the legal impediments to both public sector and private sector employer enforcement of social media policies to censor employee speech. See Ifeoma Ajunwa, Kate Crawford & Jason Schultz, *Limitless Worker Surveillance*, 105 CAL. L. REV. 735 (2017) (advocating for new statutory prohibitions regulating employer surveillance on the grounds that employee privacy is a civil rights issue); Fink, *supra* note 8 (acknowledging employer motivation behind employer surveillance of employees, including social media speech monitoring, and the statutory and judicial boundary lines of such conduct); Jeremy Gelms, *High-Tech Harassment: Employer Liability Under Title VII for Employee Social Media Misconduct*, 87 WASH. L. REV. 249 (2012) (detailing employer liability for employee social media speech harassment); Saby Ghoshray, *Employer Surveillance Versus Employee Privacy: The New Reality of Social Media and Workplace Privacy*, 40 N. KY. L. REV. 593 (2013) (exposing the employee's role in risking privacy violations through social media posting and noting the reputational harm to employers caused by employee social media speech); Susan C. Hudson & Karla K. Roberts (Camp), *Business Leadership Symposium: Drafting and*

address these issues in light of the United States Supreme Court's admonitions in *Packingham* about the damaging impacts social media speech suppression has on Free Speech concerns.¹² Part II of this Article documents corporate censorship of employee speech on social media through the use of social media policies. Existing data on this form of employer surveillance confirms that business organizations increasingly rely on social media policies to control employees' expressive activity online. The business rationale for social media censorship of employees is

Implementing an Effective Social Media Policy, 18 TEX. WESLEYAN L. REV. 767 (2012) (providing a prescriptive account of the drafting and implementation of social media policies used by business organizations to regulate employee social media speech); Christina Jaremus, *#Fired for Facebook: The Case for Greater Management Discretion in Discipline or Discharge for Social Media Activity*, 42 RUTGERS L. REC. 1 (2014-2015) (delineating the legal protections for social media speech of public sector and private sector employees); Jessica A. Magaldi & Jonathan S. Sales, *Exploring the NLRB's Jurisprudence Concerning Work Rules: Guidance on the Limits of Employer Policy to Regulate Employee Activity on Social Media*, 52 U.S.F. L. REV. 229 (2018) (analyzing restrictions on social media employee speech enacted through employer social media policies in light of National Labor Relations Act precedent); Schlag, *supra* note 2 (arguing that the National Labor Relations Board's guidance on social media policy restrictions on employee social media speech leaves both employers and employees at risk for unlawful practices and chilling speech concerns); Robert Sprague & Abigail E. Fournier, *Online Social Media and the End of the Employment-At-Will Doctrine*, 52 WASHBURN L.J. 557 (2013) (arguing that the employment of will doctrine is eroded as social media policy firings for social media speech become protected speech under the National Labor Relations Act); Robert Sprague, *Facebook Meets the NLRB: Employee Online Communications and Unfair Labor Practices*, 14 U. PA. J. BUS. L. 957 (2012) (analyzing National Labor Relations Board charges from employees asserting unlawful employment practices by employers based on their social media speech); Nicholas P. Terry, *Fear of Facebook: Private Ordering of Social Media Risks Incurred by Healthcare Providers*, 90 NEB. L. REV. 703, 718 (2012) (examining the proliferation of social media policies used by healthcare entities to regulate employee speech and the legal limits imposed on the implementation of social media policies under labor law and privacy law); Elizabeth C. Tippet, *The Legal Implications of the MeToo Movement*, 103 MINN. L. REV. 230 (2018) (examining the legal protections of #MeToo social media posts and employer non-disclosure "carve outs" in social media policies); Bethany N. Whitfield, *Social Media @ Work: #policyneeded*, 66 ARK. L. REV. 843 (2013) (providing an overview of the statutory restrictions on employer social media policies and advocating for specific implementation strategies of these policies.).

12. *Packingham*, 137 S. Ct. at 137 (quoting *Reno*, 521 U.S. at 870) ("Social media allows users to gain access to information and communicate with one another about it on any subject that might come to mind. By prohibiting sex offenders from using those websites, North Carolina with one broad stroke bars access to what for many are the principal sources for knowing current events, checking ads for employment, speaking and listening in the modern public square, and otherwise exploring the vast realms of human thought and knowledge. These websites can provide perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard. They allow a person with an Internet connection to 'become a town crier with a voice that resonates farther than it could from any soapbox.'") (citation omitted).

investigated and examples of corporate social media policies are analyzed in the context of best practices scholarship. Part III of this Article explores the evolving legal risks surrounding corporate censorship of employee social media speech. These risks arise from executive, legislative, and judicial action at both the federal and state levels and present a complicated and uncertain legal terrain business organizations must traverse when engaged in social media censorship of their employees. This Article in Part IV advances a framework for business organizations to adopt that mitigates employer risk associated with employee social media misuse while enhancing employees' freedom of expression in light of *Packingham's* designation of social media as an arterial road on the communication highway.

II. SOCIAL MEDIA POLICIES AND BUSINESS ORGANIZATIONS: POLICING EMPLOYEE SPEECH

Censorship is the control over expressive content, such as speech, including social media speech.¹³ The word censorship is etymologically derived from Ancient Rome's establishment of the public office of censors in 443 BCE.¹⁴ The contemporary understanding of censorship—when a person or entity “supervises conduct and morals”¹⁵ by examining conduct “in order to suppress or delete anything considered objectionable”¹⁶—has roots dating back thousands of years when Roman censors maintained the moral standards of Roman society by stripping Roman citizens engaged in immoral conduct in their public or private lives of their right to vote.¹⁷ For centuries, censorship has been viewed as a form of suppression of expressive conduct based on a judgment of moral condemnation aimed at controlling what constitutes acceptable communicative activity. The suppressed speech or sanctioned expressive content is adjudged to be unworthy of expression by the censor, the arbiter and imposer of the moral standard. The speaker is silenced and, in certain instances, punished for the speech; the speech itself is banned.

Corporate censorship of employee social media speech imports this

13. *Censor*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/censor> [<https://perma.cc/8R3H-DMCW>] (last visited June 18, 2019).

14. *Censor*, ANCIENT HISTORY ENCYCLOPEDIA, <https://www.ancient.eu/censor/> [<https://perma.cc/PE3J-E388>] (last visited June 18, 2019).

15. *Censor*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/censor> [<https://perma.cc/8R3H-DMCW>] (last visited June 18, 2019).

16. *Id.*

17. *Censor*, ANCIENT HISTORY ENCYCLOPEDIA, <https://www.ancient.eu/censor/> [<https://perma.cc/PE3J-E388>] (last visited June 18, 2019).

understanding of censorship to the extent business organizations police the content of employees' speech using some form of speech standard.¹⁸ Business organizations enforce speech standards through social media policies. The business rationale for this form of social media censorship includes brand protection, the securing of property rights, and legal risk mitigation.

A. Data and Trends on Employer Social Media Surveillance

Social media use in the United States remains unabated¹⁹ despite waves of controversies enveloping social media platforms involving concerns over privacy, censorship, and “fake news.”²⁰ A 2019 Pew Research Center report confirms that adult use of social media in the United States is statistically constant, unchanged and significant.²¹ YouTube and Facebook garner the most site use; seventy-three percent and sixty-nine percent of United States adults use these online platforms, respectively.²² Data on other social media platform use by adults in the United States includes: Instagram (thirty-seven percent); Pinterest (twenty-eight percent); LinkedIn (twenty-seven percent); Snapchat (twenty-four percent); Twitter (twenty-two percent); WhatsApp (twenty percent) and Reddit (eleven percent).²³ Demographic data on social media use corroborates that platforms attract users based on gender, race, ethnicity, age, income, education, and locale.²⁴ Depending on the social media platforms, adults in the United States report accessing certain social media sites daily and even several times throughout the day.²⁵ The Pew Research Center reports a broad range of motivations animating social media use

18. The question of whether corporate social media policies explicitly articulate what speech standards are used to censor employee social media speech is explored in Part II.C.2.

19. Andrew Perrin and Monica Anderson, *Share of U.S. Adults Using Social Media, Including Facebook, Is Mostly Unchanged Since 2018*, PEW RES. CTR. (Apr. 10, 2019), <http://www.pewresearch.org/fact-tank/2019/04/10/share-of-u-s-adults-using-social-media-including-facebook-is-mostly-unchanged-since-2018/> [https://perma.cc/2WQ5-CPY2].

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.* For example, in the United States, Twitter is used more by men than women; Snapchat is used most by adults ages 18 to 29 and least by adults 65 years old or higher; Instagram is frequented more by urban dwellers than those living in rural communities; and 51% of Hispanics use Instagram compared with 40% of blacks and 33% of whites. *Id.*

25. *Id.* The Pew Research Center reports that 74% of Facebook users access Facebook every day and approximately 50% of users access this platform multiple times throughout a day. A majority of users of Snapchat and Instagram also access these social media platforms on a daily basis as do YouTube users. *Id.*

with the most obvious: social network building.

Beyond that, we have documented how social media play a role in the way people participate in civic and political activities, launch and sustain protests, get and share health information, gather scientific information, engage in family matters, perform job-related activities and get news.²⁶

The ubiquitous role of social media in the lives of adults in the United States translates to its increasing relevance in the workplace with data demonstrating in both quantitative and qualitative terms the nature and extent of employee social media use on the American workplace. The Pew Research Center documented trends in social media use and the workplace, finding that thirty-four percent of the employees surveyed use social media to “take a mental break from their job” while at work; twenty-seven percent use social media at work to “connect with friends and family”; twenty-four percent use social media “to make or support professional connections”; twenty percent use social media platforms “to get information that helps them solve problems at work”; seventeen percent use social media “to build or strengthen personal relationships with coworkers” and “to learn about someone they work with”; social media for twelve percent of those surveyed is used “to ask work-related questions of people outside their organization” as well as “to ask questions of people inside their organization.”²⁷ The motivations behind social media use in the workplace disclosed by the survey participants did not always align with outcomes. For example, sixteen percent of the employees who stated they used social media to strengthen personal relationships with coworkers also reported that they discovered information on social media that “lowered their professional opinion of a colleague.”²⁸

Data on social media and the workplace confirms that a substantial percentage of employees in the United States are regulated by employer rules about social media use. Fifty-one percent of these employees report

26. Lee Rainie, *Americans' Complicated Feelings About Social Media in an Era of Privacy Concerns*, PEW RES. CTR. (Mar. 27, 2018), <http://www.pewresearch.org/fact-tank/2018/03/27/americans-complicated-feelings-about-social-media-in-an-era-of-privacy-concerns/> [<https://perma.cc/8Z7L-TYEB>] (last visited July 26, 2019).

27. Cliff Lampe & Nicole B. Ellison, *Social Media and the Workplace: New Platforms Can Be Tools for Connection with Colleagues and Outside Experts but Can Also Serve as Distractions While on the Job*, PEW RES. CTR. (June 22, 2016), <https://www.pewinternet.org/2016/06/22/social-media-and-the-workplace/> [<https://perma.cc/KNY7-4GTJ>] (last visited July 26, 2019).

28. *Id.* 14% of social media users motivated to build personal relationships discovered information through social media that positively impacted their impressions of a work colleague. *Id.*

the existence of employer rules about social media use during work hours and thirty-two percent of these employees are subjected to employer policies on “how employees may present themselves on the internet in general.”²⁹ Existing data on employer surveillance of employee social media speech documents that business organizations increasingly rely on social media policies to control employees’ expressive activity online.³⁰ A significant percentage of business organizations engage in social media surveillance of their employees: forty-four percent track their employees’ social media use during both work hours and when employees are off-duty.³¹ These business organizations adopt and enforce social media policies to guide surveillance of social media conduct by their employees.³²

Social media surveillance of employee speech by business organizations is viewed as a form of best practices by management experts, arguably augmenting these trend lines. Human Resource experts advocate for the use of social media policies by business organizations to ensure that social media communications reflect positively on the corporate brand.³³ Preaching best practices, these experts argue that social media policies should extend to employee social media use on personal social media accounts, advancing the premise that employees remain representatives of their business organizations at all times and employers risk brand diminution by any online post on any social media platform by any employee.³⁴

29. *Id.*

30. Elizabeth C. Tippet, *The Legal Implications of the MeToo Movement*, 103 MINN. L. REV. 230, 259 (2018).

31. Cressinda D. Schlag, *The NLRB’s Social Media Guidelines A Lose-Lose: Why the NLRB’s Stance on Social Media Fails to Fully Address Employer’s Concerns and Dilutes Employee Protections*, 5 AM. U. LABOR & EMPL. L.F. 89, 94 (2015).

32. *Id.* at 111.

33. Forbes Human Res. Council, *Why Your Business Needs a Social Media Policy and Eight Things It Should Cover*, FORBES (May 25, 2017), <https://www.forbes.com/sites/forbes-humanresourcescouncil/2017/05/25/why-your-business-needs-a-social-media-policy-and-eight-things-it-should-cover/#7b2787ff5264> [<https://perma.cc/8XY4-G9HR>] (last visited July 26, 2019).

34. *Id.*; see Mary J. Culnan et al., *How Large U.S. Companies Can Use Twitter and Other Social Media to Gain Business Value*, 9 M.I.S. Q. EXECUTIVE 243, 248 (2010), <https://pdfs.semanticscholar.org/a59f/46c2ee905fab79885189c1c6781def6e45b.pdf> [<https://perma.cc/UEE4-5URF>] (last visited June 20, 2019) (explaining that social media risk management by business organizations for employee content extends to content created on business social media accounts as well).

B. The Business Rationale for Employee Social Media Speech Surveillance

The business rationale for corporate censorship of employee social media speech is broader than concerns over brand protection; it extends to business organizations' interests in securing property rights and proactively mitigating legal risk.³⁵ Business organizations create and implement social media policies as private attempts, some contractually based, to regulate social media speech and enforce standards of online conduct for their employees.³⁶ Employers' motivation for social media monitoring is inherently self-interested and their speech regulation focuses on a central question: is the employee damaging the employer's interests through online conduct and speech?³⁷

Most employers likely have little interest in the details of their employees' personal lives: they likely are not particularly intrigued by their employees' vacation photos, weekend plans, or Facebook posts about their children's latest witty statements. Rather, many employers may monitor their employees' out-of-work conduct out of a concern for how that employee may be representing the employer. Is an employee making disparaging statements about the employer? Is he or she disclosing information that the employer would prefer to keep secret? Is the employee mischaracterizing some part of the employer's operations?³⁸

The viral nature of online social media speech significantly raises the stakes for business organizations in their efforts to prevent destructive or damaging information from circulating online.³⁹ Borne out of the dual

35. Nicholas P. Terry, *Fear of Facebook: Private Ordering of Social Media Risks Incurred by Healthcare Providers*, 90 NEB. L. REV. 703, 719 (2012) (stating that healthcare entities that use social media policies adhere to the commonly used standards embraced by other employers: requesting that employees post on their personal social media accounts that their social media speech does not represent the healthcare institution; admonishing employees to engage in respectful treatment of patients and coworkers online; reminding employees that compliance with legal restrictions related to their industry such as HIPPA extends to their social media speech and conduct; forbidding "abusive, profane, threatening, or offensive posts"; protecting intellectual property; and delineating in the social media policy the disciplinary action triggered by policy violations).

36. *Id.* at 704. Social media policies are private, and in some instances contractually based attempts, to regulate social media speech. *Id.*

37. Fink, *supra* note 8, at 576–77.

38. *Id.*

39. *Id.* at 578; see Tippet, *supra* note 30, at 273 (explaining that social media posts related to harassment in the #MeToo era amplify allegations of misconduct and potentially

recognition that employees possess the power to significantly impact the business organization's interests through social media posts on their personal accounts⁴⁰ and, further, that social media itself magnifies that power, business organizations actively attempt to shape the use of that power.⁴¹

Business organizations' increasing use of social media policies to monitor employee social media speech reflects the concern that employee social media speech can disparage the business brand, its products, services or workplace culture.⁴² Social media policies' brand and reputation protection extends to the protection of intangible assets such as a business organization's goodwill.⁴³ Social media censorship of employee speech in this area is a preemptive strike by the employer to ensure brand messaging control and its impact on the business organization's marketing of goods or services.⁴⁴ Social media policies also restrict cyber-slaking—defined as

heighten the risks and threats posed to business organizations). These risks include brand diminution in the critically important court of public opinion:

The court of public opinion is not so concerned about whether the conduct met the formal legal requirements for severe or pervasive conduct or whether the employer's response was legally reasonable. MeToo revealed the chasm between public expectations and legal realities, portraying employer practices as unfair, and employees' treatment as outrageous.

Tippett, *supra* note 30, at 273. Legal risks increase for the business organization as well if additional alleged victims emerge, empowered to come forward by the social media #MeToo disclosure, and commence litigation. Tippett, *supra* note 30, at 274.

40. Schlag, *supra* note 31, at 95 (explaining that social media posts by employees on their personal accounts can impact their employers both positively and negatively; this impact is used by employers to justify social media monitoring and censorship of their employees' social media speech).

41. Business social media accounts manned by employees also present risks to employers; business organizations monitor social media speech on these corporate accounts as well. Culnan, *supra* note 34, at 248 ("Social media platforms pose new and serious risk management issues for firms because a large number of employees may be creating content or interacting with customers on behalf of the firm. Risks include security breaches, breaches of client confidentiality, leaks of intellectual property, and violations of the firm's policies or codes of conduct.").

42. Tippett, *supra* note 30, at 259; *see* Terry, *supra* note 35, at 716 (stating that social media speech surveillance and censorship extends to professional associations such as the American Bar Association and the American Medical Association which import social media use standards into their professional ethical codes of conduct. This trend mirrors the increasing use of social media policies by employers to censor employee social media speech). The American Medical Association created a detailed policy on social media speech for physicians, obligating physicians to notify a posting colleague of her social media policy violation and, if necessary, report the misconduct to other "authorities." *See* Terry, *supra* note 35, at 713.

43. Magaldi & Sales, *supra* note 11, at 234.

44. Terry, *supra* note 35, at 716 ("Thus, developing ethical codes must be seen, at least

“the use of the Internet or mobile technology during work hours for personal purposes”⁴⁵—which leads to substantial efficiency losses for the business and which ultimately translates into profit erosion.⁴⁶

Another business rationale behind employer surveillance of social media speech relates to security threats posed by employee online speech.⁴⁷ Security threats to the business organization can include loss of intellectual property such as trade secrets, loss of confidential or proprietary information or strategies, and loss of the ability to protect and secure other critical information or assets the business organization relies upon to remain competitive. To protect against security-related losses, social media policies also restrict employees from misusing intellectual property⁴⁸ online or disclosing the business organization’s confidential information.⁴⁹

Business organizations justify social media surveillance as a legal risk mitigation strategy that is a necessary tool of prudent and proactive risk assessment and minimization. Employer legal risks arising from employee social media speech include liability for harassment and discrimination of fellow employees online⁵⁰ as well as liability for breaches of compliance protocols mandated under federal laws such as the Sarbanes-Oxley Act of 2002⁵¹ or other federal or state laws.⁵² Social media policies routinely require a disclaimer on the social media post that an employee does not speak on behalf of her employer,⁵³ and human resource experts recommend that employee social media posts identify opinion or viewpoint posts as solely representing the employee’s individual viewpoint; not the opinion of the employer.⁵⁴ This disclaimer language, however, may not immunize a business organization from the legal risks attendant to the social media speech it did not authorize or condone.

in part, as a prophylactic reaction to how social media will present when fully monetized. It also explains the growth in employer policies that seek to regulate employee conduct online. Such regulation, at least in part, is driven by employers’ desire to control messaging about the employers’ goods or services.”)

45. Magaldi & Sales, *supra* note 11, at 231 (noting threats to employers caused by employee social media misuse include cyber slaking).

46. *Id.*

47. *Id.* at 235.

48. Susan C. Hudson & Karla K. Roberts (Camp), *Business Leadership Symposium: Drafting and Implementing an Effective Social Media Policy*, 18 TEX. WESLEYAN L. REV. 767, 782 (2012); Forbes Human Res. Council, *supra* note 33.

49. Tippet, *supra*, note 30, at 260; Forbes Human Res. Council, *supra*, note 33.

50. Forbes Human Res. Council, *supra* note 33; *see infra* Part III.

51. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2002); *see* Hudson & Roberts (Camp), *supra* note 48, at 789.

52. Hudson & Roberts (Camp), *supra* note 48, at 789.

53. Tippet, *supra* note 30, at 260.

54. Forbes Human Res. Council, *supra* note 33.

Globally, business organizations share similar concerns about the attendant risks to the business organization arising from employee social media, including online speech that is disparaging to the business or constitutes harassment of coworkers or involves the inappropriate disclosure of confidential business information.⁵⁵ Data confirms: social media policies are used to censor employee speech in countries throughout the world; these policies include disciplinary action for policy violations; and the policies must comply with the legal regimes of specific countries which differ on issues such as data collection (China), privacy rights and consent (Brazil), and consultation with Work Councils (Germany and the Netherlands).⁵⁶

C. Corporate Social Media Policies: Best Practices and Examples

As discussed in Parts III and IV of this Article, whether a business organization's surveillance of employee social media speech is "benign" depends on an interpretation and analysis of the impacts resulting from the employer's conduct.⁵⁷ The attempted surveillance may itself "create ethical or legal risk" for the business organization.⁵⁸ This catch 22—to surveil or not to surveil—is a calculated risk assessment. A business organization that decides to engage in social media speech surveillance of its employees must then evaluate whether to create a social media policy to govern and guide the surveillance. If a business organization drafts and implements a social media policy, multiple considerations arise, including: the scope of the policy and its prohibitions; its relationship to other employer policies; its implementation including workforce policy education and resource allocation for policy enforcement; and the penalties assigned to policy violations. An analysis of corporate social media policy "best practices" scholarship as well as actual policies adopted by business organizations evidence these considerations.

55. Aliah Wright, *Social Media Mainstream Worldwide*, THE SHRMBLOG, <https://blog.shrm.org/workplace/social-media-mainstream-worldwide> [https://perma.cc/SG7U-TJXL] (last visited July 26, 2019).

56. *Id.*

57. See Ajunwa, Crawford & Schultz, *supra* note 11, at 738 n.8 (noting that employer monitoring and employer surveillance are interchangeable terms).

58. Terry, *supra* note 35, at 703.

1. Best Practices of Corporate Social Media Policies

Scholarship exists surrounding managerial “best practices” in the drafting and implementation of corporate social media policies. The discussion of “best practices” begins with the business organization’s social media policy defining, broadly, what social media is⁵⁹ and articulating the standards for the expected conduct of employees on social media.⁶⁰ An employer’s social media policy should indicate who has authority to speak on behalf of the business organization.⁶¹ The policy should provide an employee with disclaimer language to post on her personal social media accounts to indicate to her social media followers that the employee’s social media speech does not represent the employer.⁶²

“Best practices” literature recommends that corporate social media policies incorporate the business organization’s harassment and discrimination policies and that the social media policies clearly state that social media speech by employees on personal accounts must comply with these other policies.⁶³ Examples of prohibited employee social media speech include conduct that can be construed as cyber bullying or harassing a fellow employee.⁶⁴

The business organization’s ethics policy should be imported as well into the social media policy.⁶⁵ Employee social media speech arguably impacts multiple employer policies involving harassment, discrimination, privacy, and a code of ethics.⁶⁶ Additionally, any social media policy change necessitates that a business organization revisit and possibly revise other interconnected policies.⁶⁷ Scholarship in this area also recognizes that in the #MeToo era policy review should include continuing evaluation of the cultural forces that may materially impact how a policy change is perceived and accepted.⁶⁸

The literature notes that social media policies should prohibit the disclosure of the business organization’s confidential and/or proprietary

59. Hudson & Roberts (Camp), *supra* note 48, at 769.

60. *Id.* at 770.

61. *Id.* at 771.

62. *Id.* at 772.

63. *Id.* at 776. “Best practices” scholarship argues that all of the business organization’s policies should be incorporated into the social media policy. Hudson & Roberts (Camp), *supra* note 48, at 789.

64. Forbes Human Res. Council, *supra* note 33.

65. Hudson & Roberts (Camp), *supra* note 48, at 770.

66. Tippet, *supra* note 30, at 297.

67. *Id.* at 298.

68. *Id.*

information, including intellectual property⁶⁹ and restrict disclosure of information inconsistent with any corporate compliance programs, such as employee disclosure of financial information impacting compliance with the Sarbanes-Oxley Act.⁷⁰ The policies should state that employees are expected to comply with all existing laws surrounding social media use,⁷¹ and a social media policy can include education on specific legal constraints surrounding social media speech concerning product endorsements and testimonials pursuant to the Federal Trade Commission guidelines.⁷² Social media policies should address whether and to what extent employees are permitted to use their personal social media accounts during work hours⁷³ and should educate employees on privacy expectations when engaging in social media speech on their personal accounts.⁷⁴

Once developed, social media policies require careful and thoughtful implementation, according to “best practices” literature. A business organization should specifically train employees on these policies and notify them of any policy revisions.⁷⁵ Social media policy enforcement raises significant issues for the business organization. These issues concern a cost-benefit analysis and resource allocation assessment of the monitoring,⁷⁶ equitable and fair enforcement of the policy,⁷⁷ and even whether social media speech triggers rights and protections under whistleblowing or reporting statutes at the federal or state level.⁷⁸

2. Examples of Corporate Social Media Policies

An examination of social media policies adopted by business organizations demonstrates that business organizations incorporate many of these best practices when drafting social media policies to censor employee social media speech. Business organizations import codes of conduct and

69. Hudson & Roberts (Camp), *supra* note 48, at 782; Forbes Human Res. Council, *supra* note 33.

70. Pub. L. No. 107-204, 116 Stat. 745 (2002); Hudson & Roberts (Camp), *supra* note 48, at 789.

71. Hudson & Roberts (Camp), *supra* note 48, at 790.

72. *Id.* at 787.

73. *Id.* at 773.

74. *Id.* at 783.

75. *Id.* at 791.

76. *Id.* at 793.

77. *Id.* at 795; Forbes Human Res. Council, *supra* note 33 (stating that a business organization’s social media policy should incorporate the organization’s code of conduct so that the employer is empowered to discipline or terminate an employee for social media misconduct).

78. Hudson & Roberts (Camp), *supra* note 48, at 796.

other corporate policies into social media policies governing employees' use of personal social media accounts and alert employees that corporate policies extend to employees' "personal" online activities and online speech.⁷⁹ Social media policies may specifically request that employees disclose their relationship to their employer and act to "protect" their employer when using social media.⁸⁰ These social media policies prohibit the disclosure of the business organization's "non-public" or "confidential information"⁸¹ which includes information related to a business organization's finances or operations: "This includes strategies, forecasts and most anything to do with a dollar-figure attached to it. If it's not already public information, it's not your job to make it so."⁸² Additionally, these social media policies warn against intellectual property misuse as well.⁸³

Corporate social media policies restrict employee social media speech which is "harassing, threatening, retaliatory, or discriminatory" to work colleagues, customers, or vendors.⁸⁴ Social media posts constituting any form of illegal discrimination are prohibited.⁸⁵ One corporate social media policy explicitly recognizes the "free speech rights" of all employees but admonishes employees to be mindful that "customers, colleagues and supervisors often have access to the online content you post," necessitating that employees consider the impact of their social media speech on these audiences.⁸⁶ The policy also warns that employees who take "public positions online that are counter to the Company's interests might cause conflict."⁸⁷

Social media policies adopted by business organizations direct that employees should "strive to be ethical, truthful, and decent,"⁸⁸ "use good

79. THE COCA-COLA COMPANY ONLINE SOCIAL MEDIA PRINCIPLES, <https://www.viralblog.com/wp-content/uploads/2010/01/TCCC-Online-Social-Media-Principles-12-2009.pdf> [<https://perma.cc/YG5Q-6FZ6>] (last visited June 19, 2019); BEST BUY SOCIAL MEDIA POLICY, <https://forums.bestbuy.com/t5/Welcome-News/Best-Buy-Social-Media-Policy/td-p/20492> [<https://perma.cc/UE4F-BA3C>] (last visited June 19, 2019).

80. INTEL SOCIAL MEDIA GUIDELINES, <https://www.intel.com/content/www/us/en/legal/intel-social-media-guidelines.html> [<https://perma.cc/C9WM-XBRG>] (last visited June 19, 2019).

81. THE COCA-COLA COMPANY ONLINE SOCIAL MEDIA PRINCIPLES, *supra* note 79, at 2.

82. BEST BUY SOCIAL MEDIA POLICY, *supra* note 79.

83. NORDSTROM SOCIAL MEDIA EMPLOYEE GUIDELINES, <https://shop.nordstrom.com/content/social-networking-guidelines> [<https://perma.cc/H3U4-4EBZ>] (last visited June 19, 2019); BEST BUY SOCIAL MEDIA POLICY, *supra* note 79.

84. NORDSTROM SOCIAL MEDIA EMPLOYEE GUIDELINES, *supra* note 83.

85. BEST BUY SOCIAL MEDIA POLICY, *supra* note 79.

86. THE COCA-COLA COMPANY ONLINE SOCIAL MEDIA PRINCIPLES, *supra* note 79, at 2.

87. *Id.*

88. INTEL SOCIAL MEDIA GUIDELINES, *supra* note 80.

judgment”⁸⁹ and “do so properly, exercising sound judgment and common sense”⁹⁰ when engaging in social media speech on their personal social media accounts. Social media policies also encourage employees to report social media speech on a social media site that “shouldn’t be happening,”⁹¹ and provide warnings to employees that social media policy violations may result in employment termination.⁹²

III. CORPORATE CENSORSHIP OF EMPLOYEE SPEECH: THE LEGAL RISKS

Censorship by business organizations of their employee social media speech is part of a landscape of employment surveillance used to exert influence and control over employee behavior.⁹³ Social media policies and social media speech monitoring, suppression, and punishment create unique and evolving legal risks for business organizations while chilling the free expression of their employees. The legal risks surrounding corporate censorship of social media speech arise from executive, legislative, and judicial action at both the federal and state levels and present a complicated and uncertain legal terrain business organizations must traverse when engaged in social media censorship of their employees.⁹⁴

A. *Judicial Reaction: Litigation and the Legal Risks*

The specter of litigation hangs over business organizations engaged in social media surveillance of their employees.⁹⁵ The discipline meted out by

89. NORDSTROM SOCIAL MEDIA EMPLOYEE GUIDELINES, *supra* note 83.

90. THE COCA-COLA COMPANY ONLINE SOCIAL MEDIA PRINCIPLES, *supra* note 79, at 2.

91. INTEL SOCIAL MEDIA GUIDELINES, *supra* note 80.

92. BEST BUY SOCIAL MEDIA POLICY, *supra* note 79.

93. Ajunwa, Crawford & Schultz, *supra* note 11, at 739.

94. See Christina Jaremus, *#Fired for Facebook: The Case for Greater Management Discretion in Discipline or Discharge for Social Media Activity*, 42 RUTGERS L. REC. 1, 3–4 (2014–2015) (emphasizing how public sector employers that engage in social media speech censorship face legal risks specific to governmental actors including constitutional challenges brought under the First Amendment of the United States Constitution as well as statutory claims under teacher tenure statutes and civil service statutes); see also Fink, *supra* note 8, at 555 (highlighting that private sector employees enjoy limited privacy rights in the United States); cf. Fink, *supra* note 8, at 555 n.6 (discussing the privacy rights of public sector employees which are similarly constrained but have constitutional protections not available to private sector employees).

95. Fink, *supra* note 8, at 588–89 (detailing that employer social media monitoring combats harassment claims and potential liability under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e17 (2019)). Employers may be subject to vicarious liability

the employer for social media posts the employer deems objectionable and, in many cases, a violation of its social media policy⁹⁶ can lead to litigation in which the employee asserts her legal rights were violated by the employer's response to her social media speech.⁹⁷ Termed "Facebook Fired"⁹⁸—which refers to employer disciplinary actions for employee social media use that results in employment termination—many of the cases brought involve protracted litigation in which the judiciary wrestles with the legal issues embedded in these disputes.⁹⁹ This litigation triggers legal risks for business organizations, which include attorney's fees and other litigation-related costs, the risk of damages, diversion of employee time in the defense of the lawsuit, and potential brand diminution.¹⁰⁰

The judicial reaction to employment discrimination litigation brought by employees against business organizations that engage in social media speech censorship is devoid of any discussion of the underlying freedom of expression and freedom of speech concerns that led the United States Supreme Court in *Packingham* to declare social media a critical venue for speech expression.¹⁰¹ These decisions, handed down both before and after *Packingham*, demonstrate the judiciary's silence about these underlying values and interests when social media suppression occurs in private sector employment and speech standards in social media policies are articulated and enforced.¹⁰²

for employee social media speech rising to the level of a hostile work environment claim or a quid pro quo sexual harassment claim brought under Title VII.)

96. In some instances, disciplinary action for social media speech may not be based on an explicit social media policy; if the employer does not maintain such a policy, the discipline, including Facebook Firings, may be based on speech standards articulated by the employer after the fact or may be cited as a violation of a policy involving ethics or harassment. *Kane v. Fin. of Am. Reverse, LLC*, No. 1:17-cv-02266-JMS-TAB, 2018 U.S. Dist. LEXIS 71847, at *8 (S.D. Ind. Apr. 30, 2018).

97. *Id.* at *10.

98. Kathleen Hidy & Mary Sheila McDonald, *Risky Business: The Legal Implications of Social Media's Increasing Role in Employment Decisions*, 18 J. LEGAL STUD. BUS. 69, 71 (2013).

99. *Carter v. Transp. Workers Union of Am. Local 556*, 353 F. Supp. 3d 556, 563 (N.D. Tex. 2019).

100. Tippet, *supra* note 30, at 259. Brand diminution can result from negative media reporting about the lawsuit as well as adverse impacts on recruitment and talent retention if the business organization's conduct in connection with social media speech censorship is perceived in a negative light.

101. Hidy, *supra* note 3, at 1058.

102. See *infra* Part III.A.1 and Part III.A.2 addressing legal challenges other than those brought under the National Labor Relations Act, 29 U.S.C. §§ 151–169 (2018), whose statutory provisions relating to employee social media speech are discussed in Part III.C.

1. Facebook Fired for Political Speech

Litigation brought by employees for employer censorship of political speech on social media abounds. Facebook firings by business organizations for speech involving Black Lives Matter, Donald Trump, the Women's March, the Ku Klux Klan, and abortion rights triggered lawsuits by employees accusing the business organizations of illegal employment discrimination.

Finance of America terminated Brian Kane, a high-performer who "was told repeatedly that he 'was the best manager in the company,'"¹⁰³ for Facebook posts he made involving Black Lives Matter. Mr. Kane, who is Caucasian, made a post on his personal Facebook account stating: "'all lives matter' and [he] suggested that people should take responsibility for their actions rather than 'blame their plight on others.'" The post also stated that people should be judged by their actions not their race."¹⁰⁴ Mr. Kane sued Finance of America, alleging his Facebook Firing constituted race discrimination in violation of Title VII of the Civil Rights Act of 1964 ("Title VII")¹⁰⁵ and that Finance of America created a hostile work environment and retaliated against him when he complained about this discrimination.¹⁰⁶

In his lawsuit, Mr. Kane alleged that "African-American employees of Finance of America frequently posted messages and photos related to Black Lives Matter, including posts suggesting that African Americans [stet] who have committed crimes are treated more harshly than their Caucasian counterparts and that police officers intentionally target African Americans in police shootings."¹⁰⁷ Mr. Kane asserted that these African-American employees did not experience any "retribution" from their employer for their social media speech.¹⁰⁸ Mr. Kane also alleged in his lawsuit that he was unaware of any social media policy adopted by Finance of America.¹⁰⁹

The United States District Court for the Southern District of Indiana dismissed Mr. Kane's hostile work environment claim on a motion for judgment on the pleadings filed by Finance of America but denied Finance of America's motion seeking dismissal of Mr. Kane's reverse race

103. Kane v. Fin. of Am. Reverse, LLC, No. 1:17-cv-02266-JMS-TAB, 2018 U.S. Dist. LEXIS 71847, at *7 (S.D. Ind. Apr. 30, 2011).

104. *Id.* (citation omitted).

105. 42 U.S.C. §§ 2000e-2000e17 (2019).

106. Kane, 2018 U.S. Dist. LEXIS 71847, at *1.

107. *Id.* at *6.

108. *Id.* at *8.

109. *Id.*

discrimination and retaliation claims.¹¹⁰ In defending its decision to allow Mr. Kane to proceed on a reverse race discrimination claim, the *Kane* Court ruled that Mr. Kane had alleged a reverse race discrimination claim based on the Facebook Firing:

Specifically, he has provided enough background information, including his stellar job performance and his purported complaints about discriminatory conduct, to plausibly suggest that there was something “fishy” about his termination. Second, he has alleged that he was meeting Finance of America’s legitimate performance expectations and, in fact, was excelling. Third, he alleges that he suffered an adverse employment action when he was terminated. Finally, he alleges that he was treated less favorably than some African American employees because he alleges that several African American employees posted messages related to Black Lives Matter and were not disciplined.¹¹¹

Another business organization accused of illegal employment discrimination after a Facebook Firing was Waverly Heights, LTD, (“Waverly”), a senior living facility located in suburban Philadelphia, Pennsylvania. Waverly defended its social media speech censorship in litigation brought by Kathleen Jungclaus, Waverly’s former Director and Vice President of Human Resources.¹¹² Waverly terminated Ms. Jungclaus for violating the company’s social media policy after she tweeted from her personal Twitter account: “@realdonaldtrump I am the VP of HR in a comp[any] outside of Philly[. A]n informal survey of our employees shows 100% AA employees Voting Trump!”¹¹³

Waverly’s Chief Executive Officer, to whom Ms. Jungclaus reported directly, told her he received an anonymous letter about Ms. Jungclaus’s Tweet, and fired her for the social media speech.¹¹⁴ Ms. Jungclaus sued Waverly, the Chief Executive Officer and Waverly’s Board of Directors for violations of Title VII, the Age Discrimination in Employment Act,¹¹⁵ and violations of Pennsylvania statutory and tort law on the grounds Waverly’s Facebook Firing violated her rights.¹¹⁶ The United States District Court for the Eastern District of Pennsylvania agreed to dismiss the defamation claim

110. *Id.* at *21.

111. *Id.* at *20.

112. *See Jungclaus v. Waverly Heights, Ltd.*, Civ. Action No. 17-4462, 2018 U.S. Dist. LEXIS 59635 (E.D. Pa. Apr. 9, 2018).

113. *Id.* at *3 (alterations in original).

114. *Id.*

115. 29 U.S.C. §§ 621–634 (2019).

116. *Jungclaus*, 2018 U.S. Dist. LEXIS 59635, at *1.

brought against Waverly, ruling that “violating a social media policy does not reach the level of business misconduct needed to sustain a claim of defamation *per se*.”¹¹⁷

In litigation brought in the United States District Court for the Western District of Pennsylvania, a business organization successfully sought summary judgment adjudication in its favor for a Facebook Firing in which the employee accused a business organization of misunderstanding her meaning in a social media post involving Ku Klux Klan imagery. Mindy Caplan, a district manager of L. Brands/Victoria Secret Stores, LLC (“VSS”) used her personal Facebook account “on a daily basis.”¹¹⁸ Ms. Caplan identified herself on her Facebook account as a VSS district manager; her Facebook profile picture was a photograph of herself in front of a VSS store.¹¹⁹ Ms. Caplan’s Facebook account was publically accessible and was accessible to Facebook users who were also VSS employees.¹²⁰

VSS received an anonymous complaint on its ethics hotline accusing Ms. Caplan of “disturbing” Facebook posts¹²¹ and claiming Ms. Caplan had “made racist and derogatory remarks while on the job, and refused to hire or promote African-American candidates.”¹²² VSS human resource specialists investigated this ethics complaint. The Facebook posts reported to the ethics hotline included two posts:

... the first was a reposted picture depicting a person wearing a Ku Klux Klan-reminiscent white, hooded robe emblazoned with the Los Angeles Clippers logo and the number 42, and was captioned “Game 5 in LA is Free Sheet Night... Donald Sterling Bobble head doll night too!;” the second was a reposted picture of an African-American female named “Airwrecka McBride” appearing in a local newscast, with a caption stating “I’ve been spelling Erica wrong my whole life.”¹²³

VSS’s general counsel determined that Ms. Caplan’s Facebook posts “were offensive and violated VSS equal opportunity, off duty conduct, and social media policies.”¹²⁴ VSS’s social media policy:

117. *Id.* at *14.

118. *Caplan v. L. Brands/Victoria’s Secret Stores, LLC*, 210 F. Supp. 3d 744, 749 (W.D. Pa. 2016), *aff’d*, 704 Fed. App’x 152 (3d Cir. 2017).

119. *Id.*

120. *Id.* at 750.

121. *Id.*

122. *Id.*

123. *Id.* (alteration in original).

124. *Id.*

[E]ncourages employees to use common sense, keep confidential information confidential, be respectful and ethical, interact responsibly with company sponsored media, redirect media inquiries, and be safe. With respect to ethics, the policy specifies that employees should “be aware of the impact you can have and . . . [b]e thoughtful when discussing issues where emotions run high.”¹²⁵

The off-duty conduct policy VSS adopted states, in part: “While the company respects your privacy, illegal activities or any conduct that will, or is reasonably likely to have, a negative effect on the company might be the subject of disciplinary action up to and including termination even if that conduct occurs off the property or off the clock.”¹²⁶ When confronted with the Facebook posts, Ms. Caplan “admitted to reposting the two Facebook posts mentioned in the ethics complaint, but denied making the racist remarks.”¹²⁷ Ms. Caplan defended her social media speech, asserting in her lawsuit that VSS misconstrued the meaning of the Facebook posts as “she intended the posts to be a protest against racism and that the posts were not ‘actually offensive.’”¹²⁸

VSS terminated Ms. Caplan for her social media speech conduct;¹²⁹ she sued VSS, alleging her Facebook Firing constituted race discrimination¹³⁰ and violated the Family Medical Leave Act of 1993 (“the FMLA”).¹³¹ In dismissing Ms. Caplan’s claims on summary judgment, the district court ruled that the perception of VSS executives—and not Ms. Caplan’s perception—about the meaning of her social media speech controls the legal question of whether a Facebook Firing is, in fact, an illegal retaliatory firing:

Caplan’s insistence that she intended the posts to be a protest against racism and that the posts were not “actually offensive” are inapposite. What matters is the perception of the decisionmaker, not the intent or personal opinion of the employee; the question, after all, is whether the employer acted with a retaliatory motive instead of its proffered motive in making its employment decision.¹³²

125. *Id.* at 772 n.4 (alteration in original) (citation omitted).

126. *Id.* at n.3.

127. *Id.* at 751.

128. *Id.* at 766.

129. *Id.* at 751.

130. Ms. Caplan’s race discrimination claim was brought under 42 U.S.C. § 1981 (2019). *Id.*

131. 29 U.S.C. § 2601 (2019).

132. *Caplan*, 210 F. Supp. 3d at 766 (citation omitted).

Social media posts about the Women’s March and abortion rights prompted Facebook Firings by business organizations that were then sued by their former employees for multiple legal claims, including religious discrimination in violation of Title VII.¹³³ Flight attendant Charlene Carter brought suit in the federal district court in the Northern District of Texas against her former employer, Southwest Airlines (“Southwest”) and the flight attendants’ union.¹³⁴ Ms. Carter made anti-abortion Facebook posts on her personal Facebook account and sent Facebook messages to the union president regarding the participation by the union president and union members in the 2017 “Women’s March on Washington, D.C.”¹³⁵ Southwest terminated Ms. Carter after it conducted an investigation of Ms. Carter’s social media speech prompted by a complaint filed with Southwest by the president of the union.¹³⁶ Southwest informed Ms. Carter that:

. . . when [Plaintiff] posted the videos and pictures on Facebook, she was identifiable as a Southwest Airlines Employee and represented the [C]ompany in a manner that is disparaging to Southwest Flight Attendants as well as to all Southwest Employees.” Southwest informed Plaintiff that the Company was terminating her because her conduct violated the Southwest Airlines Mission Statement and Company policies and rules, including but not limited to, the Workplace Bullying and Hazing Policy and the Social Media Policy. Southwest also stated that Plaintiff’s conduct “could also be a violation” of Southwest’s Policy Concerning Harassment, Sexual Harassment, Discrimination, and Retaliation.¹³⁷

Ms. Carter sued Southwest, alleging the Facebook Firing violated her free speech rights under the Railway Labor Act (“RLA”),¹³⁸ and constituted illegal religious discrimination under Title VII and retaliation under the RLA and the First and Fifth Amendments of the United States Constitution.¹³⁹ The federal district court dismissed the constitutional claims against Southwest¹⁴⁰ and Ms. Carter’s claims brought directly under

133. Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e–2000e-17 (2019).

134. *Carter v. Transp. Workers Union Local 556*, 353 F. Supp. 3d 556, 562 (N.D. Tex. 2019).

135. *Id.* at 563–64.

136. *Id.* at 563.

137. *Id.* at 565 (citations omitted).

138. 45 U.S.C. § 152 (2019).

139. *Carter*, 353 F. Supp. 3d at 566. Ms. Carter brought suit against the union as well alleging breach of its duty of fair representation, religious discrimination in violation of Title VII, and violations of the RLA and the United States Constitution. *Id.*

140. Southwest is “not a state actor” and its actions do not give rise to First or Fifth Amendment constitutional deprivations. *Id.* at 576.

the RLA.¹⁴¹ Examining Ms. Carter’s Facebook posts in light of Title VII’s prohibition against religious discrimination, the district court ruled that Ms. Carter could proceed in the litigation against Southwest on this claim: “Plaintiff has established ‘more than a sheer possibility’ that her religious beliefs and practice were a factor in Southwest’s decision to terminate her.”¹⁴²

An opposite outcome in a case in the United States District Court for the Middle District of Florida ended litigation against a business organization that terminated two employees for alleged social media policy¹⁴³ violations involving anti-abortion activities and charges of Title VII religious discrimination.¹⁴⁴ Paula Thyfault and Sally Passmore worked as members of a radiation oncology team for 21st Century Oncology, LLC (“21st Century Oncology”).¹⁴⁵ The record before the district court established that Ms. Thyfault and Ms. Passmore were actively involved in pro-life activities, participating in anti-abortion marches on the weekends,¹⁴⁶ and that Ms. Passmore “is a Baptist and strongly opposes abortion.”¹⁴⁷ A women’s medical center providing gynecological and abortion services shared a parking lot with 21st Century Oncology.¹⁴⁸ The director of the women’s medical center complained to 21st Century Oncology about anti-abortion signs Ms. Passmore had in her car that were visible to patients of the women’s medical center.¹⁴⁹ During one workday, Ms. Passmore and Ms. Thyfault recorded a video from 21st Century’s offices of a young woman carried out on a stretcher from the women’s medical center and transported away by ambulance.¹⁵⁰ The two employees could be heard on the video discussing the situation,¹⁵¹ and, shortly after filming this video, Ms. Thyfault gave the video to an anti-abortion activist.¹⁵² An anti-abortion website posted this video on its website; both

141. *Id.* at 573. The federal district court refused to dismiss the retaliation claims brought under the RLA. *Id.* at 574.

142. *Id.* at 578.

143. The social media allegedly at issue in this case was an anti-abortion website. *Passmore v. 21st Century Oncology, LLC*, No. 3:16-cv-1094-J-34PDB, 2019 U.S. Dist. LEXIS 90236, at *54 (M.D. Fla. May 30, 2019).

144. *Id.* at *2.

145. *Id.* at *5.

146. *Id.* at *7 n.8.

147. *Id.* at *10.

148. *Id.* at *6.

149. *Id.* at *11. Additional incidents occurred between the director and Ms. Passmore. *Id.* at *11–20.

150. *Id.* at *21.

151. *Id.*

152. *Id.* at *23.

Ms. Passmore and Ms. Thyfault denied knowledge of how that occurred or knowledge of who “maintained the website upon which the video was posted.”¹⁵³

The director of the women’s center informed 21st Century Oncology about the posting of the video.¹⁵⁴ 21st Century Oncology investigated the conduct of Ms. Passmore and Ms. Thyfault¹⁵⁵ and determined that “Passmore and Thyfault violated the company’s policies regarding harassment, work place [sic] violence, and use of social media.”¹⁵⁶ 21st Century Oncology maintained multiple policies in its employee handbook, including prohibitions against harassment and workplace violence, and policies regulating employees’ use of social media.¹⁵⁷ The social media policy:

[C]ounseled employees to remember that “what is posted can be tracked, traced and is permanent. When employees . . . contribute to any . . . online media . . . , they are impacting their personal image and potentially impacting the Company.” As such, “[w]hile each employee is responsible for the content they publish, all Company policies regarding off-duty conduct will apply to social media activity. This will include but not be limited to policies related to anti-harassment, non-discrimination, code of conduct, HIPAA and protecting confidential proprietary information.”¹⁵⁸

21st Century Oncology terminated Ms. Passmore and Ms. Thyfault and the two employees brought suit against their former employer alleging their terminations were illegally based on “their religious beliefs opposing abortion.”¹⁵⁹ 21st Century successfully pursued summary judgment adjudication and dismissal of the lawsuit.¹⁶⁰

2. Facebook Fired for Non-Political Speech

The judicial reaction in employment discrimination cases to Facebook Firings involving non-political social media speech is equally agnostic on the issue of freedom of expression and freedom of speech concerns, as courts address the enforcement of social media policies and the imposition

153. *Id.*

154. *Id.*

155. *Id.* at *34–35.

156. *Id.* at *32.

157. *Id.* at *8–9.

158. *Id.* at *9–10 (citation omitted).

159. *Id.* at *2.

160. *Id.* at *54.

of speech standards in the workplace. This litigation brought against business organizations that engage in employee social media speech censorship focuses on the content of the censored social media speech, the language of the social media policies, the unequal enforcement of the policies, and the elements of the statutory or common law legal claims brought by the terminated employees.

In *Jones v. Gulf Coast Health Care of Del., LLC*,¹⁶¹ the Eleventh Circuit Court of Appeals heard an appeal of a case brought under the FMLA¹⁶² by Rodney Jones against his employer, a health care company running a long-term care nursing facility. In his lawsuit, Mr. Jones accused his employer of interference with and retaliation against Mr. Jones for the exercise of his rights under the FMLA when his employer suspended and then terminated his employment.¹⁶³ The health care company argued that it terminated Mr. Jones because he posted photographs on Facebook of him vacationing while on medical leave—an alleged violation of its social media policies and demonstrating “poor judgment” by a manager.¹⁶⁴ The Eleventh Circuit Court of Appeals concluded that the health care company’s stated reason for the Facebook Firing was based on inconsistent and contradictory evidence, raising the issue of whether the social media policy violation was a pretext for illegal retaliation under the FMLA.¹⁶⁵ For example, prior to his termination, Mr. Jones asked his supervisor “how he had obtained the photos,”¹⁶⁶ and the supervisor replied: “‘you can thank your wonderful staff, they just ratted you out,’ but also remarked that ‘maybe if you’re going to have a Facebook account, you shouldn’t have it on public.’”¹⁶⁷ This evidence contradicted claims made by the health care company that the Facebook posts were anonymously reported.¹⁶⁸

The company did not conduct an investigation regarding the allegedly anonymous complaint.¹⁶⁹ The social media policy provision cited by the company in the litigation—termination for social media posts that “have an adverse effect on coworkers”—was not communicated to Mr. Jones when he was terminated.¹⁷⁰ The Court of Appeals cast doubt on the company’s interpretation and application of the language in the social media policy:

161. 854 F.3d 1261 (11th Cir. 2017).

162. 29 U.S.C. § 2601 (2019).

163. *Jones*, 854 F.3d at 1267.

164. *Id.* at 1274.

165. *Id.* at 1275.

166. *Id.* at 1266.

167. *Id.*

168. *Id.* at 1275.

169. *Id.*

170. *Id.*

“Finally, there is evidence that the purpose of Accentia’s social-media policy, as discussed during managerial training, is to prevent employees from posting harmful or negative comments about the company’s staff or facilities. Jones’s Facebook posts were clearly far afield from this area of concern.”¹⁷¹ The Court of Appeals affirmed the district court’s grant of summary judgment in the employer’s favor on the interference claim but reversed the finding of summary judgment in favor of the employer on Mr. Jones’s retaliation claim.¹⁷²

In another Facebook Firing case, Beth Schirnhofner, a billing assistant for Premier Comp Solutions, LLC (“Premier”), sued her former employer for violations of the FMLA, the Americans with Disabilities Act,¹⁷³ as well as state and local statutes.¹⁷⁴ Ms. Schirnhofner was fired the same day she posted on her personal Facebook page about “haters and being bullied,” although the Facebook posts did not identify co-workers or “specifically mention work.”¹⁷⁵ Ms. Schirnhofner’s direct supervisor forwarded the Facebook posts to the company president who terminated Ms. Schirnhofner that same day.¹⁷⁶ Premier defended its Facebook Firing on the grounds that Ms. Schirnhofner’s Facebook posts on her personal Facebook page violated the company’s social media policy, which censored “inappropriate” employee social media speech: “[An] ‘[i]nappropriate posting may include discriminatory remarks, harassment, and threats of violence or similar inappropriate or unlawful conduct.’”¹⁷⁷ Not persuaded that the Facebook Firing was legal, the United States District Court for the Western District of Pennsylvania refused Premier’s request for summary judgment adjudication in its favor on Ms. Schirnhofner’s claims.¹⁷⁸

Wal-mart Stores, Inc. (“Wal-Mart”) prevailed in a pre-trial dismissal of a Facebook Firing case involving a Sam’s Club manager.¹⁷⁹ Virginia Rodriquez worked for Sam’s Club and was eventually promoted to operations manager.¹⁸⁰ Ms. Rodriquez was terminated from her employment because she violated Wal-Mart’s social media policy and had a previous disciplinary action involving improperly discounting items for

171. *Id.*

172. *Id.* at 1276.

173. 42 U.S.C. § 12101 (2019).

174. *Schirnhofner v. Premier Comp Sols., LLC*, 303 F. Supp. 3d 353, 355 (W.D. Pa. 2018).

175. *Id.* at 362.

176. *Id.*

177. *Id.*

178. *Id.* at 376.

179. *Rodriquez v. Wal-Mart Stores, Inc.*, 540 Fed. App’x 322, 323 (5th Cir. 2013).

180. *Id.*

her own and another employee's purchase.¹⁸¹ Wal-Mart's social media policy: "[P]rohibits any conduct that adversely affects job performance or other associates. While the Social Media Policy allows employees to post complaints online, the comments cannot appear 'unprofessional, insulting, embarrassing, untrue, [or] harmful.'"¹⁸²

Ms. Rodriguez made a public Facebook post on the personal Facebook page of another employee. Ms. Rodriguez's Facebook post commented on the employee's Facebook posting of photographs of a party she hosted. Two Sam's Club cashiers were in the photographs; they had called in sick to attend the party.¹⁸³ Ms. Rodriguez's Facebook post stated:

I hear that Caleb didn't show up for work on this day what's up with that???? He is partying with you guys?? WOW and Carrie tried to call in for him and knew about this . . . you guys are amazing and bold enough to post these [pictures] hahahahaha.¹⁸⁴

The Fifth Circuit Court of Appeals affirmed the district court's dismissal of Ms. Rodriguez's lawsuit against Wal-Mart, ruling that her retaliation, age, and national origin discrimination claims against her employer lacked merit and should not proceed to trial.¹⁸⁵

Chris Redford's Facebook Firing litigation was viewed more favorably by the United States District Court for the Western District of Louisiana. Mr. Redford, a white male, was an on-air crime reporter for KTBS, a local news station.¹⁸⁶ KTBS's social media policy, communicated to the news department, stated an employee should not respond to complaints from viewers posted on social media or, if a response is posted, the social media post should direct the viewer to KTBS management.¹⁸⁷ Mr. Redford was Facebook Fired for a post he made on his own personal Facebook account:

Some moron had to go and comment under this story in the KTBS story. The only intelligent thing he had to ask was, "Does Bob Griffith still play with hamsters??" I get so damn tired of stupid people. What the heck purpose does that serve?? Casey Ford is his name. Sorry, but that crap just gets on my last nerve.¹⁸⁸

181. *Id.* at 324.

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.* at 329.

186. *Redford v. KTBS, LLC*, 135 F. Supp. 3d 549, 553 (W.D. La. 2015).

187. *Id.*

188. *Id.* at 554.

Another KTBS employee was terminated on the same day as Mr. Redford for violation of the social media policy. Rhonda Lee, an African-American female and an on-air personality, responded on at least three different occasions to negative comments made by viewers on KTBS's official Facebook page.¹⁸⁹ She was given warnings from management that her comments violated the social media policy prior to her termination.¹⁹⁰ A third employee, a white female named Sarah Machi, made a negative Facebook post on her personal Facebook account in reaction to a KTBS viewer's comment, and she was not given a warning or disciplined for the social media post.¹⁹¹

Mr. Redford, a Facebook Fired television news reporter, successfully thwarted his employer's attempt to end his employment discrimination lawsuit during the pre-trial phase of the litigation. Mr. Redford sued the television station, KTBS, as well as the general manager and news director for gender and race discrimination under Title VII, Section 1981,¹⁹² and various state law tort claims.¹⁹³ The federal district court in the Western District of Louisiana dismissed the intentional infliction of emotional distress and negligence claims¹⁹⁴ as well as the Title VII claims against the general manager and news director.¹⁹⁵ However, the district court ruled that Mr. Redford's Title VII claim against KTBS could proceed to trial. Mr. Redford established sufficient evidence of gender and racial discrimination. Specifically, he demonstrated that he was "treated less favorably than those two comparators because in response to their first infraction of the station's social media policy, which prohibits commenting to viewers on Facebook, Defendants fired Mr. Redford and reprimanded Ms. Lee and Ms. Machi but did not fire them."¹⁹⁶ The district court also

189. *Id.*

190. *Id.*

191. *Id.*

192. 42 U.S.C. § 1981 (2019).

193. *Redford*, Civ. Action No. 13-3156, 2016 U.S. Dist. LEXIS 16828, at *1 (W.D. La. 2016); The district court noted: "Because the Fifth Circuit analyzes intentional discrimination claims brought pursuant to Title VII or §1983 under the same rubric, Plaintiff's employment discrimination claims under §1983 are one in the same as his employment discrimination claims under Title VII." *Id.* at *1 n.2 (citation omitted).

194. *Id.* at *2.

195. *Id.* at *14.

196. *Id.* at *6; see *Bush v. Gulf Coast Elec. Coop., Inc.*, No. 5:13-cv-369-MW-GRJ, 2015 U.S. Dist. LEXIS 80669, at *6 (N.D. Fla. 2015) (noting that an employer's discipline of two female employees "for outside-of work activity on Facebook" contributed to a "'convincing mosaic' of circumstantial evidence" (*Id.* at *25) to support a jury's finding of gender discrimination when male employees "were not subjected to discipline for more egregious actions" including an arrest, a report of using racist language, and an allegation of sexual harassment. *Id.* at *16. The employer was sued for gender and age discrimination

ruled that Mr. Redford provided evidence that the KTBS social media policy only applied to KTBS official social media and not employees' personal social media accounts, indicating that Mr. Redford's firing for a violation of the corporate social media policy may have been a pretext for illegal discrimination.¹⁹⁷

B. Legislative Efforts: Lifestyle Control, Privacy, and Social Media Speech

Employer attempts to monitor and censor employee social media speech are part of a larger pattern of control employers increasingly seek to exert over "off-duty" conduct by their employees.¹⁹⁸ Reacting to these trends with growing concern for employees' privacy,¹⁹⁹ lifestyle choices, and freedom of expression, many state legislatures have passed statutes to address this perceived employer encroachment on the freedom of employees to cultivate and enjoy lives outside the orbit of employer control and influence. Business organizations risk running afoul of these legislative enactments by engaging in social media speech censorship and employee speech suppression. The statutory landscape in this area is evolving and changing, creating a heightened risk that a business organization's social media policy and practice may violate a legislative mandate.

Social media speech monitoring by employers of prospective or current employees' password-protected social media accounts requires a key to open the door to the closed account: the social media account password. Several states have enacted legislative protections against

and retaliation against their employer that culminated in constructive discharge and termination.).

197. *Redford*, 2016 U.S. Dist. LEXIS 16828, at *13.

198. Stephen D. Sugarman, "Lifestyle" *Discrimination in Employment*, 24 BERKELEY J. EMP. & LAB. L. 377, 379 (2003); see Matthew T. Bodie, *The Best Way Out Is Always Through+*: *Changing the Employment At-Will Default Rule to Protect Personal Autonomy*, 2017 U. ILL. L. REV. 223, 226 (2017) (discussing employee privacy in light of a proposal to modify the employment at will doctrine to include a "default presumption: that the employer will not make employee-related decisions based on employee actions or beliefs that lie outside of the employment relationship.").

199. Fink, *supra* note 8, at 582 (acknowledging that employees are increasingly willingly to open the doors of their private lives through social media sharing. They allow their social media followers, including fellow employees and even managers, to view intimate details of their private lives in photographs and videos and to hear their opinions and viewpoints through social media speech. Employer monitoring of social media conduct which is not kept private is arguably not a privacy violation and likely "encourages employer snooping.").

employer requests for social media passwords for prospective as well as current employees.²⁰⁰ Maryland led the way in 2012, prohibiting employers from requesting social media passwords from prospective or current employees, and other states including Michigan, California and Illinois have followed Maryland's legislative footprint in this area.²⁰¹ Now some twenty-six state legislatures have enacted laws that restrict or limit employer access to employees' personal social media accounts.²⁰² These statutes typically prevent employers from requesting the social media passwords of current or prospective employees' personal social media accounts, changing privacy settings on those accounts, or requesting that the employee or job applicant add a supervisor, administrator, or co-worker to the contacts list of those social media accounts.²⁰³

State legislatures have also enacted lifestyle discrimination statutes that seek to protect employees from employment discrimination based on lifestyle choices that, though legal, may be unacceptable to a disapproving employer.²⁰⁴ Lawful product statutes have been adopted in six states—Minnesota, Nevada, North Carolina, Wisconsin, Montana and Illinois.²⁰⁵ California, Colorado, New York, and North Dakota legislatures have outlawed discrimination against employees based on his or her off-duty activity.²⁰⁶ New York's legislature enacted Labor Law section 201-d which prohibits employers in the State of New York from discriminating against prospective or current employees on the basis of their political activities, recreation, union, and consumable products as long as these activities are legal and are conducted off-duty, off the employer's premises and without use of the employer's equipment or other property.²⁰⁷ The New York State Legislature specifically exempted from statutory protection, employee activity which "a. creates a material conflict of interest related to the employer's trade secrets, proprietary information or other proprietary or

200. Ajunwa, Crawford & Schultz, *supra* note 11, at 758.

201. *Id.*; Schlag, *supra* note 31, at 98.

202. *State Social Media Privacy Laws*, NAT'L CONF. STATE LEGISLATURES, <http://www.ncsl.org/research/telecommunications-and-information-technology/state-laws-prohibiting-access-to-social-media-username-and-passwords.aspx> [<https://perma.cc/9VHP-JDF8>] (last visited July 19, 2019).

203. *E.g.*, ARK. CODE ANN. § 11-2-124 (2019); COLO. REV. STAT. § 8-2-127 (2019); MICH. COMP. LAWS § 37.271-37.278 (2019). *See* Ajunwa, Crawford & Schultz, *supra* note 11, at 758 (discussing state legislative enactments in this area).

204. Mark Bannister, Michael Jilka & Derek Ulrich, *Striking Gold, Not Dynamite When Using Social Media in Employment Screening*, 32 HOFSTRA LAB. & EMP. L.J. 1, 24 (2014).

205. *Id.*

206. *Id.*

207. N.Y. LAB. LAW § 201-D (2019).

business interest.”²⁰⁸

Colorado’s statutory prohibition against lifestyle employment discrimination applies only to current employees and does not protect an employee activity which:

- (a) Relates to a bona fide occupational requirement or is reasonably and rationally related to the employment activities and responsibilities of a particular employee or a particular group of employees, rather than to all employees of the employer; or
- (b) Is necessary to avoid a conflict of interest with any responsibilities to the employer or the appearance of such a conflict of interest.²⁰⁹

North Dakota passed a statute that makes it illegal to discriminate against a prospective or current employee engaging in a “lawful activity off the employer’s premises during nonworking hours which is not in direct conflict with the essential business-related interests of the employer.”²¹⁰ The California Legislature enacted California Labor Code section 96(K) that provides a remedy to an employee who is demoted, suspended or terminated by her employer for “lawful conduct occurring during nonworking hours away from the employer’s premises.”²¹¹

As legislatures continue to regulate employer control over prospective and current employee off-duty activity, business organizations assume the risk that their monitoring and censorship of their workforce’s social media speech may conflict with these lifestyle discrimination statutes. The idiosyncratic nature of these various laws requires business organizations with employee operations in multiple states to draft and implement policies that comply with different standards for permissible employer conduct. This increases the cost of compliance for business organizations and heightens the risk that a business organization will fail to adopt and implement a coherent, uniform, and compliant social media policy.

C. Executive Action: The National Labor Relations Board’s Rulings

Social media policies adopted by business organizations to censor employee social media speech are scrutinized by the National Labor Relations Board,²¹² an independent federal agency created by the United

208. N.Y. LAB. LAW § 201-D.3.a. (2019).

209. COLO. REV. STAT. § 24-34-402.5 (2016).

210. N.D. CENT. CODE § 14-02.4-03 (2019).

211. CAL. LAB. CODE § 96(K) (2019).

212. NAT’L LAB. REL. BOARD, <https://www.nlr.gov/about-nlr> [<https://perma.cc/68DP-S7WX>] (last visited July 20, 2019).

States Congress to administer the National Labor Relations Act (“NLRA”).²¹³ The National Labor Relations Board examines employer social media policies to ascertain whether social media speech censorship enacted through these policies violates the NLRA.²¹⁴ The NLRA prohibits employers from terminating employees engaged in “concerted” or “union-related” activities.²¹⁵ Section 7 of the NLRA states:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3) [29 U.S.C. § 158(a)(3)].²¹⁶

The language of Section 8(a)(1) of the NLRA states an employer may not “interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.”²¹⁷ Section 8(a)(3) prohibits an employer from discriminating against an employee with respect to protected activities.²¹⁸

The National Labor Relations Board polices employers’ compliance with the NLRA. It has issued pronouncements and rulings on the statute’s prohibitions against employer censorship of employee social media speech—censorship often conducted through social media policies.²¹⁹ Not all employee social media speech enjoys Section 7 protection, however. The National Labor Relations Board examines and weighs the interests of the employer in regulating speech against Section 7 protections and employee rights.²²⁰ Social media policies that censor employee social media speech through overly broad language—such as prohibiting derogatory statements against supervisors or co-workers—may unlawfully chill an employee’s exercise of her Section 7 rights.²²¹ For example,

213. National Labor Relations Act, 29 U.S.C. §§ 151–169 (2017).

214. See Sprague, *Facebook*, *supra* note 11, at 993 (discussing recent actions taken by the NLRB to review employers’ social media policies).

215. *NLRB v. Pier Sixty, LLC*, 855 F.3d 115, 122 (2d Cir. 2017).

216. 29 U.S.C. § 157 (2017).

217. 29 U.S.C. § 158(a)(1) (2017).

218. 29 U.S.C. § 158(a)(3) (2017).

219. Sprague, *Facebook*, *supra* note 11, at 993.

220. *Id.* at 1001.

221. *Id.* at 1004.

employee speech that describes workplace harassment or discrimination on social media likely falls within protected activity under Section 7 of the NLRA.²²² By contrast, if a social media policy clarifies that it only prohibits employee social media speech related to non-Section 7 protections—such as the sharing of proprietary and confidential property online—it may survive a Section 7 challenge.²²³ A compliant social media policy ties the business organization’s social media speech prohibitions to non-Section 7 business interests.²²⁴

Social media monitoring by employers may create the “unlawful impression of surveillance,”²²⁵ violating Section 8(a)(1) of the NLRA by impermissibly chilling employees’ exercise of their rights under the NLRA.²²⁶ Surveillance concerns arise when an employer receives information about problematic social media speech from indirect sources.²²⁷ This can occur when a supervisor is a Facebook friend of an employee’s “friend” and views the employee’s Facebook posts through this indirect route.²²⁸ Surveillance concerns are not triggered, however, when an employer obtains and reviews social media posts directly from an employee who has authorized a supervisor to view her social media account (e.g. the employee “friends” the supervisor on Facebook) or when a customer or fellow employee forwards a social media post of the employee to the employer.²²⁹

The National Labor Relations Board has stated that Section 7 protections extended to the following employee social media speech:

- (1) a paramedic posting derogatory comments about her supervisor and discussing supervisory actions online with coworkers after being denied union representation during a work-related dispute;
- (2) tweeting about the status of ongoing union negotiations;
- (3) Facebook discussions about how employees were being treated by the employer at work in terms of work assignments and compensation;
- (4) an employer’s “pre-emptive” firing of an employee due to fear of the consequences of the employee’s Facebook postings about sexually-derogatory comments directed at her in the workplace;
- (5) Facebook postings among employees regarding another employee’s

222. Tippet, *supra* note 30, at 252.

223. Sprague, *Facebook*, *supra* note 11, at 1004.

224. *Id.*

225. *Id.* at 1008.

226. *Id.* at 1007.

227. *Id.* at 1008.

228. *Id.*

229. *Id.*

promotion and mismanagement; (6) Facebook postings among employees criticizing a supervisor's attitude and performance; (7) multiple Facebook postings criticizing management, which were widely followed by fellow employees; (8) five employees complaining on Facebook about a coworker's conduct; (9) employees criticizing, in a Facebook conversation, the employer's inaccurate payroll tax withholding, with one employee "liking" the conversation, and (10) employees complaining on Facebook about late paychecks.²³⁰

Employers risk an adverse ruling by the National Labor Relations Board when they censor employee social media speech. A business organization's adoption and implementation of a social media policy does not immunize it from an NLRA offense; the boundaries of what constitutes protected speech and what speech can be lawfully regulated by the employer are unclear.²³¹ Some employers react to the National Labor Relations Board's rulings on social media speech censorship by using carve-out language in their social media policies, in an effort to achieve technical compliance with the National Labor Relations Board rulings.²³² For example, a social media policy may state that all social media communications protected under law, including Section 7 of the NLRA, are permitted under the policy.²³³ These carve-out provisions provide scant guidance to employees on what social media speech the employer deems acceptable, while attempting to preserve the employer's defense that its social media policy complies with existing law.²³⁴

IV. A PROPOSED FRAMEWORK TO MITIGATE EMPLOYER RISKS AND ENHANCE EMPLOYEE FREE EXPRESSION

Business organizations incur significant risk in their attempts to censor employee social media speech; censorship designed, ironically, to mitigate other risks. Business organizations traverse a complicated and complex legal terrain marked by increasing legal challenges to social media

230. See Sprague & Fournier, *supra* note 11, at 560–61 (noting this NLRB guidance was provided through formal and informal decisions on individual cases, including through "General Counsel memoranda and ALJ and Board decisions") (citations omitted).

231. Magaldi & Sales, *supra* note 11, at 263 (analyzing the legality of social media policies in light of NLRA protections and concluding that "there is considerable uncertainty for employers that promulgate social media policies and for employees with regard to what social media activities may be legitimately restricted").

232. Tippet, *supra* note 30, at 261–62.

233. *Id.* at 262.

234. *Id.*

policies and evolving, sometimes confusing, legal standards surrounding these policies and their implementation.²³⁵ They march forward, however, in their quest to suppress unacceptable employee social media speech, motivated by significant concerns over brand protection, intellectual property rights, security, workplace culture, and a broad array of legal compliance issues ranging from employment discrimination to securities laws. This march tramples upon an employee's freedom of speech and freedom of expression as employer censorship of employee speech on social media carries a hefty price tag that could cost the employee her job.²³⁶ In light of the United States Supreme Court's decision in *Packingham*—designating social media an arterial road on the communication highway²³⁷—a prudent path forward is a new framework for business organizations, proposed below, that mitigates employer risk associated with employee social media misuse while enhancing employees' freedom of expression on social media.

A. *The Packingham Legacy*

The United States Supreme Court in *Packingham* raised the stakes in the debate over employer censorship of employee social media speech when it designated social media as a crucial communication venue. The Supreme Court's pronouncements in the *Packingham* decision make clear that social media plays a critical role in securing free speech and free expression in the “Cyber Age”²³⁸—a “revolution of historic proportions[.]”²³⁹ The Supreme Court cautioned that social media speech has an important relationship to “First Amendment activit[ies]”²⁴⁰:

Social media offers “relatively unlimited, low-cost capacity for communication of all kinds.” *Reno, supra*, at 870, 117 S.Ct. 2329. On Facebook, for example, users can debate religion and politics with their friends and neighbors or share vacation photos. On LinkedIn, users can look for work, advertise for employees,

235. See *infra* Part III.A, B, C.

236. See *infra* Part III.A.

237. *Packingham v. North Carolina*, 137 S. Ct. 1730, 1737 (2017) (quoting *Reno v. ACLU*, 521 U.S. 844, 870 (1997)).

238. *Id.* at 1735–36 (2017); see Hidy, *supra* note 3 for a detailed discussion of the *Packingham* decision.

239. *Packingham*, 137 S. Ct. at 1736.

240. *Id.* at 1735–36 (citation omitted). While the First Amendment is not implicated in social media policies adopted by private sector business organizations, the values underlying First Amendment protections such as robust and unfettered freedom of expression and debate are threatened by employer social media speech censorship in the private sector. *Id.*

or review tips on entrepreneurship. And on Twitter, users can petition their elected representatives and otherwise engage with them in a direct manner. Indeed, Governors in all 50 States and almost every Member of Congress have set up accounts for this purpose. In short, social media users employ these websites to engage in a wide array of protected First Amendment activity on topics “as diverse as human thought.” *Reno, supra*, at 870, 117 S.Ct. 2329 (internal quotation marks omitted).²⁴¹

The Supreme Court recognized that social media speech provides a private citizen with “perhaps the most powerful mechanisms”²⁴² to voice, amplify, and be heard on any issue:

Social media allows users to gain access to information and communicate with one another about it on any subject that might come to mind. . . . North Carolina with one broad stroke bars access to what for many are the principal sources for knowing current events, checking ads for employment, speaking and listening in the modern public square, and otherwise exploring the vast realms of human thought and knowledge. These websites can provide perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard. They allow a person with an Internet connection to “become a town crier with a voice that resonates farther than it could from any soapbox.”²⁴³

The legacy of *Packingham* is the status conferred by the United States Supreme Court on social media speech: its importance and prominence as the vehicle for ordinary persons to engage, debate, dialogue and express knowledge, information, ideas, and opinions. Social media speech also plays a pivotal role in the realm of people’s work and livelihood, allowing entrepreneurs, employers, job seekers and financiers to interact and connect. Censorship or suppression of social media speech threatens these communication channels and undermines the values and interests at the core of freedom of speech and freedom of expression.

B. Police the Brand, the Property Rights, and the Culture of Compliance

Business organizations have serious and justifiable concerns about the damage employee social media speech can have on their brands, their

241. *Id.*

242. *Packingham*, 137 S. Ct. at 1737.

243. *Id.* (citations omitted).

confidential and proprietary information, their intellectual property rights, and the corporate culture of compliance with both internal and external rules, such as harassment policies, discrimination laws, and other statutory mandates. A corporate social media policy should explicitly identify these business-related concerns.²⁴⁴ It should educate employees on speech content that violates these business interests and explain the nature of the harms incurred by the business organization resulting from this form of speech. Education is a form of deterrence, and employee training on social media policy norms grounded in legitimate business-related interests can incentivize employees to self-regulate on social media where their employers' interests are threatened.

Business organizations should encourage employees to protect their privacy interests on social media. Social media policies should articulate the employer's commitment to employee privacy rights, freedom of speech and freedom of expression.²⁴⁵ These policies should clearly state whether, and in what manner, the business organization will engage in employee social media surveillance. A social media policy should also identify the investigatory and verification process used by the employer when a social media policy violation is reported. Corporate social media policies that are narrowly focused on justifiable business-related interests, clear in identifying and training on prohibited conduct, transparent about the investigatory process, and committed to respecting and upholding employees' interests in privacy and free expression strike an appropriate balance between protecting valid corporate interests and honoring the valuable societal interests outlined in *Packingham* in preserving robust and unfettered speech on social media.

C. *Reject Civility Codes: The Right to Be Forgiven*

Business organizations should reject civility codes in their adoption and implementation of social media policies. The speech standards used in some corporate social media policies that encourage employees on social

244. See Fink, *supra* note 8, at 594 (advocating for limiting employer surveillance of employees, including social media monitoring, to a business organization's justifiable need to investigate work-related matters consistent with a business necessity and comporting with employees' reasonable expectations of privacy). The author notes that verification of the accuracy and context of any information obtained by the employer through employee social media speech surveillance should be pursued as well. *Id.*

245. See Ajunwa, Crawford & Schultz, *supra* note 11, at 740 (noting that worker privacy is a "civil rights issue: both for the protection of human dignity rights and because privacy invasions can serve as vehicles for unlawful discrimination.").

media to use “good judgment” and “common sense” and to be “ethical” and “decent”²⁴⁶ are inherently subjective and ambiguous. These are not uniform or objective standards. To the contrary, they require interpretation, are dependent on perceptions that may vary among individuals, and are open to manipulation by co-workers, managers, and even clients or customers who may unfairly target an employee for retribution. Social media policies that use speech standards that import civility codes create the risk of unfair, discriminatory, and disparate treatment of employees. They also chill employee social media speech, jeopardizing the free speech concerns outlined in *Packingham*. Employees may self-censor or abstain altogether from social media speech in lieu of facing disciplinary actions triggered by a report of uncivil behavior on their personal social media accounts.

The right to be uncivil, impolite, and impolitic on social media is intertwined with the right to be free, to be human, to err.²⁴⁷ By rejecting civility codes for employee social media speech, business organizations grant their employees the “right” to be forgiven for this social media speech. This enhances freedom of expression and freedom of speech, integral to both individual and societal interests.

V. CONCLUSION

Business organizations calculate the risks employee social media speech pose to their brands, property interests, and compliance efforts. To mitigate these risks, business organizations may choose to engage in censorship of this speech by adopting and implementing social media policies that regulate and control employees’ expressive activity online. This corporate strategy invites additional legal risks for business organizations as they react and respond to executive, legislative, and judicial action at both the federal and state levels that challenge the legality of employee social media speech censorship.

The United States Supreme Court in *Packingham* elevates the status of social media speech and highlights the freedom of speech and freedom of expression concerns attendant to social media speech suppression. Business organizations should recalibrate their risk mitigation strategy post-*Packingham* and protect employees’ freedom of expression. Corporate social media policies that narrowly focus on business-related

246. See *infra* Part II.C.2.

247. See Alexander Pope, *An Essay on Criticism: Part II*, POETRY FOUND., <https://www.poetryfoundation.org/poems/44897/an-essay-on-criticism-part-2> [<https://perma.cc/3BPW-QVXF>] (last visited July 26, 2019) (“To err is human; to forgive, divine.”).

social media misuse but reject civility codes for employee social media speech defend corporate interests while upholding the values of free speech and expression. This risk mitigation approach advances both employees' interests and the larger societal interest in granting these employees unfettered access to "speaking and listening in the modern public square."²⁴⁸

248. *Packingham*, 137 S. Ct. at 1737.