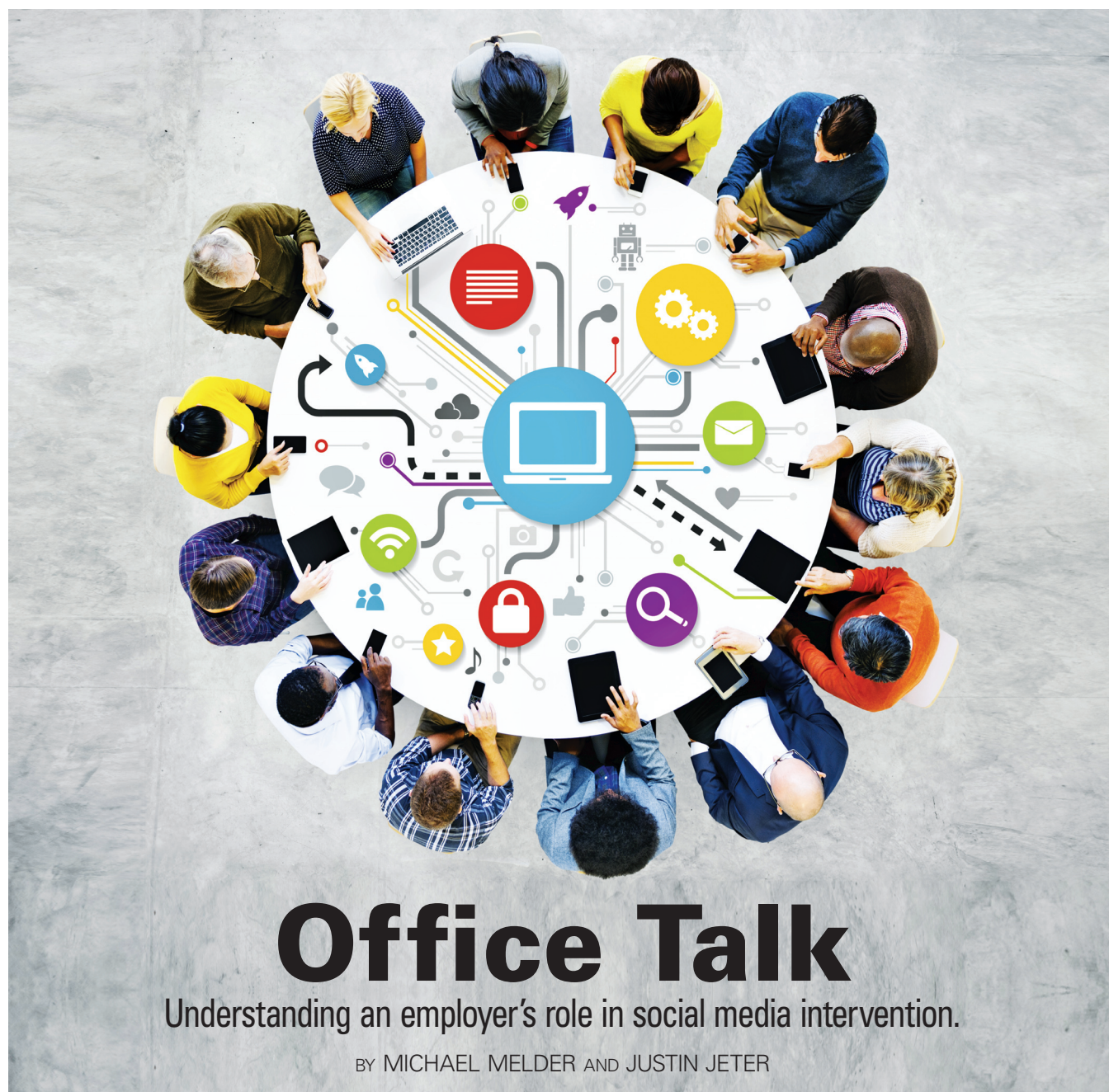




Office Talk

Understanding an employer's role in social media intervention.

BY MICHAEL MELDER AND JUSTIN JETER

Most employers know that the National Labor Relations Act impacts unionized workforces; however, it also impacts nonunionized workforces. The NLRA protects *all* employees' rights to participate in concerted activity, meaning that employees can get together and talk about how bad their boss is, or how much they make,

or how terrible their work environment is, etc. Let's call it grouching over job conditions—we have all done it.

Traditionally, employees participated in concerted activity with other employees during lunches, happy hours, or barbecues. The Internet has changed all of that. Now many employees post on Facebook or other social media sites

the same things that were once discussed over beers and brats.

For some folks, postings have led to discipline or termination after the boss gets wind of the not-so-flattering rants. At times, these restrictions on concerted activity have led to violations of the NLRA.

The National Labor Relations

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Board—the arm of the federal government that is charged with enforcing the NLRA—has become very active in protecting employees' rights to use social media to conduct concerted activity. In 2011, the NLRB's general counsel began issuing memorandums cataloging its enforcement activity related to employers' monitoring of employee social media activity. More specifically, it found violations of the act when an employer enforces a social media policy that restricts or can be perceived to restrict an employee's right to discuss the terms and conditions of employment with other employees. In addition, employers may run afoul of the act if they make employment-related decisions, such as discipline or termination, based on an employee's job-related social media postings.

Employers' Use of Social Media Policies

Most employers have policies that address how employees are to use social media and other specific employer concerns. Not surprisingly, employers don't want employees saying derogatory things about the employer, other employees, or clients. In addition, employers have very good reasons to limit disclosure of confidential and proprietary information. However, careless drafting of these policies can lead to NLRA violations. Some examples of policy language found objectionable by the board include:

- "You also need to protect confidential information when you communicate it . . . You should never share confidential information with another team member unless they have a need to know the information to do their job. . . ."
- "If you engage in a discussion related to [Employer] . . . you must also be sure that your posts are completely accurate and not misleading and that they do not reveal non-public company information on any public site."
- "Offensive, demeaning, abusive or inappropriate remarks are as

out of place online as they are offline, even if they are unintentional. We expect you to abide by the same standards of behavior both in the workplace and in your social media communications."

The NLRB determined that this type of language violated employees' rights to engage in concerted activity, which should give employers pause. Notice that the wording simply related to an employer's desire to protect confidential information or maintain a cordial workplace.

What Are Employers to Do?

To comply with the act, employers should review their social media, privacy, confidentiality, harassment, investigation, or other policies touching on employee communications and interactions. If these policies prevent or can be perceived by employees to prevent them from talking about wages, work conditions, other employees, etc., then the employer should consider revising and narrowly tailoring these policies.

Also, employers should include in their social media policies a savings clause to ensure that if some language is deemed objectionable, the entire policy will remain intact and enforceable. Simple is best and employees should be able to easily understand it. However, a savings clause will not save a helplessly broad or illegal policy.

Employees Using Social Media to Discuss Work

Another area where employers should be mindful relates to employees using social media to engage in concerted activity. Employers have completely legitimate reasons to monitor employees' use of social media. For example, to ensure employees do not inadvertently disclose trade secrets or to investigate employee wrongdoing. However, while conducting legitimate monitoring, an employer may discover comments made by employees that are unflattering to the company, other employees, or clients. The employer's use of that infor-

mation may bring the NLRA into play.

Employers making employment-related decisions based on employees chatting on social media sites regarding work or working conditions should pause and determine if the employees are engaged in concerted activity. Generally, it takes more than one employee to implicate the NLRA. So an employee simply complaining about work to friends and not co-workers probably would not fall within the NLRA. However, if an employee is discussing issues about work with other employees, there is a good chance it might be concerted activity. These discussions can be animated, involve derogatory language and name-calling, and still be concerted activity.

As an employer, you can choose to ignore the comments or take action. If the online comments are not harmful or do not violate lawful company policies, one course of action is to disregard them. The forum in which the discussions take place may be different, but these types of conversations aren't; most employees talk about their work, wages, and bosses. In addition, train managers so they have awareness of the potential issues. You may use these online conversations as a learning tool to implement positive change.

Certain conversations that devolve into threats of violence, excessive name-calling or cussing, etc., however, may remove the concerted activity protection employees enjoy. Employers confronted with these types of online conversations should carefully consider their options with their counsel before making disciplinary decisions. **TBJ**



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