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ABSTRACT

Extending a holistic social media framework to the nexus of social media and employee privacy revealed the power of external regulatory pressures to shape an organization's social media structure and governance. Employers' social media policies have been significantly impacted by recent decisions of the National Labor Relations Board (NLRB), the 5-member body charged with overseeing the National Labor Relations Act (NLRA). Organizations with social media policies that are written in broad terms may find themselves under scrutiny of the NLRB, as such policies can violate the rights of employee conversation deemed protected under Section 7 of the NLRA. The forces of social media regulatory parties, in this case the NLRB, play a stronger role in determining actual social media structure and governance than the firm's intended social media structure and governance edicts themselves. The NLRB is an important stakeholder in the analysis of workplace social media dynamics.

KEYWORDS

social media, workplace privacy, National Labor Relations Act, National Labor Relations Board, Section 7, Triple Play Sport Bar, Chipotle

INTRODUCTION

As social media enters its second decade of growth and popularity, organizations remain attuned to the challenges of managing social media in the workplace. Seven functional building blocks common to all forms of social media were first identified by Kietzmann, Hermkens, McCarthy and Silvestre (2011): identity, conversation, sharing, presence, relationships, reputations, and groups. Exploring these building blocks has offered vast opportunities for research on social media in organizations in myriad disciplines: human resources (Rokka, Karlsson & Tienari, 2014; Vroman, Stalz, Hart & Stalz, 2017), communication (Linke & Zerfass, 2013; Relling, Schnittka, Sattler, & Johnen, 2016), public relations (Eyrich, Padman & Sweetser, 2008), and marketing (Ashley & Tuten, 2015; Quinton, 2013; Schultz & Peltier, 2013). Arguably the first holistic framework identifying the elements of strategic social media marketing was developed by Felix, Rauschnabel & Hinsch (2017). Drawing on findings, theories and frameworks from multiple disciplines, Felix et al. (2017) propose a framework specifying the dimensions on which managers make firm or situation-specific social media marketing decisions. Among the disciplinary findings, theories and structures that informed their framework: human resources (Sivertzen, Nilsen & Olafsen, 2013), organizational management (Heller, Baird & Parasnis, 2011), public relations (Eyrich et al., 2008) and communications (Linke & Zerfass, 2013). Although Felix et al. (2017) present the framework as one useful to the field of marketing, its applicability to other disciplines, particularly given its multi-disciplinary lineage, is broad. Social media is not a communication platform exclusive to marketing; on the contrary, it has broad implications for, among other disciplines, human resource management.

Social media platforms include blogs, photo sharing, personal and professional networking, and communication boards. In 2017, 81 percent of U.S. Americans had a social media profile; Facebook is the most popular social media platform in the United States (Percentage of U.S. population with a social media profile, n.d.). As of 2016, 79% of internet users, (68% of US adults) use Facebook. About 44 percent of all social media site visits are on Facebook, and 76% of Facebook users visit the site daily. By comparison, as of 2016, 24% of online Americans use Twitter (representing 21% of US adults); 42% of Twitter users use the site daily (Percentage of U.S. population with a social media profile, n.d.; Social Media Update, 2016).

The reach of communications on social media can range from encapsulated communications received by "friends" on a social network such as Facebook: ostensibly, the communication remains in a "tunnel," viewable to only those who are connected on the social network, or reposts by friends. At the other extreme, Twitter can act as megaphone: Twitter

accounts can accumulate followers that number in the millions, who can then retweet a message to their followers. One tweet can develop into a quickly spreading communication wildfire that cannot be contained.

Given vast social media use and the potential for broadcasting information over social media platforms, firms have taken steps to manage social media posts. Importantly, firms set guidelines to reduce the risks of improper social media use by their employees with rules on how social media should be used in work-related contexts (Rokka et al., 2014). Some companies have developed strategies to educate employees about the personal and firm-related consequences of "undesirable" social media use through social media marketing guidelines (Linke & Zerfass, 2013). The need to manage employees' responsibilities within the social media sphere is critical, given management, employees, and customers operating in social media may construct meaning differently (Rokka et al., 2014). Moreover, stakeholders can take control of and manipulate social media content (Labrecque, von dem Esch, Mathwick, Novak & Hofacker, 2013). Quinton (2013) noted the balance of power to control a shared reality and an individual's ability to communicate a brand narrative have changed with the rise of social media.

Following an introduction to the strategic social media marketing framework proposed by Felix et al. (2017), examples of social media pertaining to human resources – employee privacy, to be specific – will be presented, with the goal of extending the Felix et al. (2017) framework beyond the marketing discipline. Therefore, this paper explores the research question: What dimensions of a strategic social media framework are most relevant to human resource management in the area of employee privacy, given the legal protections employees have concerning workplace communications?

SOCIAL MEDIA MARKETING – SYNOPSIS OF A FRAMEWORK

Using a two-stage research design, Felix et al. (2017) collected data from social media marketing practitioners via in-depth interviews and qualitative survey data. From that, they constructed a strategic social media marketing framework with four central dimensions: scope, culture, structure and governance.

Social Media Marketing Scope acknowledges firms can use social media to build relationships with customers, employees, communities and other stakeholders. It concerns whether companies use social media marketing primarily for communication with few stakeholders or comprehensively, both externally and internally, in collaborative efforts. Firms that pursue an Explorer approach take advantage of the integrative, interactive, and collaborative potential of social media marketing, facilitating integrated, two-way communication and collaboration that is completely open, rather than simply broadcasting information. Collaboration in the context of the Explorer approach refers to any of several possible types of collaboration, such as the collaboration between the firm and customers or among multiple employees, and as a tool for stakeholder management. Whereas Defenders merely push out content, Explorers' collaborative ethos is premised on the idea that social media should motivate people to share information.

Defenders	⟷	**Explorers**
Social media used unidirectionally, pushing content and information to stakeholders or customers		Social media used reciprocally with stakeholders (clients, employees, suppliers, government agencies) for authentic social media collaborative experiences

Social Media Marketing Culture reveals a continuum along conservatism and modernism. Much like organizational culture, social media marketing culture falls somewhere between the extremes of risk aversion and broad permeability. Quoting one of their interviewees, Felix et al. (2017) illustrate an organizational dilemma of social media: "All employees and especially top management have to believe in social media and take the risk that someone may talk negatively about the company." Related to culture is how organizational members handle and manage consumers' interactions with the firm's social media content, particularly when the content is not consistent with the company's intended message.

Conservatism		**Modernism**
Social media shall remain risk-averse and internally focused	⟷	Social media approaches shall be permeable, open and flexible.

Social Media Marketing Structure concerns responsibility of social media marketing efforts, specifically, who has the responsibility to post and interact in these media. Is this responsibility highly centralized or broadly dispersed?

Hierarchies		**Networks**
Social media marketing is highly centralized and social media marketing responsibilities are clearly defined to given assignee(s)	⟷	All employees are responsible for social media marketing

Social Media Marketing Governance concerns how rules and guidelines are established, and thus, is closely related to Social Media Marketing Structure. Notably, social media can be used by employees in official (company-granted access) or unofficial (personal account access) capacities, thus making traditional Information Technology governance frameworks inapplicable.

Autocracy		**Anarchy**
Social media communications handled by single department	⟷	Departments and employees are free to communicate at will on social media platforms

Felix et al. (2017) conclude these four dimensions are interdependent and companies should acknowledge the integrated nature of the dimensions; they do not represent isolated, independent decisions. Presented as a holistic framework, the authors suggest future research to explore its applicability in strategic social media marketing activities. They also offer the role of regulatory bodies on this framework as an area to investigate. Cavico, Mujtaba, Muffler, & Samuel (2013) explored social media and tort law as it pertains to employment-at-will, however, federal agencies with regulatory employment oversight were not part of their analysis. The current paper explores this regulatory dimension as a critical feature in the analysis of social media in the workplace.

The applicability of the Felix et al. (2017) framework to an area of social media that has garnered much publicity, specifically employee privacy, is explored next. Given employee privacy rights are subject to regulatory oversight, the current paper extends the Felix framework in multiple, meaningful ways; it extends the Felix framework to human resources and examines the role of social media regulatory forces.

SOCIAL MEDIA PRIVACY LEGISLATION

As social media enters its second decade of growth and popularity, the legal framework surrounding it continues to evolve, albeit slowly. Laws concerning electronic communications prior to the advent of social media included the Stored Communications Act (SCA) and the Electronic Communications Privacy Act (ECPA). The SCA governs the circumstances of an internet service provider (ISP) disclosing the contents of or other information about a customer's emails and other electronic communications (Wright, 2013). The ECPA, in expanding and revising federal wiretapping and electronic eavesdropping provisions, was promulgated to create "a fair balance between the privacy expectations of citizens and the legitimate needs of law enforcement" (Electronic Communications Privacy Act). Neither of these statutes was intended to govern the privacy of social media communications, and without regulatory guidance, social media have been open for inspection. An Indiana federal court ruled that in cases of emotional distress, and specifically when a plaintiff alleges emotional trauma and harassment against an employer, information from the plaintiff's social networking profiles and postings that relate to general emotions, feelings, and mental states must be produced in discovery (Gavejian, 2010). With the ubiquity of social media, there is growing concern about employers intruding upon applicants' or employees' privacy by viewing restricted-access social media accounts. Employers use social networking sites to research

job candidates not only during the hiring process, but also as part of workplace investigations (Crespo & Lyon, 2014). Postings on social networking sites have also resulted in workplace discipline, including termination (Bloom & Rosen 2014).

Proposals at the federal level to enact national social media privacy law have been unfruitful. In the absence of any federal regulation, as of 2017, 25 states have passed state laws, as have Washington, D.C. and Guam (State Social Media Privacy Laws, 2017). Maryland was the first state to pass a "state social media law" in 2012. Such laws restrict employer access to personal social media accounts of applicants and/or employees. As of this writing, legislation is pending in several additional states. States with social media protections bar employers from requiring or even "requesting" an applicant or employee disclose user name or password to his or her personal social media account[1]. Some also impose other restrictions, such as prohibiting an employer from requiring or requesting that an applicant or employee: (a) add an employee, supervisor or administrator to the friends or contacts list of his or her personal social media account; (b) change privacy settings of his or her personal social media account; (c) disclose information that allows access to or observation of his or her personal social media account, or otherwise grant access in any manner to his or her personal social media account; (d) access personal social media in the employer's presence, or otherwise allow observation of the personal social media account; or (e) divulge personal social media. Moreover, said laws prohibit retaliating against, disciplining or discharging an employee, or refusing to hire an applicant for failing to comply with a prohibited requirement or request. Employers are free to review public information, such as what is open to the public on an applicant's social media pages. However, all state social media laws prohibit employers from seeking access to the nonpublic social media pages of applicants (State Social Media Privacy Laws, 2017).

Interestingly, privacy is not the only catalyst for these protections. Given the platform of social media, some employers find the potential to leverage employees' social media networks for their own business gain highly opportune. Should an organization wish to use employees' social media networks for business development or marketing purposes, can it do so? Oregon amended its social media law, effective January 1, 2016, to prohibit employers from requiring or requesting that an applicant or employee establish or maintain a personal social media account or that an applicant or employee authorize the employer to advertise on his or her personal social media account (Lazzarotti, 2015). Meanwhile, Virginia's law, effective July 1, 2015, explicitly excludes from covered information an account set up by the employee at the request of the employer (State Social Media Privacy Laws, 2017). Thus, two different takes on leveraging employees' social media are revealed: Virginia employers may request employees set up social media accounts, but ensure protection of that information, while Oregon bars any employer from coercing employees to establish social media accounts or hosting company advertising on the employees' accounts.

Another quandary, in regard to workplace investigations, concerns an employer's right to inspect or gain access to employees' personal social media in connection with workplace investigations (Crespo & Lyon, 2015). Imagine, via social media, an employee complains of harassment or threats made by a co-worker. Or an employer receives a report that an employee is posting proprietary or confidential information or otherwise violating company policy. Here again, state social media laws vary widely in their coverage of workplace investigations. Some states provide at least limited exceptions for workplace investigations, while others do not. Both Illinois and Nevada establish an employer's investigation of potential misconduct may not justify social media access. Colorado and Maryland provide an exception only for investigating violations of securities laws or potential misappropriation of proprietary information. California, Oregon and Washington allow an employer to ask an employee to divulge content from a personal social media account but forbid the employer from requesting an employee's login credentials. In Arkansas, Colorado, Maryland and Michigan, an employer may request any employee's social media login credentials to investigate workplace misconduct (Crespo & Lyon, 2015).

THE NATIONAL LABOR RELATIONS BOARD

Given the ubiquity of social media and the vast differences in protections by state, it behooves employers to ensure compliance with relevant state social media laws and articulate social media guidelines to mitigate risks posed by

[1] 24 of the 25 state laws protect both current employees and applicants; New Mexico's law protects only applicants

employee social media postings. This guidance has become even more prudent in the face of recent rulings of the National Labor Relations Board (NLRB), the federal body responsible for overseeing the National Labor Relations Act (NLRA) of 1935. Section 7 of the NLRA grants employees the right to engage in concerted activity for their mutual aid or protection, which includes the right to discuss their terms and conditions of employment. Employers violate this right when they maintain a social media policy or apply it in a way that restricts the employee's ability to discuss the terms and conditions of employment (The NLRB and Social Media). The NLRB is a 5-member board appointed by the President of the United States. More than 30 regional field offices handle the processing of charges. Upon investigation of a complaint, an administrative law judge will conduct a hearing. Decisions of the judge may be reviewed by the NLRB (Greenhouse, 2010). NLRB members serve a 5-year term, and are identified by political party, an important detail since three of the five board members will share the United States President's political party, while the other two will represent the other major political party. Such a structure is intended to offer balanced perspectives but lean toward the President's predilections. In addition to the board, the President appoints a NLRB General Counsel to a 4-year term, responsible for bringing cases to the board and upholding board decisions. NLRB members are subject to Senate confirmation hearings, although recent history has upended this tradition. Between January 2008 and mid-July 2013, the NLRB never had all five members, nor did it operate with three confirmed members. This lack of a legitimate quorum created a legal quandary but did not lessen the power of the NLRB. Rather, this diminished structure resulted in emboldened decisions by the NLRB over this period, which continued through 2017. . Many consider the far reach of the NLRB a worrisome development, among them the United States Chamber of Commerce, who published a 45-page discourse in 2015 entitled "Theater of the Absurd: The NLRB Takes on the Employee Handbook," stating:

> "One particular way the NLRB's majority has transformed the agency is through adopting a wildly expansive reading of the NLRA's protections in order to undermine sensible and widespread workplace policies. Through a series of decisions and official guidance, the NLRB has undertaken a campaign to outlaw heretofore uncontroversial rules found in employee handbooks and in employers' social media policies—rules that employers maintain for a variety of legitimate business reasons." (U.S. Chamber of Commerce, 2015, pp. 3-4)

APPLICATION OF THE FRAMEWORK TO NOTEWORTHY SOCIAL MEDIA NLRB DECISIONS

The intersection of employee privacy rights and social media posts is sometimes thorny. The NLRB is the regulatory body with (a) jurisdiction over these issues, and (b) authority to decide cases when these forces collide. Felix et al.'s (2017) framework of strategic social media marketing is applied here, albeit in a novel, non-marketing, context. The application of the Felix et al framework necessitates an acknowledgement of the core differences between two business functions: (1) marketing and (2) human resources, in this case, honoring employee rights and privacy in the course of workplace dynamics. Marketing is traditionally a strategy-driven, top-down initiative, with social media merely offering a new platform to deliver the marketing message to consumers. Employee rights and employee privacy, the purview of the current paper, are exercised at the employee level. That is, they are not top-down initiatives, and although they may be subject to policy written by executives, their violations are revealed at the employee level during the course of employment. Given the core differences of marketing and employee rights, the Felix et al. (2017) framework will rightly reveal some "flex," that is, certain dimensions are likely more salient than others when applying the framework to human resource phenomena. Specifically:

- Social Media Scope may be difficult for organizations to manage given the sharing, reciprocal nature of authentic social media experiences. The message that circulates may not be the communication the organization sanctions. The examples of American Medical Response, Triple Play Sports Bar and Grille and Chipotle Restaurants, the three case studies that follow, reveal the difficulty organizations have in controlling the scope of social media communications.
- Social Media Culture is likewise difficult to manage. The organization may lean toward conservatism, but the very nature of social media, namely its social and interactive construction, makes keeping social media communications internally focused somewhat unlikely. The case studies that follow illustrate the challenges of containing social media communications.
- Social Media Structure in the Felix et al. (2017) framework concerns responsibility for posting and interacting

in social media. Employees may not be organizationally sanctioned to post and interact on social media, but may choose to do so via personal accounts. Their posts, outside of the organization's reach, may have material implications for the organization, as seen in each of the case studies.

- Social Media Governance concerns the rules to freely communicate via social media. Employees discussing the organization on unofficial, personal accounts may find their communications protected under the NLRA and sanctioned by a regulatory body, the NLRB, as illustrated in the case studies that follow.

SELECTED CASES OF THE NLRB

American Medical Response

A paramedic in Connecticut became a flashpoint in the social media privacy debate when the NLRB investigated her termination resulting from negative comments about her supervisor posted on her Facebook page. Dawnmarie Souza's unflattering, disparaging language includes calling her boss a "scumbag" and "code 17" – shop talk for a psychiatric patient, prompting her employer, American Medical Response, to terminate her in December 2009. In what became a watershed case, the NLRB upheld her rights, stating "Employees must be permitted to discuss the terms and conditions of their employment with co-workers and others, and by terminating Souza for posting comments that drew support from co-workers, AMR had violated the NLRA" (NLRB v American Medical Response, 2011).

Triple Play Sports Bar and Grille

Similar protections were afforded employees of a Connecticut sports bar (*Triple Play Sports Bar and Grille*). Two employees of Triple Play Sports Bar and Grille discovered they owed more than expected in state income taxes on their earnings at the sports bar. The topic was discussed at work with other employees, and some employees complained to the employer about the tax problem (Bloom & Rosen, 2014). One employee posted the following "status update" to her Facebook page:

> Maybe someone should do the owners of Triple Play a favor and buy it from them. They can't even do the tax paperwork correctly!!! Now I OWE money… [expletive deleted]!!!!

Responses included the following from a (a) Facebook "friend" and customer and (b) Triple Play employee:

> "You owe them money…that's [expletive deleted] up."
>
> "I [expletive deleted] OWE MONEY TOO!"
>
> "The state. Not Triple Play. I would never give that place a penny of my money. Ralph [DelBuono] [expletive deleted] up the paperwork…as per usual."
>
> "It's all Ralph's fault. He didn't do the paperwork right. I'm calling the labor board to look into it bc he still owes me about 2000 in paychecks."

An employee selected the Facebook "Like" option under initial status update. The discussion continued:

> "We shouldn't have to pay it. It's every employee there that it's happening to."
>
> "I mentioned it to him and he said that we should want to owe."
>
> "Hahahaha he's such a shady little man. He prolly pocketed it all from all our paychecks. I've never owed a penny in my life till I worked for him. Thank goodness I got outta there."
>
> "I owe too. Such an [expletive deleted]."

The owner of Triple Play found out about the Facebook discussion and fired two employees: the person who engaged in the thread, who was informed she would be contacted by the company attorney regarding a defamation action, and the person who clicked "Like" to the initial status update. The restaurant owner told him because he "liked" the disparaging and derogatory comments, he was disloyal, and it was "apparent" that he wanted to work elsewhere; he too was told "[Y]ou will be hearing from our lawyers." In defense of the terminations, Triple Play acknowledged the employees' Facebook activity was concerted and they had a protected right to engage in a Facebook discussion about the employer's

tax withholding calculations. However, Triple Play contended it had not violated the NLRA because the plaintiffs had "affirmed" allegedly defamatory and disparaging comments, which were unprotected. The Facebook posts were visible to employees and customers in a "public" forum. Triple Play management felt the posts undermined its authority and affected its public image, thereby rendering the Facebook posts unprotected.

The NLRB disagreed. In its analysis, the dispute involved a social media discussion among *offsite, off-duty* employees and two non-employees. No manager or supervisor participated in the Facebook thread and there was no direct confrontation with management. In the opinion of the NLRB, the "use of a single expletive" to describe her manager "in the course of a protected discussion on a social media website" did not "sufficiently implicate" the employer's "legitimate interest in maintaining discipline and order in the workplace." The NLRB determined that even though customers were involved in the thread, they joined the discussion as Facebook friends, on their own initiative and in the context of a social relationship outside of the workplace, not because they were the employer's customers. Moreover, the conduct was not disloyal or defamatory. Rather, the purpose of the employees' communications was to seek and provide mutual support to encourage the employer to address problems in the terms or conditions of employment, not to disparage its product or services or to undermine its reputation. Although conducted offsite and by off-duty employees, the NLRB concluded the discussion clearly showed a labor dispute existed and the employees' participation was not *directed to* the general public but was akin to conversations that can be *overheard* by a customer. Nor were the passages defamatory; the NLRB concluded Triple Play had not established the comments were made with knowledge of their falsity or with reckless disregard for their truth or falsity. According to the NLRB, the use of an expletive to describe a co-owner in connection with the asserted tax-withholding errors "cannot reasonably be read as a statement of fact; rather, Sanzone was merely (profanely) voicing a negative personal opinion of [the co-owner]" (Bloom & Rosen, 2014). Similarly, the use of Facebook's "Like" option was deemed a protected activity by a current employee, as it expressed agreement only with the comment it immediately followed (the original post by a Triple Play coworker), and not with other comments.

Although Triple Play had an Internet/Blogging policy[2], it bore no consequence in this dispute, as the NLRB deemed employees' rights to engage in concerted activity were fully protected. In fact, the NLRB held Triple Play's internet/blogging policy unreasonably *chilled* employees' Section 7 rights by prohibiting employees from "engaging in inappropriate discussions about the company, management, and/or co-workers." (Gordon & Appenteng, 2015). In effect, the NLRB found Triple Play's policy in violation of the NLRA.

Irritated but undeterred, Triple Play appealed portions of the NLRB ruling and brought the case to the U.S. Court of Appeals for the Second Circuit. Triple Play did not appeal the board's determination regarding Facebook's "Like" thumbs-up icon, affirming employees' entitlement to Section 7 protections in this regard. Effectively, Triple Play agreed the "thumbs up" affirmation by the employee was protected concerted activity.

Of greatest concern to Triple Play was in exercising Section 7 rights, the employees' disparaging and false statements toward the employer. The Supreme Court's decision in NLRB v. Electrical Workers Local 1229, 346 U.S. 464 (1953), better known as the Jefferson Standard, was the standard used by the NLRB in evaluating the off-duty Facebook exchanges by Triple Play employees. Under the Jefferson Standard, disparaging and disloyal comments lose the Act's protection if they "amount to criticisms disconnected from any ongoing labor dispute" (Rajendra, 2014). The NLRB was also guided by a standard established in Linn Plant Guards Local 114, 383 U.S. 53 (1966), which holds statements lose protection if made "with knowledge of [their] falsity, or with reckless disregard of whether [they were] true or false." (Gordon & Appenteng, 2015). Ultimately, the board concluded the employees' comments were *neither disloyal nor*

[2] Internet/Blogging Policy: The Company supports the free exchange of information and supports camaraderie among its employees. However, when internet blogging, chat room discussions, email, text message, or other forms of communication extend to employees revealing confidential and proprietary information about the company, or engaging in inappropriate discussions about the company, management, and/or co-workers, the employee may be violating the law and is subject to disciplinary action, up to and including termination of employment. Please keep in mind that if you communicate regarding any aspect of the Company, you must include a disclaimer that the views you share are yours, and not necessarily the views of the Company. In the event state or federal law precludes this policy, then it is of no force or effect.

defamatory, even though they were made in the online presence of a customer. The board found the conversation was not clearly directed to the general public but was akin to "a conversation that could potentially be overheard by a patron or other third party" (Gordon & Appenteng, 2015). Triple Play disagreed with the NLRB's conclusion that employees' comments were neither disloyal nor defamatory and argued to the appellate court that employees' speech lost the Act's protection because it was obscene, disloyal, and false, citing NLRB v. Starbucks Corp., 679 F.3d 70 (2d Cir. 2011). In the Starbucks case, the court held the Board had "improperly disregarded the entirely legitimate concern of an employer not to tolerate employee outbursts containing obscenities in the presence of customers" (Gordon & Appenteng, 2015). The Starbucks case concerned obscenities by an employee during a union organizing activity in the company's store.

The Second Circuit acknowledged a legitimate employer concern in the Starbucks case, but felt extending the Starbucks rationale to all social media communications by employees would be too far reaching, noting:

> Almost all Facebook posts by employees have at least some potential to be viewed by customers. Although customers happened to see the Facebook discussion at issue in this case, the discussion was not directed toward customers and did not reflect the employer's brand. The Board's decision that the Facebook activity at issue here did not lose the protection of the Act simply because it contained obscenities viewed by customers accords with the reality of modern-day social media use.

The Court of Appeals affirmed the Board's proper application of the Jefferson Standard and the Linn Standard, and dismissed the Starbucks rationale. Because the conversation was not specifically directed to customers, as seen in the Starbucks case, the Starbucks rationale failed. Rather, the conversation between employees was witnessed by customers rather than directed at them, leaving the Second Circuit to rely on the Jefferson and Linn standards. Triple Play argued the disparaging and false comments about Triple Play and its owners lost the Act's protections by virtue of their disparaging and defamatory qualities. The employee's comment that she "owe{d} too…" was *knowingly false*, as she did not believe tax withholding errors were made with her pay. However, the court found "[a]lthough [the employee] may not have believed that Triple Play erroneously withheld her taxes, that has no bearing on the truth of her statement 'I owe too' or her conceivable belief that Triple Play may have erroneously withheld other employees' taxes." Interestingly, the Second Circuit never published this summary, despite requests by the NLRB to do so. Nevertheless, the Triple Play case establishes a powerful precedent, extending great liberties to employees to express disdain with their employers on social media.

Chipotle

Less than six months later, an administrative law judge of the NLRB issued a decision with far-reaching implications for how employers manage disparaging comments made by employees on social media. Unlike the Triple Play case, which involved a conversation between co-workers and merely witnessed by customers, the case of *Chipotle Services LLC* involved *purely one-way communications*, namely tweets, by an employee, James Kennedy. An hourly employee of the company's Havertown, PA restaurant, Kennedy named the firm's communication director by name, in a tweet addressing a news article about hourly employees reporting on work for snow days, when public transportation was closed, and other Chipotle employees were permitted time off. Specifically, Kennedy tweeted "Snow day for 'top performers' Chris Arnold?" Another tweet by Kennedy was in response to a customer who tweeted "Free chipotle is the best thanks." Kennedy replied "nothing is free, only cheap #labor Crew members only make $8.50hr how much is that steak bowl really?" Another customer response Kennedy tweeted concerned guacamole and referenced Chipotle's competitor Qdoba: "it's extra not like #Qdoba, enjoy the extra $2." Of note, none of Kennedy's tweets involved two-way communications with other employees, as recognized by Section 7 rights of protected, *concerted* activity (Prescott & Jewell, 2016). One tweet represented a sarcastic jab at management, and the other two tweets were in response to customer posts.

Upon reading the tweets, Chipotle's national social media manager contacted Kennedy's management team, who requested Kennedy delete the tweets and review the firm's social media policy. The social media policy shown to Kennedy was not the firm's current policy. Kennedy was mistakenly shown an outdated social media policy, which stated (1) employees may not share "confidential information" online or anywhere else; and (2) employees may not make "disparaging, false, misleading, harassing, or discriminatory statements" about Chipotle or its employees.

The NLRB judge concluded the term "confidential" was undefined and vague, and thus the firm's prohibiting disclosure of confidential information problematic in that it could "easily lead employees to construe it as restricting their Section 7 rights" (Prescott & Jewell, 2016). The judge also took issue with the policy's language regarding disparaging, false, or misleading statements, concluding Chipotle's policy violated the NLRA on two grounds. First, disparaging language "could easily encompass statements protected by Section 7, and the Board has found rules prohibiting derogatory statements to be unlawful" (Prescott & Jewell, 2016). Second, the judge stated false and misleading statements must have a *malicious motive* in order to lose the protection of the National Labor Relations Act.

Regarding management's request that Kennedy delete the tweets, he readily complied with the request, but the judge found the request in violation of the NLRA, as it "amounted to an order from a higher-level manager," and that it "implicitly directed [Kennedy] not to post similar content in the future." Citing Board case law, the judge rendered a rule that "reasonably tends to chill employees in the exercise of their Section 7 rights" violates the NLRA (Prescott & Jewell, 2016). Notably, in this case, Kennedy was not disciplined for the tweets, nor specifically requested to delete them. Rather, deletion of the tweets was requested by management, and Kennedy complied.

As noted, Kennedy's tweets did not involve direct interaction with coworkers. Regardless, the judge, in his ruling, elevated them to the level of protected and *concerted* activity, ruling Kennedy's tweets were "visible to others" and had the purpose of "educating the public and creating sympathy and support for hourly workers in general and Chipotle's workers in specific" (Prescott & Jewell, 2016). The judge deemed Kennedy's tweets concerned "the workplace or employees' interests as employees" and thus, were for the *mutual aid and protection* of employees, even though Kennedy's were solo, one-way communications.

The Chipotle case provided employers many takeaways. The NLRB's broad definition of "protected and concerted" activity grants strong and sweeping protection under Section 7 to an extensive range of employee statements on social media, even solo, one-way communications that disparage and denigrate an employer. Engaging in constructive communications for the purpose of mutual aid and protection has expanded to protect singular blathering about an employer, under the auspices of "educating the public and creating sympathy and support." In the Chipotle case, the judge upheld the firm's policy prohibiting harassing or discriminating statements but gave broad latitude to permit language that could be derogatory or disparaging, going so far as to rule that only false and misleading statements made *with malice* would violate the NLRA. This strong posture of the NLRB should rightly concern employers, who must demonstrate an expansive tolerance for employee statements, which may be pejorative or misleading.

THE APPLICABILITY OF THE SOCIAL MEDIA FRAMEWORK

Applying the holistic social media marketing framework to the nexus of social media and employee privacy reveals the power of external regulatory pressures to shape an organization's social media structure and governance. Organizations can articulate a social media policy in terms of desired positions on scope (defender-explorer), culture (conservatism-modernism), structure (hierarchy-networks) and governance (autocracy-anarchy) dimensions, but the ability to adhere to these desired locations is not exclusively under the firm's control. Rather, the forces of social media regulatory parties, in this case the NLRB, play a stronger role in determining actual social media structure and governance than the firm's edicts themselves. A firm's desire for highly centralized social media structure (hierarchy) handled by a single department (autocracy) may be futile strategies to pursue, given the NLRB's broad interpretation of protected and concerted activity. The takeaways of the American Medical Response, Triple Play and Chipotle cases are an understanding that the NLRB has the power to liberally and broadly interpret social media behaviors and posts that disfavor employers, irrespective of the firm's clearly articulated social media policy. While scope and culture may remain the purview of an organization's social media architects and visionaries, external regulatory pressures have the power to shape an organization's social media structure and governance. The NLRB is an important stakeholder in the analysis of workplace social media dynamics.

CONCLUSION

This analysis extended the Felix et al. (2017) framework to human resources and explored the role of social media regulatory forces. Future avenues of research might include applying the framework to other social media contexts with regulatory oversight to extend and sharpen the research lens of corporate social media strategy.

The clear takeaway to employers is that a social media framework may be a valuable tool to organizations as they harness the power of social media communications with stakeholders, but their ability to fulfill the desired strategy may be more challenging than envisioned, given the strong stance of the NLRB in protecting employees' social media rights. Moreover, recent decisions of the NLRB reveal organizations should evaluate and investigate before taking action for alleged social media misconduct where the activity is protected by Section 7 of the NLRA. Despite offensive language or the public viewing an online disagreement, the NLRB makes clear it will afford significant leeway to employees in their protected activity. Triple Play established precedent that protected activity includes clicking an icon to affirm a co-worker's views of terms and conditions of employment. Further, obscene language in social media posts in the online presence of customers or clients does not infer the communications will lose the protection of the Act. Online group discussions about work that are disparaging or defamatory may be protected by the Act. Broad statements in employee handbooks regarding "inappropriate discussions" in the absence of clear examples may not withstand NLRB scrutiny. In Chipotle, an employee's tweets, ***which did not involve any interaction directly with coworkers***, rose to the level of protected and ***concerted*** activity for the purpose of those employees' mutual aid and protection under Section 7. The NLRB's decision clearly reflects the NLRB's aggressive stance towards employer's social media policies.

For employees, it bears repeating that employees should always remain mindful of their social media posts. Since the political predilections of the United States President will guide the NLRB's direction, the protections of concerted activity afforded by the NLRB may diminish when the political winds of Washington, DC change direction. Indeed, a few months after the 2017 inauguration of President Donald J. Trump, the composition of the NLRB changed dramatically. With a new NLRB General Counsel and Trump appointees holding a majority of NLRB seats, the likelihood of the NLRB revisiting decisions made by the prior administration is real (Crotty & Vanesse, 2017).

In light of prevailing NLRB decisions and uncertainty regarding the likelihood of their rollback, companies should review their social media policies, carefully avoiding broad workplace policy language that unwittingly prohibits protected activities. With more than three-fourths of Americans using social media in 2017 (Social Media Fact Sheet, 2017), company social media policies should be clearly written and offer precise examples of permissible and non-permissible content. A company that puts broad restrictions on social media posts may find itself in the crosshairs of the NLRB.

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