

Advisory by Steven M. Swirsky, Michael F. McGahan Cited in "Social Media Policies: Is Your Procrastination Putting Your Company at Risk?"

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Steven M. Swirsky and **Michael F. McGahan**,
Members of the Firm, cowrote an *Act Now* Advisory that
was cited in "Social Media Policies: Is Your
Procrastination Putting Your Company at Risk?"

Following is an excerpt:

An employee who criticizes his employer online is not automatically protected under the NLRA, and the NLRB has ruled in favor of employers who terminated workers for inappropriate online activity in several cases, including earlier this year when it "opined that it was legal for the Arizona Daily Star to fire a reporter who posted 'inappropriate and offensive Twitter postings'" because they "did not involve protected concerted activity."

In a separate incident, an NLRB Administrative Law Judge ruled that an automobile dealership did not wrongfully terminate an employee for his Facebook postings. Although the ALJ agreed with the NLRB that a portion of the postings were "a protected concerted activity," other postings "had nothing to do with the terms and conditions of employment and were not protected. The ALJ concluded that the salesperson was fired for the [unprotected] postings, and the termination was not unlawful."

Perhaps even more significantly, it would appear that the NLRB is adopting a measured approach to its interpretation of protected activity: "in a number of cases, the NLRB found that the use of social media to simply air individual gripes was not protected activity." ([Helpful Guidance Summarizing the National Labor](#)

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[Relations Board's Position on Social Media Issues: Two Reports and One Decision](#) by Epstein Becker & Green, P.C.) This is good news for employers, but it underscores the need to analyze on a case-by-case basis what they consider to be inappropriate social media activity, before they take any action with respect to employee termination.