E-Petitions and Protected Concerted Activity: The Millennial Response to Organized Labor?

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“[I]n today’s economy, we should be making it easier, not harder, for folks to join a union. . . . [W]e should be finding new avenues for [workers] to join together and advocate for themselves as well. . . . [P]art of the goal of this summit is to think creatively about how . . . we have a growing movement around the country to empower workers, to give them a sense of possibility. And we’re seeing some of that happening here . . . . Workers are organizing online at sites like Coworker.org to fight for new protections.”

—Former President Barak Obama, White House Summit on Worker Voice, October 7, 2015.

Introduction

There is no dispute that technology has profoundly changed how humans communicate with one another. With the click of a mouse, electronic communication allows for the instant broadcasting of opinions, thoughts, and emotions to a wide community of listeners. In particular, widely used social media tools such as Facebook and Twitter have opened up avenues for the instant sharing of ideas, especially among younger generations. In recent years, the National Labor Relations Board (“Board”) has consistently ruled that protected concerted activity under section 7 of the National Labor Relations Act (“NLRA”) includes the use of social media as a means for airing workers’

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1. Section 7 of the National Labor Relations Act states that employees 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,” as well as the right “to refrain from any or all such activities.” 29 U.S.C. § 157 (2012).
grievances. Notably, the Board has opined that employees who make certain complaints about working conditions on sites such as Facebook and Twitter are protected against adverse employment actions as a result of those complaints.2

Labor relations scholars have exhaustively analyzed the legalities of social media communication among coworkers, with some arguing that the Board has greatly overstepped its authority by extending section 7 protections to certain employee social media posts,3 and others arguing that the Board has merely applied long-established standards of section 7 policy to protect workers’ rights under the law.4 But a lesser-known phenomenon—one which has received little attention in the legal literature to date—has been occurring in the social media arena with potentially significant impact on the future of labor organizing.5 That phenomenon is the increasing use of electronic petitions (e-petitions) to effectuate workplace change.6 Sites such as Coworker.org7 offer workers an easy mechanism through which to petition their employers for workplace change outside of a traditional labor union environment. Petitioning employers to improve working conditions is nothing new


3. Regina Robson, “Friending” the NLRB: The Connection Between Social Media, “Concerted Activities” and Employer Interests, 31 HOFSTRA LAB. & EMP. L.J. 81, 123 (2013). Robson thoroughly traces the Board’s stance on employer social media regulations and policies from 2010 through 2013 and concludes that “the NLRB has expanded Section 7 protection well beyond concerted activities.” Id. (emphasis added).

4. See, e.g., Ariana R. Levinson, Solidarity on Social Media, 2016 COLUM. BUS. L. REV. 303, 335.

5. See, e.g., Paul M. Secunda, The Wagner Model of Labour Law Is Dead-Long Live Labour Law!, 38 QUEEN’S L.J. 545 (2013). Secunda argues, inter alia, that social media sites like Coworker.org should actually increase membership in labor organizations by providing simpler routes for coworker communication:

The aspiration is that in the short term, Coworker.org will lead to some smaller “wins” for employees seeking more of a voice in their workplaces and will later become part of a larger movement to rebuild the now-dormant workers’ rights movement in the U.S. If enough successful campaigns are initiated through the platform, a movement of smaller organizers might be built and the platform’s email list could become a powerful organizing tool in its own right.

Id. at 77.

6. An Internet search identified several e-petition sites, including change.org, coworker.org, ipetitions.com, thepetitionsite.com, and gopetition.com.

7. About Us, COWORKER.ORG, http://about.coworker.org (last visited Oct. 5, 2018) (“Coworker.org is a global platform to advance change in the workplace. Our technology makes it easy for individuals or groups of employees to launch, join and win campaigns to improve their jobs and workplaces. Coworker.org is a non-profit organization fiscally sponsored by the New Venture Fund.”).
and undoubtedly falls squarely within section 7’s definition of protected concerted activity.\(^8\) But what is new is the ease with which employees can now petition employers electronically to effect change regardless of whether their workplaces are unionized. In the pre-social media era, workers who wished to effect change had limited tools. Conventional petitions required that workers expend significant time and resources identifying coworkers who could be persuaded to sign the petition requesting change. In so doing, the employee initiating the petition was exposed in the workplace, often at great personal risk at being singled-out by the employer for stirring up trouble. Not so anymore. Now, employees are encouraged to launch an e-petition through a guided, step-by-step process to address any workplace problem large or small without ever stepping foot on employer property. As one example, consider how employees at Starbucks used the website Coworker.org to change the company’s policy prohibiting tattoos.\(^9\) In just three weeks’

\(^8\) See Concerted Activity, NLRB, https://www.nlrb.gov/rights-we-protect/whats-law/employees/i-am-represented-union/concerted-activity (last visited Oct. 5, 2018) (stating unequivocally that concerted activity includes “circulating a petition” asking for better working conditions); see also Chipotle Servs. LLC, 364 NLRB 1, 11 (2016) (finding employer violated section 8(a) when it terminated employee for circulating petition in workplace).

time, employees presented Starbucks’ CEO with a petition containing 21,000 signatures. The policy was changed shortly thereafter. 

10. Id. Prior to the Coworker.org petition, Starbucks’ policy required baristas to cover up tattoos while serving customers. Petitioner employees argued that tattoos were individual expressions of speech and accordingly should be permitted to be shown in the workplace. The petition stated, in part:

It is a practice of Starbucks, as it is of many companies, not to hire personnel that are known to have tattoos. This is discrimination. Tattoos are a very personal expression of one’s self, and a part of one’s identity. No one should have to hide their identity to be hired.

Tattoos do not make Baristas unreliable, they do not imply incompetence. They do not make anyone any less efficient at their job, nor do they keep Baristas from connecting with customers.

In my experience, most of my co-workers have tattoos and hide them. They are told to wear long sleeve shirts to cover their arms, and put band-aids on their wrists and hands. This may not seem like a big deal, until you work as a Barista. Wearing long sleeves behind the bar is more than an inconvenience to my fellow partners, it is uncomfortable and unsanitary. The frequency and speed required for washing pitchers, blenders, spoons, etc. while on bar, usually means that sleeve become soaked. Not only is it unhealthy for a Barista to wear wet sleeves for an 8-hour shift, it also constitutes a surface that cannot be regularly washed, that comes into contact with clean dishes, and could possibly inadvertently contaminate beverages or pastries. Also, the temperature BEHIND the bar, and BEHIND the register, is usually a lot higher than the rest of the store. It get’s [sic] pretty darn hot in the back, and working with long sleeves in such an environment breeds inefficiency, fatigue, and an overall misery that makes it VERY difficult to maintain rapport and a positive attitude with customers.

Band-aids on your hands also have their problems. Besides the risk of them falling off, they are incredibly expensive. Anyone on a Barista’s pay knows that buying enough band-aids to wear everyday [sic] is a financial burden.

Some argue tattoos are offensive. Offensive to who? The idea that somehow seeing permanent body art on someone else somehow harms your piece of mind is out-dated and horribly prejudiced.

Anyone has the right to not like tattoos, to not to want to get a tattoo themselves. It is some kind of arrogant to believe you should have a say whether another grown adult has control of their own body. It has no impact on job performance.

The fact that it is a CHOICE to get a tattoo has no baring [sic] on the validity of the prejudice. It is ALSO A CHOICE to get a short haircut, or grow it long, or even dye your hair (“un-natural” colors are currently banned by Starbucks). The point is that SOME people still think long hair on men is offensive. That does not give Starbucks, or any company the right to only hire men with short hair. Nor does it give them the right to only hire people without tattoos. If Starbucks is to continue the policy of disallowing tattoos, they might as well take our right to choose our own hairstyle, which I think we can agree, would be quite silly.

I ask you, support the repeal of the ban on workplace tattoos, not only because it has become a workers rights issue, but also because it is good for business.


E-Petitions and Protected Concerted Activity

So, what effect will e-petitions have on workplace organizing? Some scholars believe that e-petitions via sites like Coworker.org will facilitate formal union organization efforts. But this article suggests that social media in general, and sites like Coworker.org in particular, may lessen support for formal workplace organizing campaigns in two ways: first, such sites allow workers to band together easily and somewhat anonymously to effect workplace change without forming a union, a process with which “millennials” seem quite comfortable; and second, by allowing employers to respond to worker grievances on an ad hoc basis, social media tools may dilute the perceived need for unions as the most effective option to effect workplace change. Indeed, in light of the recent Janus v. AFSCME, Council 31 decision which dealt a blow to public-sector labor unions, e-petitions may gain even further popularity.

Part I of this article sets forth the law of concerted activity under section 7 of the NLRA and includes discussion of recent Board decisions related to social media as concerted activity. Part II of this article examines whether e-petitions fall within the concerted activity protected by section 7 of the NLRA and discusses the increasing use of e-petitions to effect workplace change. Part III concludes by arguing that e-petitioning tools like Coworker.org will affect how workers will address workplace grievances, making traditional unionizing campaigns less attractive.

I. Understanding Section 7 of the NLRA
A. Protected Concerted Activity

Section 7 of the NLRA protects an employee’s “right to self-organization . . . and to engage in other concerted activities for the

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purpose of collective bargaining or other mutual aid or protection." Section 8 of the NLRA prohibits employers from abrogating their employees' section 7 rights. Employers may not “interfere with, restrain, or coerce employees in the exercise” of their section 7 rights. The phrase “protected concerted activity” is not statutorily defined. Nevertheless, the Board has long interpreted “concerted” activity to include actions of two or more employees working to improve working conditions. Concerted activity may also include acts “of individual employees who seek to initiate or to induce or prepare for group action, as well as individual employees bringing truly group complaints to the attention of management.” Concerted activity can lose the protection of the Act, however, if it disparages an employer’s products or services, as well as its business reputation. Moreover, precedent dictates that “mere griping,” or comments typically made by individuals who are blowing off steam unrelated to concerted activity, do not warrant protection under the law.

B. Protected Concerted Activity and Social Media

According to the Board’s website, it began receiving charges related to employers’ social media policies in 2010, including instances of discipline for Facebook posts. In response, the Board, through then-Acting General Counsel Lafe Solomon, issued a series of three reports to offer guidance to employers and ensure consistent application of Board policy. The three reports, issued between 2011 and 2012, examined

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16. Id. § 158.


18. Building on the holding in Meyers I, in Meyers Industries v. Prill, 281 N.L.R.B. 882 (1986) (Meyers II), the Board held that concerted activity “encompasses those circumstances where individual employees seek to initiate or to induce or to prepare for group action, as well as individual employees bringing truly group complaints to the attention of management.” Meyers II, 281 N.L.R.B. at 887.


20. NLRB v. Office Towel Supply Co., 201 F.2d 838, 841 (2d Cir. 1953).

21. See Levinson, supra note 4, at 317 (describing “mere griping” as connoting individual who complains about something at work to blow off steam).


multiple cases involving both employee social media posts as well as employer social media policies; they were critical of employer conduct and attempted to clarify what constituted protected concerted activity, as well as when employer social media policies overreached and thus became overly broad. In the vast majority of the social media post cases, the Board favored protecting employee speech and striking down employer social media policies as overly broad under section 7.

A few of the cases featured in those reports warrant further discussion here. In the 2012 decision of Hispanics United of Buffalo, Inc., the Board addressed the “novel” application of whether protected concerted activity extended to certain employee Facebook postings and thus whether the employer violated the law when it discharged five employees for Facebook comments written in response to a coworker’s criticism of their job performance. In finding that section 7 protection did indeed extend to those Facebook communications, the Board de facto acknowledged that there was nothing unique in the electronic nature of those communications that would remove them from the protection of the act. Hispanics United thus opened the door to other similar Board decisions related to the protection of employees’ social media communication.

Notably, in Triple Play Sports Bar and Grill, the Board held that employees who participated in a Facebook discussion concerning the employer’s tax withholding error could not be discharged as a result of that discussion. The protected Facebook communication at issue...
in *Triple Play*—a Facebook post complaining about the employer, followed by “likes” from coworkers—is certainly not unusual in this age of social media communication. Perhaps because such communication is omnipresent, employers have been arguably disadvantaged by the Board’s apparent insensitivity to employer concerns about posts that could disparage and/or harm business reputation. Thus, the Board in *Triple Play* took care to set forth the legal argument in favor of protecting the employee expression in that case, relying largely on well-established precedent from two cases, *NLRB v. Electrical Workers Local 1229 (Jefferson Standard)* and *Linn v. United Plant Guard Workers Local 114*. Specifically, the Board explained that employee expression must be weighed in light of the employer’s legitimate interest in preventing employees from making disloyal or defamatory statements that are likely to harm the employer’s business reputation. Expression is protected where “it is related to an ongoing dispute between the employees and the employers and the communication is not so disloyal, reckless or maliciously untrue as to lose the Act’s protection.” The Board found that the comments of the workers in the Facebook exchange were neither defamatory nor disloyal under the *Jefferson-Linn* test.

While the Board’s interpretation of the foregoing cases seems to have clarified the law in favor of protecting social media posts, some scholars and practitioners still argue that the Board’s release of the reports tended to increase, rather than decrease, employer confusion with respect to both when employers could discipline employees for social media postings and how social media policies should be drafted.

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32. The employees who worked at Triple Play Sports Bar and Grille were nonunionized. *Id.* at 309. Waitress and bartender Jillian Sanzone, as well as cook Vincent Spinella and former employee Jamie LaFrance, all had Facebook accounts. *Id.* In January, 2011, LaFrance posted the following on 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. . . . Wtf!!!” *Id.* Several other current employees joined in the conversation, as well as a current customer of the employer. In response, Spinella “liked” LaFrance’s initial post, and Sanzone posted “I owe too. Such an asshole.” *Id.* When co-owner Thomas Daddona learned of Sanzone’s post, Sanzone was terminated for making disloyal comments about the employer. *Id.* Likewise, Spinella was terminated for liking LaFrance’s initial post. *Id.* at 310.

33. See Robson, supra note 3, at 86–87.

34. 346 U.S. 464 (1953).


36. *Triple Play*, 361 N.L.R.B. at 309. The Board specifically rejected application of the test set forth in *Atlantic Steel Co.*, 245 NLRB 814 (1979), which balances four factors, including place of discussion, subject matter discussed, nature of the employee’s outburst, and whether the outburst was provoked by the employer’s unfair labor practices. *Triple Play*, 361 N.L.R.B. at 311. The Board based its rejection of the test on the “clear inapplicability of *Atlantic Steel*’s ‘place of the discussion’ factor,” which lends itself to workplace confrontations, and not offsite social media discussions. *Id.*

37. *Triple Play*, 361 N.L.R.B. at 312 (quoting MasTec Advanced Tech., 357 N.L.R.B. 103, 107 (2011) (citation omitted)).

38. *Id.*
to avoid legal trouble. Nonetheless, these rulings provide notice to management that disciplining employees for certain social media posts are likely to run afoul of the law.

II. E-Petitions: A New Form of Workplace Petition

A. Petitioning as Concerted Activity

The concept of petitioning to effect change is certainly nothing new. Indeed, some of the earliest forms of protest in the United States (of both governmental and non-governmental entities) have originated from a petition. The colonists of the pre-revolutionary war era routinely relied upon a petition to make their voices heard. During that time, the petition provided a formalized process through which citizens could both air their grievances and expect a governmental response via a hearing of some sort. As tensions rose between the colonists and Great Britain, colonists were frustrated by a lack of responsiveness to their petitions, as expressed in the now-famous text in the Declaration of Independence in which frustrated colonists asserted that “in every stage of these Oppressions we have Petitioned for Redress in the most humble terms: Our repeated Petitions have been answered only by repeated injury.”

Given the central role of the petition in the civic life of the colonists, it is no surprise that the right to petition became part of the First Amendment to the Constitution, giving the new citizens the right to "petition the Government for a redress of grievances." Although the role of the petition has changed since the founding era, its value in a democratic republic remains.

With this historical context in mind, it is not difficult to understand how citizens have turned to the petition as a political tool in

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40. For the purpose of this article, the phrase “employee petitions” does not refer to those required during a unionizing campaign such as RC-1 and ETC. Rather, as used here, the term refers to the use of petitions by non-union workers who seek to effect workplace change outside of a traditional labor organization.


42. Id.

43. Id.

44. THE DECLARATION OF INDEPENDENCE para. 3 (U.S. 1776).

45. U.S. CONST. amend. I.

46. See generally, Phillips, supra note 41, at 672–73. The author argues that the petition has changed through history. Where it once provided a vital function of allowing citizens to seek redress for grievances from their government, today the right to petition has been conflated with other First Amendment rights such as the right to free speech and assembly, and accordingly, has lost its function as a process in which to hold the government accountable. Id. at 679–80.
times of turmoil. In fact, petitions have a long history in labor relations. During the early days of the Industrial Revolution, workers relied on petitions to draw attention to poor working conditions. In the 1830s through the 1840s, the women workers of the Lowell, Massachusetts, textile mills famously relied upon petitions to draw attention to poor working conditions and low wages. Petitions were aimed both at the mill owners and at state legislators. In one such campaign in 1845, more than 2,000 workers signed a petition to the Massachusetts legislature seeking a ten-hour cap on the work day. Although such petitions were rarely successful, they helped shed light on the conditions of the women and shifted focus towards political action.

Given the long history of the petition as a vehicle for change, petitioning is summarily recognized by the Board as a legitimate tool for communicating dissatisfaction in the workplace and, as such, is undisputedly protected concerted activity under section 7 of the NLRA. Indeed, the process of petitioning, in which one or more employees draft and circulate a petition to other employees to garner widespread support for a certain workplace proposal is, by its very nature, concerted activity. Thus, unlike other forms of workplace communication in which a single employee’s expression may or may not constitute concerted activity, a petition’s intent is arguably clearer in that regard.

In the recent Board decision of Chipotle Services LLC, the Board affirmed this view of petitioning as protected concerted activity. In that case, James Kennedy, an employee server in the Havertown, Pennsylvania, restaurant drafted and circulated a petition to coworkers seeking enforcement of a fair break policy. Shortly thereafter,

48. Id.
49. An 1834 petition to mill owners garnered support from women in several mills and stated that “[w]e will not go back into the mills to work unless our wages are continued.” Lowell Mill Women Create the First Union of Working Women, AFL-CIO, http://aflcio.org/about/history/labor-history-events/lowell-mill-women-form-union (last visited Nov. 4, 2018).
50. Id.
51. Id.
52. See Concerted Activity, NLRB, https://www.nlrb.gov/rights-we-protect/whats-law/employees/i-am-not-represented-union/concerted-activity (last visited Nov. 4, 2018) (giving example of concerted activity as including “circulating a petition asking for better hours”).
53. 364 N.L.R.B. No. 72 (Aug. 18, 2016), review denied, Chipotle Servs. v. NLRB, 690 F. App’x 277 (5th Cir. 2017) (per curiam) (affirming in part decision of administrative law judge, Chipotle Servs., LLC d/b/a/ Chipotle Mexican Grill, Cases 04-CA-147314 and 04-CA-149551 (Mar. 14, 2016)). The administrative law judge addressed several issues in this case in addition to the employee’s petition rights. They included whether Chipotle’s social media policies were overly broad, and whether Respondent violated the Act by directing employee to delete tweets and not engage in protected activity in the future. Id. at 9–11.
54. Id. at 7.
the employee was confronted by general manager Jennifer Cruz, who instructed the employee to stop circulating the petition. When he refused, he was terminated.55 The Administrative Law Judge determined that the termination was in retaliation for circulating the petition and was therefore a clear violation of the employee’s section 7 rights.56 Specifically, the judge stated that “Kennedy engaged in protected concerted activity when he drafted and circulated a petition among employees, challenging the Respondent’s denial of breaks to which employees were entitled.”57 The Board affirmed the decision of the Administrative Law Judge, ordering that the employer “[c]ease and desist from . . . [p]rohibiting employees from circulating petitions regarding the company’s adherence to its break policy or any other terms and conditions of employment.”58

Similarly, in a case out of the New Orleans regional office, a group of nonunion welders signed a petition protesting working conditions and hours at Five Star Contractors.59 When the worker who presented the petition was fired and threatened with deportation, the group filed a charge with the Board, which promptly filed a complaint against Five Star alleging section 7 violations.60 The matter settled quickly, and the petitioning worker was reinstated with back pay.

B. E-Petitions

The development and widespread use of electronic petitioning (or e-petitioning) is perhaps an inevitable outgrowth of electronic communication. Like other social media tools, e-petitioning has the advantage of reaching large audiences with the click of a button.61 E-petition websites have been used to petition for change in a variety of settings. For example, Change.org, a website that was created in 2007, has helped people launch political petitions aimed at lawmakers, as well as petitions aimed at raising awareness of social issues.62 It has also helped

55. Id. at 7–8.
56. Id. at 11–13.
57. Id. at 11.
58. Id. at 2.
59. See Moss Point, Mississippi, NLRB, http://www.nlrb.gov/rights-we-protect/protected-concerted-activity/moss-point-mississippi (last visited Nov. 12, 2018). Per the Board’s website, this case was settled when the terminated employee who circulated the petition was reinstated and given back pay of $13,000.
60. Id.
61. E-petitions fall squarely within the definition of “social media” as that phrase is defined by Webster’s Dictionary: “Social Media is a form of electronic communication through which users create online communication to share information, ideas, personal messages, and other content.” Social Media, MERRIAM-WEBSTER DICTIONARY, www.merriam-webster.com/dictionary/social_media (last visited Nov. 12, 2018).
employees in petitioning employers, as was the case with Starbucks employees who successfully petitioned for a change in the company’s tattoo policy for coffee baristas.63

Although several e-petition websites exist, Coworker.org is created specifically for workplace petitioning. According to its website, Coworker.org was created in 2013 to provide “a global peer-based platform for workers to solve problems and advance change in the workplace. . . . Coworker.org is a non-profit organization fiscally sponsored by the New Venture Fund.”64 According to the site’s homepage, “Coworker.org allows you to start, run, and win campaigns to change your workplace. Have an idea for improving your workplace? Start by creating a Coworker.org petition and talking to your coworkers about your campaign.”65

Coworker.org touts several workplace “victories” on its website as proof that e-petitioning works. Examples are numerous and include Netflix’s expanded paid parental leave for hourly employees, Tupelo Honey Café’s pay increases for certain employees, Starbucks’ expanded parental leave policy, and Jimmy John’s workplace policy changes regarding tattoos and dreadlocks for employees.66

An undeniable appeal of e-petitioning is the ease with which petitions can be generated and supported, in some instances through anonymous means.67 Per its website, Coworker.org states that its “tech-

63. Filip, supra note 10.
64. About Us, supra note 7. The website states that [c]o-founder and co-director Michelle Miller is a nationally recognized leader on the future of work and emerging models of worker power. She is a former Echoing Green Fellow, JM Kaplan Innovation Fellow and Fellow at Georgetown University’s Kalmanovitz Initiative. . . . Co-founder and co-director Jess Kutch leads our digital strategies and technology development. She directs efforts to deepen the impact of workers using the Coworker.org platform. Jess has managed digital programs at Change.org and the Service Employees International Union (SEIU). She is an Aspen Institute Job Quality Fellow, JM Kaplan Innovation Fellow, and Echoing Green Global Fellow.

65. COWORKER.ORG, WWW.HOME.COWORKER.ORG (last visited Nov. 12, 2018).

You could create a petition with a fake account and pseudonym. However, we at Coworker.org believe that a key ingredient for the success you will have through your petition efforts will be the willingness of you and your coworkers to stand up for yourselves by stating your demands for workplace improvements openly, without fear or shame. For this reason, we do not encourage the use of fake accounts or pseudonyms.
nology makes it easy for individuals or groups of employees to launch, join and win campaigns to improve their jobs and workplaces.”

The website encourages users to follow the following process:

If you’re an employee who’s targeting your employer in a petition, it’s important that you reach out to coworkers to sign and support your petition. . . . Reach out to your colleagues by any means available to you—in person, on the phone, on Facebook or email. Once you’ve got signatures on your petition, it’s important to deliver your petition to your target in-person. Many people choose to contact local reporters to cover the petition delivery. A local news report of your petition can often lead to success.

It is not difficult to demonstrate how the process of e-petitioning would fit neatly into the current understanding of protected concerted activity, as set forth in Part I, above. In addition, the Coworker.org website offers simplified instructions to employees in light of both the legalities of workplace petitions, and of the anti-retaliation provisions of section 8, thereby ensuring compliance with the NLRA. For example, the website states:

Make sure your campaign meets the following basic criteria:

- There are two or more workers addressing the problem together
- You are not using your work time to talk about the issue
- It is about a positive change that will improve conditions for all employees
- Any critical statements made about your employer or its supervisors are related to how you and your coworkers are treated at work

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68. About Us, supra note 7.
70. Id.

It’s against the law in the United States to fire or retaliate against an employee who joins with his or her coworkers to improve their working conditions. This is called protected concerted activity, the right to engage in which is guaranteed to most private sector employees under Section 7 of the National Labor Relations Act (“NLRA”). (Not protected by the NLRA, however, are federal, state, and local government employees, supervisors, agricultural workers, independent contractors, many employees involved in the railroad and airline business, and employees of many small businesses, among others.)
• You do not use your work computer or work email address (i.e., the company’s internet domain name) to communicate about your petition.\textsuperscript{71}

• All of the statements made about your employer are true.

C. Section 7: E-petitions vs. Traditional Petitions

If the Board’s section 7 decisions on social media postings are any indication, then it seems likely that e-petitioning will be afforded the same legal protection as traditional petitions.\textsuperscript{72} In other words, petitioning an employer via electronic communication through sites such as Coworker.org, much like complaining about working conditions via electronic communication on sites like Facebook and Twitter, as was the case with Hispanics United and Triple Play Sports Bar, does not alter the legal status of the communication \textit{per se}. Such communication remains protected activity so long as the legal requirements of the activity are met: (1) the conduct must be concerted,\textsuperscript{73} and (2) it must be engaged in for the purposes of collective bargaining or for other mutual aid or protection.\textsuperscript{74} In the context of social media complaints, meeting these criteria has been the focus of much discussion, as set forth in Part I, above. The analysis may not be as difficult in the e-petition context. We may debate whether a “like” of a coworker’s Facebook post about working conditions constitutes “concerted” activity for the purpose of mutual aid or protection, but there is less doubt that signing a petition constitutes such activity. This view finds support in the Board’s 2014 decision in Fresh & Easy Neighborhood Market.\textsuperscript{75} In that case,

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\item \textsuperscript{71} Contact of coworkers via work e-mail in furtherance of section 7 rights is an issue that has already been addressed by the Board. In the controversial 2014 decision of Purple Communications, Inc., the Board held that employees could organize via employer e-mail accounts provided to employees for work-related matters: “Consistent with the purposes and policies of the Act and our obligation to accommodate the competing rights of employers and employees, we decide today that employee use of email for statutorily protected communications on nonworking time must presumptively be permitted by employers who have chosen to give employees access to their email systems.” 361 N.L.R.B. 1050, 1050 (2014). This ruling is presently on appeal before the Ninth Circuit, and in light of the Supreme Court’s recent decision in \textit{Janus v. AFSCME}, attorneys for Purple Communications and others have filed a letter of supplemental authority with the Court arguing that the same First Amendment principles that prohibit a union from requiring fees from non-union members apply to prohibit employees from using employer e-mail to disseminate messages about which the employer may disagree. Letter of Suppl. Authority at 1–2, Purple Commc’ns, Inc. v. NLRB, Nos. 17-71062, 17-71276 (9th Cir. filed July 6, 2018). The NLRB has asked the Ninth Circuit to hold the case in abeyance while the Board considers Caesars Entm’t Corp. d/b/a Rio All-Suites Hotel & Casino, No. 28-CA-060841, and the court has done so. Order, Purple Commc’ns, Inc. v. NLRB Nos. 17-71062, 17-71267 (9th Cir. filed Sept. 24, 2018).

\item \textsuperscript{72} As of the date of this writing, no NLRB cases were found related to the section 7 protection of online workplace petitions under the NLRA.

\item \textsuperscript{73} \textit{Meyers I}, 268 N.L.R.B. 493, 497 (1984).

\item \textsuperscript{74} Chipotle Servs. LLC, 364 N.L.R.B. No. 72, at 11 (Aug. 18, 2016) (citing Fresh & Easy Neighborhood Mkt., 361 N.L.R.B. 151, 153 (2014)).

\item \textsuperscript{75} 361 N.L.R.B. 151 (2014).
\end{itemize}
female cashier Margaret Elias approached three coworkers and asked them to sign a piece of paper depicting what she claimed was sexually harassing content that had been drawn on a white board post in the break room.76 Because employees were not permitted to carry their cameras in the workplace, she drew the depiction of the white board content by hand and sought the coworker signatures as witnesses to the whiteboard content.77 In the course of its decision, the Board first addressed the issue of whether the cashier’s conduct was concerted, and held that the mere act of approaching other employees to sign the paper on which she had copied the whiteboard message was enough to constitute concerted activity, even absent intent “to pursue a joint complaint.”78 Inferentially, then, approaching coworkers to sign a petition—electronic or otherwise—would certainly fall within this broad79 definition of concerted activity as set forth in Fresh & Easy Markets. Nonetheless, the e-petition must still meet the requirement that it is “for the purpose of mutual aid or protection.”80 Again, this may be an easy hurdle to jump as well after Fresh & Easy Neighborhood Market.81

The Board found that Elias’s complaint of sexual harassment was for the purpose of mutual aid or protection, even though the sexual harassment was allegedly directed towards her alone.82 The Board reasoned that section 7 created a framework through which employees could join together “in solidarity to address their terms and conditions of employment with their employer.”83 This “solidarity principle” allows a banding together with other workers over separate grievances, even

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76. Id. at 151.
77. Id. 151 & n.3.
78. Id. at 153.
79. According to labor attorney Nelson Cary, the Board’s decision in Fresh & Easy went too far and adopted an overly broad definition of concerted activity that could create “significant concern” for employers when it found that Elias was engaged in protected concerted activity by “[m]erely soliciting her co-workers to sign the paper . . . [even though] her co-workers didn’t agree with her complaint; the solicited employee was uncomfortable with the solicitation; or Elias was the only immediate beneficiary of the solicitation.” Nelson Cary, Cry “Solidarity” and Let Loose the NLRB: A Significant Expansion of the NLRA’s Protections, VORYS ON LABOR (Aug. 26, 2014), https://www.vorysonlabor.com/2014/08/articles/nlrb/cry-solidarity-and-let-loose-the-nlrb-a-significant-expansion-of-the-nlras-protections.
80. The seminal decision on whether a communication is for the “purpose of mutual aid or protection” is found in Eastex, Inc. v. NLRB, 437 U.S. 556, 558 (1978). There, the Court held that the distribution of a union-sponsored newsletter discussing certain employment issues was for the purpose of mutual aid or protection. Id. at 570.
81. Fresh & Easy Neighborhood Mkt., Inc., 361 N.L.R.B. 151.
82. Id. at 155, 158. In so finding, the Board reversed its decision in Holling Press, 343 N.L.R.B. 301 (2004), which nullified the solidarity principle for claims of sexual harassment involving conduct directed to only one employee. The Board here found that the Holling Press decision “seemed to create a special exception for sexual harassment claims” an exception that the Board found to be fundamentally flawed. Id. at 156-57.
83. Fresh & Easy Neighborhood Mkt., Inc, 361 NLRB at 155 (citing NLRB v. City Disposal Sys., 465 U.S. 822, 835 (1984)).
where only one employee has an immediate stake in the outcome. 84 Accordingly, in light of Board precedent, coworkers who approach others to sign petitions, no matter the format, which affect a broad range of workplace conditions, will be able to demonstrate “concerted activity for the purpose of mutual aid or protection” as required by the law.

Just like other social media communication, however, e-petitions will undoubtedly lose protection if they are drafted in a manner designed to defame or disparage the employer under the Jefferson Standard and Linn tests. 85 But here again, this should be an easier task for the online petitioner for several reasons. First, the very nature of drafting a petition requires at least some research and deliberative word choice. This type of social media communication, then, is quite different from a Facebook rant, which can be hastily posted in a fit of pique and thus prone to inappropriate content. But second, Coworker.org, like most social media sites, enforces strict user guidelines that specifically prohibit communication that could run afoul of the Jefferson Standard and Linn tests. For example, the website posts the following “Prohibited Content” warning:

Coworker values a respectful exchange of ideas. Do not post any content that advocates hate, violence, abuse, threats, or harm against any person, entity or group. Similarly, do not post any content that bullies, harasses, or encourages others to bully or harass, any person entity or group. Any content that is racist, sexist, or otherwise prejudiced towards any person or group is absolutely prohibited. Do not post content that is vulgar, obscene, or pornographic.

You may not use the Site to promote or encourage illegal, unethical, or unlawful activity. You may also not post content that is defamatory, libelous, or slanderous. Finally, you may not post content that infringes on the rights of any third-party, including copyright or intellectual property rights, that discloses confidential information or trade secrets, or that violates any right or duty you may have under law.

Keep in mind that this is not a complete list of prohibited content. If we discover user content that is contrary to the spirit of these Terms or is not in line with the aims of this Site, we may remove it at our sole discretion. 86

Accordingly, Coworker.org in essence performs the function of pre-screening posts to comply with legal standards. Given the growth and success of sites like Coworker.org in recent years, it seems likely that e-petitioning for workplace change is here to stay. The question

84. Id. at 155–56 (quoting NLRB v. Peter Cailler Kohler Swiss Chocolates Co., 130 F.2d 503, 505 (2d Cir. 1942)).
85. See supra notes 36–37.
remaining, then, is what effect the phenomenon will have on the future of labor relations in the United States.

### III. The Future of E-Petitions

The emergence of e-petitions, advanced through social media platforms, offers non-unionized employees a potent avenue to address workplace grievances under the umbrella of section 7's protection for concerted activities. Some employers may welcome e-petitions, embracing the opportunity to engage with employees on an issue-by-issue basis and potentially avoiding the threat of an organizing campaign. Others may fear e-petitions as yet another headache, preferring not to air their employees' grievances through these quasi-public social media platforms.

Regardless of management's perspective, the potential for e-petitions to change the dynamics of the relationship between employers and employees should not be underestimated, especially given the present labor climate combined with the rise of social media as a preferred tool for communication, particularly among millennials, who represent the largest percentage of the U.S. workforce.

Specifically, the United States has been experiencing a long-term trend of declining unionization, coupled with an even more recent generalized animus towards organized labor. Statistics reflect a

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87. See Smith, supra note 13; see also D. Martin Stanberry, Comment, Youth and Organizing: Why Unions Will Struggle to Organize the Millennials, 2 CASE W. RESERVE J.L. TECH. & INTERNET 103, 114 (2011).
88. See Stanberry, supra note 87, at 114.
91. Added to the declining rate of unionization are well-orchestrated attacks designed to dismantle or disempower existing unions as well as aggressive efforts to stigmatize or otherwise prevent the rise of unions in specific industries or organizations. In the past few years, for example, governors and lawmakers in Wisconsin, Ohio, Michigan, and several other states have pursued high-profile legislative agendas that either target unions as institutions or seek to seriously erode collective bargaining rights for public employees. See Michael L. Artz, Beyond Wisconsin: Public Employee Union Rights Amidst State Attacks on Public Sector Bargaining, 2 AM. U. LAB. & EMP. L. F. 131, 132 (2012). Beyond these legislative actions, the Supreme Court in Janus v. AFSCME recently struck down the right of states and public sector unions to require non-union member employees to pay “agency fees,” reasoning that “[t]his procedure violates the First Amendment.” 138 S. Ct. 2448, 2486 (2018). While the precise impact of the Janus decision on public sector unions is yet to be fully discerned, a ripple effect on private sector unions and workplaces is predicted, the extent to which is also presently unknown. See Alexia Elejalde-Ruiz, Supreme Court’s Janus Ruling Could Undercut Private Sector Unions Too, Chi. Trib. (July 11, 2018, 10:00 AM), http://www.chicagotribune.com/business/ct-biz-janus-private-sector-ramifications-20180709-story.html. Outside the context of public sector employment, it is also worth noting that Walmart, the world’s largest private
significant decrease in union membership in the private sector across all age groups from a total of almost 16.8% in 1983\(^92\) to 6.4% in 2018.\(^93\) Even more striking is the decrease in unionization in the combined private and public sectors among younger workers: approximately 15% of workers aged sixteen to twenty-four and 28% of workers aged twenty-five to thirty-four were union members in 1980\(^94\) compared with only 4.7% and 9.4%, respectively, in 2017.\(^95\) Compounding and perhaps contributing to this phenomenon is a recent resurgence in state right-to-work laws,\(^96\) which prohibit private employers from requiring an employee to join a union and to pay agency fees. At present, twenty-eight states have enacted such laws,\(^97\) adding another obstacle to union organizing efforts. Against this backdrop is a complex landscape of attitudes held by millennials towards organized labor. In particular, recent studies suggest that millennials hold a positive attitude towards unions in general and tend to share values espoused by organized labor, but are unfamiliar with the more concrete aspects of the role that unions play in the employment relationship, if they think about unions at all.\(^98\) Despite this favorable perception of unions, millennials tend to be suspicious of non-democratic systems, which may influence their willingness to engage in union organizing efforts to the extent that they perceive unions to be functioning as a hierarchy.\(^99\) Indeed, recent efforts at unionization launched by millennials have been met with mixed results,\(^100\) making it difficult to predict the future.
of organized labor in a millennial-dominated workforce. Given this uncertain future, e-petitions offer a new form of advocacy that may increase in appeal as awareness of this tool becomes more pervasive.

The uncertain future of organized labor exists alongside a rise in the use of social media platforms as a form of communication and information-gathering across all age groups. As of 2015, 84% of American adults indicated that they use the internet, including 96% of persons between the ages of eighteen to twenty-nine.\(^{101}\) Moreover, 79% of online adults use Facebook, with 56% of online adults using more than one of five social media platforms, including Facebook, Instagram, Twitter, LinkedIn, and Pinterest.\(^{102}\) Predictably, online adults between the ages of eighteen and twenty-nine represent the highest rate of users on each of the five platforms.\(^{103}\) Moreover, 76% of Facebook users acknowledge that they visit the site daily, with a majority (56%) accessing the site several times a day.\(^{104}\) These statistics demonstrate the pervasiveness of social media's role in our communication networks and may portend a future where social media platforms dominate all other mediums for interacting with others across a wide range of topics, conceivably including issues relating to workplaces and work lives. Recent cases before the Board and agency guidance suggest as much.\(^{105}\)

The convergence of these forces makes ripe the potential for e-petitions to reshape the paradigm that defines the employment relationship, as discussed earlier in Part II. The availability of e-petitions to effectuate changes in the workplace may lead millennials as well as a broader age range of individuals comprising the workforce to seek a middle ground between full blown efforts at unionizing their workplace and doing nothing at all. As workers become increasingly familiar with this alternate channel, one effect may be to lessen the attractiveness of unions, which workers historically may have perceived as the only—and most effective—means for addressing workplace concerns, posing yet another challenge to already besieged union-organizing campaigns in private workplaces. At a minimum, e-petitions may provide some


\(^{103}\) See id.; see also Josh Carroll, *The NLRB’s Purple Communications Decision: Email, Property, and the Changing Patterns of Industrial Life*, 14 Duke L. & Tech. Rev. 280, 292 (2016) (noting the particular advantages to millennials of social networking platforms, including “anonymity, speed of communication, and lack of administrative hurdles” as well as a bridge between employees in diverse geographic locations).

\(^{104}\) See Greenwood, supra note 102.

hope for workers whose efforts at organizing have been met with resistance by both management and coworkers.

**Conclusion**

In an environment of steadily declining unionization rates and a workforce increasingly dominated by millennials, e-petitions offer employees a legally protected vehicle to effectuate change in their workplace outside the formal structure of collective bargaining. Indeed, e-petitions seem to be a particularly well-suited tool for millennials, who are entering the workforce in unprecedented numbers and bringing along their affinity for technology as well as a generalized ambivalence about the role of unions. Although e-petitions are a new phenomenon, this emerging form of workplace advocacy should merit legal protection as “concerted activity” under the rubric of the National Labor Relations Act. Drawing upon recent Board guidance and cases which recognize and protect the use of social media to engage in “concerted activity,” it is difficult to distinguish e-petitions from other forms of social media posts to the extent that they reflect the same essential twofold characteristics: evidence of concerted activity for mutual aid or protection. The accessibility of e-petitions coupled with the security of legal protection makes this form of workplace advocacy especially attractive. If embraced by millennials, e-petitions may well serve as the “new avenue[] for [workers] to join together and advocate for themselves,” fulfilling one of former President Obama’s goals to “empower workers, to give them a sense of possibility.”