Sex, Drugs, and Twitter: Emerging Issues in EPL Coverage[1]

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[1] The views expressed in this article are exclusively those of the authors, and not representations of the authors' employers or clients. Christina A. Culver thanks Jared Douthit, attorney at Thompson Coe, for his contribution.

I. Introduction

Employment practices liability ("EPL") insurance covers claims arising out of a wide variety of wrongful employment practices. Such practices include wrongful termination, wrongful failure to promote, retaliation, violation of the Family & Medical Leave Act, harassment, discrimination, civil rights violations, libel and slander, and privacy violations. Although most EPL insurers use manuscript policy forms, EPL insurance often shares many common features from insurer to insurer. In addition to covering the workplace torts listed above, among others, such common features include: (1) claims-made or claims-made-and-reported coverage; (2) insureds include the corporate entity, directors and officers, management personnel, and employees; (3) defense costs within limits; (4) optional coverage for claims made by third parties, such as customers or applicants; and (5) broad definition of "loss," which can include front and back pay, punitive damages (where permitted by law), exemplary and multiple damages, and pre- and post-judgment interest.

As employers face new liability risks associated with marijuana, wage & hour claims, #MeToo, and social media use, they undoubtedly turn to their EPL policies for coverage. This paper discusses the following coverage issues presented by these new risks:

- *Marijuana*. With more states passing legislation permitting medical and/or recreational marijuana use each year, it is likely that marijuana-related employment claims will follow. For example, will employers be required to accommodate medical marijuana use, either at the workplace or away from the workplace? Can an employer that terminates an employee who fails a drug test due to legal marijuana use away from the workplace be held liable for wrongful termination? Can an employer legally refuse to hire an applicant who legally uses

medical marijuana? Section II of this paper discusses EPL coverage for these and related scenarios.

- *Wage & Hour*. Lawsuits alleging that an employer refused to pay required wages, overtime, or provide breaks – Wage & Hour ("W&H") claims – can be very costly for employers, particularly because they lend themselves to class actions and laws such as the Fair Labor Standards Act permit fee shifting to the prevailing party. As Section III of this paper explains, while many EPL policies purport to exclude indemnity coverage for W&H claims, each W&H claim must be evaluated based on the specific language of the W&H exclusion at issue to determine whether there is coverage. Moreover, as Section IV of this paper discusses, some EPL policies provide limited defense and indemnity coverage for W&H claims, often for additional premium.
- *#MeToo* The emergence of the #MeToo movement presumably will lead to an increase in workplace sexual harassment claims. Although coverage for sexual harassment liability has long been a cornerstone of EPL policies, an influx of claims could cause underwriters to reexamine such coverage, perhaps requiring insureds to undertake additional risk management measures to reduce the frequency and severity of workplace sexual harassment claims. Moreover, sexual harassment claims could give rise to coverage issues such as whether punitive damages are indemnifiable under applicable law and coverage for intentional acts. Section V discusses some of these coverage considerations.
- *Social Media* Social media continues to present myriad liability exposures to employers relating to employee privacy, harassment, and discrimination. A

difficult issue for employers is ensuring that their development and implementation of employee social media policies do not run afoul of the protections afforded by the National Labor Relations Act for discussions among employees of wages and working conditions. Section VI of this paper discusses the growing body of law addressing this issue and its interplay with EPL coverage.

II. Coverage for Marijuana Claims

A. Some States Provide Coverage For Employees Who Use Marijuana

While the law on EPL coverage in this area is lacking, the underlying employment actions feature a pattern of facts that are worth considering as an initial matter to determining whether EPL policies provide coverage to the employer. We provide two common hypotheticals here.

In Hypothetical A, an employee is given a drug test, which might be a routine drug test or one administered after the employee has an accident and seeks workers compensation coverage. The employee tests positive for marijuana use, is fired, and then sues the employer for wrongful termination. In Hypothetical B, a job applicant fails a drug test for marijuana or admits to the employer that they use marijuana. If the job applicant is not offered a job they are qualified for or a job offer is withdrawn, they might bring an action against the employer for discrimination.

When employment actions are brought pursuant to state law in state court, as they often are, state law will determine how such underlying employment actions will proceed. The 50 states and the District of Columbia have marijuana laws ranging from legalized recreational use, medical use only, or entirely illegal use. However, some states have, in effect, decriminalized marijuana use even where it is fully illegal. A map of these jurisdictions can be viewed here: https://disa.com/map-of-marijuana-legality-by-state. Aside from this hodgepodge of state laws,

the federal government treats marijuana as a Schedule 1 drug, which means it has no accepted medical use, is subject to a high potential of abuse, and lacks accepted safety for use under medical supervision.

These myriad laws affect how the scenarios introduced in Hypotheticals A and B would be treated. Some states that allow marijuana use of some kind also have laws that protect employees who use marijuana. For example, Arizona allows medicinal marijuana use, and passed the Arizona Medical Marijuana Act ("AMMA"), which makes it illegal for an employer to terminate an employee because of a "positive drug test for marijuana components or metabolites, unless the patient used, possessed or was impaired by marijuana on the premises of the place of employment or during the hours of employment." In one Arizona case, a customer service supervisor was terminated after she was injured at work and tested positive on a drug test. (*Whitmire v. Wal-Mart Stores Inc*., 359 F. Supp. 3d 761 (D. Ariz. 2019).) The District Court of Arizona court found that the employee, who had a medical marijuana card, had been wrongfully terminated under the AMMA. (*See also, Chance v. Kraft Heinz Foods Co*., No. CV K18C-01-056 NEP, 2018 WL 6655670 (Del. Super. Ct. Dec. 17, 2018) (allowing a medical marijuana user to proceed with a lawsuit against his former employer after his employment was terminated due to a positive post-accident drug test result for marijuana); *but see, Coats v. Dish Network, LLC*, 350 P.3d 849 (Colo. 2015) (employee could be terminated for his use of medical marijuana because it was unlawful under federal law and therefore not protected under a state statute as lawful activity).)

The law applicable to off-duty marijuana use by employees is murkier in other states. For example, California allows recreational marijuana use. However, a bill that would have created rights for medical cannabis patients (AB 2069) stalled in the legislature in 2018, and the California Supreme Court stated more than 10 years ago that an employer could refuse to hire an applicant

who tested positive for cannabis, even if it was legally prescribed for a disability. (*Ross v. RagingWire Telecommunications, Inc*., 42 Cal. 4th 920 (Cal. 2008).) Instead, an employee might have to rely on statutes that protect "lawful conduct occurring during nonworking hours away from the employer's premises." (Cal. Labor Code §§ 96(k), 98.6.) But it is not clear whether such lawful off-duty conduct includes marijuana use or whether it must be activity protected by statute.

B. Each state's marijuana laws are more likely to affect indemnification than the duty to defend.

The question is whether an EPL policy will provide coverage for an employer that faces a claim from an employee or job applicant who used or is accused of using marijuana. The following is a typical EPL insuring clause:

> We will pay those sums the insured becomes legally obligated to pay as damages resulting from a "wrongful act" to which this insurance applies … (if a) "claim" against any insured for damages because of the "wrongful act" is first made during the policy period …

(ISO Form EP 00 01 11 09, Sec. I, ¶ A.1, A.2.c.) A "wrongful act" is typically defined to include the following allegations that may be implicated by Hypotheticals A and B above:

- Discrimination
- Wrongful discharge or termination
- Breach of employment contract
- Wrongful discipline
- Retaliation

EPL policies may include language that states the insurer is obligated to provide a defense even if the allegations made against the employer are "groundless, false, or fraudulent."

Under either Hypothetical A or B, the EPL policy likely provides a defense for the employer. The language of "groundless, false, or fraudulent" is so broad that if an employee under

either hypothetical makes a claim for an employment wrongful act in a state where marijuana use is not permitted under any circumstance, the EPL carrier should still provide a defense to the employer. Thus, the marijuana laws of the state where the action is brought should not matter for purposes of the employer receiving a defense.

But the marijuana laws of the state may matter when it comes to indemnification. First, consider Hypothetical A in a state where marijuana is legal to some degree. In those states, the employee may have a legitimate claim that they were wrongfully terminated because of their engagement with a lawful activity. Some of these states, such as Arizona and Delaware, also explicitly protect against such discrimination on the basis of marijuana use by statute. But consider Hypothetical A in a state where marijuana is entirely illegal. In those states, there might be no protection for an employee who is fired for using marijuana. In defense of a wrongful termination claim, the employer might be able to rely on at-will employment, its own drug policy, or a criminal activity policy. The carrier might then question the reasonableness of any settlement in such a case since there would be little grounds for liability on the part of the employer to justify a meaningful settlement value. Therefore, the carrier may decline to indemnify the full amount of any settlement in such a wrongful termination case, because the value of the settlement could, in the carrier's eyes, exceeded the reasonable exposure to covered Loss. The same result may be true where the employee works pursuant to a federal grant that requires a drug-free work policy, even if they work in a state where marijuana use is otherwise legal.

Again, the same analysis would apply to Hypothetical B where a job applicant is not hired as a result of marijuana use. In a state with more liberal marijuana laws, the job applicant may have a more viable discrimination claim that should be indemnified. But in a state banning all marijuana use, or in a situation where the employer is required by federal law to adhere to a drug-

free work policy, the carrier might refuse to indemnify the full settlement amount in the case since the employer's activity was not illegal, and therefore, would not warrant a significant settlement value.

C. Marijuana & Employment Claims – Scope of Coverage Concerns

Often with EPL coverage, the most cutting edge areas of employment law offer more simple issues to discuss from an EPL coverage perspective. From an insured's perspective, avoidance of the" risk of strangers bearing gifts" is key. In other words, if the policy is left to its own devices, it should cover the new exposure. However, a carrier may not wish to take on a new exposure, and will negotiate exclusions. A careful review of the policy terms is important from both sides.

Take the hypotheticals provided earlier with regard to marijuana as a perfect example of this concern. In Hypothetical A, the resulting claim of wrongful termination would typically be covered by an EPL policy even though the root cause of the termination – use of marijuana – may be new and unique. Most EPL policies broadly cover claims of wrongful termination without any limitation as to the source of decision to terminate the employee. Barring any unrelated coverage issues about late notice, prior knowledge or failures to properly follow other requirements of the policy, the wrongful termination claim should be covered since the broad-based definition of wrongful act should cover any claim alleging wrongful termination.

The only slightly unique wrinkle of Hypothetical A is the origin of the claims as initially being brought as a worker's compensation claim. Most EPL policies include a workers' compensation exclusion. So certainly the actual workers compensation proceeding itself and any resulting workers' compensation award to the employee for the accident itself would be excluded. The reasoning behind the exclusion being that there is separate workers' compensation insurance

to address coverage for that component of the claim. The trick, however, is to make sure that the workers' compensation exclusion and the bodily injury exclusion, also likely found in the EPL policy, are not drafted so broadly as to give the insurer the opportunity to allege that the resulting wrongful termination or retaliation claim that arose out of the workers' compensation claim is also not covered. The things to look for in the policy to best prevent that result is to have the workers' compensation exclusion be a "for" exclusion instead of a "based upon, arising out of" exclusion. In other words, the exclusion should apply only to the workers' compensation proceeding itself and not any other action that may arise out of that proceeding. In addition, a carve-out added to the exclusion to expressly cover any resulting retaliation claim alleging that the employer retaliated against the employee for filing a workers' compensation claim is helpful. Similarly, any bodily injury exclusion should be a "for" exclusion and should have expressed carve-outs for mental anguish, emotional distress, etc., that are alleged to have been inflicted as a result of the employment claim.

Now to the "strangers bearing gifts" concern. Often when a new protected right is created, the first reaction by underwriters is to expressly offer to add this new projected right to the definition of covered wrongful acts. So you could have the definition of wrongful termination expressly amended to add wrongful termination for marijuana usage, but doing that has some potentially negative ramifications. First, the carrier may seek to charge more premium for the addition when the existing broad definition may have already covered it. Second, with a new area of exposure like this, the underwriter may seek to add the expressed coverage but only with a sub-limit that limits the amount coverage available for such a loss. For instance, they may say, you can have the express coverage but only $1 million of the $5 million in limits will be available for that "new" coverage. Again, suddenly, something that would have already been covered if you

had just done nothing to the policy wording is suddenly costing more money and the available limits have been decreased. Lastly, there is the simple reality that city, state, and federal laws change quite often, but your insurance policy wording changes at best only once a year and usually not even that often. So if your definitions of what is covered are too dependent on a long list of very specific projected classes, you are prone to missing something under some jurisdiction. Alternatively, if you have a definition that is open-ended, as in the case of simply covering wrongful termination in all its forms, you are likely much better off. It is even better is to have an open ended definition such as covering discrimination but then following that up with words to the effect of "including but not limited to the following protect classes . . .." This approach gives comfort to the insured that the new areas of law you are aware of are expressly covered because they are in the list but also allows the definition to function properly even if a new area of protect class develops as with marijuana employment law.

With regards to Hypothetical B, the key item to check with regarding to your policy is to ensure that the definition of wrongful act includes expressed coverage for wrongful failure to hire. Most policies include the coverage using words to the above effect. Often coverage for this type of wrongful act can be found in a sub-definition of wrongful act for "workplace torts" if it is not broken out in the general definition of wrongful act.

III. Coverage for Wage & Hour Claims

Wage-and-hour claims are generally excluded in EPL policies. So, how do employers get coverage for these commonly alleged claims? As an initial matter, we begin with the exclusionary language. A typical form might exclude any actual or alleged violation of:

- the Fair Labor Standards Act (except the Equal Pay Act),
- the National Labor Relations Act,

- the Worker Adjustment and Retraining Notification Act,
- the Consolidated Omnibus Reconciliation Act of 1983,
- the Occupational Safety and Health Act,
- any workers' compensation, unemployment insurance, social security, or disability benefits law, and
- other similar provisions of any federal state or local statutory or common law or any rules or regulations promulgated under any of the foregoing.

The policy might also exclude claims alleging, based upon, arising out of, attributable to, directly or indirectly resulting from, in consequence of, or in any way involving:

- improper payroll deductions,
- unpaid wages,
- misclassification of exempt or nonexempt employee status,
- compensation earned by or due to the claimant but not paid by the Insured (including but not limited to commission, vacation and sick days, retirement benefits, and severance pay),
- overtime pay for hours actually worked or labor actually performed by any Employee of a Company, or
- any violation of any federal, state, local or foreign statutory law or common law that governs the same topic or subject, or any rules, regulations or amendments.

This language appears to exclude most wage-and-hour claims, particularly because it also excludes "other similar provisions of any federal state or local statutory or common law or any rules or regulations promulgated under any of the foregoing" and laws that "govern the same topic or subject, or any rules, regulations or amendments."

In addition, the exclusions only apply to certain enumerated laws or "similar provisions," and not all wage-and-hour claims necessarily fall under these categories. For example, in *Cal. Dairies, Inc. v. RSUI Indem. Co.*, 617 F. Supp. 2d 1023 (E.D. Cal. 2009), the underlying complaint alleged that the insured employer had violated various provisions of the California Labor Code. The insurer denied the claim based upon an exclusion purportedly precluding coverage for claimed violations of the Fair Labor Standards Act ("FLSA") or similar state law ("Exclusion 4"). The court held that while Exclusion 4 precluded coverage for some alleged statutory violations, it did not preclude coverage for certain other alleged violations of the California Labor Code. Specifically, the court denied the insurer's motion to dismiss causes of action based upon Exclusion 4 that included a claim for failure to comply with itemized wage statement requirements under California Labor Code § 226 and failure to reimburse for necessary expenditures, including uniforms, under California Labor Code § 2802. It found that neither Section 226 nor Section 2802 were "similar" to any provision of the FLSA, and therefore, claims arising under these statutes were not excluded. The analysis would therefore depend on the allegations at issue and whether they are specifically excluded or sufficiently similar to excluded claims.

Coverage for these claims may be available through optional wage-and-hour endorsements, often with a lower liability limit than the primary limits of coverage. This coverage may cover defense expenses associated with claims for violation of federal, state, or local laws governing or relating to the payment of wages.

IV. Wage & Hour Claims – A Broker's Perspective

As addressed elsewhere in this paper, typical EPLI policies contain expressed Wage & Hour ("W&H") exclusions that successfully exclude the majority of W&H claims. From a broker's perspective, we often advocate on behalf of insureds seeking to obtain coverage for W&H

claims under an existing EPL policy containing a variety of different W&H exclusions, but for purposes of this section, I would like focus on what coverage is currently intentionally and expressly available in the insurance marketplace as opposed to what coverage might be found in EPL policies that might require coverage litigation to obtain.

Expressed W&H coverage has come a long way in recent years, but basically, it falls into two buckets. The first bucket is sub-limited, defense cost-only coverage. This type of coverage grant is usually only available to smaller employers, who are often private or non-profit organizations as opposed to publicly traded companies. This type of coverage has been available in ebbs and flows for a long time now. Basically, the coverage was not only an outgrowth of the increased frequency of W&H claims even for small employers over the last decade or more, but also out of the reality that most small employer and private/non-profit policy forms are duty to defend policies. Carriers providing EPL coverage to these private and/or non-profit organizations often found themselves defending entire employment claims that include both covered traditional employment claims like discrimination, wrongful termination or retaliation that also included allegations of W&H violations. As a result of being duty to defend policies and often having relatively small deductibles, the carrier was then often stuck defending the entire claim because of the nature of duty to defend laws that often require the carrier to defend both the covered and non-covered aspects of the claim with an ability after the claim is resolved to theoretically seek reimbursement from the insured for any uncovered aspects of the claim. For a variety of reasons, the ability to recover those uncovered costs was often more difficult for the carrier to achieve than it was worth to seek to recover the costs.

Back to my theory of strangers bearing gifts, these carriers began offering expressed coverage for W&H defense costs but with strict sub-limits. These sub-limits in some ways was an

attempt to limit the otherwise relatively unlimited defense cost coverage they were providing in the duty to defend context of the hybrid EPL/W&H claims mentioned above. Under the expressed sub-limited language, the carrier apparently felt better able to stop the bleeding of paying the defense costs for the W&H claim after the sub-limit had been exhausted than they would have if they had no expressed coverage at all. Nonetheless, as mentioned above, the market tends to ebb and flow on whether even this sub-limited coverage for defense cost-only coverage is offered since carriers have still often found themselves paying more on even this limited coverage than they had anticipated for these smaller insured, and instead, they sometimes seek to further broaden their exclusions to seek avoid any unintended coverage.

Meanwhile, larger employers with higher deductibles seldom are even able to purchase this defense cost-only coverage in their EPL policies, because their policies are non-duty to defend policies that tend not to expose insurers to the same kind of difficulty in simply excluding the non-covered aspects of even hybrid claims, and larger employers also tend to be more prone to W&H claims that are simply W&H class actions only without any traditional EPL allegations.

This brings us to the second bucket. For over seven years, now true W&H coverage has been available in the insurance marketplace. This coverage is broad in that is covers not only defense costs but the damages and settlement awards for back wages owed and even civil fines and penalties awarded for W&H claims. Initially, this coverage was designed for larger companies because the minimum deductibles were so high that smaller companies would have found little value in the coverage. Also, underwriters providing the coverage often felt that companies below a certain size threshold were unlikely to have sufficient sophistication to have implement proper risk avoidance mechanisms to avoid large W&H claim. So carriers would not even offer coverage to employers below 1,000 employees.

Over time, however, as underwriters become more comfortable that they were able to distinguish a good risk from a bad risk, minimum retentions have fallen from the initial minimum of $5 million to as low as $500,000 out of the London marketplace, and $1 million out of the Bermuda marketplace. Outside of a few carriers, this broad coverage is largely unavailable from any other US domestic insurers. In part, that was a matter of intentional design when the product was first created. At the time, it was determined that the coverage was better suited for off-shore markets like Bermuda and London primarily to ensure that there were not insurance regulatory issues conflicting with the ability of the coverage to respond to the applicable losses. Based on prior coverage litigation around W&H claims it had become apparently that certain jurisdiction like California had insurance regulatory concerns about insuring restitution damages and civil fines and penalties that were often awarded or threatened in W&H cases. Therefore, rather than build the new product with domestic carriers who would then have to offer so-called off-shore wrap policies to ensure the coverage could respond, the product was instead developed with London and Bermuda carriers who were based in jurisdictions that do not limit the insurability of such damages.

Today, the product has grown dramatically in the amount of premium placed, the broad array of clients from different industries and headcount sizes purchasing the coverage and the amounts of limits available for purchase. Companies interested in the coverage can buy as little a few million dollars in limits and as much as over $200 million in limits.

V. Coverage for #MeToo Claims

Not surprisingly, there have been significant ramifications in the EPL marketplace as a result of the #MeToo movement. First, rest assured that the EPL coverage for sexual harassment claims does indeed actually work. Carriers have defended and paid settlements and verdicts on small and very large sexual harassment claims. The increased frequency and severity of sexual

harassment claims, in large part as a result of the #MeToo movement, have significantly impacted the profitability of EPL for carriers. This, in turn, has caused insurers to focus more underwriting attention to investigating the preventive efforts its current and prospective insureds are implementing or have implemented as a result of the movement. It has not, however, resulting in any meaningful reduction in coverage for sexual harassment claims. The reality is that sexual harassment claims are at the core of the coverage that EPL provides. So it is very hard for insurers to simply stop providing the coverage. Instead, underwriters are asking more questions around what employers are doing to: (1) enhance their formal policies and procedures; (2) train their rank and file employees, supervisors and even the board room around appropriate treatment in the workplace; and (3) enhance the promotion of typically already existing avenues for reporting incidents of alleged sexual harassment as well as reinforced protection for employees who do raise complaints. This helps limit risks for all.

To ensure coverage for sexual harassment claims, the main issue is to determine if indemnification is precluded based on state laws. Many states either through insurance regulations or public policy refuse to allow insurance to cover loss as a result of intentional harm and/or punitive damages. Sexual harassment claims obviously involve alleged intentional harm and sexual harassment complaints often seek to recover punitive damages. Jury awards in sexual harassment cases also regularly award punitive damages. There are some ways that the policy can be drafted to try to ensure it can respond even if the claim itself is brought in a state that frowns upon insuring the claim. First, if the insured organization is incorporated or has its principal place of business in a state that allows for insurability of punitive damages and intentional acts, then the policy can simply include a choice of law provision that applies that state's law. Second, policies often have broad "favorable venue" wording that states that the insurer agrees to apply any

applicable venue that is most favorable to allowing coverage. Third, the client can acquire a punitive damage/intentional acts wrap policy that is typically issued out of Bermuda that in effect wraps around the domestic insurance policy and steps in to pay the intentional acts or punitive damage award in any instance in which the domestic policy is not permitted to provide the coverage by law. These policies are usually provided by an off-shore affiliate of the domestic carrier and since the intention of even the on-shore policy is to pay the claim if they are permitted to do so, the cost of the wrap is relatively cheap often priced at approximately 10% of the cost of the on-shore policy.

The other coverage issue of interest with regards to sexual harassment claims is the reality that, while the bulk of the focus of the coverage under EPL policies is to insure the entity, because the entity is often the true employer most exposed to responsibility for an employment claim, the policy does cover basically everyone that works at the company as an insured as well. This raises the unpleasant reality that the individual harasser in a sexual harassment claims is protected under the policy as well. If this concerns the entity purchasing the coverage, there are some carriers that are willing to include within the policy an intentional harm exclusion applicable only to natural person individuals that can be waived if need be by the insured entity. This allows the employer to in effect prevent a proven wrongdoer from receiving the benefits of the coverage. Even so, the exclusion typically only comes into play where the individual has been proven to have committed the act. So the policy often ultimately still provides a defense to the alleged wrongdoer, for better or worse, until he/she is proven to have committed the act.

VI. Coverage for Social Media

The prevalent use of social media has given rise to employment-related claims under an EPL policy even though case law in this area is considerably lacking. The main question with

regard to social media claims tends to be the capacity in which an individual is acting when they allegedly committed an employment practices wrongful act via social media. Often these claims allege harassment by one individual employee against another individual employee over social media. Or an employee is complaining about work. The question then arises as to whether the alleged wrongdoer was acting in his/her capacity as an employee of the organization when he/she posted on social media. For instance, if an employee posts derogatory comments about another employee on Twitter, they may be sitting at home at the time and they may be discussing highly personal matters. Similar to the question around the waivable intentional acts exclusion, the insured entity may want to include language stating that such claims made over social media are expressly covered or they may not want the individual covered at all given that expanding the coverage to pick up these claims may expose the policy limits to covering an individual acting more in their personal capacity than their capacity as an employee. Nonetheless, the entity should at a minimum ensure that the entity itself is insured under the policy in the likely event that they are named in the action by the harmed individual alleging that the employer entity was responsible for the harassment or for failing to prevent the harassment.

Claims involving social media can also involve wrongful termination, retaliation, or another employment-related act. A discussion of the importance of the context of the communications is key. Most of these claims are covered. However, EPL policies include certain exclusions – some with exceptions – for those claims protected under the National Labor Relations Act ("NLRA"). This exclusion is relevant to claims involving social media and center around the capacity in which the employee is acting. The NLRA, enforced by the National Labor Relations Board ("NLRB"), protects the rights of employees to act together to address conditions at work, with or without a union, and extends to certain work-related conversations or posts on social media.

In cases involving employees' use of social media, the context of the communication or post is crucial. If the employee is engaged in "protected concerted activity" because he is discussing the terms and conditions of employment, then such communications are protected under the NLRA, and excluded from coverage under an EPL policy. Conversely, posts unrelated to working conditions are not protected by federal law and therefore do not fall within the NLRA exclusion. Specifically, 29 U.S.C. §157 provides:

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

29 U.S.C. §157.

A "concerted activity" is a group effort of several or more employees that act together to address the issues with terms or conditions of their employment. The NLRB defines "concerted activity" as an employee engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself. *Meyers Industries, Inc. and Kenneth P. Prill,* 268 N.L.R.B 493, 497 (N.L.R.B January 6, 1984). However, activity is no longer protected "concerted activity" when it is egregiously offensive or knowingly and maliciously false. *See* National Labor Relations Board, *Concerted Activity*, https://www.nlrb.gov/rights-we-protect/whats-law/employees/i-am-represented-union/concerted activity (Jan. 3, 2020). When employee action deviates from the stated definition and is instead an "individual gripe" not about terms or conditions of the employment shared by other employees, such an act is not covered by the NLRA. *See N.L.R.B. Div. of Advice, Tasker Healthcare Group d/b/a Skinsmart Dermatology*, Case No. 04-CA-094222, at *3 (May 8, 2013).

Sending messages to other employees within the locality to unionize because of the poor employment conditions is an activity that is protected by the NLRA. *N.Y. Party Shuttle, LLC*, 359 N.L.R.B. 1046, 1050 (N.L.R.B. May 2, 2013). In *New York Shuttle*, a bus tour company employee sent messages to other tour guides within the locality of his concerns about the employment conditions and his desires to unionize. *Id.* The concerns of the employment conditions included assertions that some of the Respondent's paychecks had been returned for insufficient funds. *Id.* In addition to the concerns of the employment conditions, the employee attempted to convince the other guides to unionize with him. *Id.* After commenting on the Respondent's employment practices and publicizing his union organizational activities, the charging party no longer received any tour guide assignments from the Respondent. *Id.* at 1046. By failing to give him any tour guide assignments, the NLRB found that the employer effectively discharged the employee. *Id.* The Respondent argued that the employee's claims could be deemed as impermissibly disparaging and libelous statements. *Id.* However, the NLRB found that while the employee's statements were "harsh," they were not libelous because they were virtually all true. *Id.* at 1050. The NLRB ordered the employee be reinstated with back pay. *Id*. at 1051.

A post on social media discussing the poor working conditions with the objective of preparing co-workers for a group defense against the employer is communication protected by the NLRA. *Hispanics United of Buffalo, Inc. and Carlos Ortiz*, 359 N.L.R.B. 368, 375 (N.L.R.B. December 14, 2012). In *Hispanics United of Buffalo, Inc. and Carlos Ortiz*, an employee, Marianna Cole-Rivera, received a text message from a fellow employee, Lydia Cruz-Moore. *Id*. at 368. That text message consisted of Cruz-Moore's concerns about how they did not provide adequate assistance to their clients. *Id*. Influenced by the text, Cole-Rivera sought to motivate the other employees to stand up and seek change in their work environment by posting on Facebook, "Lydia

Cruz, a coworker feels that we don't help our clients enough at [Respondent]. I about had it! My fellow coworkers how do u feel?" *Id.* at 369. Four other employees then responded to the post, raising objections to the assertion that their work performance was substandard. *Id.* The first workday after the post, the Respondent discharged all the employees that participated. *Id*. The Respondent reasoned the internet interaction constituted "bullying and harassment" and violated the Respondent's zero tolerance policy, prohibiting such conduct. *Id.* However, the NLRB ruled differently. *Id.* at *375. The NLRB held enlisting the support of fellow employees in mutual aid and protection is as much concerted activity as is ordinary group activity. *Id.* The NLRB ruled the enlistment was protected by §157 and ordered the reinstatement of the discharged employees. *Id.* at *376.

Commenting on and "liking" a post on Facebook about an ongoing dispute at the respondent's place of employment is activity protected by the NLRA, unless the statements are made with knowledge of falsity, or with reckless disregard for the truth. *Triple Play Sports Bar & Grille*, 361 N.L.R.B. 308, 312 (N.L.R.B. August 22, 2014). In *Triple Play Sports Bar and Grille and Vincent Spinella*, a former employee of the Respondent posted a Facebook status that discussed an error in the Respondent's tax withholdings. *Id.* at 309. Several employees commented on and liked the status and were terminated as a result. *Id*. While the author of the post was no longer an employee, the NLRB found the post discussed issues intended to be raised at an upcoming meeting, and as a result was therefore concerted activity among the employees that participated. *Id.* at 323. The NLRB found the employee's comment on the post effectively endorsed the former employee's status and was protected. *Id.* at 312. Further, the NLRB found that while the "like" of the status is more ambiguous than a comment, it was to be treated as expressing agreement with the original complaint. *Id.* Furthermore, because the Respondent was unable to meet the

standard of proving the statements were made with knowledge of falsity or with reckless disregard for the truth, the Facebook activities were protected, and the termination of the employees violated the NLRA. *Id.* at 327.

Commenting on a terminated employee's Facebook status with advice is activity protected under the NLRA. *Butler Medical Transport, LLC and Michael Rice and William Lewis Norvell*, 365 NLRB No. 112, *5 (N.L.R.B. July 27, 2017). In *Butler Medical Transport, LLC and Michael Rice and William Lewis Norvell*, Michael Rice was discharged after writing a Facebook status about his employer. *Id.* at *4. William Norvell, Rice's co-worker, commented on Rice's status saying, "Sorry to hear that, but if you want you may think about getting a lawyer and taking them to court. You could contact the Labor Board too." *Id.* at *5. Shortly thereafter, the Respondent terminated Mr. Norvell for his comment on Rice's Facebook status. *Id.* at *13. However, the NLRB has long held that employee discussions in which future action is sought or offered constitutes concerted activity. *Id.* at *6 (citing *UniQue Personnel Consultants*, 364 NLRB No. 112, slip op. at 3 (2016) (citing *Jhirmack Enterprises*, 283 NLRB 609, 614-615 (1987), and *Cadbury Beverages*, 324 NLRB 1213, 1220 (and cited cases) (1997), enfd. 160 F.3d 24, 333 U.S. App. D.C. 94 (D.C. Cir. 1998)). Therefore, the NLRB held that because he offered advice regarding future action to Mr. Rice, Mr. Norvell's comment was protected under the NLRA. *Id.* at *7. Mr. Norvell's termination violated the NLRA and his comments were protected concerted activity, as they touched the concerns which animate §157. *Id.* at *16.

While the NLRA provides protection for a wide variety of different social media activities, it does not provide protection for a post that contains personal "gripes" or abusive rants relating to one's employment. *See N.L.R.B. Div. of Advice, Tasker Healthcare Group d/b/a Skinsmart Dermatology*, Case No. 04-CA-094222, at *2 (May 8, 2013). The NLRB issued a memorandum

regarding a situation in which an employee communicated in a private Facebook conversation about an exchange she had with her supervisor. *Id.* The employee complained about her supervisor and stated they should "back the freak off" and that they were "full of [expletive]." *Id.* The Facebook message thread was then shown to the supervisor. *Id.* The employee was terminated. *Id.* The employee attempted to protect her social media activity under the NLRA as concerted activity, but the NLRB denied the request. *Id.* The NLRB stated that because the messages did not involve shared employee concerns over terms and conditions of the employment it was not a concerted activity. *Id.* The Board found the comments were an individual gripe because they reflected the employee's personal contempt for her supervisor, rather than a concern shared amongst the employees over terms and conditions of the employment. *Id.* at 3.

An employee's personal frustrations that do not concern terms or conditions of the employment, and which are not shared by other employees, do not garner NLRA protection. N.L.R.B. Div. of Operations-Management, Memorandum OM 11-74, *Report of the Acting General Counsel Concerning Social Media Cases*, at *14 (Aug. 18, 2011). In 2011, the General Counsel of the NLRB provided a report of cases involving social media and NLRA protection. *Id.* at *1. Notably, denial of NLRA protection is seen in the example of the disgruntled and tired bartender. *Id.* at *14. In February 2011, responding to a message received on Facebook from a relative as to how work went, the employee responded that he did all the work and received no tips. *Id.* Within that conversation, the employee called the customers of the employer "rednecks," and stated that he hoped they choked on glass as they drove home drunk. *Id.* The employee did not share or discuss that post with other employees of the employer, and other employees did not respond to the post. *Id.* at *15. The employer discovered the post and terminated the employee shortly thereafter. *Id.* at *14. The NLRB ruled that, while the post addressed terms and conditions

of the employment, the conversation was not discussed with his coworkers and therefore not concerted activity. *Id.* at *15. Because there was no concerted activity, there was no NLRA protection. *Id.*

Overall, the context of an employee's social media post is crucial to determining whether a claim under an EPL policy may be covered, or at a minimum, trigger a duty to defend.