

**BLOGGERS CREATION OF A LABOR UNION: A STEP IN THE RIGHT DIRECTION FOR THE  
FUTURE OF BOTH GROUPS**

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## INTRODUCTION

What if bloggers created a labor union? That was the question on some journalist's minds when, in 2007, a group of left-leaning bloggers created the idea of forming a labor union.<sup>1</sup> These bloggers hoped to gain health insurance, be able to conduct collective bargaining, and set professional standards for other bloggers.<sup>2</sup> Some bloggers are looking for recognition considering their importance in the media today, especially in the upcoming presidential campaign.<sup>3</sup>

In practice, no one is sure how the idea of a bloggers union should or could work. Some want an association for activist bloggers, some want a guild that is open to any blogger, and others want the opportunity to join established unions, like the National Writers Union, which is a local of the United Auto Workers.<sup>4</sup> Further, while some bloggers are looking for the protections listed above that labor unions generally give, others want a way to get health insurance discounts, the ability to gain press credentials, or guidelines on how to present advertising and data on the blog.<sup>5</sup> Some bloggers just want to be seen as professionals.<sup>6</sup> The big problem is that while few bloggers are paid for their work and even fewer could make a living doing it, many spend significant amounts of time on their blogs.<sup>7</sup> Further, some bloggers believe that structuring the world of blogs would make it too mainstream a pastime.<sup>8</sup>

The history of blogging is short, but this medium has already had a large effect on society. Specifically, blogging has created issues in the employer-employee relationship and

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<sup>1</sup> See, e.g., Ashley M. Heher, *Bloggers Consider Forming Labor Union*, USA TODAY (2007), available at [http://www.usatoday.com/tech/webguide/internetlife/2007-08-06-blogger-union\\_N.htm](http://www.usatoday.com/tech/webguide/internetlife/2007-08-06-blogger-union_N.htm). See also Associated Press, *Bloggers Consider Forming a Labor Union*, MSNBC, Aug. 6, 2007, <http://www.msnbc.msn.com/id/20136904/>.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

legal protection for bloggers who lose their jobs is not always available. At the same time that blogging is integrating into society, labor unions are having trouble staying in the forefront of employee protection. Labor unions and the law that protects them are not changing at the same pace that society and technology are changing. This comment argues that a bloggers “labor union” is exactly what is needed to both protect bloggers of all types and to change the face of labor unions.

## I. BLOGGING TODAY

Blogging in America is something conducted by millions of people. Further, as more people blog in today’s society, the problems associated with this form of “journalism” become newsworthy in and of themselves.

### A. The History of Blogging

The word blog comes from a shortened version of the word “web log.”<sup>9</sup> This concept was created in 1997 by Jorn Barger.<sup>10</sup> The individual who creates and edits the blog is called a blogger.<sup>11</sup> Early blogs were not what are now seen today. The first blogs simply listed websites that the owner visited in a chronological order with occasional commentary.<sup>12</sup> This option was ideal for individuals using dial-up Internet service because it was faster and more tailored to certain interests.<sup>13</sup> Further, blogs were used by Internet user groups to document individual progress on group projects.<sup>14</sup> The other option for early blogs beyond technological information was for an individual to use them as a personal diary.<sup>15</sup>

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<sup>9</sup> Benjamin Ostrander, *Problems and Solutions to Corporate Blogging: Model Corporate Blogging Guidelines*, 7 J. HIGH TECH. L.J. 226, 233 (2007).

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> Paul S. Gutman, *Say What?: Blogging and Employment Law in Conflict*, 27 COLUM. J.L. & ARTS 145, 145 (2003).

<sup>13</sup> *Id.*

<sup>14</sup> Ostrander, *supra* note 9, at 233.

<sup>15</sup> *Id.*

In 1999, the first blogging software was created, using programs where individuals could create blogs through web browsers.<sup>16</sup> This made a change in blogging from the link based description above, to something closer to journalism.<sup>17</sup> Today, blogs run the spectrum from personal diaries to something closer to traditional media and a source of information for the public.<sup>18</sup> Many blogs are able to give checks to mainstream press and have widespread recognition.<sup>19</sup> Blogs focus on a variety of topics, with politics taking the focus for many bloggers.<sup>20</sup> The growing influence of blogs most likely stems in their reverse chronological order, direct links to sources, and interactivity.<sup>21</sup>

Blogging today has become a phenomenon in America.<sup>22</sup> In 2006, one research group found that 8% of Internet users -approximately twelve million Americans- create and update blogs.<sup>23</sup> This number jumps dramatically if one considers the number of people that read blogs- currently 39% of Internet users, or close to fifty-seven million Americans.<sup>24</sup> Many bloggers, however, are not creating their blogs for the public eye, or for money or fame, instead they create them as creative expression and to share personal experiences.<sup>25</sup> For example, about 32% of bloggers say they blog for an audience, and only seven percent give making money as their major reason for blogging.<sup>26</sup> Further, only 34% of bloggers consider it a form of journalism, and

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<sup>16</sup> *Id.* at 233-34.

<sup>17</sup> *Id.* at 234.

<sup>18</sup> Anne Flanagan, *Blogging: A Journal Need Not a Journalist Make*, 16 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 395, 398 (2006).

<sup>19</sup> *Id.*

<sup>20</sup> Konrad Lee, *Anti-Employer Blogging: Employee Breach of the Duty of Loyalty and the Procedure for Allowing Discovery of a Blogger's Identity Before Service of Process is Effected*, 2006 DUKE L. & TECH. REV. 2, 4 (2006).

<sup>21</sup> Rafael Gely & Leonard Bierman, *Social Isolation and American Workers: Employee Blogging and Legal Reform*, 20 HARV. J.L. & TECH. 287, 294 (2007).

<sup>22</sup> Pew Internet & American Life Project, *Bloggers: A Portrait of the Internet's New Storytellers*, July 19, 2006, <http://www.pewinternet.org/pdfs/PIP%20Bloggers%20Report%20July%2019%202006.pdf>.

<sup>23</sup> *Id.* at 2.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 2-4.

<sup>26</sup> *Id.* at 3-4.

56 to 57% actually verify and link sources either “sometimes” or “often.”<sup>27</sup> Time spent by bloggers working on their blog is usually about one to two hours per week (59%), but one in ten bloggers spend ten or more hours per week blogging.<sup>28</sup>

Some bloggers are no longer just blogging as a pastime, but attempt to make money by creating these so-called online “journals.”<sup>29</sup> Certain bloggers are employed by individuals who create networks of blogs on differing topics.<sup>30</sup> In 2005, one specific company called Weblogs, Inc., employed 120 bloggers and published 90 blogs.<sup>31</sup> These bloggers were estimated to make anywhere from two hundred to three thousand dollars a month.<sup>32</sup> However, it was found that to make \$500.00 an individual had to post 125 posts a month, monitor comments and delete offensive ones, as well as respond to readers.<sup>33</sup> This equates to approximately \$4.00 per post, not including the extra work.<sup>34</sup>

Blogging has gone so far that companies have created corporate blogs as a business tool for customers to use.<sup>35</sup> Companies such as Sony and Microsoft are using blogs as marketing tools to better interact with their customers.<sup>36</sup> In 2005, Sun Microsystems (Sun) had about 2000 employees blogging, which included its President.<sup>37</sup> Further, Sun, Microsoft and General Motors have corporate blogs sanctioned by the company itself so employees can write about company

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<sup>27</sup> *Id.* at 4.

<sup>28</sup> *Id.* at 3.

<sup>29</sup> See e.g., Aaron Kirkland, “You Got Fired? On Your Day Off?!”: Challenging Termination of Employees For Personal Blogging Practices, 75 UMKC L. REV. 545, 547 (2006).

<sup>30</sup> Weblogs, Inc., <http://www.weblogsinc.com/> (last visited April 12, 2008); Adam L. Penenberg, *Can Bloggers Strike It Rich?*, WIRED, Sept. 22, 2005, <http://www.wired.com/culture/lifestyle/news/2005/09/68934?currentPage=2>.

<sup>31</sup> Penenberg, *supra* note 30.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> See generally Lee, *supra* note 20.

<sup>36</sup> Henry Hoang Pham, *Bloggers and the Workplace: The Search for a Legal Solution to the Conflict Between Employee Blogging and Employers*, 26 LOY. L.A. ENT. L. REV. 207, 208 (2005-2006).

<sup>37</sup> *Id.* at 210.

products and strategy.<sup>38</sup> Also, companies such as IBM and Sun have blogging policies given to their employees that make it clear what can and cannot be said on employee blogs.<sup>39</sup> This helps both employers and employees and shows embracement of this new wave of communication in technology.

However, on the other end of the spectrum are so-called gripe sites, which involve complaints about individual's work places or their employers.<sup>40</sup> One such site, which is now disabled, is dedicated solely to a message board where large company layoffs are leaked to the outside world.<sup>41</sup> As of 2006, the website was receiving approximately 124,000 visits per week and encouraging insiders to leak confidential information.<sup>42</sup> These websites can possibly harm employer's goodwill and business relationships, and many employers spend time scouring these sites for possible damaging information.<sup>43</sup>

#### B. Job Losses Due to Blogging

Steve Olafson was a reporter for the Houston Chronicle in 2002 and also blogged under the name of Banjo Jones.<sup>44</sup> Olafson discussed issues common among bloggers; describing his life, family, and local politics.<sup>45</sup> However, while Olafson discussed politics in his blog, he also did so for the Chronicle.<sup>46</sup> When his employers found out about his other form of "journalism" they asked him to take it down and eventually fired him.<sup>47</sup> Another reporter was fired from a Durham, North Carolina, newspaper only a day after posting critical comments about her

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<sup>38</sup> *Id.* at 210.

<sup>39</sup> *See infra* part IV.A.3.

<sup>40</sup> Lee, *supra* note 20, at 4.

<sup>41</sup> Fucked Company, <http://www.fuckedcompany.com/index.html> (last visited April 5, 2008).

<sup>42</sup> Lee, *supra* note 20, at 4; *see also* Fucked Company, *supra* note 41.

<sup>43</sup> Lee, *supra* note 20, at 4.

<sup>44</sup> Gutman, *supra* note 12, at 147.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 148.

<sup>47</sup> *Id.*

employer on her blog.<sup>48</sup> These statements included commentary about awards given out at work she believed were stupid and her hatred for her place of employment.<sup>49</sup> This employee was fired even though she blogged anonymously, and did not name her company, its location, or the names of her co-workers.<sup>50</sup>

There are other stories as well that have been on the news throughout the years.<sup>51</sup> For example, a Delta Airlines flight attendant was fired for posting pictures of herself posed in risqué ways aboard a plane.<sup>52</sup> Another largely publicized firing was a contractor who was working for Microsoft and was fired for posting pictures on his blog of Apple computers being delivered to the Microsoft campus.<sup>53</sup> Finally, Heather Armstrong was fired from her Web design company for blogging about her workplace and co-workers, including comments about the employee Christmas party.<sup>54</sup>

The above stories may be a surprise to many people, but employers today have quite a bit of leeway to terminate an individual's employment for griping about the workplace and colleagues.<sup>55</sup> Employers may have personal fears about his or her own reputation or about the public gaining knowledge of issues in the workplace.<sup>56</sup> The company's reputation can be in danger and any pride in confidentiality can be lost.<sup>57</sup> Further, comments about other employees can affect productivity and disrupt the workplace.<sup>58</sup> Basically, beyond certain protections

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<sup>48</sup> See, e.g., Robert Sprague, *Fired For Blogging: Are There Legal Protections For Employees Who Blog?*, 9 U. PA. J. LAB. & EMP. L. 355, 357 (2007).

<sup>49</sup> Amy Joyce, *Free Expression Can Be Costly When Bloggers Bad-Mouth Jobs*, WASH. POST, Feb. 11, 2005, <http://www.washingtonpost.com/wp-dyn/articles/A15511-2005Feb10.html>.

<sup>50</sup> See, e.g., Sprague, *supra* note 48, at 357.

<sup>51</sup> See, e.g., *id.* at 357-58.

<sup>52</sup> *Id.* at 357.

<sup>53</sup> *Id.* at 358.

<sup>54</sup> *Id.* at 357.

<sup>55</sup> *Id.* at 358.

<sup>56</sup> Gutman, *supra* note 12, at 151.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

discussed in this paper, an employer may decide that public commentary about work is not in the best interest of his or her business, and may fire the employee accordingly.<sup>59</sup>

## II. LABOR UNIONS TODAY

Previously, labor unions were able to give employees a voice and an ability to influence their own employment.<sup>60</sup> Organizing activities by unions made employees aware of rights under the National Labor Relations Act (NLRA) in creating a union.<sup>61</sup> Once union elections were held and the union recognized, then collective bargaining could occur that helped communication between employers and employees.<sup>62</sup> However, for many private employees today, the communication and solidarity of the union hall ideal is no longer available.<sup>63</sup> Many private sector employees are no longer unionized and instead at will employment gives them less job security.<sup>64</sup>

### A. The History of Labor Unions

From the 1950's until today, union membership has decreased from 35% to 12%.<sup>65</sup> Specifically, the amount of private sector employees in labor unions has dropped to almost 7%, which is the lowest membership has been since the early 1900's.<sup>66</sup> Before industrialism, craftsman skilled in a trade worked in a sort of partnership with their employers to create goods.<sup>67</sup> Craftsmen organized themselves along craft lines to gain benefits and knew there would be few costs because they were the only individuals skilled in their trade.<sup>68</sup> These trade

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<sup>59</sup> See, e.g., Sprague, *supra* note 48, at 358.

<sup>60</sup> Gely & Bierman, *supra* note 21, at 299.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 300.

<sup>64</sup> *Id.*

<sup>65</sup> Kenneth G. Dau-Schmidt, *The Changing Face of Collective Representation: The Future of Collective Bargaining*, 82 CHI.-KENT L. REV. 903, 903 (2007).

<sup>66</sup> *Id.*

<sup>67</sup> See Dau-Schmidt, *supra* note 65, at 906.

<sup>68</sup> *Id.*

unions were able to gain quite a bit of bargaining power.<sup>69</sup> However, the changes in production methods that occurred in the Industrial era created problems for the original craft unions.<sup>70</sup> Employers began to try to control the craft unions to gain control of their knowledge and adopt the industrial methods for production.<sup>71</sup> Employers fought to become union free and unions realized that to have the power they needed they had to organize all employees and not simply craftsman.<sup>72</sup>

During the Depression, the American labor movement changed and the National Labor Relation Act was created.<sup>73</sup> This is when strong labor leaders changed the face of labor unions by organizing under the United Mine Workers, and the Congress of Industrial Organizations (CIO).<sup>74</sup> By 1940, 27% of American workers were unionized, and after World War II a little over 33% of workers were members of unions.<sup>75</sup> Through the 1960's the concept of the labor union worked in its single unit, collective bargaining strategy, and employees through this method were given a voice to address their important concerns.<sup>76</sup> Further, the labor unions were able to support smart political candidates, who maintained valuable improvements such as worker's compensation, unemployment compensation, health and safety workplace changes, and limiting discrimination in the workplace.<sup>77</sup>

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<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 907

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 908.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 910.

<sup>77</sup> *See id.* at 911.

## B. Changes in Labor Unions

However, changes in the economy and workforce in the next forty years affected the union's ability to function.<sup>78</sup> There became issues with international competition, manufacturing jobs migrating overseas, and information technology effected the organization of companies.<sup>79</sup> Further, the NLRA has not been significantly amended since 1959, and it is still based on the way the workplace existed in 1935.<sup>80</sup>

The changes in the workforce have created outdated issues with the labor movement as it exists today.<sup>81</sup> For example, the definitions given by the NLRA of employers, employees, and what is a proper bargaining unit, are becoming irrelevant as workers are now serving a variety of roles, such as subcontractors or temporary workers, jobs are less well defined, and an appropriate bargaining unit relies on an ability to define employers and employees.<sup>82</sup> Further, employees now have less long-term interest in their jobs and feel less need to organize.<sup>83</sup> It has also become very expensive to organize.<sup>84</sup> Traditional collective bargaining does not work as well in today's economy.<sup>85</sup>

Therefore, changes need to be made in how unions are organized to better mesh with society. The belief is that a big change in unions towards more open and diverse membership can occur because of the Internet.<sup>86</sup> The Internet is one way to reach members from a variety of backgrounds and locations, as well as to lower the ever increasing cost of union membership.<sup>87</sup>

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<sup>78</sup> *Id.* at 912.

<sup>79</sup> *Id.*

<sup>80</sup> Jeffery M. Hirsch, *The Silicon Bullet: Will the Internet Kill the NLRA*, 76 GEO. WASH. L. REV. 262, 265 (2008).

<sup>81</sup> *See, e.g.*, Dau Schmidt, *supra* note 65, at 915-16.

<sup>82</sup> *Id.* at 915.

<sup>83</sup> *Id.* at 916.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> Richard B. Freeman & Joel Rogers, *A Proposal to American Labor*, THE NATION, June 24, 2002, <http://www.thenation.com/doc/20020624/rogers>, 3. *See also* Dau Schmidt, *supra* note 65, at 918-19.

<sup>87</sup> *Id.*

The Internet drastically reduces the cost of giving information, advice, and services to union members.<sup>88</sup> Further, it allows recruiting and coordinating of a more varied and larger labor movement.<sup>89</sup> This use combined with open membership and minority representation could help breathe life back into the labor movement.<sup>90</sup>

Unions have begun to use the Internet to organize and communicate with employees who are more difficult to reach.<sup>91</sup> At the same time unions are no longer embracing the NLRA representation process, and are instead trying to find other routes to help in their recruiting.<sup>92</sup> For example, the Association of Pizza Drivers formed an Internet chat room and met for all business meetings over the Internet.<sup>93</sup> However, a recent National Labor Relations Board (NLRB) ruling that employees have no right under the NLRA to use employer email, equipment, or media for section 7 activity, might make actions like this harder.<sup>94</sup> Section 7 activity under the NLRA will be discussed more in-depth later, but the basic premise is that it gives employees rights, including but not limited to, self-organization, forming labor unions, collective bargaining, and “to engage in other concerted activities for the purpose of collective bargaining and other mutual aid and protection....”<sup>95</sup>

The future seems to imply a union’s organizational goals will go beyond the things traditionally asked for under collective bargaining agreements, such as changes in wages or benefits.<sup>96</sup> One example is found with The International Alliance of Theatrical and Stage Employees that created a different kind of agreement which allowed individual contracts and did

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<sup>88</sup> Freeman & Rogers, *supra* note 86, at 4.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *See, e.g.,* Hirsch, *supra* note 80, at 274.

<sup>92</sup> *Id.* at 275.

<sup>93</sup> *Id.* at 276.

<sup>94</sup> The Guard Publishing Company, 351 N.L.R.B. No. 70 (2007).

<sup>95</sup> 29 U.S.C. § 157 (2000).

<sup>96</sup> Dau Schmidt, *supra* note 65, at 926.

not guarantee employment.<sup>97</sup> The creation of individual contracts is in opposition to the traditional group collective bargaining agreement generally created by unions. Instead this group helped individuals get their own contracts with different rights for each person, as opposed to one contract with the same rights for everyone. Further, the New York AFL-CIO, along with Casa Mexico and the New York Attorney General's Office, established a corporate code of conduct to give minimum standards for greengrocer employees and address labor code violations, although there is no actual union representation or bargaining agreement.<sup>98</sup> Thus, the group gave greengrocers a type of support similar to that given by a union even though there was not traditional union representation with a collective bargaining agreement for all greengrocers.

Further, the labor movement seems to be going in a direction to protect workers who have been previously overlooked.<sup>99</sup> For example, janitors, apple pickers, and agricultural workers have recently entered groups that help them reach minimum acceptable level of wages or a better working environment.<sup>100</sup> Closer to the cause discussed in this paper is a New York group of freelancers who labeled themselves the Freelancers Union, and came from many fields, including writing.<sup>101</sup> The group organized themselves to get benefits like health insurance.<sup>102</sup> Today the group labels itself a type of union and offers members important work benefits like insurance and discounts.<sup>103</sup> The group also offers educational events and advocacy campaigns

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<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at 904.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* See also Clem Richardson, *A Healthy Plan Group Aids N.Y.'s Uninsured Workers*, N.Y. DAILY NEWS, Aug. 24, 2003, [http://www.nydailynews.com/archives/news/2003/08/04/2003-08-04\\_a\\_healthy\\_plan\\_group\\_aids\\_n\\_.html](http://www.nydailynews.com/archives/news/2003/08/04/2003-08-04_a_healthy_plan_group_aids_n_.html); Steven Greenhouse, *Labor Union, Redefined, For Freelance Workers*, N.Y. TIMES, Jan. 27, 2007, <http://www.nytimes.com/2007/01/27/us/27freelance.html>.

<sup>102</sup> *Id.*

<sup>103</sup> Freelancers Union: Platform for an Independent Workforce, <http://www.freelancersunion.org/index.html> (last visited April 9, 2008).

for its members to give visibility to independent workers.<sup>104</sup> It is free to join the “union” and it offers networking events, job postings, and an opportunity for individuals to be included in a yellow pages like list.<sup>105</sup> This type of union is not typical, but it gives members a variety of benefits that they were unable to receive other places.

### III. BLOGGING AND THE PRESENT LEGAL PROTECTION

As blogging continues to change and grow, and as more people read and interact with blogs in their daily lives, legal problems arise for bloggers. Certain legal issues especially exist when considering an employer and employee relationship. Some protection is afforded through common law, and statutory and constitutional law, but certain holes still exist in protection for bloggers.

#### A. Blogging and Non-Union Protection

There are numerous problems that can arise with employees who blog.<sup>106</sup> Blogs can share with the world confidential information, like trade secrets, or can defame the employer and its image.<sup>107</sup> Further, employee bloggers could defame other employees and the employer would be liable.<sup>108</sup> The doctrine of respondeat superior says that if an employee engages in tortuous behavior than the employer can be held liable.<sup>109</sup> For example, if an employee causes intentional infliction of emotional distress through language used on a blog, then an employer may be brought to suit for it.<sup>110</sup> Employee bloggers, however, may hold certain protections under First

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<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> This paper is discussing employment issues between bloggers and employers, but is not specifically focusing upon defamation, leaking of information, or First Amendment protection. These issues are important, but another paper would need to be written for proper focus on their concerns.

<sup>107</sup> Ostrander, *supra* note 9, at 331.

<sup>108</sup> *Id.*

<sup>109</sup> Gutman, *supra* note 12, at 150.

<sup>110</sup> *Id.* at 150-51.

Amendment free speech rights and privacy interests.<sup>111</sup> Congress, under the Constitution, is not allowed to harm an individual's free speech rights, and this concept is invoked whenever a threat to anonymity is found.<sup>112</sup> Thus, when employers try to force a blogger to reveal his or her identity, there are possible First Amendment concerns. For many employers and employees, this is a difficult balance considering the employee's at will employment status.<sup>113</sup>

The employment "at will" doctrine is defined as a situation where either an employer or an employee may terminate an employment relationship at any time, or for any reason.<sup>114</sup> The initial assumption then, is seen in the above personal descriptions of individuals who were fired for blogging. If an employer does not like what an employee is blogging about, then that employer may fire him.<sup>115</sup> Further, taken to its extreme, employees could be terminated for office politics, nepotism, or something as arbitrary as their favorite sports team.<sup>116</sup> However, many states have entered exceptions to this broad sweeping policy.<sup>117</sup> The three general exceptions include not allowing a discharge if there is a violation of an implied duty of good faith and fair dealing, an implied contract obligation, or a violation of public policy.<sup>118</sup>

One exception applicable to this paper would be contracts that are considered implied in fact.<sup>119</sup> This concept states that even if an express contract is lacking or if an employer represents something to an employee concerning job security or how a termination might be made, these may be considered binding by the court even though they have no actual contract

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<sup>111</sup> Ostrander, *supra* note 9, at 331.

<sup>112</sup> Lee, *supra* note 20, at 9.

<sup>113</sup> Ostrander, *supra* note 9, at 331.

<sup>114</sup> Gutman, *supra* note 12, at 156.

<sup>115</sup> *Id.*

<sup>116</sup> *See* Sprague, *supra* note 48, at 361.

<sup>117</sup> *Id.* at 156-57. There are six states that have kept a strict at will rule, including Alabama, Delaware, Georgia, Louisiana and New York. *Id.* at 157. However, these states may provide other methods of protection for employees. *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *See, e.g.,* Sprague, *supra* note 48, at 369. New York rejects implied contracts as an exception to the at-will doctrine. *Id.* at 370.

and they are considered an at will employee.<sup>120</sup> These statements can come from a variety of places, including employee handbooks, oral statements, performance reviews, and historical practices with employee retention.<sup>121</sup> It seems that courts are focusing on the fundamental unfairness found if an employer benefits from breaking promises to employees for the employer's own convenience.<sup>122</sup> This type of exception may have an effect in situations where employers create blogging policies.<sup>123</sup> Specifically, employers that make blogging policies could possibly create an implied contract that protects employees who face wrongful discharge actions.<sup>124</sup> For example, an employee handbook has been previously considered by courts as an implied contract because employees read it and rely on what it promises.<sup>125</sup> In the same way, a blogging policy could have a similar effect. The blogging policy would be read by employees and they would rely on its promises about the types of things they could and could not blog about.

A second exception applicable to this analysis that is sometimes used for the at will employment doctrine is that of public policy concerns.<sup>126</sup> This exception protects employees who will not violate a law when asked by their employer to do so, who act lawfully when their employer does approve, or who act with the public's good in mind, such as revealing employer bad conduct.<sup>127</sup> This specific exception has been codified by certain states to protect employees for taking part in lawful actions outside of the workplace.<sup>128</sup> For some states, this focuses on not

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<sup>120</sup> *See, e.g., id.* at 369.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *Id.* at 372. *See also supra* part IV.A.3.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Id.* at 375.

<sup>127</sup> *Id.*

<sup>128</sup> *See, e.g., Id.* at 376.

firing employees for lawful consumption of products such as food, alcohol, or tobacco.<sup>129</sup>

However, some other states have created broader statutes that protect outside activities beyond lawful consumption.<sup>130</sup> These states include California, Colorado, Connecticut, New York, and North Dakota.<sup>131</sup>

California has a statute concerning the above public policy exception.<sup>132</sup> This statute would seemingly allow bloggers to post criticisms about employers, unless there is an employment policy that prohibits or limits blogging.<sup>133</sup> Thus, bloggers could post reasonable comments, but if an employer has a blogging policy then that policy will be enforced by the California courts.<sup>134</sup> In Connecticut, an employee has to express a matter of public concern to be protected.<sup>135</sup> This implies that if an employee discusses concerns as a citizen this outweighs the interest of the employer to promote the company.<sup>136</sup> Therefore, it seems that discussion of something like environmental concerns, even if it harms the company, might still be protected.

Colorado only extends protection as balanced against an employer's business needs, and there is an implied duty of loyalty within the statute.<sup>137</sup> This creates protection similar to Connecticut where public concerns are allowed to be communicated.<sup>138</sup> It, however, does not protect most other communication somewhat relating to an employee's position.<sup>139</sup> This lack of protection could possibly include discussion of personal problems with an employer or fellow employees. North Dakota's statute differently includes under its discriminatory practice section

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<sup>129</sup> See, e.g., MONT. CODE ANN. § 39-2-313 (2007).

<sup>130</sup> See, e.g., Sprague, *supra* note 48, at 376-77.

<sup>131</sup> *Id.*

<sup>132</sup> *Id.* at 377. See also CAL. LAB. CODE § 96(k) (West 2008).

<sup>133</sup> See Kirkland, *supra* note 29, at 551-52.

<sup>134</sup> *Id.* at 552.

<sup>135</sup> Sprague, *supra* note 48, at 380-81.

<sup>136</sup> See Kirkland, *supra* note 29, at 558.

<sup>137</sup> Sprague, *supra* note 48, at 380. See also *Marsh v. Delta Air lines, Inc.*, 952 F. Supp 1458, 1462 (D. Colo. 1997).

<sup>138</sup> See Kirkland, *supra* note 29, at 556.

<sup>139</sup> *Id.*

a clause that protects discharging an employee for “participation in lawful activity off the employer's premises during nonworking hours which is not in direct conflict with the essential business-related interests of the employer.”<sup>140</sup> This implies that as long as the blogging is in no way related to employment, no matter what it discusses, the employee will be protected.

New York, on the other hand, seems to offer a wider range of security by protecting legal political activities, use of legal consumable products, and “legal recreational activities outside work hours, off of the employer's premises and without use of the employer's equipment or other property.”<sup>141</sup> However, this is statutorily limited to not include creation of “a material conflict of interest related to the employer's trade secrets, proprietary information or other proprietary or business interest,” and violations of collective bargaining agreements or local laws.<sup>142</sup> This does limit the protection similarly to Colorado’s statute, and may not protect bloggers dependant on content.<sup>143</sup> Therefore, discussion of things completely separate from work would be allowed, but questions of protection may arise from other discussion including aspects of the workplace.

#### B. The NLRA and Labor Union Protection for Bloggers

There is protection afforded to individuals beyond common law concerning at will employment. The National Labor Relations Act protects both union and non-union employees. The NLRA protects the ability to form private sector labor unions and to create collective bargaining contracts through that union.<sup>144</sup> Through these collective bargaining agreements most employees can only be fired from a position for “just cause,” as opposed to the more amorphous reasoning of at will employment.<sup>145</sup> Further, the Act is able to protect against certain

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<sup>140</sup> N.D. CENT. CODE § 14-02.4-03 (2008). *See also* Sprague, *supra* note 48, at 382.

<sup>141</sup> N.Y. LAB. LAW. § 201-d(2) (McKinney 2007).

<sup>142</sup> *Id.* at § 201-d(3).

<sup>143</sup> *See, e.g.,* Sprague, *supra* note 48, at 382.

<sup>144</sup> 29 U.S.C. § 157 (2000).

<sup>145</sup> *Id.*

adverse employment actions, such as letting an employee go for trying to organize a union.<sup>146</sup> Further, the NLRA is able to protect non-union employees because they are able to engage in “concerted activity for the purpose of . . . mutual aid or protection.”<sup>147</sup> This may apply to employee blogging dependant on what is discussed.<sup>148</sup> However, non-union employees do not know about this protection, and those who do know about their rights have trouble obtaining effective enforcement.<sup>149</sup> The problems come from lesser sanctions being afforded under the NLRA than those given under either state or federal law.<sup>150</sup> The sanctions under the NLRA are either seen as remedial or reparative,<sup>151</sup> and this might not be what the employee was ultimately looking for as protection of his or her blog.

First, is protection of employees for concerted activities under the NLRA, which are defined as activities conducted together by two or more employees.<sup>152</sup> It can also be a concerted activity for one employee to act on behalf of other employees.<sup>153</sup> Thus, multiple employees could complain about a supervisor and it would be concerted activity,<sup>154</sup> but if one employee complained in a non-unionized workplace without consulting other employees, it would not be considered concerted activity.<sup>155</sup> That is unless the single employee is asserting a right under the collective bargaining agreement, which is considered concerted activity.<sup>156</sup> Employee emails to

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<sup>146</sup> 29 U.S.C. § 158(a) (2000); Gely & Bierman, *supra* note 21, at 303.

<sup>147</sup> 29 U.S.C. § 157(2000).

<sup>148</sup> *See, e.g.*, Gely & Bierman, *supra* note 21, at 304.

<sup>149</sup> *Id.*

<sup>150</sup> *Id.* at 304 n.129.

<sup>151</sup> *Id.*

<sup>152</sup> *N.L.R.B. v. Wash. Aluminum Co.*, 370 U.S. 9 (1962) (finding concerted activity for employee protest of work conditions).

<sup>153</sup> *Esco Elevators*, 276 N.L.R.B. 1245 (1985) (finding concerted activity where single employee raised safety complaint).

<sup>154</sup> *See Atl.-Pac. Constr. Co. v. N.L.R.B.*, 52 F.3d 260 (9th Cir. 1995).

<sup>155</sup> *See Joanna Cotton Mills Co. v. N.L.R.B.*, 176 F.2d 749 (4th Cir. 1949).

<sup>156</sup> *See N.L.R.B. v. City Disposal Sys.*, 465 U.S. 822 (1984).

other employees that complain about terms and conditions of employment have been held by the NLRB as concerted activity, and so protected, even if the language is somewhat offensive.<sup>157</sup>

Mutual aid and protection is the second part of the requirement to gain protection under the NLRA. This means that concerted activity has to be for mutual aid and protection to be considered protected activity under the Act. Here the focus is on the purpose behind the employees' actions.<sup>158</sup> The Supreme Court has left the task of deciding whether actions are for mutual aid and protection in most part to the NLRB.<sup>159</sup> The Court did specify that this protection is intended to include things beyond protections like self organization and collective bargaining, which are already included in Section 7.<sup>160</sup>

The Court did, however, place some limits upon the concept where the relationship between the employees' interests as employees and their activity is so attenuated that it can no longer be considered "mutual aid and protection".<sup>161</sup> The NLRB has been somewhat liberal in finding "mutual aid and protection," including protection of employee protests regarding discharge of supervisors,<sup>162</sup> and protection of individuals who wrote letters to legislators even though what they complained of was not under their employer's control.<sup>163</sup> This may map onto blogging in situations like Steve Olafson's (mentioned above) because his mockery of subjects he discussed in his blog were closely tied to his employment as a political reporter, which could be tenuously related to other employee's interests.<sup>164</sup> Therefore, conduct like that of Olafson is possibly protected under this concept, but might lack protection because it is attenuated from his

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<sup>157</sup> See e.g., *American Postal Workers Union & Cheryl Alves*, 2006 WL 2559848 (N.L.R.B. Aug. 31, 2006); *Timekeeping Systems, Inc.*, 323 N.L.R.B. 244 (1997).

<sup>158</sup> Gely & Bierman, *supra* note 21, at 308.

<sup>159</sup> *Eastex, Inc. v. N.L.R.B.*, 437 U.S. 556, 568 (1978).

<sup>160</sup> See generally *Eastex*, 437 U.S. 556.

<sup>161</sup> *Eastex*, 437 U.S. at 567-68.

<sup>162</sup> *Bob Evans Farms v. N.L.R.B.*, 163 F.3d 1012, 1015 (7th Cir. 1998) (allowing for employees to protest changes in supervisors when it affects the terms and conditions of their employment).

<sup>163</sup> *Kaiser Engineers*, 213 N.L.R.B. 752 (1974). See also Gely & Bierman, *supra* note 21, at 309.

<sup>164</sup> See *supra* notes 44-47; Gely & Bierman, *supra* note 21, at 309-10.

interest as an employee. It seems that the employee may not be protected if discussion is too far removed from something that the employer is doing and that other individuals or groups, like a union, could protect the employee from.

The protection afforded to activities that are considered concerted and for mutual aid and protection can be stripped away if the activity is abusive, insubordinate, or disloyal.<sup>165</sup> In one case, employees distributed handbills which criticized the employer's television broadcasts and did not discuss the labor dispute.<sup>166</sup> The court believed that an employer should not in essence have to fund an attack upon itself when the attack was without relation to the labor dispute.<sup>167</sup> Specifically, the court stated that while section 7 allows protection for concerted activities for mutual aid and protection this does not weaken the employer and employee loyalties toward each other.<sup>168</sup> This exception for disloyalty has been better explained in other cases.<sup>169</sup> In a clearer explanation, the court acknowledged that product disparagement that has nothing to do with the labor dispute, the sharing confidential information, and violent threats, are unreasonable options to pursue a labor dispute.<sup>170</sup> It is more a question of whether the influencing of strangers was pursued reasonably under the circumstances.<sup>171</sup> This seems to imply a case by case analysis taking into account the limitations described in previous cases. Further, limitations on concerted behavior have come from situations where individuals are truly insubordinate or disruptive in the workplace.<sup>172</sup> This does not include general unpleasantries discussed amongst other concerted activity,<sup>173</sup> but no bright line distinction has been drawn.

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<sup>165</sup> N.L.R.B. v. Local Union No. 1229, 346 U.S. 464 (1953) [hereinafter *Jefferson Standard*].

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

<sup>168</sup> *Id.* at 473.

<sup>169</sup> See, e.g., *Sierra Publ'g Co. v. N.L.R.B.*, 889 F.2d 210 (9th Cir. 1989); Gely & Bierman, *supra* note 21, at 310.

<sup>170</sup> *Sierra Publ'g Co.*, 889 F.2d at 220.

<sup>171</sup> *Id.*

<sup>172</sup> See, e.g., *Will & Banner Candle Co.*, 206 N.L.R.B. 772, 774 (1973).

<sup>173</sup> Gely & Bierman, *supra* note 21, at 311.

However, courts have set a high threshold for the of Section 7 privileges.<sup>174</sup> Not all impropriety will affect an individual's protection,<sup>175</sup> and one circuit has even stated that an employee has to be "unfit for further service."<sup>176</sup> Examples of language allowed by the NLRB under Section 7 protection include calling a supervisor an "a-hole,"<sup>177</sup> describing management as "tyrannical" and "despotic,"<sup>178</sup> and describing an executive as a "son of a bitch."<sup>179</sup> These situations are some that would ultimately be comparable to language used in blogging.<sup>180</sup> Employee action that has not been protected is a violent sit down strike.<sup>181</sup> While this is not the same as language, it shows that violence makes an employee not fit for later employment.<sup>182</sup> Thus, particularly violent threats or language would probably cross the line and not be protected.

The NLRB does offer certain protections to employers as well under the Act which need to be taken into account. The Board sometimes balances the employee's section 7 rights with the employer's business justification.<sup>183</sup> Employers who terminated bloggers would most likely challenge any argument with either arguments that confidential information was disclosed, or that blogging harms order and discipline in the work place.<sup>184</sup> Therefore, overall the NLRA offers significant protection to employees, but there is a line they can cross where employers will instead be protected.

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<sup>174</sup> *Id.* at 311-12.

<sup>175</sup> *N.L.R.B. v. Thor Power Tool Co.*, 351 F.2d 584, 587 (7th Cir. 1965).

<sup>176</sup> *N.L.R.B. v. Ill. Tool Works*, 153 F.2d 811, 816 (7th Cir. 1946).

<sup>177</sup> *Postal Service*, 241 N.L.R.B. 389, 389 (1979).

<sup>178</sup> *Harris Corp.*, 269 N.L.R.B. 733, 739 (1984).

<sup>179</sup> *Churchill's Restaurant*, 276 N.L.R.B. 775, 789 (1985).

<sup>180</sup> *See, e.g., Gely & Bierman*, *supra* note 21, at 312.

<sup>181</sup> *N.L.R.B. v. Fansteel Metallurgical Corp.*, 306 U.S. 240 (1939).

<sup>182</sup> *Gely & Bierman*, *supra* note 21, at 312.

<sup>183</sup> *See, e.g., Thor Power Tool*, 351 F.2d at 587.

<sup>184</sup> *Gely & Bierman*, *supra* note 21, at 312-13.

#### IV. THE NEW FUTURE FOR BLOGGERS AND LABOR UNIONS

As blogs become far more ingrained in society, changes are going to be made in the bloggers' culture. Blogging has created certain problems in the employer and employee relationship and while they have been discussed within the context of many scholarly articles, the issues have not been addressed in totality by courts or the NLRB.

While many have estimated how courts or the board will treat bloggers, it seems that protection is limited and estimates are shaky. Perhaps protection for bloggers needs to come from another place. The recent news this summer that a group of bloggers debated creation of a labor union may be the action that individuals need to gain protection.

Many in the blogging community scoff at the idea of creating a labor union for something as non-mainstream as blogging.<sup>185</sup> Perhaps this is the exact protection that individual bloggers need to gain credence in society and protection in the legal community. Further, labor unions are losing their ability to influence the workplace and society in the way they once used to, and perhaps a meeting of the minds between unions and bloggers could help change the face of a labor union as well. If bloggers can embrace some mainstream values, and the labor union movement can embrace some non-mainstream opportunities, then together they can both move forward.

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<sup>185</sup> See, e.g., Jason Lee Miller, *Do Bloggers Need to Unionize?*, WEBPRONews, August 6, 2007, <http://www.webpronews.com/insiderreports/2007/08/06/do-bloggers-need-to-unionize>; Suburban Guerrilla Blog, <http://susiemadrak.com/2007/08/07/09/47/finally-kind-sorta/> (last visited April 13, 2008); the Constant Observer Blog, <http://spap-oop.blogspot.com/2007/08/could-bloggers-union-help-us-negotiate.html> (last visited April 13, 2008); Commentation Blog, <http://tngolfer.blogspot.com/2007/08/blog-writers-union.html> (last visited April 13, 2008).

## A. How a Labor Union Could Help Bloggers

Bloggers face a variety of legal issues dependant on what they write about.<sup>186</sup> Specifically, considering many bloggers do not write their blogs as a full time job, there are legal issues concerned with their pastime of blogging in conjunction with their career. Further, for bloggers who do work solely in the blogging field, there are still similar concerns regarding their employer and employee relationship. The problem is that many bloggers do not know about the protection afforded to them under a variety of laws that do exist. Further, while there is a certain amount of protection already afforded, it is no where near enough considering the effect blogging has upon society today. Bloggers are more prominent in society than they have previously been,<sup>187</sup> and yet their protection is limited under both labor and employment law.<sup>188</sup> This problem is unacceptable considering the impact blogging law has on so many individuals in the workplace.

The first thing to acknowledge is that a typical labor union, as described above, would not work for many bloggers who do not blog as their sole career. However, for those few bloggers who are paid enough for blogging to be their career, a labor union could protect them from their treatment as second rate journalists and low salary for any paying work they do accomplish. What about protection for the rest of the bloggers who either make no money for their blogging, or are unable to make it their sole career? These individuals need a different kind of protection. The biggest problem faced by bloggers who are more like hobbyists is that the integration of their career lives with their blogging lives is not occurring smoothly. As seen from the examples above, individuals who blog about their jobs may either personally or

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<sup>186</sup> This article is focusing on legal issues in the employer and employee relationship, specifically those given under at will employment and labor law. However, there are other legal issues not addressed here, such as anonymity concerns and individual defamation claims. These ideas are not able to be addressed in-depth in this analysis.

<sup>187</sup> *Supra* notes 22-34 and accompanying text.

<sup>188</sup> *Supra* Part III and accompanying text.

professionally face serious consequences.<sup>189</sup> Some of these job losses could have been avoided by applying law already available, if the individuals had known about the legal options, and some of the terminations could be avoided if the law was changed to address the effects that blogging has on society.

### *1. Bloggers Who Blog about Their Personal Lives*

The first thing that a labor union could do for bloggers is to teach them about the laws available to support their blogging, especially considering the at will status of most employees who blog. As discussed above, there are different protections depending on what individuals are trying to blog about. If bloggers are blogging outside of work time and about their private lives, and an employer does not like the things they are saying, some states offer protection through statutes.<sup>190</sup> Through these statutes a level of protection is offered to individuals who are fired for lawful recreational activities conducted outside of the workplace.<sup>191</sup> The problem is that many of these statutes weigh the interests of employees to do what they want with business interests of employers.<sup>192</sup> Thus, employees are still quite limited under these statutes as to what they are able to say and still be protected.<sup>193</sup> Much of blogging does not seem to fall under the language described in these examples of privacy statutes. This, along with the fact that protection is only afforded by a couple states in limited natures, does not help many bloggers in the face of termination.

Therefore, in this situation, beyond teaching individuals about their legal options, and helping them find representation, a union could also help place into office representatives who

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<sup>189</sup> *Supra* Part I.B and accompanying text.

<sup>190</sup> *Supra* notes 126-43 and accompanying text.

<sup>191</sup> *Id.*

<sup>192</sup> *Id.*

<sup>193</sup> *Id.*

wanted to change the laws in this area, similar to what they used to do in the past.<sup>194</sup> One option that might work to protect bloggers across the United States is a federal statute concerning termination for lawful activities outside the workplace.<sup>195</sup> The statute protects legal recreational activities that are outside of work hours, which is limited for the employer by stating that if the activity creates a conflict of interest concerning trade secrets or proprietary or business interests, then the activity is no longer protected.<sup>196</sup> Further, protection is afforded if the activity substantially interferes with job performance or the employer and employee's working relationship.<sup>197</sup> Further protection is also afforded against unreasonable invasions of privacy by employers and for whistleblowing employees.<sup>198</sup> This type of statute on a federal level would protect all bloggers who wanted to simply use blogging as an outlet for discussion of their personal lives, and yet it still allows for employers to feel safe that their business will not be harmed by these actions.

## *2. Bloggers Who Blog about the Workplace*

Bloggers, however, generally do not keep their discussions in their blogs solely about their personal lives because an individual's life is intertwined with the work they do during the day and the people that they work with. The stories described above of individuals who lost their jobs because of their blogs show that most of them occurred because of something discussed that had to do with their jobs.<sup>199</sup> For many, this dealt with discussion of their coworkers.<sup>200</sup> For others, it was about using their work environment in pictures,<sup>201</sup> or discussing an issue in their

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<sup>194</sup> See, e.g., *supra* note 77 and accompanying text.

<sup>195</sup> Kirkland, *supra* note 29, at 566-68.

<sup>196</sup> *Id.* at 566.

<sup>197</sup> *Id.*

<sup>198</sup> *Id.*

<sup>199</sup> *Supra* Part I.B and accompanying text.

<sup>200</sup> *Id.*

<sup>201</sup> *Id.*

blog that they also discuss at work.<sup>202</sup> There is a separate kind of protection, as discussed below, and a bloggers' union could have a significant effect on this protection.

As with the protection for writing about private lives discussed above, the first thing a union could help with is teaching individuals about the protection given to them legally. Many individuals are unaware of the fact that labor law protects individuals who are not members of a union.<sup>203</sup> Individuals in the workplace who exercise their voices or actions in a way that can be considered concerted activity for mutual aid and protection are protected under the NLRA without having to be a member of a union.<sup>204</sup>

However, a recent NLRB ruling states that employees have no right under the NLRA to use employer email for section 7 activity.<sup>205</sup> Further, the Board expanded this statement and said that it has consistently held that as long as restrictions are not discriminatory then there is no statutory right to use an employer's equipment or media for such actions.<sup>206</sup> It could be stated that this is completely against the concept previously decided by the Board, where an employer is generally prohibited from restriction of employee discussion about section 7 concepts in non-work areas and off of work time.<sup>207</sup>

This holding does not seem to make any sense considering that the *Republic Aviation* standard was built for discussions on breaks or before or after work that take place in parking lots, break rooms, water coolers, and other such locations. These locations are technically still owned by the employer, yet that was not enough to dissuade protection of section 7 activity. This should be the same principle for electronic communication. Therefore, it seems like the

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<sup>202</sup> *Id.*

<sup>203</sup> *Supra* Part III.B and accompanying text.

<sup>204</sup> *Id.*

<sup>205</sup> *The Guard Publishing Company*, 351 N.L.R.B. No. 70 (2007).

<sup>206</sup> *Id.* at 7.

<sup>207</sup> *Republic Aviation Corp. v. N.L.R.B.*, 324 U.S. 793 (1945). *See also* Hirsch, *supra* note 80, at 282-85.

Board will completely ban electronic communication in the workplace, which is where many employees now spend the majority of their time communicating with one another.<sup>208</sup>

The Board needs to embrace this technological change, and a union for bloggers could help lobby for these changes. The union would want to do that because one electronic communication in the workplace would be and could be blogging. If an employee decided to blog during a break about an employer or a workplace, without being too improper,<sup>209</sup> and other employees read that blog during a break and commented, this action would seem to meet the definitions of both concerted activity and mutual aid and protection.<sup>210</sup> A union could help argue the bloggers' position in this argument, even if the blogger was not unionized within that employer's workplace. She would still have the protection of her organization so that her blogging did not mean loss of her job.

A union could also protect bloggers in a less typical manner without collective bargaining or group agreements, as will be further discussed below. Instead, a union could negotiate for individual contracts with any bloggers who have employers and are paid for their work.<sup>211</sup> This would entail creating separate and unique agreements for each blogger as opposed to one all encompassing collective bargaining agreement for all bloggers. For individuals who work for companies like Weblogs, Inc., it seems from the information provided that they are being paid very little for a lot of work.<sup>212</sup> The union could bargain for these employees to be treated fairly. Bloggers should be paid more than \$4.00 per post.<sup>213</sup> This is their profession, and like a reporter or freelance writer, they deserve more recognition than payment below a minimum wage scale.

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<sup>208</sup> Hirsch, *supra* note 80, at 285.

<sup>209</sup> *Supra* notes 165-184 and accompanying text.

<sup>210</sup> *Supra* notes 152-164 and accompanying text (describing how courts have defined and limited the ideas of concerted activity and mutual aid and protection).

<sup>211</sup> *See, e.g., supra* note 97 and accompanying text.

<sup>212</sup> *See supra* notes 29-34.

<sup>213</sup> *Supra* note 34 and accompanying text.

There are fifty-seven million Americans that read blogs and that does not include international readers.<sup>214</sup> Bloggers who try to profit to the point of sustainability and change a hobby into a profession need to be treated seriously, and a collective representation could support that goal.

While these solutions may not help protect every single blogger, they would be a good first step in both educating and changing the way the law and employers treat bloggers. It is true that some statements could still lead to termination, dependant on whether employers found out what was being discussed, but the first step of creating a bloggers' organization or union could even change laws and views on bloggers beyond the ideas discussed in this paper. For example, perhaps a bloggers' union could help lobby for minimum standards for blogger employment. A bloggers' union could also provide lawyers for individuals who are wrongfully discharged for their blogging. Finally, a bloggers' union could make more bloggers able to create employment possibilities from their passion in blogging.

### 3. *One Way to Protect Employers and Employees*

Another possible solution to the issues faced by employees that blog, either about their work lives or their private lives, involves employers embracing blogging. Blogging guidelines can help employers protect themselves and take advantage of the positives that employee blogging can create.<sup>215</sup> The guidelines protect employees as well by making it clear what exactly they can and cannot blog about, and what will happen if he or she does blog against the guidelines.<sup>216</sup> For example, if employees choose to publish a blog, they are personally liable for the content, as opposed to the company being liable.<sup>217</sup> Other ramifications can also occur, although not necessarily explicitly defined in guidelines, which seem to promote blogging rather

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<sup>214</sup> *Supra* note 24 and accompanying text.

<sup>215</sup> Ostrander, *supra* note 9, at 237.

<sup>216</sup> *Id.*

<sup>217</sup> Yahoo Personal Blog Guidelines, <http://jeremy.zawodny.com/yahoo/yahoo-blog-guidelines.pdf> (last visited May 4, 2008).

than dissuade from it.<sup>218</sup> This seems to imply that employees can be disciplined or even terminated for blogging in a way that is against the guidelines. Some more progressive companies, such as IBM and Yahoo!, have already created certain guidelines for their employees.<sup>219</sup> While these companies are obviously more technologically forward considering the line of business that they are in, this sort of handbook would help in almost any company considering the number of people that blog today.

Most corporate guidelines have certain similarities in how they are put together and what they require for employee bloggers. The first part required could be a disclaimer.<sup>220</sup> This usually includes text prominently placed in the blog along the lines of “[t]he postings on this site are my own and don’t necessarily represent IBM’s positions, strategies or opinions.”<sup>221</sup> Along those same lines, bloggers are supposed to fully introduce themselves using their name and title, as well as speak in the first person so there is no confusion.<sup>222</sup> These steps protect employers because they do not look like they are sanctioning the blog content, and it protects employees from treatment like the stories described above.<sup>223</sup>

One other important feature of all blogging guidelines is the idea that bloggers should not disclose proprietary information.<sup>224</sup> Following the requirement not to print proprietary information, it also is sometimes recommended that bloggers request permission before printing internal conversations.<sup>225</sup> The guidelines then discuss in some way the problems associated with

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<sup>218</sup> See, e.g., *id.*; IBM Blogging Guidelines, <http://www.ibm.com/blogs/zz/en/guidelines.html> (last visited May 4, 2008).

<sup>219</sup> IBM Blogging Guidelines, *supra* note 218; Yahoo! Blogging Guidelines, *supra* note 217. See also Ostrander, *supra* note 9, at 238.

<sup>220</sup> Ostrander, *supra* note 9, at 238.

<sup>221</sup> See IBM Blogging Guidelines, *supra* note 218.

<sup>222</sup> *Id.*

<sup>223</sup> See Ostrander, *supra* note 9, at 238; *supra* Part I.B.

<sup>224</sup> See IBM Blogging Guidelines, *supra* note 218; Yahoo! Blogging Guidelines, *supra* note 217.

<sup>225</sup> See IBM Blogging Guidelines, *supra* note 218.

disclosure for the company, as well as disciplinary measures if employees do not comply.<sup>226</sup>

They may also discuss issues such as using the company logo or trademark, use of copyrighted information or other peoples work, and possible legal consequences of blogging outside of the employer-employee issues.<sup>227</sup>

The final aspects that many blogging guidelines seem to include are issues dealing with respect and not speaking badly of other employees.<sup>228</sup> Bloggers are supposed to think before they write something in the blog and to make contextual and coherent arguments.<sup>229</sup> Some companies even help bloggers by giving examples and tips on how to successfully blog and attract individual readers to the blog.<sup>230</sup> These companies are embracing blogging and societal changes as well as protecting themselves by creating implied contracts.<sup>231</sup>

Thus, a form of a bloggers' union could create model blogging guidelines and could help push for more companies to incorporate such guidelines into the information provided to their employees. This in itself could protect both groups because the information and expectations are clear. One individual recommends a Model Corporate Blogging Guideline, which can have sections added onto it dependant on the industry at hand.<sup>232</sup> This means that there are certain sections implicit to every set of guidelines and then extra sections can be added on to tailor them to the type of work environment they would be used for. The implicit sections include: definitions, guidelines to promote employee blogging, disclaimer, protection of confidential or proprietary information and trade secrets, copyright infringement, and defamation.<sup>233</sup> This is an

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<sup>226</sup> See IBM Blogging Guidelines, *supra* note 218; Yahoo! Blogging Guidelines, *supra* note 217.

<sup>227</sup> *Id.*

<sup>228</sup> *Id.*

<sup>229</sup> *Id.*

<sup>230</sup> *Id.*

<sup>231</sup> *Supra* notes 119-25 and accompanying text (discussing the how blogging guidelines could be considered implied contracts).

<sup>232</sup> See Ostrander, *supra* note 9, at 244-47.

<sup>233</sup> *Id.*

example of something a union could help implement, and one way to protect employees and embrace blogging.

## B. How Bloggers Could Help Labor Unions

The above section shows that some form of a union could help bloggers gain protection from losing their jobs, while still allowing certain freedom to write about the things they want. This may change the face of blogging in society, but it could be argued that the face of blogging is already changing, looking at the history of blogging and what it has now become.<sup>234</sup> However, a bloggers' union could have a second effect of helping change the face of labor unions.

As discussed above, union membership is at an all time low for private sector employees.<sup>235</sup> Further, while the NLRA was created during a time when the type of support given by the Act was much needed by employees, the Act has not changed in conjunction with changes in society.<sup>236</sup> This lack of change, plus the expense in unionizing as once done before,<sup>237</sup> show a need for change before unions become completely extinct.

Two authors recommend that unions need more people to join and need broader support from the public.<sup>238</sup> There are steps that can be taken to reach both of these lofty goals. At the time the authors wrote their article, almost 100 million private sector American employees had no union representation, but a survey from before that point in the mid-1990's stated that most workers want some sort of organization.<sup>239</sup> This number comprises a large group of untapped resources, a group approximately twelve times the size of private union membership at that

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<sup>234</sup> *Supra* Part I.A and accompanying text.

<sup>235</sup> *Supra* notes 65-66 and accompanying text.

<sup>236</sup> *Supra* Part II and accompanying text.

<sup>237</sup> *Supra* note 84 and accompanying text.

<sup>238</sup> Freeman & Rogers, *supra* note 86, at 3.

<sup>239</sup> *Id.*

time.<sup>240</sup> From this time forward, union membership has only decreased,<sup>241</sup> but it seems plausible to assume that worker attitudes about some form of organization, although perhaps not traditional unions, have not changed. Therefore, changes obviously need to be made to embrace the large amount of people who want representation not afforded by typical unions. Bloggers fall squarely into this group, both professional bloggers those who make their living doing something besides blogging.

One large area that can help reach and draw in more people, as well as lower the expense of creating union type organizations is use of the Internet.<sup>242</sup> Recently a semblance of a virtual union hall has been created on the Internet through blogging.<sup>243</sup> Through blogs employees can have the ability to develop strategies, debate and adopt actions, and conduct elections.<sup>244</sup> If unions will embrace the possibility of using the Internet through blogs, or other options such as websites or message boards, they can draw some of the millions of people who want some form of representation, perhaps a different kind than what used to be given by unions, and for some people, perhaps a better type.

Further, labor organizations can offer different protection than what the generic union protection originally offered. Specifically, one author recommends representation of members by helping them negotiate and enforce individual contracts, and in helping to promulgate and enforce both statutory and constitutional rights.<sup>245</sup> This use of individual contracts helps protect wider groups of people than the typical collective agreement that works better in standardized positions. Further, unions can represent workers' interests in debates on issues involving new

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<sup>240</sup> *Id.*

<sup>241</sup> *See supra* notes 65-66.

<sup>242</sup> *Supra* notes 91-95 and accompanying text.

<sup>243</sup> Gely & Bierman, *supra* note 21, at 302.

<sup>244</sup> *Id.* at 302-03.

<sup>245</sup> Dau Schmidt, *supra* note 65, at 919.

information technology,<sup>246</sup> such as the problems with bloggers discussed in this paper. This would change the law that protects bloggers and also advance technology in the workplace and beyond. The same author also believes that changes need to be made in the present NLRA election process, described as cumbersome, and that unions can try to gain leverage over employers to make these changes in private contracts.<sup>247</sup> These changes and negotiations that are outside the realm of what most unions presently accomplish would not only help bloggers, as described above, but would allow unions to finally grow and change with society.

The last step, beyond embracing the Internet and changing the type and subjects of negotiations, would be a change in how unions are organized as a whole. It has been estimated that employee organization is going to change from the traditional method of organizing within a particular craft or industry.<sup>248</sup> This is because employers have fewer boundaries with the use of new information technology.<sup>249</sup> Unions will have to follow and also lose their boundaries organizing along different lines, including multi-employer, occupational, professional, or national basis.<sup>250</sup> This will help employees exist in the new economy and gain continuity in benefits, training, and opportunities.<sup>251</sup> These types of changes have been seen in smaller unions,<sup>252</sup> but bigger changes need to be made to truly help the new employee.

Creating a bloggers' union through a well known, established union, such as the National Writers Union, could have a large impact on unionizing as a whole, and could effect large changes. The National Writers Union describes its membership as freelance and contract writers who include: journalists, book authors, business and technical writers, web content providers,

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<sup>246</sup> *Id.*

<sup>247</sup> *Id.* at 922.

<sup>248</sup> *Id.* at 925.

<sup>249</sup> *Id.*

<sup>250</sup> *Id.*

<sup>251</sup> *Id.*

<sup>252</sup> *Supra* notes 96-105 and accompanying text.

and poets.<sup>253</sup> This could easily include bloggers under the heading of web content providers, and would allow them to be part of a strong union right from the start. This concept is not far fetched considering that the United Kingdom's equivalent of the National Writers Union, the National Union of Journalists, recently allowed a blogger to become part of its group.<sup>254</sup> Therefore, this could be an easy step for both bloggers and labor unions to come together, and then more complicated changes can later be made in the unions' treatment of this group.

#### CONCLUSION

Both bloggers and labor unions are at a sort of impasse in their respective paths in today's society. These paths are intersecting at a place where perhaps few expected them to, but somewhere that could potentially help both groups. Bloggers and labor unions need to embrace changes to gain the full benefits from each other. However, if both groups can meet in the middle, labor unions will become a thing of the future, as opposed to a remnant of the past, and bloggers will progress forward with knowledge and protection to continue their respective place in society.

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<sup>253</sup> National Writers Union, <http://www.nwu.org/nwu/> (last visited May 4, 2008).

<sup>254</sup> Leah McBride Mensching, First Blogger Joins National Union of Journalists, Shaping the Future of the Newspaper Blog, <http://www.sfnblog.com/index.php/2007/11/16/868-first-blogger-joins-national-union-of-journalists> (last visited May 4, 2008).