Jackson Kelly PLLC

# Interference Online: The Perils of Social Media and Section 105(c) of the Mine Act

Presented to:
Northeast Mine Safety & Health Conference
April 4, 2017

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# Social Media Statistics:



- Percentage of online adult Americans* who use:
  - Facebook – 79%
  - Instagram – 32%
  - Pinterest – 31%
  - LinkedIn – 29%
  - Twitter – 24%

*86% of Americans use the internet

Source: Pew Research Center, “Social Media Update 2016” (Nov. 11, 2016).

# Social Media Statistics:



- Daily time spent on social networking by internet users worldwide since 2012:
  - 2012: 96 minutes
  - 2013: 100 minutes
  - 2014: 103 minutes
  - 2015: 109 minutes
  - 2016: 118 minutes

Source: https://www.statista.com/statistics/433871/daily-social-media-usage-worldwide.

According to a 2014 survey, “Social Media in the Workplace” by Proskauer Rose LLP:

- Over 70% of employer survey respondents had disciplined employees for social media misuse.
- 80% had social media policies
  - Over half of those policies address use in and outside of the workplace.

# Is this an MSHA issue?

# Scenario



- MSHA receives 103(g) hazard complaint.
- MSHA investigates, finds no violation and issues negative findings
- Supervisor, who is Facebook friends with mine employees, posts on Facebook: “Another hazard complaint…no violations found. What a waste of time!”

# Is this an MSHA issue?

# Interference under Section 105(c)

# §105(c)(1) of the Mine Act



No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against **or otherwise interfere** with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this Act because such miner, representative of miners or applicant for employment has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine, or because such miner, representative of miners or

# §105(c)(1) of the Mine Act



applicant for employment is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101 or because such miner, representative of miners or applicant for employment has instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding, or because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this Act.

30 U.S.C. §815(c)(1)

# MSHA's Proposed Test



(1) A person's actions can be reasonably viewed, from the perspective of members of the protected class and under the totality of the circumstances, as tending to interfere with the exercise of protected rights; and

(2) The person fails to justify the action with a legitimate and substantial reason whose importance outweighs the harm caused to the exercise of protected rights.

# Case law



UMWA on behalf of Franks & Hoy v. Emerald Coal Resources, LP, 38 FMSHRC 799 (ALJ Miller April 2016)

- Involved questioning of witnesses during company investigation following MSHA investigation into complaint.
- ALJ applied MSHA's proposed test for interference, noting that intent of the operator was not an element of that test.
- ALJ found interference when the company insisted that the two miners provide information about a possible safety violation and suspended them when they did not.
- Case settled after ALJ decision.

# Case law



Secretary on behalf of Greathouse v. Monongalia County Coal Co., et al., 38 FMSHRC 941 (ALJ Miller May 2016)

- Involved "Safety and Production Bonus Plans" at six underground coal mines.
- Disqualification from bonus for crew if incapacitating lost time accident, S&S citation or withdrawal order.
- ALJ applied MSHA's proposed test for interference.
- ALJ found that the policy interfered with miners' rights by discouraging safety reporting and time spent on safety measures.
- ALJ ordered plan to be rescinded, posting of notice and penalty of $150,000
- Decision appealed.

# Case law



Secretary on behalf of Pepin v. Empire Iron Mining Partnership, 38 FMSHRC 1435 (ALJ Barbour June 2016)

- Involved confrontation between manager and hourly employee after safety cards and 103(g) complaint were filed.
- ALJ found interference, ordered an $8,000 penalty and a posted notice for a period of one year.
- ALJ did not apply the Secretary's proposed test, but instead:
  1. Respondent's actions can be viewed, from the perspective of members of the protected class, as tending to interfere with the exercise of protected rights;
  2. Such actions were motivated by the exercise of protected rights.
  3. If the foregoing is established, the operator may defend by showing a business justification that outweighs the harms caused.
- Case was not appealed to the Commission.

# Case law



Secretary on behalf of McGary et al. v. Marshall County Coal Co. et al., 38 FMSHRC 2006 (Rev. Comm. 2016)

- Involved CEO's "awareness meetings" with work force, specifically requesting employees report safety concerns to MSHA instead of filing 103(g) hazard complaints.
- ALJ applied the Secretary's proposed test and found interference with employee rights to make anonymous complaints.
- ALJ ordered $150,000 penalty and ordered CEO to read statement.
- Commission affirmed finding, but did not adopt a test for interference.
- Case remanded for penalty issue, back on appeal.
- Can the appropriate test be considered?

# Competing Tests



## Secretary's Test

1. A person's actions can be reasonably viewed from the perspective of members of the protected class and under the totality of the circumstances, as tending to interfere with the exercise of protected rights; and
2. The person fails to justify the action with a legitimate and substantial reason whose importance outweighs the harm caused to the exercise of protected rights.

## Pepin Test

1. Respondent's actions can be viewed, from the perspective of members of the protected class, as tending to interfere with the exercise of protected rights;
2. Such actions were motivated by the exercise of protected rights.
3. If the foregoing is established, the operator may defend by showing a business justification that outweighs the harms caused.

# What does this mean for social media?



- "[T]here is no clear legal definition of what constitutes 'online harassment'… [or] who should be responsible for monitoring bad behavior online."

  Pew Research Center, Online Harassment (October 22, 2014) at 10.

- Pew Research Center considered six incidents to constitutes online harassment:
  - Name-calling
  - Purposeful embarrassment
  - Physical threats
  - Stalking
  - Harassment over a sustained period of time.
  - Sexual harassment.

# Statistics:



- 40% of adult internet users have personally experienced some variety of online harassment:
  - Name-calling: 27%
  - Purposeful embarrassment: 22%
  - Physical threats: 8%
  - Stalking: 8%
  - Harassment over a sustained period of time: 7%
  - Sexual harassment: 6%

Pew Research Center, Online Harassment (October 22, 2014) at 22.

# So, what can you do about it?

# Is it as simple as banning all social media discussions about work… NO!

# National Labor Relations Act ("NLRA")



- Section 7 of the NLRA:

  Employees have the right to self-organize, 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 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

# NLRA



- Section 7 protections have been held to apply to certain employee usage of social media.

# NLRA



Two Areas of Concern:

1. Employer disciplines employee because of employee's conduct on social media.

2. Employer social media policy.

# NLRA



A social media policy could be found to run afoul of the NLRA if it is overboard such that employees could reasonably construe its restrictive language to prohibit Section 7 activity.

See, e.g., Lutheran Heritage Village-Livonia, 343 NLRB 646 (2004)

# NLRA



- NLRB's two step inquiry:
  1. If the rule explicitly restricts an employee's Section 7 rights, it is unlawful.
  2. If the rule does not explicitly limit Section 7 activities, it is unlawful if:
     - Employees would reasonably construe the language to prohibit Section 7 activities.
     - The rule was created in response to union activity.
     - The rule has been applied to restrict the exercise of Section 7 rights.

# Best Practices for Operators



- Know the law – HR professionals, safety management and front line management.
- Train management specifically on issue of interference.
- Ensure that policies and practices related to social media are sufficiently specific so as not to run afoul of the NLRA.
- Educate and ensure miners that they are encouraged and supported when addressing safety concerns or asserting rights under the Mine Act.
- Have a plan for what to do if a complaint is filed.

For more information on these and other occupational safety and health topics, please visit:

http://safety-health.jacksonkelly.com/