# "DON'T BE EVIL": COLLECTIVE ACTION AND EMPLOYEE PROSOCIAL ACTIVISM

Kelley Changfong-Hagen*

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* J.D. Candidate 2021, Columbia Law School; B.A. 2015, Gordon College. The author would like to thank Professor Mark Barenberg for his invaluable guidance throughout the writing process, the wonderful staff of the *Columbia Human Rights Law Review* for their thoughtful feedback and editorial assistance, and Henry Hagen for his support and partnership in everything.

## INTRODUCTION

In November and December 2019, Google fired five activist employees within a three-week period.[1] Google management's actions followed more than a year of growing unrest among its employees around the world. Throughout 2018 and 2019, Google employees created petitions and organized both national and global walkouts of the company to protest various activities—including Google's contracts with a number of U.S. and foreign government agencies implementing controversial policies, as well as the company's response to sexual harassment and assault claims and the multi-million dollar exit packages it granted to executives who had been credibly accused of these claims.[2]

Recent strikes, petitions, walkouts, and unionization[3] at major technology companies such as Google illustrate the growing demands from employees for heightened recognition of ethical standards in business practices by employers.[4] This growing interest from workers as to the social effects of their companies' activities has developed in parallel to a

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1. Joseph Menn, *Google Fires Fifth Activist Employee in Three Weeks; Complaint Filed*, REUTERS (Dec. 17, 2019), https://www.reuters.com/article/uk-google-unions/google-fires-fifth-activist-employee-in-three-weeks-complaint-filed-idUKKBN1YL1LL [https://perma.cc/PX3S-D6BG].

2. Scott Shane & Daisuke Wakabayashi, *'The Business of War': Google Employees Protest Work for the Pentagon*, N.Y. TIMES (Apr. 4, 2018), https://www.nytimes.com/2018/04/04/technology/google-letter-ceo-pentagon-project.html (on file with the *Columbia Human Rights Law Review*) (describing the letter signed by thousands of Google employees protesting the company's role in a program to develop military surveillance and warfare technology); Kate Conger & Daisuke Wakabayashi, *Google Employees Protest Secret Work on Censored Search Engine for China*, N.Y. TIMES (Aug. 16, 2018), https://www.nytimes.com/2018/08/16/technology/google-employees-protest-search-censored-china.html (on file with the *Columbia Human Rights Law Review*) (detailing a letter signed by hundreds of Google employees demanding transparency to understand and make ethically-informed decisions about their work in response to news reports divulging that Google was developing a censored search engine for China under the name Project Dragonfly); Daisuke Wakabayashi et al., *Google Walkout: Employees Stage Protest Over Handling of Sexual Harassment*, N.Y. TIMES (Nov. 1, 2018), https://www.nytimes.com/2018/11/01/technology/google-walkout-sexual-harassment.html (on file with the *Columbia Human Rights Law Review*) (reporting on the global Google employee walkouts prompted by news reports that Google had paid male former executives accused of misconduct millions of dollars in exit packages, even while remaining silent about the complaints).

3. *See* discussion *infra* Section IV.C.

4. Nitasha Tiku, *Three Years of Misery Inside Google, the Happiest Company in Tech*, WIRED (Aug. 13, 2019), https://www.wired.com/story/inside-google-three-years-misery-happiest-company-tech/ [https://perma.cc/7FM2-US3R].

growing body of social science literature arguing that employees increasingly seek meaning and moral value, beyond merely a steady paycheck, from their places of work.[5] Additionally, economists Edward Leamer and Rodrigo Fuentes posit that the "innovations in personal computing and internet-based communications," as well as the shift in the economy from manufacturing to "neurofacturing," have led to weekly work hours well in excess of the conventional forty hours.[6] This phenomenon is particularly exacerbated in technology companies with sprawling campuses resembling "company towns," where employees' personal and work lives are increasingly commingled.[7] The upsurge in hours worked combined with a broader vision for purposeful work by employees evinces the enlarged role that work plays in an individual's life. As employees increasingly use collective action to promote prosocial activism[8] from within their organizations, the question arises whether these employees are protected or should be protected from retaliatory responses by employers under federal labor law.

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5. *See* Amy Wrzesniewski et al., *Interpersonal Sensemaking and the Meaning of Work*, 25 RSCH. IN ORG. BEHAV. 93, 94–96 (2003).

6. J. Rodrigo Fuentes & Edward E. Leamer, *Effort: The Unrecognized Contributor to U.S. Income Inequality* 3 (Nat'l Bureau of Econ. Rsch. Working Paper No. 2642, 2019) (on file with the *Columbia Human Rights Law Review*). The "neurofacturing" that Fuentes and Leamer describe typically refers to intellectually intensive white-collar labor, often connected to the internet. Hours worked have been on an upward trend for decades, and for Americans with bachelor's and advanced degrees, has increased nearly 10% since 1980. Derek Thompson, *Why White-Collar Workers Spend All Day at the Office*, THE ATLANTIC (Dec. 4, 2019), https://www.theatlantic.com/ideas/archive/2019/12/how-internet-enables-workaholism/602917/ (on file with the *Columbia Human Rights Law Review*). For a very brief history of the 40-hour work week in the United States, see Marguerite Ward & Shana Lebowitz, *A History of How the 40-Hour Workweek Became the Norm in America*, BUS. INSIDER (June 12, 2020), https://www.businessinsider.com/history-of-the-40-hour-workweek-2015-10 [https://perma.cc/5KTU-367Z].

7. David Streitfield, *Welcome to Zucktown. Where Everything Is Just Zucky*, N.Y. TIMES (Mar. 21, 2018), https://www.nytimes.com/2018/03/21/technology/facebook-zucktown-willow-village.html (on file with the *Columbia Human Rights Law Review*); *see also* Leanna Garfield, *Facebook and Amazon Are So Big They're Creating Their Own Company Towns—Here's the 200-Year Evolution*, BUS. INSIDER (Mar. 26, 2018), https://www.businessinsider.com/company-town-history-facebook-2017-9 [https://perma.cc/WU6D-8EH5] (describing Facebook and Amazon 's introduction of modern company towns, with "campuses" so large that they functionally serve as independent towns).

8. This Note uses the term "prosocial activism" to denote protest or advocacy activity directed towards issues affecting society more broadly, and/or issues outside of the employee-specific context.

The National Labor Relations Act (NLRA), which created the National Labor Relations Board (NLRB or Board), was enacted in 1935 to "protect the rights of employees and employers, to encourage collective bargaining, and to curtail certain private sector labor and management practices, which can harm the general welfare of workers, businesses and the U.S. economy."[9] NLRA protections for strikes and other similar collective action primarily fall under Section 7, which shields from retaliation employees' "concerted action . . . for mutual aid or protection."[10] The NLRA has long been interpreted as protecting collective bargaining activities to achieve classic labor objectives related to workers' terms and conditions of employment, such as wages and hours.[11]

The phenomenon of a worker uprising in the tech industry and other "white-collar" workplaces previously insulated from collective action efforts or unionization[12] exemplifies the discord between modern workers' conception of their terms and conditions of employment and the now-antiquated conception of employment underpinning current NLRA Section 7 protections. This discord calls for realignment between the reality of workers' conceptions of their employment conditions and the current law's treatment of that relationship. However, any proposed changes to the way that the NLRB interprets its organic statute must reckon with the inherently partisan nature of the Board, which generally tends to rule in favor of management in Republican administrations and in favor of labor unions and employees in Democratic administrations, leading to long-term inconsistency in decision-making.[13]

This Note discusses how Section 7 of the NLRA is currently understood to protect employee activism and how it could, and should, be interpreted in light of the increase in employee activism protesting matters outside of what have conventionally been considered the terms and conditions of employment. Part I provides an overview of the growing incidence of employee activism in major companies in the technology sector. Part II examines the research on the current conceptions of the role

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9. National Labor Relations Act, 29 U.S.C. §§ 151–69.

10. 29 U.S.C. § 157.

11. 29 U.S.C. § 158(d).

12. Kate Conger & Noam Scheiber, *Employee Activism Is Alive in Tech. It Stops Short of Organizing Unions.*, N.Y. TIMES (July 8, 2019), https://www.nytimes.com/2019/07/08/technology/tech-companies-union-organizing.html (on file with the *Columbia Human Rights Law Review*).

13. Amy Semet, *Political Decision-Making at the National Labor Relations Board: An Empirical Examination of the Board's Unfair Labor Practice Decisions Through the Clinton and Bush II Years*, 37 BERKELEY J. EMP. & LAB. L. 223, 253 (2016).

of work in an individual's life, focusing in particular on the studies on meaningfulness in work as an explanation for the rise of employee activism outside of the conventional terms and conditions of employment. Part III explores the current state of labor law protections for employee action. Part IV focuses on potential solutions, including a consideration of statutory adoption of a reading of "concerted activity for mutual aid or protection" that would encompass employee prosocial activism, NLRB rulemaking to that effect, and union organizing contemplating employee prosocial activism.

## I. NEW EMPLOYEE ACTIVISM IN THE TECHNOLOGY SECTOR

This Part discusses a few of the companies facing increased employee activism, noting that the rise is occurring in so-called "white collar" industries that have not traditionally faced broad unionization or collective action due to their relatively high levels of compensation.[14] The

14. While this Note focuses primarily on a few of the largest technology companies, this phenomenon is much more widespread. For example, employees at Salesforce in 2018 followed the actions of those at Microsoft, Amazon, and Google in June 2018—over 650 employees signed a petition asking Salesforce Chair and CEO Marc Benioff to end a contract with Customs and Border Protection (CBP). In response, Benioff defended the decision to renew the contract. *See* Caroline O'Donovan, *Employees of Another Major Tech Company Are Petitioning Government Contracts*, BUZZFEED NEWS (June 26, 2018), https://www.buzzfeednews.com/article/carolineodonovan/salesforce-employees-push-back-against-company-contract [https://perma.cc/NT6M-U92F]; Shirin Ghaffary, *Marc Benioff Defends Salesforce's Contract with Customs and Border Protection*, VOX (Nov. 18, 2018), https://www.vox.com/2018/11/18/18097398/salesforce-contract-customs-border-protection-marc-benioff-immigration [https://perma.cc/B7F6-PNZV] (reporting on Salesforce's CEO's defense of the company's CBP contract). Additionally, in June 2019, employees at Wayfair, an online home furnishings company, walked out of its Boston headquarters to protest a contract the company had negotiated to sell $200,000 worth of furniture to a government contractor operating a migrant detention center in Carrizo Springs, Texas. *See* Kate Taylor, *Wayfair Furniture Employees Walked out Over Sales to Migrant Facilities*, N.Y. TIMES (June 25, 2019), https://www.nytimes.com/2019/06/25/us/wayfair-walkout.html (on file with the *Columbia Human Rights Law Review*); Sapna Maheshwari & Emily Flitter, *As Wayfair Worker Protest Migrant Detention, the Specter of a Consumer Boycott Rises*, N.Y. TIMES (June 26, 2019), https://www.nytimes.com/2019/06/26/business/wayfair-walkout.html (on file with the *Columbia Human Rights Law Review*) (discussing the relationship between the Wayfair employee protests and recent consumer boycotts). In July 2019, employees at Ogilvy, the global advertising agency, also pushed back against their CEO, John Seifert, in a letter responding to Ogilvy's $12 million contract with CBP. While the company seemed open to discussion about ethical concerns raised by potential clients, the employees who leaked the internal letter and participated in the ensuing meetings were not willing to be named for fear of retribution by management. *See* Lam

protests at Google are only a single example, albeit a high-profile one, of a broader increase in employee activism around the social impact of a company's work, in particular within the technology industry.[15]

A. Google

In April 2018, over 3,100 Google employees signed a letter protesting the company's work with the Pentagon on Project Maven, wherein Google would develop artificial intelligence to interpret video imagery to improve drone strike targeting.[16] Google announced in June 2018 that it would not renew its contract with the military after it was set to expire in March 2019.[17] However, come March 2019, Google announced that it would transition its work to an unnamed technology company that would be supported by "off-the-shelf Google Cloud Platform (basic comput[ing] service, rather than Cloud AI or other Cloud Services) to support some workloads," without clarification on how Google would be

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Thuy Vo, *A Top Ad Agency's Employees Are Angry Their Firm Does Work for Trump's Border Patrol*, BUZZFEED NEWS (July 18, 2019), https://www.buzzfeednews.com/article/lamvo/ogilvy-advertising-employees-angry-customs-border-contract [perma.cc/6V6E-BDV4]; Lam Thuy Vo & Nancy Vu, *This Transcript Shows How Trump's Border Camps Have Thrown a Top Advertising Firm into Internal Crisis*, BUZZFEED NEWS (July 21, 2019), https://www.buzzfeednews.com/article/lamvo/ogilvy-transcript-meeting-customs-border-seifert-immigration [https://perma.cc/6EKX-RDC9] (transcribing the meeting held between Ogilvy's CEO and employees to discuss the company's work with CBP). Lastly, in September 2019, the software company Chef announced that it would not renew contracts with Immigration and Customs Enforcement (ICE) and CBP, after an employee deleted open-source projects in protest. Klint Finley, *Software Company Chef Won't Renew ICE Contact* [sic] *After All*, WIRED (Sept. 23, 2019), https://www.wired.com/story/software-company-chef-wont-renew-ice-contact/ [https://perma.cc/L77Y-4SJR].

15. *See* Conger & Scheiber, *supra* note 12; Rick Paulas, *A New Kind of Labor Movement in Silicon Valley*, THE ATLANTIC (Sept. 4, 2018), https://www.theatlantic.com/technology/archive/2018/09/tech-labor-movement/567808/ [https://perma.cc/A6LZ-ZDGU] (discussing the prospect of unionization and labor organizing in the technology industry).

16. *See* Shane & Wakabayashi, *supra* note 2.

17. Drew Harwell, *Google to Drop Pentagon AI Contract After Employee Objections to the 'Business of War'*, WASH. POST (June 1, 2018), https://www.washingtonpost.com/news/the-switch/wp/2018/06/01/google-to-drop-pentagon-ai-contract-after-employees-called-it-the-business-of-war/ (on file with the *Columbia Human Rights Law Review*).

compensated for use of its cloud servers or the specific Project Maven workloads that would continue to be supported.[18]

Similarly, in August 2018, around 1,400 Google employees signed on to a letter demanding transparency around the ethical consequences of their work in response to leaked information revealing that Google was developing a search engine for China that would conform to the Chinese government's strict censorship rules.[19] In the letter, employees discussed their ethical alarm over Google's willingness to abide by China's censorship requirements and their concern that they did "not have the information required to make ethically-informed decisions about [their] work, [their] projects, and [their] employment."[20]

In November 2018, Google employees also organized a twenty thousand person walkout from the company to protest its handling of sexual harassment, following a *New York Times* investigation revealing that Google had paid millions of dollars in exit packages to male executives following credible accusations of sexual harassment.[21] Employees carried signs with messages such as, "Don't be evil," which was at one time the company's motto, and "TIME'S UP," a reference to the Hollywood movement against sexual harassment.[22] In response to the employee walkout, Google announced that it would end its practice of forced arbitration for sexual

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18. Lee Fang, *Google Hedges on Promise to End Controversial Involvement in Military Drone Contract*, THE INTERCEPT (Mar. 1, 2019), https://theintercept.com/2019/03/01/google-project-maven-contract/ [perma.cc/4EGT-24Z3].

19. *See* Conger & Wakabayashi, *supra* note 2; *see also* Li Yuan & Daisuke Wakabayashi, *Google, Seeking a Return to China, Is Said to Be Building a Censored Search Engine*, N.Y. TIMES (Aug. 1, 2018), https://www.nytimes.com/2018/08/01/technology/china-google-censored-search-engine.html (on file with the *Columbia Human Rights Law Review*) (reporting on Google's plans for a censored search engine, separately from Google employees' response).

20. Yuan & Wakabayashi, *supra* note 19.

21. Wakabayashi et al., *supra* note 2; *see also* Daisuke Wakabayashi & Kate Benner, *How Google Protected Andy Rubin, the 'Father of Android'*, N.Y. TIMES (Oct. 25, 2018), https://www.nytimes.com/2018/10/25/technology/google-sexual-harassment-andy-rubin.html (on file with the *Columbia Human Rights Law Review*) (describing Google management's response to sexual harassment claims against executives, which largely consisted of public silence about misconduct, and offers of discreet and high-paying exit agreements to the accused executives).

22. Daisuke Wakabayashi, *Google Ends Forced Arbitration for All Employee Disputes*, N.Y. TIMES (Feb. 21, 2019), https://www.nytimes.com/2019/02/21/technology/google-forced-arbitration.html (on file with the *Columbia Human Rights Law Review*).

harassment and assault claims.[23] That same month, more than one thousand Google employees signed a public letter calling on the company to commit to a climate plan that would include canceling cloud computing contracts with the fossil fuel industry and halting donations to climate change deniers.[24]

In April 2019, two of the Google employees who helped to organize the walkout shared a letter internally, claiming that they had faced retaliation from Google for their organizing efforts.[25] One of the employees, Claire Stapleton, a marketing manager at YouTube, was demoted and instructed to take medical leave, although she had no illness.[26] The other employee, Meredith Whittaker, an artificial intelligence researcher, said that she had been "informed [her] role would be changed dramatically" and was told that in order to remain at the company she would be required to abandon her work on AI ethics at the AI Now Institute at NYU.[27] Finally, in August 2019, Google employees circulated a petition with over five hundred signatures from employees asking Google to pledge not to work with U.S. government agencies such as Immigration and Customs Enforcement (ICE) and Customs and Border Protection (CBP), which at the time enforced controversial immigration policies such as family separation and child detainment.[28]

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23. Kate Conger & Daisuke Wakabayashi, *Google Overhauls Sexual Misconduct Policy After Employee Walkout*, N.Y. TIMES (Nov. 8, 2018), https://www.nytimes.com/2018/11/08/technology/google-arbitration-sexual-harassment.html (on file with the *Columbia Human Rights Law Review*). The policy ending forced arbitration (for any type of dispute, not only sexual harassment or assault claims) took effect globally on March 21, 2019 and applied to all current and future employees. The policy did not apply to former employees with unresolved disputes, but current Google employees with open disputes would not be forced into arbitration. Wakabayashi, *supra* note 22.

24. Julia Carrie Wong, *Google Workers Call on Company to Adopt Aggressive Climate Plan*, THE GUARDIAN (Nov. 4, 2019), https://www.theguardian.com/technology/2019/nov/04/google-workers-climate-plan-letter [https://perma.cc/P6AX-9TLV].

25. Kate Conger & Daisuke Wakabayashi, *Google Employees Say They Faced Retaliation After Organizing Walkout*, N.Y. TIMES (Apr. 22, 2019), https://www.nytimes.com/2019/04/22/technology/google-walkout-employees-retaliation.html (on file with the *Columbia Human Rights Law Review*).

26. *Id.*

27. *Id.*

28. Shirin Ghaffary, *Google Employees Are Demanding an End to the Company's Work with Agencies Like CBP and ICE*, VOX (Aug. 14, 2019), https://www.vox.com/2019/8/14/20805562/human-rights-concerns-google-employees-petition-cbp-ice (on file with the *Columbia Human Rights Law Review*); *see also* No GCP for CBP, *Google Must Stand Against Human Rights Abuses: #NoGCPforCBP*, MEDIUM (Aug. 14, 2019), https://medium.com/@no.gcp.for.cbp/google-must-stand-against-human-rights-abuses-

In November 2019, Google hired an anti-union consulting firm to advise its management in dealing with its worker unrest, prompting concerns that Google was seeking to pre-empt any efforts at unionization.[29] That same month, shortly before the Thanksgiving holiday, Google suspended one employee and fired four employees, ostensibly for allegedly violating its data security policies and code of conduct.[30] The four terminated employees responded with a statement that Google fired them in order to suppress a growing movement among the company's employees questioning Google management on various issues, including pay disparities between contract and full-time employees and Google's controversial projects with U.S. government agencies and foreign governments.[31] A few weeks later, Google fired Kathryn Spiers, a security engineer who had used an internal alert system to remind colleagues of their right to organize.[32] The Communications Workers of America union filed charges on behalf of the five terminated employees with the NLRB.[33]

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nogcpforcbp-88c60e1fc35e [https://perma.cc/8ZW8-WPF5] (articulating the employees' concerns).

29. Noam Scheiber & Daisuke Wakabayashi, *Google Hires Firm Known for Anti-Union Efforts*, N.Y. TIMES (Nov. 20, 2019), https://www.nytimes.com/2019/11/20/technology/Google-union-consultant.html (on file with the *Columbia Human Rights Law Review*).

30. Shirin Ghaffary, *Former Google Employees Who Say They Were Fired for Organizing Are Filing Labor Charges Against the Company*, VOX (Dec. 3, 2019), https://www.vox.com/2019/12/3/20992786/google-workers-fired-nlrb-laurence-berland-rebecca-rivers-sophie-waldman-paul-duke (on file with the *Columbia Human Rights Law Review*); Ryan Gallagher, *One Google Staffer Fired, Two Others Put on Leave Amid Tensions*, BLOOMBERG (Nov. 12, 2019), https://www.bloomberg.com/news/articles/2019-11-12/one-google-staffer-fired-two-others-put-on-leave-amid-tensions [https://perma.cc/NA9S-CWYM] (reporting on Google management actions against employees engaging in labor-related activism); *see also* Menn, *supra* note 1 (noting that Google employee Kathryn Spiers was suspended during the week of Thanksgiving on the same day that four of her colleagues were fired).

31. Ghaffary, *supra* note 28; Google Walkout for Real Change, *Google Fired Us for Organizing. We're Fighting Back*, MEDIUM (Dec. 3, 2019), https://googlewalkout.medium.com/google-fired-us-for-organizing-were-fighting-back-d0daa8113aed [https://perma.cc/HEG6-MC9K] (the letter written by the four software engineers terminated following their employee activism). For an in-depth profile on the employee activists who were fired or otherwise left Google, see Noam Scheiber & Kate Conger, *The Great Google Revolt*, N.Y. TIMES MAG. (Feb. 18, 2020), https://www.nytimes.com/interactive/2020/02/18/magazine/google-revolt.html (on file with the *Columbia Human Rights Law Review*).

32. *See* Menn, *supra* note 1.

33. *See* Menn, *supra* note 1; Paresh Dave, *Labor Group Accuses Google of Firing 4 to Deter Workers from Union Activities*, REUTERS (Dec. 5, 2019), https://www.reuters.com/

On December 2, 2020, the agency issued a consolidated complaint and notice of hearing as to two of those former employees, Kathryn Spiers and Laurence Berland, following its investigation, contending that Google engaged in unfair labor practices in order to discourage employees from participating in protected concerted activities, including digitally surveilling its employees, promulgating digital calendar access restrictions, threatening reprisal, and terminating employees.[34] The case is set to be heard before an Administrative Law Judge on April 12, 2021.[35]

B. Microsoft

In June 2018, more than one hundred Microsoft employees protested the company's $19.4 million contract to develop data processing and artificial intelligence for ICE by signing onto an open letter posted to Microsoft's internal message board.[36] In response, Microsoft issued a

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article/google-unions/labor-group-accuses-google-of-firing-4-to-deter-workers-from-union-activities-idUSL1N28G01S [https://perma.cc/PFH8-38JZ].

34. Jacob Rosenberg, *Google Interfered With Workers' Labor Organizing, According to the NLRB*, MOTHER JONES (Dec. 3, 2020), https://www.motherjones.com/politics/2020/12/google-nlrb-labor-organizing/ (on file with the *Columbia Human Rights Law Review*); Order Consolidating, Consolidated Complaint and Notice of Hearing at 5–8, Google, LLC and Alphabet Inc., a single employer, N.L.R.B. Cases No. 20-CA-252802 et al., available at https://www.documentcloud.org/documents/20419300-cpt20-ca-252802ccnohdocx-redacted [https://perma.cc/5AAE-KN5F].

35. *See* Rosenberg, *supra* note 34.

36. *See* Sheera Frenkel, *Microsoft Employees Protest Work with ICE, as Tech Industry Mobilizes over Immigration*, N.Y. TIMES (June 19, 2018), https://www.nytimes.com/2018/06/19/technology/tech-companies-immigration-border.html (on file with the *Columbia Human Rights Law Review*); Tom Keane, *Federal Agencies Continue to Advance Capabilities with Azure Government*, MICROSOFT: AZURE GOV'T BLOG (Jan. 24, 2018), https://devblogs.microsoft.com/azuregov/federal-agencies-continue-to-advance-capabilities-with-azure-government/ [https://perma.cc/MD97-V3YE] (describing Microsoft's Azure cloud computing platform's work for ICE and the Department of Defense). Relatedly, in early October 2019, employees at GitHub, a software development platform that Microsoft acquired in June 2018, sent a letter to GitHub's chief executive asking the company to end its own contract with ICE. GitHub had been in contract with ICE since April 2016 under an approximately $200,000 license agreement to use GitHub servers for software development. Several employees had met with company leadership from July 2019 through September 2019, before the widespread sharing of the letter, to oppose the ICE contract as the time came for the contract to be renewed. Following those meetings, GitHub's management declared that GitHub would make a $500,000 donation to nonprofit groups supporting immigrant communities targeted by the Trump administration, but would renew its contract with ICE because it could not be held responsible for how its customers use its products and services. In response, more than 150 of the roughly 1,300 employees at GitHub signed

statement noting its opposition to the Trump administration's policy of separating migrant children from their parents, but stopped short of agreeing to end its contracts with ICE.[37] Employees followed this letter with a petition in July, which included more than 300,000 signatures, including those of five hundred Microsoft employees.[38]

In October 2018, Microsoft employees issued another open letter, this time asking the company to refrain from bidding on the Joint Enterprise Defense Infrastructure (JEDI) contract, a $10 billion project to build cloud services for the Department of Defense.[39] In response to the employees' letter, Microsoft president and chief legal officer Brad Smith wrote in a blog post that while the company appreciated the "important new ethical and policy issues that artificial intelligence is creating for weapons and warfare," Microsoft would continue to engage with the U.S.

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onto the letter calling for stronger action within the first hour, including one of the company's own vice presidents. GitHub continues to contract with ICE. *See* Nitasha Tiku, *Employees Ask GitHub to Cancel ICE Contract: 'We Cannot Offset Human Lives with Money'*, WASH. POST (Oct. 9, 2019), https://www.washingtonpost.com/technology/2019/10/09/employees-ask-github-cancel-ice-contract-we-cannot-offset-human-lives-with-money/ (on file with the *Columbia Human Rights Law Review*); Nat Friedman, *GitHub and U.S. Government Developers*, GITHUB BLOG (Oct. 9, 2019), https://github.blog/2019-10-09-github-and-us-government-developers/ [https://perma.cc/ZT7G-28GU] (displaying GitHub leadership's response to the employee letter); Rosalie Chan, *The Microsoft-Owned GitHub Is Under Pressure for Its Work with ICE, as Employees Resign and Activists Protest Its Biggest Event of the Year*, BUS. INSIDER (Nov. 13, 2019), https://www.businessinsider.com/github-employees-ice-contracts-protest-microsoft-2019-11 (on file with the *Columbia Human Rights Law Review*) (reporting on employee resignations in protest and protest activity in response to GitHub's contracts with ICE); Sidney Fussell, *The Schism at the Heart of the Open-Source Movement*, THE ATLANTIC (Jan. 3, 2020), https://www.theatlantic.com/technology/archive/2020/01/ice-contract-github-sparks-developer-protests/604339/ (on file with the *Columbia Human Rights Law Review*) (describing developer protests in response to news reports that the open-source company had contracted with ICE, and discussing the difficulty in restricting the use of open-source developed code).

37. Yoree Koh, *Microsoft Distances ICE Contract From Family Separations as It Denounces Policy*, WALL ST. J. (June 20, 2018), https://www.wsj.com/articles/microsoft-distances-ice-contract-from-family-separations-as-it-denounces-policy-1529508112 (on file with the *Columbia Human Rights Law Review*).

38. Sheera Frenkel, *Microsoft Employees Question C.E.O. Over Company's Contract with ICE*, N.Y. TIMES (July 26, 2018), https://www.nytimes.com/2018/07/26/technology/microsoft-ice-immigration.html (on file with the *Columbia Human Rights Law Review*).

39. Employees of Microsoft, *An Open Letter to Microsoft: Don't Bid on the U.S. Military's Project JEDI*, MEDIUM (Oct. 12, 2018), https://medium.com/s/story/an-open-letter-to-microsoft-dont-bid-on-the-us-military-s-project-jedi-7279338b7132 [https://perma.cc/7YNL-N3G2].

military.[40] The Pentagon awarded Microsoft the JEDI contract in October 2019.[41] In February 2019, over one hundred Microsoft workers signed yet another letter protesting the company's $480 million contract to provide the U.S. Army with augmented-reality headsets to "increase lethality" on the battlefield by "enhancing the ability to detect, decide and engage before the enemy."[42] Central to the employees' concerns was the inability of workers to be fully informed of the use of their work, which prevented them from requesting to be removed from a project for ethical reasons.[43] In response, a Microsoft spokesperson referred back to Brad Smith's October 2018 blog post, reaffirming the company's commitment to continue its Department of Defense contracts.[44]

### C. Amazon

In June 2018, Amazon employees joined civil rights groups and investors in protesting the company's sale of a facial recognition technology, called Amazon Web Services Rekognition, to law enforcement agencies.[45] More than five hundred employees addressed a letter to Jeff Bezos, Amazon's chief executive, calling for the company to cease its sale of facial recognition software to law enforcement, citing concerns about mass surveillance, the militarization of the police, the increased targeting of Black

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40. Brad Smith, *Technology and the U.S. Military*, MICROSOFT ON THE ISSUES (Oct. 26, 2018), https://blogs.microsoft.com/on-the-issues/2018/10/26/technology-and-the-us-military/ [https://perma.cc/34PV-XTB7]. Brad Smith, in September 2019 during a book promotion event, also mentioned that while Microsoft would not "turn off the technology," it would lobby or litigate in order to challenge controversial policies. Monica Nickelsburg, *Why Microsoft Won't Unplug Government Agencies Despite Opposition to Trump Policies*, GEEKWIRE (Sept. 30, 2019), https://www.geekwire.com/2019/microsoft-wont-unplug-government-agencies-despite-opposition-trump-policies/ [https://perma.cc/C6D5-C92L].

41. Kate Conger, David E. Sanger & Scott Shane, *Microsoft Wins Pentagon's $10 Billion JEDI Contract, Thwarting Amazon*, N.Y. TIMES (Oct. 25, 2019), https://www.nytimes.com/2019/10/25/technology/dod-jedi-contract.html (on file with the *Columbia Human Rights Law Review*).

42. Olivia Solon, *'We Did Not Sign up to Develop Weapons': Microsoft Workers Protest $480m HoloLens Military Deal*, NBC NEWS (Feb. 22. 2019), https://www.nbcnews.com/tech/tech-news/we-did-not-sign-develop-weapons-microsoft-workers-protest-480m-n974761 [https://perma.cc/VYF7-P9AF].

43. *Id*.

44. *Id*.

45. Jamie Condliffe, *Amazon Is Latest Tech Giant to Face Staff Backlash Over Government Work*, N.Y. TIMES (June 22, 2019), https://www.nytimes.com/2018/06/22/business/dealbook/amazon-staff-facial-recognition-protest.html (on file with the *Columbia Human Rights Law Review*).

activists, and the rise in deportations.[46] However, the company continued to pitch its facial recognition services to law enforcement agencies through 2019.[47] On June 10, 2020, amid the nationwide protests concerning racism and police brutality following the killing of George Floyd by a Minneapolis police officer, Amazon announced a one-year moratorium on the use of Rekognition by police forces, calling on Congress to promulgate federal regulations governing the ethical use of facial recognition technology in the interim period.[48]

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46. Ali Breland, *Amazon Employees Protest Sale of Facial Recognition Tech to Law Enforcement*, THE HILL (June 21, 2018), https://thehill.com/business-a-lobbying/393583-amazon-employees-protest-sale-of-facial-recognition-tech-to-law [https://perma.cc/7HJR-4NQN]; Rosalie Chan, *Read the Internal Letter Sent by a Group of Amazon Employees Asking the Company to Take a Stand Against ICE*, BUS. INSIDER (July 11, 2019), https://www.businessinsider.com/amazon-employees-letter-protest-palantir-ice-camps-2019-7 (on file with the *Columbia Human Rights Law Review*) (describing the letter sent by Amazon employees calling for the company to cease work with Palantir, a company with over $150 million in contracts with ICE). Studies on facial recognition technology show that people of color are more frequently misidentified by the technology, further exacerbating concerns about racism and biased policing. *See* Joy Buolamwini & Timnit Gebru, *Gender Shades: Intersectional Accuracy Disparities in Commercial Gender Classification*, 81 PROCEEDINGS OF MACH. LEARNING RSCH. 1, 2 (2018); *see also* Drew Harwell, *Amazon Facial-Identification Software Used by Police Falls Short on Tests for Accuracy and Bias, New Research Finds*, WASH. POST (Jan. 25, 2019), https://www.washingtonpost.com/technology/2019/01/25/amazon-facial-identification-software-used-by-police-falls-short-tests-accuracy-bias-new-research-finds/ (on file with the *Columbia Human Rights Law Review*) (reporting on Amazon's response to the research by Buolamwini and Gebru, and discussing the concerns attendant to facial identification software accuracy). In December 2020, Timnit Gebru, one of the authors of the study on facial recognition misidentification referenced here, was fired from Google, where she had served as co-leader of Google's Ethical AI team; she shared in a tweet that she had been fired for sending an email to fellow employees expressing exasperation over the company's response to efforts by her and others to increase minority representation in hiring and to draw attention to bias in artificial intelligence. Cade Metz & Daisuke Wakabayashi, *Google Researcher Says She Was Fired Over Paper Highlighting Bias in A.I.*, N.Y. TIMES (Dec. 3, 2020), https://www.nytimes.com/2020/12/03/technology/google-researcher-timnit-gebru.html (on file with the *Columbia Human Rights Law Review*). Two months later, two Google engineers resigned in protest over Gebru's dismissal. Jeffrey Dastin & Paresh Dave, *Two Google Engineers Resign over Firing of AI Ethics Researcher Timnit Gebru*, REUTERS (Feb. 3. 2021), https://www.reuters.com/article/us-alphabet-resignations-idUSKBN2A4090 [https://perma.cc/8WAT-3WR8].

47. Natasha Singer, *Amazon Faces Investor Pressure Over Facial Recognition*, N.Y. TIMES (May 20, 2019), https://www.nytimes.com/2019/05/20/technology/amazon-facial-recognition.html (on file with the *Columbia Human Rights Law Review*).

48. Karen Weise & Natasha Singer, *Amazon Pauses Police Use of Its Facial Recognition Software*, N.Y. TIMES (June 10, 2020), https://www.nytimes.com/2020/06/

In April 2019, over 4,200 Amazon employees publicly signed on to another letter to Jeff Bezos, calling for the company to better address its environmental responsibility.[49] In September 2019, one day before a planned employee-organized walkout to protest Amazon's climate impact, the company announced that it would accelerate its climate goals and aim to be carbon neutral by 2040, and Jeff Bezos responded publicly to certain proposals in the employee letter.[50]

Amazon has also seen employee activism in response to its policies amid the coronavirus pandemic.[51] In March 2020, a warehouse worker was fired after leading a protest calling for the company to temporarily close a warehouse and to provide employees with personal protective equipment to guard against exposure to the virus.[52] Two user experience designers

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10/technology/amazon-facial-recognition-backlash.html (on file with the *Columbia Human Rights Law Review*) (citing Amazon Staff, *We Are Implementing a One-Year Moratorium on Police Use of Rekognition*, AMAZON BLOG (June 10, 2020), https://www.aboutamazon.com/news/policy-news-views/we-are-implementing-a-one-year-moratorium-on-police-use-of-rekognition [https://perma.cc/2G8Q-7JA7]).

49. Karen Weise, *Over 4,200 Amazon Workers Push for Climate Change Action, Including Cutting Some Ties to Big Oil*, N.Y. TIMES (Apr. 10, 2019), https://www.nytimes.com/2019/04/10/technology/amazon-climate-change-letter.html (on file with the *Columbia Human Rights Law Review*). At the time of writing, the letter contained over 8,200 employee signatories. *See* Amazon Emps. for Climate Just., *Open Letter to Jeff Bezos and the Amazon Board of Directors*, MEDIUM (Apr. 10, 2019), https://amazonemployees4climatejustice.medium.com/public-letter-to-jeff-bezos-and-the-amazon-board-of-directors-82a8405f5e38 [https://perma.cc/5E37-QJYL]. Some Amazon employees who receive stock compensation are also leveraging those accompanying rights to push for institutional change through shareholder activism. *See* Kate Conger, *Tech Workers Got Paid in Company Stock. They Used It to Agitate for Change.*, N.Y. TIMES (Dec. 16, 2018), https://www.nytimes.com/2018/12/16/technology/tech-workers-company-stock-shareholder-activism.html (on file with the *Columbia Human Rights Law Review*).

50. Rachel Siegel & Jay Greene, *Amazon CEO Jeff Bezos Announces New 'Climate Pledge' Ahead of Employee Protests*, WASH. POST (Sept. 19, 2019), https://www.washingtonpost.com/technology/2019/09/19/amazon-ceo-jeff-bezos-announces-new-climate-pledge-ahead-employee-protests/ (on file with the *Columbia Human Rights Law Review*).

51. *See* Karen Weise, *New York Attorney General Scrutinizes Amazon for Firing Warehouse Worker*, N.Y. TIMES (Apr. 27, 2020), https://www.nytimes.com/2020/04/27/technology/amazon-fired-worker-attorney-general-coronavirus.html (on file with the *Columbia Human Rights Law Review*); *see also* Noam Scheiber & Kate Conger, *Strikes at Instacart and Amazon Over Coronavirus Health Concerns*, N.Y. TIMES (Mar. 30, 2020), https://www.nytimes.com/2020/03/30/business/economy/coronavirus-instacart-amazon.html (on file with the *Columbia Human Rights Law Review*) (reporting on Amazon worker strikes).

52. *See* Weise, *supra* note 51.

from Amazon Web Services, the cloud computing arm of the business, were later terminated in April 2020 after speaking out about Amazon's environmental impact and voicing concerns about worker safety amid the growing number of COVID-19 cases among employees at Amazon fulfillment centers.[53] While the former protests, led by warehouse employees on behalf of themselves and fellow warehouse employees, fall within existing protections for conventional labor objectives,[54] the latter firings of employees on the technology side of the business constitute prosocial activism not as readily protected by the NLRA.[55] On April 5, 2021,

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53. Monica Nickelsburg, *Amazon Employees Organize Virtual Walkout over Firings, Warehouse Conditions*, GEEKWIRE (Apr. 17, 2020), https://www.geekwire.com/2020/amazon-employees-organize-virtual-walkout-firings-warehouse-conditions/ [https://perma.cc/9GZ5-EZR9].

54. Indeed, the NLRB filed a complaint against Amazon accusing the company of intimidating the warehouse worker, Jonathan Bailey, who had helped to organize a walkout to protest working conditions at Amazon's Queens, New York facility. According to the complaint, Amazon interviewed Bailey for an hour and a half, the contents of which constituted intimidation. The case was resolved in a settlement between the parties. Annabelle Williams, *The National Labor Relations Board Found That Amazon Illegally 'Intimidated and Threatened' a Striking Worker, Report Says*, BUS. INSIDER (Mar. 22, 2021), https://www.businessinsider.com/amazon-union-retaliation-nlrb-charges-settlement-vice-report-2021-3 (on file with the *Columbia Human Rights Law Review*).

55. The response by Amazon's management led a senior executive on the technology side of the company, Vice President and Distinguished Engineer Tim Bray, to resign in protest over the firings of the employees who had organized the in-person and virtual walkouts. Mihir Zaveri, *An Amazon Vice President Quits Over Firings of Employees Who Protested*, N.Y. TIMES (May 4, 2020), https://www.nytimes.com/2020/05/04/business/amazon-tim-bray-resigns.html (on file with the *Columbia Human Rights Law Review*). In July 2019, Amazon employees also called for the company to remove Palantir, the prominent data analysis firm, from Amazon's cloud services for violating Amazon's terms of service as a result of Palantir's involvement with government agencies, but received no publicly-disclosed response from Amazon management. *See* Chan, *supra* note 46. Palantir has over $150 million in contracts with ICE, and provides software to gather data on undocumented immigrants' employment information, phone records, immigration history, and similar history, with its software hosted in the Amazon Web Services cloud. Spencer Woodman, *Palantir Provides the Engine for Donald Trump's Deportation Machine*, THE INTERCEPT (Mar. 2, 2017), https://theintercept.com/2017/03/02/palantir-provides-the-engine-for-donald-trumps-deportation-machine/ [https://perma.cc/K6DT-ZSSF]. Palantir's own employees also expressed concerns, with 200 employees signing a letter to Palantir's chief executive in August 2019 asking the company's management not to renew one of its contracts with ICE. However, Palantir renewed the ICE contract worth up to $42 million and defended the program at a company town hall meeting. *See* Douglas MacMillan & Elizabeth Dwoskin, *The War Inside Palantir: Data-Mining Firm's Ties to ICE Under Attack by Employees*, WASH. POST (Aug. 22, 2019), https://www.washingtonpost.com/business/2019/08/22/war-inside-palantir-

the *New York Times* reported on the NLRB's determination that Amazon had illegally retaliated against the two user experience designers who were fired from Amazon's Seattle headquarters.[56]

D. Facebook

In October 2019, over 250 Facebook employees signed on to a letter on the company's internal communications program urging Facebook CEO Mark Zuckerberg to reevaluate the platform's decision to permit politicians to post any claims, including false statements and misleading content, in their ads on the site.[57] The *New York Times* gained access to this letter, but the Facebook employees who shared the information declined to be identified for fear of retaliation.[58] In a speech that month, and in interviews in later weeks, Zuckerberg defended the existing policy.[59] On June 1, 2020, hundreds of Facebook employees staged a virtual walkout of the company to protest Facebook executives' decision to refrain from removing, or adding fact-checks or warning labels to the inflammatory posts that then-President Trump shared on the social media platform.[60] In response to the planned virtual protest, Facebook CEO Mark Zuckerberg wrote that he would donate $10 million to groups whose work was dedicated to racial justice, but would not change the company's hands-off approach to individual posts, stating that Trump's posts did not violate the

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data-mining-firms-ties-ice-under-attack-by-employees (on file with the *Columbia Human Rights Law Review*).

56. Karen Weise, *Amazon Illegally Fired Activist Workers, Labor Board Finds*, N.Y. TIMES (Apr. 5, 2021), https://www.nytimes.com/2021/04/05/technology/amazon-nlrb-activist-workers.html (on file with the *Columbia Human Rights Law Review*).

57. Mike Isaac, *Dissent Erupts at Facebook Over Hands-Off Stance on Political Ads*, N.Y. TIMES (Oct. 28, 2019), https://www.nytimes.com/2019/10/28/technology/facebook-mark-zuckerberg-political-ads.html (on file with the *Columbia Human Rights Law Review*); Cecilia Kang, *Facebook's Hands-Off Approach to Political Speech Gets Impeachment Test*, N.Y. TIMES (Oct. 8, 2019), https://www.nytimes.com/2019/10/08/technology/facebook-trump-biden-ad.html (on file with the *Columbia Human Rights Law Review*) (describing Facebook's decision declining to remove a political advertisement posted by the Trump campaign containing false statements).

58. *Read the Letter Facebook Employees Sent to Mark Zuckerberg About Political Ads*, N.Y. TIMES (Oct. 28, 2019), https://www.nytimes.com/2019/10/28/technology/facebook-mark-zuckerberg-letter.html (on file with the *Columbia Human Rights Law Review*).

59. Isaac, *supra* note 57.

60. Sheera Frenkel et al., *Facebook Employees Stage Virtual Walkout to Protest Trump Posts*, N.Y. TIMES (June 1, 2020), https://www.nytimes.com/2020/06/01/technology/facebook-employee-protest-trump.html (on file with the *Columbia Human Rights Law Review*).

platform's rules.[61] After the protest, Zuckerberg conducted a call with the company's employees, where he continued to defend Facebook's policy.[62]

On June 12, 2020, Facebook terminated an employee who had joined the virtual walkout and had previously criticized the decision to leave then-President Trump's Facebook posts untouched.[63] The employee, Brandon Dail, a user interface engineer in Seattle, wrote that he had been fired for tweeting about a fellow Facebook employee's refusal to add a statement of support for the Black Lives Matter movement in a company document.[64] In October 2020, Facebook changed its approach and enacted new measures, barring new political ads from running on the site and adding fact-checking notifications in an effort to dispel misinformation, in response to additional posts by then-President Trump that cast doubt on the prospect of a peaceful transfer of power and baselessly called into question the reliability of mail-in voting.[65]

## II. THE CHANGING CONCEPTION OF WORK

The increase in employee activism corresponds with a growing body of social science research and empirical studies demonstrating how the broad conception of work has changed.[66] Explorations of how

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61. *Id.*; *see also* Mike Isaac & Cecilia Kang, *While Twitter Confronts Trump, Zuckerberg Keeps Facebook Out of It*, N.Y. TIMES (May 29, 2020), https://www.nytimes.com/2020/05/29/technology/twitter-facebook-zuckerberg-trump.html (on file with the *Columbia Human Rights Law Review*) (describing Zuckerberg's position that it is not Facebook's role to fact check politicians).

62. Mike Isaac et al., *Zuckerberg Defends Hands-Off Approach to Trump's Posts*, N.Y. TIMES (June 2, 2020), https://www.nytimes.com/2020/06/02/technology/zuckerberg-defends-facebook-trump-posts.html (on file with the *Columbia Human Rights Law Review*).

63. Katie Paul, *Facebook Fires Employee Who Protested Inaction on Trump Posts*, REUTERS (June 12, 2020), https://www.reuters.com/article/us-facebook-protests-firing/facebook-fires-employee-who-protested-inaction-on-trump-posts-idUSKBN23J35Y [https://perma.cc/VKK3-4PL2].

64. *Id.*; Brandon Dail (@aweary), TWITTER (June 12, 2020, 3:12 PM), https://twitter.com/aweary/status/1271522288752455680 [https://perma.cc/E3VN-LRDC].

65. Mike Isaac, *Facebook Widens Ban on Political Ads as Alarm Rises Over Election*, N.Y. TIMES (Oct. 7, 2020), https://www.nytimes.com/2020/10/07/technology/facebook-political-ads-ban.html (on file with the *Columbia Human Rights Law Review*).

66. Workers themselves have also increasingly begun to seek meaning and significance from their employment, rather than merely pay for services rendered. These interrelated trends have grown concurrently with studies and writing about vocation and meaningful work outside of theology and philosophy, with an increase in scholarship occurring in organizational studies and psychology. Jane Dawson, *A History of Vocation:*

employees find meaning in work have occupied a breadth of researchers, involving psychologists, sociologists, economists, and organizational scholars, as well as philosophers and theologians, because the implications thereof inform how organizations should be structured to best motivate and benefit their employees.[67] This Part examines the research indicating that employees seek meaning and psychological fulfillment through their work, which provides an explanation for the increase in prosocial activism, and may be instructive as to how Section 7 may be utilized to better protect modern workers.

Scholars have noted that as work has become an increasingly prominent domain of life,[68] employees expect their jobs to fulfill a larger set of psychological, social, and economic needs.[69] Classic theories of motivation and human development suggest that worker satisfaction in an employment environment does not entirely stem from self-interested objectives, but rather is in large part affected by the prosocial impacts of the work and working environment, as well as the sense that individuals are living life in a manner that is consistent with their core values.[70] Work is likely to be deemed meaningful "when the social and cultural systems around people ascribe value to their work activities,"[71] as well as when work leads to positive "individual experiences, cognitions, and feelings," informed by values and value systems stretching across other domains of a

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*Tracing a Keyword of Work, Meaning, and Moral Purpose*, 55 ADULT EDUC. Q. 220, 226 (2005); *see also* Amy Wrzesniewski et al., *Jobs, Careers, and Callings: People's Relations to Their Work*, 31 J. RSCH. PERSONALITY 21, 31–32 (1997) (discussing the increased importance of meaning in one's career).

67. Brent D. Rosso et al., *On the Meaning of Work: A Theoretical Integration and Review*, 30 RSCH. ORGANIZATIONAL BEHAV. 91, 92 (2010). Studies on the meaningfulness of work to employees influence understandings of work motivation, absenteeism, work behavior, engagement, job satisfaction, empowerment, stress, organizational identification, career development, individual performance, and personal fulfillment. *Id*.

68. *See id.* One study on the "centrality of work" showed that a large majority of individuals would continue to work even if they had no financial needs. *See* Richard D. Arvey et al., *Work Centrality and Post-Award Work Behavior of Lottery Winners*, J. PSYCH., 138, 404–20 (2004).

69. Social scientists Christopher Bauman and Linda Skitka have identified four psychological needs that employees seek to fill in the workplace: safety and security that material needs will be met, self-esteem stemming from a positive social identity, feelings of belongingness and social validation of important values, and existential meaning and a deeper sense of purpose at work. Christopher W. Bauman & Linda J. Skitka, *Corporate Social Responsibility as a Source of Employee Satisfaction*, 32 RSCH. ORGANIZATIONAL BEHAV. 63, 69 (2012).

70. *Id*. at 73.

71. *See* Rosso et al., *supra* note 67, at 94.

person's life.[72] One set of empirical studies, conducted in response to the proliferation of commentary about work and "calling," suggests that people tend to conceive of their work as more meaningful when it is aligned with what they perceive as their calling, "because it is experienced [both] as personally fulfilling and having worldly impact."[73] Studies show that individuals who perceive their work as meaningful and/or serving some greater social or communal good report better psychological adjustment and greater overall well-being.[74]

Thus, encouraging employee prosocial activism is both evidence of work as a source of meaning, and an avenue for work to become meaningful to workers.[75] Researchers Bauman and Skitka further write that an increase in a connection to the social impact of work in a company can "increase identification and commitment to the organization, organizational citizenship behaviors, and meaningfulness of work."[76] Furthermore, researchers Amy Wrzesniewski and Jane Dutton found that when employees tie their work-related tasks to a greater moral imperative, they experience greater satisfaction from their jobs and report greater happiness overall.[77]

The emerging activism in the technology sector and other "neurofacturing"-focused industries[78] converges with this uptick in social science and psychology literature regarding meaning and work, which counsels that employees' conceptions of their work are deeply tied to their

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72. *Id*.

73. Justin Berg et al., *When Callings Are Calling: Crafting Work and Leisure in Pursuit of Unanswered Occupational Callings*, 21 ORGANIZATIONAL SCI. 973, 981 (2010).

74. Michael F. Steger et al., *Measuring Meaningful Work: The Work and Meaning Inventory (WAMI)*, 20 J. CAREER ASSESSMENT 322, 323 (2012).

75. Bauman & Skitka, *supra* note 69, at 74–78. Research related to the corporate social responsibility movement provides a helpful analogue:

> Actions that demonstrate corporate social responsibility represent a fairly rare opportunity to positively influence how individuals—especially employees and prospective employees—perceive firms. In particular, discretionary activities that indicate a prosocial rather than an instrumental orientation have the potential to elicit attributions of morality, which can strengthen the social ties between individuals and the organization.

*Id*. at 64.

76. *Id.*

77. Amy Wrzesniewski & Jane E. Dutton, *Crafting a Job: Revisioning Employees as Active Crafters of Their Work*, 26 ACAD. MGMT. REV. 179, 197 (2001).

78. *See* Fuentes & Leamer, *supra* note 6, at 8.

psychological needs and perceived impact on society.[79] Indeed, Professor Peter Capelli of the University of Pennsylvania's Wharton School wrote:

> Tech workers feel they are special, in part because they are so in demand, in part because their employers treat them that way . . . . They also feel that some of their identity is tied up with the image of the company where they work, so it really does hurt them when that image gets tarnished.[80]

In a 2018 study commissioned by MetLife, 70% of employees surveyed said that "companies must work to address society's challenges," and 52% expected their employer "to help solve issues even if they are not central to the company's business," with both figures representing increases from the same survey conducted in 2017.[81]

The social science discussions of changes in employees' conceptions of their responsibility as workers find illustration in the recent protest activity and public speech by employees regarding ethical concerns about corporate activity. As studies note, modern workers increasingly place significant importance on the moral value of their work.[82] Therefore, substantial divergence between the moral implications of workers'

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79. *See* Bauman & Skitka, *supra* note 69; Adam M. Grant, *Relational Job Design and the Motivation to Make a Prosocial Difference*, 32 ACAD. MGMT. REV. 393, 403–05 (2007) (discussing the importance to employees of the "social, organization, and occupational contexts" in which a job is situated).

80. Jena McGregor, *How Tech Workers Are Fueling a New Employee Activism Movement*, WASH. POST (Dec. 13, 2018), https://www.washingtonpost.com/business/2018/12/13/how-tech-workers-are-fueling-new-employee-activism-movement/ (on file with the *Columbia Human Rights Law Review*).

81. *Great Expectations: Americans Want More From Companies*, METLIFE (Nov. 27, 2018), https://www.metlife.com/about-us/newsroom/2018/november/great-expectations-americans-want-more-from-companies/ [https://perma.cc/5E2N-775R]. The General Social Survey—a nationally-representative annual study of sociological and attitudinal trends operated by the University of Chicago and supported by the National Science foundation—revealed that even in early surveys from 1973 through 1992, Americans reported valuing important, meaningful work over high income, job security, short working hours, and opportunities for advancement when asked to rank their preferred job characteristics. Wayne F. Cascio, *Changes in Workers, Work, and Organizations*, *in* HANDBOOK OF PSYCHOLOGY, VOLUME 12: INDUSTRIAL AND ORGANIZATIONAL PSYCHOLOGY 401, 404 (Irving B. Weiner et al. eds. 2003).

82. *See generally* GALLUP, REPORT: HOW MILLENNIALS WANT TO WORK AND LIVE (2016) (surveying millennials on work attitudes and finding that they seek jobs to which they feel emotionally and behaviorally connected, which have meaning, and which fuel their sense of purpose); Berg et al., *supra* note 73, at 979–81 (2010) (finding that people actively reshape their work roles in order to incorporate or emphasize aspects that correspond to their perceived callings).

contributions and their own value systems would naturally lead to objections. Thus, the growing phenomenon of employee activism in the tech sector serves as a demonstration of the need for legal protections to align with the reality of workers' perceptions of their conditions of employment, which may extend beyond traditional considerations.

## III. EMPLOYEE ACTIVISM AND THE PROTECTIONS UNDER FEDERAL LABOR LAW

Modern American labor law was developed amid the growth of industrial unions during the Great Depression, and was intended to promote public policy through freedom of association and collective bargaining.[83] However, the NLRA has not changed dramatically, despite the broad shifts in employee-work relations.[84] This Part will first explore the current understanding of NLRA Section 7, comparing the approach to prosocial activism in the private sector to analogous circumstances for public employees. This Part will then examine a notable recent case involving the definition of "mutual aid or protection" and considers how the ruling in this case may serve as an early step forward in expanding protections for employee prosocial activism.

### A. Protected Concerted Activity Under the National Labor Relations Act

Section 7 protects, among others, the right of employees "to engage in . . . concerted activities for the purpose of collective bargaining or other mutual aid or protection."[85] According to the NLRB, activity is "concerted" if "it is engaged in . . . not solely by and on behalf of the employee himself, . . . includ[ing] circumstances where a single employee seeks to initiate, induce, or prepare for group action, as well as where an employee

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83. William B. Gould IV, *New Labor Law Reform Variations on an Old Theme: Is the Employee Free Choice Act the Answer?*, 70 LA. L. REV. 1, 1 (2009).

84. *Id*.

85. Section 7 states as follows:

> 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.

brings a group complaint to the attention of management."[86] NLRA Section 2(3) declares that "the term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise."[87] Congress further acknowledged that "disputes may arise regardless of whether the disputants stand in the proximate relation of employer and employee."[88] Thus, employees in this Section include not only parties in the roles of employer and employee, but also prospective hires.[89]

While the legislative history of Section 7 provides few hints as to Congress' intent regarding the bounds of "concerted activities,"[90] the Supreme Court has read this statutory language to include discrete actions taken by a single employee that are related to other employees' concerted activities.[91] However, the Court in *NLRB v. City Disposal Systems Inc.* also stated a limiting principle, writing that "at some point an individual employee's actions may become so remotely related to the activities of fellow employees that it cannot reasonably be said that the employee is engaged in concerted activity."[92] Personal "griping" has been held to be outside of the concerted activity contemplated in Section 7, though the line at which the purely personal becomes concerted activity is a case-by-case determination.[93]

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86. *Interfering with Employee Rights (Section 7 & 8(a)(1))*, NAT'L LAB. RELS. BD., https://www.nlrb.gov/rights-we-protect/whats-law/employers/interfering-employee-rights-Section-7-8a1 [https://perma.cc/7VMR-TZYH].

87. 29 U.S.C. § 152 (3).

88. Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 192 (1941) (citations omitted).

89. Gregory C. Kloeppel, *Salt Anyone? The United States Supreme Court Holds That Paid Union Organizers Qualify as Employees Under the NLRA in* NLRB v. Town & Country Electric, Inc., 42 ST. LOUIS UNIV. L.J. 243, 250–51 (1998).

90. NLRB v. City Disposal Sys. Inc., 465 U.S. 822, 834 (1984).

91. *Id.* at 835. The Court also noted that the concerted activity language was adapted from the Clayton Act and the Norris-LaGuardia Act of 1932. *Id.* at 834–35.

92. *Id.* at 833 n.10.

93. *See* Koch Supplies, Inc. v. NLRB, 646 F.2d 1257, 1259 (8th Cir. 1981) ("[I]f an employee's actions constitute mere personal griping or complaining, then the actions are not entitled to protection[,] . . . [but] if the employee's efforts are intended to gain more favorable contract terms . . ., then there is some element of collective activity or contemplation thereof, and the employees' efforts are protected."); NLRB v. Buddies Supermarkets, Inc., 481 F.2d 714, 717 (5th Cir. 1973) (holding that "individual griping or complaining" does not constitute concerted activity); Mushroom Transp. Co. v. NLRB, 330 F.2d 683, 685 (3d Cir. 1964) ("[I]t must appear at the very least that [the conversation at issue] was engaged in with the object of initiating or inducing or preparing for group action or that it had some relation to group action in the interests of the employees.").

The concerted activity must also be undertaken for the purpose of "mutual aid or protection."[94] The Supreme Court has interpreted this language broadly to encompass protection for workers in non-union as well as union environments.[95] In *Eastex, Inc. v. NLRB*, the Court elucidated its understanding of the type of activity covered, reading into the statutory language protection for employees' actions seeking "to improve working conditions through resort to administrative and judicial forums" and "appeals to legislators to protect their interests as employees."[96] Action for mutual aid or protection also includes the distribution of material among employees referencing political issues concerning workers' rights.[97] The sharing of materials that are "so purely political or so remotely connected to the concerns of employees as employees," however, may be beyond the protection of the clause; this is "a determination that should be left for case-by-case consideration."[98]

Section 8(a)(1) of the NLRA provides enforcement for the protections outlined in Section 7 by condemning any "interfere[nce] with, restrain[t of], or coerc[ion of] employees in the exercise of their rights" under Section 7 as an "unfair labor practice."[99] The NLRB has found an unfair labor practice when employers threaten to retaliate against employees who have engaged in concerted actions,[100] as well as when employers adopt rules that "reasonably tend to chill" employees' exercise of Section 7 rights.[101] Following *Meyers Indus., Inc.* ("*Meyers I*"), an employer's action rises to the level of an unfair labor practice under Section 8(a)(1) when the employee engaged in concerted activity according to Section 7, the employer knew of the concerted nature of the employee's activity, the concerted activity was for mutual aid or protection and was therefore covered under the NLRA, and the discipline or discharge action by the

94. 29 U.S.C. § 157 (2012).

95. NLRB v. Wash. Aluminum Co., 370 U.S. 9, 14–15 (1962).

96. Eastex, Inc. v. NLRB, 437 U.S. 556, 564–67 (1978).

97. *Id*.

98. *Id.* at 570 n.20.

99. 29 U.S.C. § 158; NLRB, *supra* note 86 (providing examples of unfair labor practices). A finding of an unfair labor practice may result in reinstatement and/or back pay. Rita Gail Smith & Richard A. Parr II, *Protection of Individual Action as 'Concerted Activity' Under the National Labor Relations Act*, 68 CORNELL L. REV. 369, 370 n.6 (1983).

100. NLRB v. Gissel Packing Co., 395 U.S. 575, 618 (1969) ("If there is any implication that an employer may or may not take action solely on his own initiative for reasons unrelated to economic necessities and known only to him, the statement is . . . a threat of retaliation based on misrepresentation and coercion, and . . . without the protection of the First Amendment.").

101. Lafayette Park Hotel, 326 N.L.R.B. 824, 825 (1998).

employer was motivated by the employee's activity.[102] According to *Meyers Indus., Inc.* ("*Meyers II*"), individual conduct is recognized as "'concerted' both where 'individual employees seek to initiate or to induce or to prepare for group action' and where 'individual employees bring truly group complaints to the attention of management.'"[103]

### B. Contrasting the First Amendment Approach for Public Employees

The First Amendment does not provide an avenue for private employees to raise a claim against retaliatory actions by employers.[104] However, contrasting the NLRB's approach towards private employees' speech with the First Amendment approach towards the protections of public concerns aired by public employees serves as a helpful illustration of the gap left in Section 7 protections for private employees. Professor Cynthia Estlund first noted this curious contradiction in the landscape of labor and employment law, where protections differ on either side of the public/private divide: "the kinds of protests that in the private sector are covered by Section 7—those concerning the terms and conditions of employment—are unprotected . . . in the public sector," whereas "matters of public concern" which would be protected in the public sector remain without protection in the private sector.[105]

#### 1. Matters of Public Concern: *Connick v. Myers*

The case of *Connick v. Myers* provides an apt illustration of the protections afforded by federal law to public employee action. Sheila Myers, a public employee serving as an Assistant District Attorney in New Orleans, "was informed that she would be transferred to prosecute cases in a different Section of the criminal court."[106] Myers was opposed to the transfer and expressed this view to her supervisors, to no avail.[107] In a later meeting with a supervisor, Myers also discussed other office issues in

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102. Meyers Indus., Inc. (*Meyers I*), 268 N.L.R.B. 493, 497 (1984).

103. MCPc, Inc. v. NLRB, 813 F.3d 475, 483 (3d Cir. 2016) (quoting Meyers Indus., Inc. (*Meyers II*), 281 N.L.R.B. 882, 887 (1986)) (alteration omitted).

104. Cynthia L. Estlund, *Free Speech and Due Process in the Workplace*, 71 IND. L.J. 101, 116 (1995).

105. Cynthia L. Estlund, *What Do Workers Want? Employee Interests, Public Interests, and Freedom of Expression Under the National Labor Relations Act*, 140 U. PA. L. REV. 921, 924 (1992).

106. Connick v. Myers, 461 U.S. 138, 140 (1983).

107. *Id*.

addition to her reluctance to transfer.[108] In response to her supervisor's comment that her concerns were not shared by others, Myers prepared and subsequently distributed a questionnaire soliciting the opinions of her coworkers concerning "office transfer policy, office morale, the need for a grievance committee, the level of confidence in supervisors, and whether employees felt pressured to work in political campaigns."[109] Myers' supervisor then terminated her employment, ostensibly due to her refusal to accept the transfer, and also informed her that the distribution of the questionnaire was considered an act of insubordination.[110] She then filed suit under 42 U.S.C. § 1983, arguing that her employment was wrongfully terminated because she had exercised her constitutionally-protected right to free speech.[111]

Despite success before the District Court and the Fifth Circuit, Myers lost at the Supreme Court.[112] The Court characterized her survey as an employee grievance in all ways save for the question regarding a feeling of pressure to work in political campaigns, and ultimately upheld her discharge as not offending the First Amendment.[113] Justice White, writing for the Court, articulated that:

> [W]hen a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest . . . a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior.[114]

The holding in *Connick* affirmed that public employees' speech grounded in workplace concerns is not statutorily protected, although speaking out on matters of "public concern" does enjoy protection under First Amendment principles.[115]

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108. *Id.* at 141.
109. *Id.*
110. *Id*.
111. *Id.* at 141–42.
112. *Id*.
113. *Id.* at 154. For the full list of survey questions, see *id.* app. at 155–56.
114. *Id*. at 147.
115. Estlund, *supra* note 105, at 115; *see*, *e.g.*, Borough of Duryea v. Guarnieri, 564 U.S. 379, 386 (2011) ("When a public employee sues a government employer under the First Amendment's Speech Clause, the employee must show that he or she spoke as a citizen on a matter of public concern."); Engquist v. Or. Dep't of Agric., 553 U.S. 591, 600 (2008) ("[T]he First Amendment protects public employee speech only when it falls within the core of First Amendment protection—speech on matters of public concern.");

### 2. "Disloyalty" as Unprotected Action: *NLRB v. Local Union No. 1229, International Brotherhood of Electrical Workers* ("*Jefferson Standard*")

The *Connick* case demonstrating the public employee context serves as an exact opposite illustration of the NLRA provisions for private employees. Private employees enjoy protection from employer retaliation when they speak on matters regarding working conditions and terms of employment but are unprotected when voicing concerns akin to matters of public interest. In *Jefferson Standard*, technicians at the Jefferson Standard Broadcasting Company distributed handbills criticizing the quality of the television programs offered in the area amidst ongoing negotiations between the representative union and the company.[116] Ten technicians were discharged for distributing the handbills and filed a complaint charging that the company had engaged in an unfair labor practice.[117] Despite finding that the leaflets "did not misrepresent, at least willfully, the facts they cited to support their disparaging report," the Supreme Court concluded that "insubordination, disobedience or disloyalty [was] adequate cause for discharge," notwithstanding the provisions of NLRA Section 7.[118] As such, the Court concluded that employee disloyalty was an exception under Section 10(c) to the rule that employees' concerted activity is protected under Section 7 because "[t]here is no more elemental cause for discharge of an employee than disloyalty to his employer."[119]

Professor Estlund writes that while the *Jefferson Standard* case is read primarily as an "outside" limitation on activity considered in Section 7 (that the language not be abusive or unreasonably disparaging), the decision "necessarily rests as well on an 'internal' limitation on the meaning of Section 7"[120] (that "the employer's policies not directly relating to terms and conditions of employment [could] not *themselves* [be] the proper subject of concerted activity by employees" for their mutual aid or

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City of San Diego v. Roe, 543 U.S. 77, 82–83 (2004) ("[T]o merit *Pickering* balancing, a public employee's speech must touch on a matter of 'public concern.'").

116. NLRB v. Local Union No. 1229, International Brotherhood of Electrical Workers (Jefferson Standard), 346 U.S. 464, 466–68 (1953). The handbills specifically lamented the television station's lack of live and local coverage due to inadequate equipment, questioning whether the company "consider[ed] Charlotte a second-class community." *Id.* at 468.

117. *Id.* at 468–70.

118. *Id.* at 472, 475.

119. *Id.* at 472.

120. *See* Estlund, *supra* note 105, at 930.

protection).[121] This internal limitation on Section 7's protections is of primary concern because it draws a fine line between employee action that is appropriately critical of working conditions and thus falling within protection, and employee action that is instead considered "disloyal" or "excessive." As Justice Frankfurter wrote in dissent to the *Jefferson Standard* decision, "to float such imprecise notions as . . . 'loyalty' in the context of labor controversies, as the basis of the right to discharge, is to open the door wide to individual judgment by Board members and judges."[122]

Public employee speech has been held unprotected only when it involves that employee's concerns about her employment. However, when a public employee "speaks as a citizen on a matter of public concern, the employee's speech is protected unless the interest of the state, as an employer, in promoting the efficiency of the public services it performs" outweighs the employee's concern.[123] This means that a private employee, in order to raise concerns that do not involve traditional labor objectives, must sufficiently tie her concern to some self-interested motivation related to the terms and conditions of employment so as to bring her actions under the protection of Section 7.[124] This understanding of the statute not only sets an undue restriction on employee rights, but also denies the public important information about the practices of private companies. [125] This is particularly concerning where the companies in question are prominent economic actors with outsized influence on society.

### C. A Shift from "Disloyalty" to Mutual Aid: *Five Star Transportation, Inc. v. NLRB*

In the case of *Five Star Transportation, Inc. v. NLRB*, the National Labor Relations Board and the First Circuit nudged the line slightly toward a broader reading of mutual aid or protection. In *Five Star*, a Massachusetts school district had negotiated a three-year contract for school bus transportation services with First Student, Inc., a unionized bus company.[126] When the expiration of the school district's contract neared, the school

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121. *Id*.

122. *Jefferson Standard*, 346 U.S. at 481 (Frankfurter, J., dissenting).

123. Janus v. Am. Fed'n of State, Cnty., and Mun. Employees, Council 31, 138 S. Ct. 2448, 2471 (2018) (internal quotations omitted) (citing Harris v. Quinn, 573 U.S. 616, 652–53 (2014); Garcetti v. Ceballos, 547 U.S. 410, 420–22 (2006); Connick v. Myers, 461 U.S. 138, 143 (1983)). In *Janus*, the Court indicated in dicta that it would not follow *Connick*, but did not expressly overrule it. 138 S. Ct. at 2470.

124. *See* Estlund, *supra* note 105, at 932–35.

125. *Id.* at 956–67.

126. Five Star Transp., Inc. v. NLRB, 522 F.3d 46, 48 (1st Cir. 2008).

district once again organized the bid process for the following three years and awarded the contract to a non-union company, Five Star Transportation, Inc.[127] The union representing the First Student bus drivers, who under the bid stipulations were to be considered for hire by the new contracting company, protested the district's decision and made efforts to have the district rebid the contract with a requirement to honor the terms of the prior collective-bargaining agreement.[128] Fifteen of the union bus drivers sent letters to the school district expressing the drivers' concern that Five Star would not continue providing the wages, benefits, and safe work environment that the union had negotiated for them with First Student.[129]

Five Star ultimately hired six of seventeen former First Student drivers who were members of the union.[130] The other eleven applicants were not hired because they had written letters critical of Five Star.[131] The union subsequently filed a complaint against Five Star with the NLRB on behalf of all eleven unhired drivers.[132] Following an evidentiary hearing, a three-member panel of the NLRB granted relief to six of the eleven drivers, ordering their reinstatement and back pay with interest.[133] The panel found that the other five drivers were properly denied employment because they either failed to raise common employment-related concerns or primarily disparaged Five Star in their letters.[134]

The First Circuit Court of Appeals enforced the NLRB panel decision.[135] In the First Circuit's order, Judge Torruella noted that some of the drivers who were granted relief had made references in their letters to

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127. *Id.* at 48–49.
128. *Id*.
129. *Id*. at 49.
130. *Id.*
131. *Id.*
132. *Id*.
133. *Id*.
134. *Id.* The NLRB panel "divided the eleven drivers into three categories": (1) those whose letters had failed to raise common employment-related concerns; (2) those whose letters primarily raised such concerns; and (3) those whose letters primarily disparaged Five Star. The NLRB concluded that Five Star had violated Section 8(a)(1) only as to the six drivers belonging to the second group, because only those drivers' actions were protected by the Act. It ordered these drivers reinstated and granted back pay with interest; the remaining drivers were properly denied employment.

*Id.*

135. *Five Star Transp., Inc.*, 522 F.3d at 55.

non-employment related concerns about the safety of the children riding the buses, but that another group of drivers was found to be unprotected by the federal statute because the NLRB had read their letters to "*primarily* address those same non-employment related concerns."[136] In all cases where relief was granted, the letters to the district were not found to be "excessively disloyal, reckless or maliciously untrue" under a *Jefferson Standard* analysis.[137] Markedly, the NLRB accepted the child safety concerns—prosocial activism related to the impact of the drivers' prospective employer—together with standard employment concerns regarding wages and benefits.[138] Judge Torruella, while noting the uniqueness of the NLRB's tolerance of the drivers who had raised child safety concerns, stated that the court in review of the NLRB panel's decision, would "not reposition a line drawn by the Board between protected and unprotected behavior unless the Board's line is 'illogical or arbitrary.'"[139] Concluding that the NLRB decision here to "tip[] the scale in favor of" the drivers did not constitute such a deviation, the First Circuit entered judgment to enforce the NLRB's order.[140] The *Five Star* case thus exhibits an openness, albeit slight, to the concept that the quality and the societal effects of one's work may be a component part of an employee's conditions of employment; such acceptance may open the door to wider

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136. *Id.* at 54 (emphasis added).

137. *Id.* at 53; *see also* Me. Coast Reg'l Health Facilities, 369 N.L.R.B. No. 51, 1 (Mar. 30, 2020) (affirming the administrative judge's decision from the 2018 case); Susan B. Allen Mem'l Hosp., 14-CA-233000, 2019 N.L.R.B. LEXIS 456, at *27 (Aug. 15, 2019) (finding that a hospital employee's posts on Facebook regarding hospital administration, salary, and certain benefits were protected under the Act); Me. Coast Reg'l Health Facilities, 01-CA-209105, 2018 N.L.R.B. LEXIS 528, at *41 (Nov. 2, 2018) (finding that a hospital employee's letter to a local newspaper protesting the hospital's staffing shortages and working conditions was a protected activity under the Act).

138. *Five Star Transp., Inc.*, 522 F.3d at 54. In a previous similar case, *Petrochem Insulation, Inc. v. NLRB*, construction unions raised objections to the issuance of zoning and construction permits to non-unionized contractors on environmental grounds, under the Clean Air Act. The union's permit challenges were upheld as protected under NLRA Section 7 by the NLRB and enforced by the Court of Appeals, but only because the union's purpose was to use the permit process to force the companies to meet union wage and benefit levels, not because of an acceptance of union concern with the environmental effects of the permits. *See* Petrochem Insulation, Inc. v. NLRB, 240 F.3d 26, 30 (D.C. Cir. 2001) (affirming the district court's finding that the unions' intervention in the environmental permit proceedings was a form of "concerted activity protected by Section 7").

139. *Id*. at 54–55 (quoting *NLRB v. Parr Lance Ambulance Serv.*, 723 F.2d 575, 577 (7th Cir. 1983)).

140. *Id.* at 55.

protection for the kind of prosocial activism exhibited by employees in recent years.

## IV. ADOPTING A BROADER READING OF MUTUAL AID OR PROTECTION

This Part will discuss the unique challenge to enacting change in labor law stemming from the well-known politicization of the NLRB, before exploring possible statutory, agency-side, and employee-side solutions to the issue.

### A. The Problem of Politicization in the National Labor Relations Board

Any solution involving changes in the practices or policies of the NLRB must reckon with the well-known politicization of the agency.[141] Scholars argue that the Board under Democratic versus Republican administrations acts differently on a range of issues including "limiting the availability of the voluntary recognition of unions, the scope of Section 7 protections for mutual aid protections, and the use of interim injunctions under Section 10(j) for violations of unfair labor practice laws."[142] Under Republican administrations, the Board generally acts in favor of protecting managerial prerogatives, for example, increasing the ability of employers to oppose unionization.[143] Under Democratic administrations, however, the Board generally votes in more pro-labor union and pro-employee patterns,

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141. NLRB members are appointed by the President with the advice and consent of the Senate for five-year terms, and enjoy for-cause removal protection. *See* 29 U.S.C. § 153(a). However, despite being an independent federal agency—ostensibly more insulated from partisanship than an agency directly overseen by the Executive Branch—the Board is notorious for reaching seemingly-partisan outcomes in politically-sensitive questions. *See, e.g.*, Charles Fried, *Five to Four: Reflections on the School Voucher Case*, 116 HARV. L. REV. 163, 179 (2002) ("The Board pretends to act like a court solemnly arriving at the correct interpretation of a legislative command, but in fact acts like politicians carrying out their electoral mandate to favor labor or to favor management."); JAMES A. GROSS, BROKEN PROMISE: THE SUBVERSION OF U.S. LABOR RELATIONS POLICY, 1947–1994, at 275 (2010) ("national labor policy is in shambles in part because its meaning seems to depend primarily on which political party won the last election").

142. Catherine L. Fisk & Deborah C. Malamud, *The NLRB in Administrative Law Exile: Problems with Its Structure and Function and Suggestions for Reform*, 58 DUKE L.J. 2013, 2020 (2009); Joan Flynn, *A Quiet Revolution at the Labor Board: The Transformation of the NLRB, 1935-2000*, 61 OHIO ST. L.J. 1361, 1399, 1401 (2000) (discussing the historical factors that led to the trend in increasingly-partisan appointments to the NLRB).

143. *Id*.

such as broadening the definition of "employee" to extend protections to broader classes of workers.[144]

One notable example of partisan swings based on the party affiliation of the appointing President has been the changes in Section 7 protections for concerted activity conduct outside of unions. The application of Section 7 separate from the union context has gained significance as union prevalence has declined.[145] In *Eastex*, the Supreme Court affirmed that Section 7 protections apply broadly.[146] According to Professors Catherine Fisk and Deborah Malamud, the NLRB's extension of protections of the statute outside of activities related to unionization has been largely dependent on the partisan makeup of the NLRB appointees, "with Republican NLRBs taking a narrow view of the scope of Section 7 and Democratic NLRBs finding it to have broader applicability in nonunion workplaces."[147]

Accordingly, any changes to the way labor and employment disputes are handled before the NLRB must account for the relative

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144. *Id*. The uptick in partisanship in the Agency began in the Reagan era, which initiated a trend of ideologically motivated appointments to the NLRB. *See* Semet, *supra* note 13, at 233. During this time, "package" nominations increasingly became popular amidst the increased broad polarization, and former NLRB members attest to the effect of partisan motivation on NLRB decision making. *Id*. The result, since this shift in the Reagan administration, has been constant reversals on legal issues coming before the NLRB, and ensuing calls for restructuring of the agency. *See* Flynn, *supra* note 142, at 1392. Researcher Amy Semet's empirical work suggests that political actors do not directly exert any control over the actions of the NLRB; rather, the impact of partisanship on the NLRB is seen as a result of the appointment process. *See* Semet, *supra* note 13, at 255, 283.

145. Fisk & Malamud, *supra* note 142.

146. Eastex, Inc. v. NLRB, 437 U.S. 556, 570–76 (1978).

147. Fisk & Malamud, *supra* note 142. One particular issue on which the NLRB has reversed course with almost every change in the party of the Presidential administration has been whether Section 7 protects the right of a nonunion employee to have a coworker present during a disciplinary interview. The NLRB under the George W. Bush administration held that Section 7 only offers this protection to union employees, overturning a Clinton NLRB decision that a coworker's presence during a disciplinary interview was "concerted activity" for "mutual aid or protection." The Clinton NLRB, in turn, had reversed a decision from the Reagan NLRB on this question, which had previously overturned a decision from the Carter NLRB. *See* Fisk & Malamud, *supra* note 142, at 2025; IBM Corp., 341 N.L.R.B. 1288, 1288 (2004); Epilepsy Found., 331 N.L.R.B. 676, 680 (2000); Sears, Roebuck & Co., 274 N.L.R.B. 230, 232 (1985) (reversing Materials Research Corp., 262 N.L.R.B. 1010 (1982)). The Board under President Obama was never presented with the issue, so despite expectations that these "Weingarten rights" would be extended to nonunion employees during this period, the ruling in *IBM Corp.* has not been reversed.

impermanence of NLRB approaches to legal questions with politically sensitive implications.

### B. An Inclusive Understanding of Mutual Aid or Protection

As Professor Cynthia Estlund first noted in 1992, the best response to the reality of growing employee concern for the societal impact of their work is to expand the understanding of mutual aid or protection to include activities reflecting those concerns.[148] Law professor Matthew Finkin put an even finer point on this idea: "To view an employee's concerns in regard to these matters today as illegitimate, for want, as the Labor Board viewed it a half century ago, of work-related responsibility or expertise, is not only to perpetuate an anachronism, it is to blink at reality."[149]

Notably, a more encompassing understanding of mutual aid or protection would not disturb protections for traditionally-considered employment concerns, which by and large would remain the foremost interest for many employees. However, as shown by the marked increase in technology employee activism,[150] and the literature on the change in workers' views on work as a vehicle for meaning,[151] the social impact of an employee's work is increasingly central to her conception of her employment, and perhaps even more so than some benefits or factors that would be understood as conventional "terms and conditions." Both statutory amendment and NLRB rulemaking serve as potential solutions that could permit this broader reading and would withstand partisan shifts in the makeup of the Board.

#### 1. Statutory Amendment

A statutory resolution of the issue, mandating protection of employee prosocial activism as concerted activity for mutual aid, would serve as the most targeted and effective solution that would overcome partisan shifts within the NLRB. One option would be a Congressional amendment expanding Section 7's definition provision to clarify the phrase

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148. *See* Estlund, *supra* note 105, at 957 ("As with product quality, employees have a legitimate stake in being part of an enterprise that does good and not harm.").

149. Matthew Finkin, *Disloyalty! Does Jefferson Standard Stalk Still?,* 28 BERKELEY J. EMP. & LAB. L. 541, 561 (2007).

150. *See* Conger & Scheiber, *supra* note 12; Paulas, *supra* note 15 (noting the growing interest in unionization in the technology industry, which had not previously been a focus of such efforts).

151. *See* Wrzesniewski, *supra* note 5, at 93.

"for mutual aid or protection." This expanded definition could explicitly encompass prosocial activism by employees, and would effectively denounce any employer retributive action in response to employee activism as an unfair labor practice.

2. NLRB Rulemaking

The Board could also engage in increased rulemaking to guide its decisions in individual cases.[152] The NLRB rarely engages in rulemaking as a discretionary matter, largely conducting policymaking via individual adjudication instead, and has promulgated only a handful of rules over the course of the Agency's history.[153] One challenge to the Board in fostering consistent policy has been that the Board's adjudications are numerous, rapid, and are decided by a number of disparate decisionmakers.[154] Rulemaking would set clearer standards for Board decision-making, resulting in greater efficiency and consistency, and may mitigate the

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152. The Board could also use guidance documents or non-binding statements of policy, which do not require the procedural steps of notice-and-comment rulemaking to instruct later decisions in adjudication, but these methods are more likely to be impermanent, as they are susceptible to reversal as a consequence of changes in the partisan bent of the agency. *See* Semet, *supra* note 13, at 289; Fisk & Malamud, *supra* note 142, at 2079 (suggesting nonbinding policy guidance documents as an alternative to notice and comment rulemaking, particularly in the early stages of policy development).

153. NLRA Section 6 authorizes the Board to make rules and regulations "necessary to carry out the provisions of the Act" in accordance with the Administrative Procedures Act, while NLRA Sections 9 and 10 authorize the Board to adjudicate individual cases, but the choice of which policymaking avenue to use is left to the NLRB's discretion. The NLRB's first rule was published in 1989. *See* Appropriate Bargaining Units in the Health Care Industry, 29 C.F.R. § 103.30 (1989); Am. Hosp. Assoc. v. NLRB., 499 U.S. 606, 620 (1991) (upholding the NLRB's discretion in amending or rescinding rules where the Board undertook "reasoned analysis" of the subject); Mark H. Grunewald, *The NLRB's First Rulemaking: An Exercise in Pragmatism*, 41 DUKE L.J. 274, 276 (1991) (documenting the NLRB's first use of its rulemaking authority, and discussing the litigation that followed). The NLRB promulgated three additional rules in 2014, 2019, and 2020, and is currently engaged in one additional rulemaking process, initiated in July 2020. *See Rulemaking: Voter List and Military Ballots Notice of Proposed Rulemaking*, NAT'L LAB. RELS. BD., https://www.nlrb.gov/about-nlrb/what-we-do/national-labor-relations-board-rulemaking/voter-list-and-military-ballots [https://perma.cc/QX5R-T7GK]. The NLRB had initiated rulemaking to establish the standard for determining whether students who perform services at private universities in connection with their studies are "employees" within the meaning of Section 2(3) in September 2019, but withdrew the Notice of Proposed Rulemaking in March 2021. *See Rulemaking: Student Assistants*, NAT'L LAB. RELS. BD., https://www.nlrb.gov/about-nlrb/what-we-do/national-labor-relations-board-rulemaking/student-assistants [https://perma.cc/YY4M-MST2].

154. *See* Semet, *supra* note 13, at 288.

partisan shifting of the Board under new administrations, as a result of the procedural requirements of the administrative rulemaking process.[155] Even limited rulemaking would be beneficial to temper the ad-hoc nature of the NLRB's decision-making through adjudication, especially on the issue of Section 7 protections for employee activism activities, which is a question more likely than others to be subject to reversals following partisan shifts within the NLRB. The rulemaking process under the notice-and-comment procedural requirements of the Administrative Procedure Act (APA) would also increase the legitimacy of the final rule, because interested parties would have the opportunity to contribute to the agency's decision-making process.[156]

With regard to the issue of protection for prosocial activism, the rulemaking would be directed at broadening the definition Section of NLRA Section 7 to demarcate the bounds of "concerted action" for "mutual aid or protection," with the intent to include employee prosocial activism as within the classification of this phrase. The NLRB's recent and ongoing rulemaking in various areas may serve as instructive for future efforts regarding expanding definitions in the statute.[157]

### C. Union Advocacy for Prosocial Interests

As mentioned in the case of *Petrochem Insulation, Inc. v. NLRB*, some unions have taken up non-employment related causes in order to further collective bargaining goals.[158] A further step presents itself here, for

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155. Alexander Acosta, *Rebuilding the Board: An Argument for Structural Change, Over Policy Prescription, at the NLRB*, 5 FLA. INT'L L. REV. 347, 359 (2010). Predictability in Board adjudications could also promote earlier settlement in many cases. Furthermore, engaging in the rulemaking process would provide the Board with the opportunity to collect and analyze information, fostering best practices. Charlotte Garden, *Toward Politically Stable NLRB Lawmaking: Rulemaking vs. Adjudication*, 64 EMORY L.J. 1469, 1473–77 (2015).

156. *See* Garden, *supra* note 155, at 1475.

157. In particular, the processes whereby the NLRB has sought to clarify definitions in the statute may be instructive, even where later withdrawn. Off. of Pub. Affs., *NLRB Proposes Rulemaking Concerning Students*, NAT'L LAB. RELS. BD. (Sept. 20, 2019), https://www.nlrb.gov/news-outreach/news-story/nlrb-proposes-rulemaking-concerning-students [https://perma.cc/CT6F-AYMA]; *Rulemaking: Student Assistants*, *supra* note 153 (noting that this Notice of Proposed Rulemaking was withdrawn on March 15, 2021).

158. Unions have also taken on environmental causes where those goals have aligned with collective action objectives. James C. Oldham, *Organized Labor, the Environment, and the Taft-Hartley Act*, 71 MICH. L. REV. 935, 940–42 (1973); *see also* Five Star Transp., Inc. v. NLRB, 522 F.3d 46 (1st Cir. 2008) (sustaining the NLRB's

workers to form unions that not only negotiate with firms about employee wages, benefits, and working conditions, but also advocate for the prosocial concerns raised by members regarding the broader impact of a company's work. As recognized in *Five Star Transportation*, there is some confluence between wage and hour considerations and the broader impact of one's work.[159] Unions that relate these objectives with traditional collective bargaining goals may better serve their members by more explicitly connecting the broader impacts of employees' work with employees' psychological needs in negotiating with employers. In the inverse, while highly compensated industries such as the technology sector have largely avoided unionization, employees that seek to engage in prosocial activism to change the activities of their companies may well consider utilizing the strategy of unified collective bargaining.

In January 2020, the Communications Workers of America (CWA) announced a new initiative, the Campaign to Organize Digital Employees (CODE-CWA), in part in response to growing concerns about "the disconnect between the companies' stated values and the social impact of the technology. CODE-CWA will provide resources for workers who are joining together to demand change."[160] In January 2021, over four hundred Google employees formed the Alphabet Workers Union, a CWA-affiliate, focused on "giv[ing] structure and longevity to activism at Google," rather than "negotiat[ing] for a contract."[161] Parul Koul and Chewy Shaw, the executive chair and vice chair of the newly-formed union, emphasized the

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interpretation of "concerted activity" under the NRLA, even though that interpretation was based on events that had occurred at a union meeting); Petrochem Insulation, Inc. v. NLRB, 240 F.3d 26 (D.C. Cir. 2001) (holding that a union's permit challenging a non-union organization's activities were protected under the NLRA and that the NRLB's finding of retaliatory motive was supported by the fact that petitioner's lawsuit was meritless).

159. *See supra* Section III.C.

160. Press Release, Communications Workers of America, CWA Launches New Initiative in Support of Organizing Tech and Game Workers (Jan. 7, 2020), https://cwa-union.org/news/releases/cwa-launches-new-initiative-in-support-of-organizing-tech-and-game-workers [https://perma.cc/Q9DR-G5ZH].

161. Kate Conger, *Hundreds of Google Employees Unionize, Culminating Years of Activism*, N.Y. TIMES (Jan. 4, 2021), https://www.nytimes.com/2021/01/04/technology/google-employees-union.html (on file with the *Columbia Human Rights Law Review*); Press Release, Communications Workers of America, Google Workers Join CWA (Jan. 7, 2021), https://cwa-union.org/news/google-workers-join-cwa [https://perma.cc/L9Q2-S8ED] (announcing the creation of the Alphabet Workers Union as part of the Communications Workers of America).

inclusive objectives of the union, which will advocate for "workers [to] have a meaningful say in decisions that affect us and the societies we live in."[162]

## CONCLUSION

As Americans spend ever-growing proportions of their lives at work, the need to reexamine the way that law and other areas of society consider the role of work in an individual's life becomes increasingly imperative. Moreover, not only are employees spending more time at work, they are also placing greater value on their employment as not merely a source of wages, but rather a source of personal meaning and identity.[163] Therefore, protections under the law that would support workers' actions to promote prosocial consequences from the activities and conduct of their companies not only serves as a realignment of the law with the reality of employees' conceptions of their occupations, but would also empower employees to use their position within companies to foster societal good.

162. Parul Koul & Chewy Shaw, Opinion, *We Built Google. This Is Not the Company We Want to Work for.*, N.Y. TIMES (Jan. 4, 2021), https://www.nytimes.com/2021/01/04/opinion/google-union.html (on file with the *Columbia Human Rights Law Review*).

163. *See supra* Section II.