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THE FUTURE: THEY WILL LEAD; THE LAW WILL FOLLOW

*Robert A. Kearney**

You will not notice what is coming to the workplace near you until one day you look around and see a new generation of workers. They will transform the workplace in ways that the legal and regulatory environment cannot. Let us take a few examples.

These younger workers, whom I teach on a daily basis, do not value the same things that workers with twenty years of experience value. In their world, no bright line separates the work world from one's personal life; their facility with technology means their work is portable, just as their backpacks are.¹ Their boundaryless nature means they do not leave their work at the office in the way their parents do; rather, they use their social media accounts to vent about their coworkers and their supervisors just as they would their everyday life experiences or aggravations.²

It is not they who will be forced to change; it is the workplace. Workplaces with tough social media policies are already running into trouble with the National Labor Relations Board³ (the law does not just

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1. For some younger workers, that means using technology to bring their work to bed. See Sue Shellenbarger, *More Work Goes 'Undercover'*, WALL ST. J., Nov. 14, 2012, at D1 ("Researchers who study work habits say a new generation reared on mobile devices is increasingly accustomed to using them while propped against pillows, lying down or in a fetal curl.").

2. See Report of the Acting General Counsel Concerning Social Media Cases, Memorandum to All Regional Directors, Officers-in-Charge, and Resident Officers from Anne Purcell, Associate General Counsel, at the NLRB's Office of the General Counsel (Aug. 18, 2011), available at <http://privacyblog.litler.com/uploads/file/NLRBAugust18Memo.pdf>; see also Report of the Acting General Counsel Concerning Social Media Cases, Memorandum to All Regional Directors, Officers-in-charge, and Resident Officers from Anne Purcell, Associate General Counsel (Jan. 24, 2012), available at http://www.dorsey.com/files/upload/NYC12_Employees_NLRB.pdf (collectively, "NLRB AGC Reports").

3. See NLRB AGC Reports, *supra* note 2.

protect unionized workers),⁴ but the typical new generation worker has not even heard of the NLRB.⁵ They will not run to an agency they have never heard of, and frankly it is a generation that is fairly conflict-avoidant anyway.⁶ Rather, they will leave organizations that enforce such a sharp divide. To the young workers, such an organization is one that is trying to hide something, and while the job market is not robust, the smart organizations will change before the law makes them.

For the same reasons, the younger worker looks at workplace privacy as somewhat old-fashioned.⁷ This worker has little problem sharing her salary, or even her performance evaluations, in the name of egalitarianism and democracy.⁸ It is a strange world, I confess, and one without special deals and workplace favoritism. But it is a product of the world the younger worker grew up in, where they were told by their parents that they won even when they lost, or at least that they tied.⁹ Against this backdrop and these expectations, this worker will insist that their organizations treat gay and transgender employees as any other employee, whether federal law protects on the basis of sexual orientation or not.¹⁰ And though their natural passivity will give them some pause, they will not tolerate an employer whose external social programs do not match their egalitarian value system.

In the classroom, these new workers reject authoritarian professors with twenty-page syllabi and narcissistic tendencies. They will make employment laws (and, for that matter, labor laws) lagging, not leading, indicators. We can wonder whether a major law will be amended, but if

4. See 29 U.S.C. §§ 157, 158(a)(1) (2006) (conferring rights on "employees").

5. See William R. Corbett, *Waiting for the Labor Law of the Twenty-First Century: Everything Old is New Again*, 23 BERKELEY J. EMP. & LAB. L. 259, 267 (2002) ("The scope of coverage of section 7 and its application to nonunion employees may have been one of the best-kept secrets of labor law.").

6. Stephanie Hamel & Ruth Guzley, *Dissent and the Generational Divide*, in DISSENT AND THE FAILURE OF LEADERSHIP 56 (Stephen P. Banks ed., 2008) ("Millennials value consensus building and collaboration but they are also conflict avoidant.").

7. See David Allen Larson, "Brother, Can You Spare a Dime?" *Technology Can Reduce Dispute Resolution Costs When Times are Tough and Improve Outcomes*, 11 NEV. L.J. 523, 528 (2011) ("[T]he question of whether privacy is becoming an antiquated notion no longer can be dismissed.").

8. See *id.* at 528-29 (stating "[t]he fact that individuals are willing to forgo privacy in their daily affairs in exchange for the convenience offered by technology"); see also Rachel Emma Silverman, *Psst . . . This is What Your Co-Worker is Paid*, WALL ST. J., Jan. 30, 2013, at B6.

9. See Susan K. McClellan, *Externships for Millennial Generation Law Students: Bridging the Generation Gap*, 15 CLINICAL L. REV. 255, 263 (2009) (noting that the Millennial Generation may have trouble responding to criticism "[h]aving always been praised for their achievement and having received inflated grades").

10. At this point, it does not. See 42 U.S.C. § 2000e-2(a)(1) (2006).

it is, it will not be to add a protected class. It is more likely to be changed to make the workplace more like the family and school environments these workers are familiar with: where bullying is taken as seriously as sexual or racial harassment.¹¹ Sometimes, as in the case of sexual harassment, the law has to rule something out before the workplace starts to take it seriously.¹² But the mistake we make is that the next thirty years will follow suit. The new generation worker has already changed the norms. When workplace laws are changed, for example, to fully protect gays and to forbid bullying, it will seem quite after-the-fact.

There will still be brutish workplaces, to be sure, and the steady rise in charges filed with the Equal Employment Opportunity Commission¹³ demonstrates that the new generation workers cannot come soon enough. They do not have all the answers, and they still need mentors and training. And whether they are even correct on some of these issues, such as privacy, is another matter.¹⁴ What matters now is this: they will lead, and the law will follow.

11. In fact, anti-bullying state statutes are now the norm. See Susan Hanley Duncan, *Restorative Justice and Bullying: A Missing Solution in the Anti-Bullying Laws*, 37 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 267, 270-71 (2011).

12. The birth of sexual harassment law may be traced to Guidelines issued by the Equal Employment Opportunity Commission in 1980. Those Guidelines define sexual harassment as a form of sex discrimination. See 29 C.F.R. § 1604.11(a)-(g) (2012); see also *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 66 (1986) (“Since the Guidelines were issued, courts have uniformly held, and we agree, that a plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive work environment.”).

13. See Charge Statistics FY 1997 Through FY 2012, U.S. EQUAL OPPORTUNITY EMP. COMMISSION, <http://www1.eeoc.gov/eeoc/statistics/enforcement/charges.cfm> (last visited March 7, 2013).

14. Their perspective on privacy may simply be a function of the lack of privacy in the modern world. Try doing much of anything in public beyond the lens of a camera.

