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Social Media Policies



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Consider the Statistics

- A recent survey of employees conducted by Deloitte revealed some alarming realities:
 - 74% agreed that it is easy to damage a company's reputation on social media.
 - 53% said Facebook pages are none of their employers' business.
 - 24% don't even know if their company has a social media policy.
 - 49% says a policy would not change how they behave on social media sites.
- The increase in social media usage for employees age 30-39 was 105%, ages 40-49 was 164%, and ages 50-54 was 166%.



Today's Agenda....

1. What rules apply? Direct and indirect governing laws.
2. What are the goals? Positive and negative social media considerations.
3. What should be included and avoided in the policy language and terms.
4. Employee training and notification.
5. Employee discipline.
6. Industry-specific concerns.
7. Legislative trends.
8. Odds & ends.



Laws Governing Employee Use of Social Media

- Among the laws that may impact workplace use of social media are the following:

- National Labor Relations Act (NLRA);
- The Stored Communications Act (SCA);
- The Fair Credit Reporting Act (FCRA);
- The Genetic Information Nondiscrimination Act (GINA);
- Common law privacy principles; and
- Other laws based on facts, i.e., HIPAA, Lanham Act, Communications Decency Act, Securities and Exchange laws, Sarbanes and Dodd-Frank, etc.



May 30, 2012 NLRB Acting General Counsel Report

- “My previous reports touched on some of these [social media] policies and rules, and they are the sole focus of this report. . . .”
- Reiterates that work rules violate NLRA if they “would reasonably tend to chill employees in the exercise of their Section 7 rights.”
- BUT, the third time was a charm, and for the first time the Acting GC approved of a policy *in its entirety*. This gives employers an actual roadmap for what should survive NLRB scrutiny.



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May 30, 2012 NLRB Acting General Counsel Report (continued)

- “. . . rules that clarify and restrict their scope by including examples of clearly illegal and unprotected conduct, such that they could not reasonably be construed to cover protected activity, are not unlawful.”
 - GC did not say or mean such policies are **lawful**, just that they are **not *per se* unlawful**.
 - Importantly, approved policy prohibits “inappropriate postings that may include discriminatory remarks, harassment and threats of violence or similar inappropriate or unlawful conduct.”



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May 30, 2012 NLRB Acting General Counsel Report (continued)

- Other approved provisions include:
 - **Confidentiality:** limited to trade secrets and proprietary information – provided examples.
 - **“Be Respectful,” “Fair and Courteous”:** questioned this, but approved because specific, detailed definitions of prohibited conduct were provided.
 - Provisions approved without comment include:
 - “Carefully read these guidelines [and other applicable codes and policies] and ensure your postings are consistent . . .”
 - “Make sure you are honest and accurate. . . Never post any information or rumor that you know to be false about [Employer, customers or co-employees].”
 - “Never represent yourself as a spokesperson. . . make it clear that your views do not represent those of [Employer].”

What are the goals?

Positive and negative social media considerations

- Benefits to organization can include:
 - Ability to connect and communicate efficiently and inexpensively.
 - Ability to promote values, goals, products and services.
 - Allows organization to further engage employees.
 - Promotes sense of employee freedom of expression.
 - Can be used to increase computer skills.
- Detriments to organization can include:
 - Increases risk of lawsuits/legal problems.
 - Can lead to disclosure of secrets.
 - Can cause damage to reputation.
 - Can become venue for disgruntled employee/union organization.



What are the goals?

Positive and negative social media considerations

- First, determine the **who, what when and scope**:
 - To **whom** should the policy apply?
 - All employees?
 - Only those with computers or email provided by employer?
 - Only those with nondisclosure agreements/access to confidential info?
 - **What** technologies need to be covered to accomplish your goals?
 - Just internal company email and sites?
 - What about privately owned and held sites and accounts (Facebook, etc.)?
 - What about devices (laptops, PDAs, etc.) provided by the organization?

What are the goals?

Positive and negative social media considerations

- **When** does the policy apply?
 - Only at work, only while being paid to work, or at all times?
- How broad does the **scope** need to be to accomplish your goals?
 - Do you need to include limitations or restrictions on employees' ability to identify their association with your organization?
 - What about confidentiality?
 - What conduct will be prohibited?
- The key is the ability to articulate a legitimate need for the work rule, and then to provide as much clarification through examples and definitions as possible.

Policy Elements

- After deciding the goals of the work rule(s), consider the following preliminarily approved provisions (assuming drafted correctly):
 - Confidentiality/proprietary information protections need examples and definitions.
 - Prohibitions against inappropriate postings need qualifying language to clarify this means unlawful discrimination, harassment, threats of violence, etc., and not everything an employer doesn't like.
 - Prohibitions against false information are ok, but be careful not to be so broad that an employee's mistaken belief about a work practice, etc., would be included.
 - Rules for identifying association with employer and/or representing opinions as the organization's.



Policy Elements (continued)

- Rules for workplace use of social media – be careful not to be too broad, but acceptable if tailored to work hours, work equipment and work-related content.
- Prohibitions against dissemination of certain safety information are acceptable, but so far they need to be limited to information about the safety of products or services and not workplace safety.
- Prohibitions against disclosure of information projected by attorney-client privilege are fine – but avoid blanket prohibitions of information regarding “legal matters.”
- Remember, the “approval” of these provisions is a moving target as other agencies and courts consider the policies and as lawmakers, and other provisions may be endorsed (or endorsed by one court and criticized by another. . .).



Policy Elements to Avoid

- Among others, avoid policy terms that include the following:
 - Prohibitions against “friending” co-workers. But, could an organization prevent managers/supervisors from “friending” subordinate employees? That remains unanswered.
 - Language that encourages employees to use alternative complaint mechanisms.
 - Prohibitions against discussions of salary information or work terms.
 - Blanket prohibitions against negative comments about co-workers, supervisors, or the employer generally.



Employee Training & Notification

- Remember, 24% of employees indicated they did not know if their employer had a social media policy.
- You have to provide employees with clear notice of the rules, what they mean, and the consequences for violations.
- Train supervisors and managers to be prepared to encounter criticism via social media, and on effective ways to deal with the criticism.
- Make sure new hires understand your policy as it may differ in many ways from prior employers.
- Get an acknowledgement of employee training.



Employee Discipline & Termination

- No law (yet) addresses acceptable levels of severity for violations of social media policies, but legislation has been proposed in several states that would limit the ability to fire an employee based on what they say on Facebook or the like.
- Consider putting specific examples of violations of organization's social media policy in progressive discipline policy, or in social media policy.
 - Be very clear if one strike could or will result in termination of employment.
- Be consistent.
- Document everything.



Specific Industry Concerns

- Health Care:
 - Policy should address patient privacy concerns, HIPAA compliance issues, and should protect against creation of evidence supporting malpractice claims, where possible.
 - Consider a prohibition against employees “friending” or otherwise using social media to connect with patients or residents?
 - Incorporate confidentiality and nondisclosure policies or agreements.
 - Inform and remind employees that their organization may monitor blogs and postings, and that there is no expectation of privacy with equipment provided by employer.



Specific Industry Concerns

- Broker - Dealers:
 - FINRA recently issued regulatory Notice 10-06 to broker-dealers, and it covers use of social media sites.
 - Like the NLRB, FINRA clearly favors broker-dealers with formal, written rules governing use of social media.
 - Unlike NLRA's focus on employee's rights, FINRA's rules protect investing public and govern "public appearances" in things like blogs and advertisements.
 - Other regulations include recordkeeping obligations, governance of third-party posts and other control measures.



2012 and Beyond – What to Expect

- Look for employer-sponsored challenges to NLRB rulings and positions to make their way to courts.
- Watch for more legislation like Maryland's law that forbids employers from demanding access to employee's social media accounts.
- Look for legislation governing use of GPS with employees, email privacy issues, and use of social media with background checks.

