Social Media #BestPractices for Employers

Employment and Labor

CHEAT SHEET

- ***Policy.*** The company social media policy should establish clear and consistent guidelines for acceptable employee social media use during work hours, and whether off-duty social media conduct will be subjected to disciplinary action.
- ***Implementation.*** Disseminate the social media policy and have employees acknowledge receipt and agree to the terms. Also implement routine training on proper social media conduct and make sure the policy is applied consistently.
- ***Risks.*** Consider whether the employee's social media use is protected speech by either national or local regulations before taking disciplinary action.
- ***Employment contracts.*** Refer to the employee's contract to determine if there are contractual protections, stipulated disciplinary actions, or restrictive covenants that extend to

post-employment social media conduct.

The workers of a Manhattan catering company had it with management. They felt they had been treated unfairly and were going to unionize. A few days before the union election, an employee vented about his supervisor on Facebook, writing, “Bob is such a NASTY MOTHER F** don’t know how to talk to people!!!!! F his mother and his entire f family!!!! What a LOSER!!!! Vote YES for the UNION!!!!!!” The employee was promptly fired. Because the employee had coworkers as “friends,” this was protected speech, as a judge later confirmed.

The advent of technology has brought many changes to the workplace. As those of us who used to save documents to a floppy disk and use dial-up internet can attest, many of these changes have helped promote productivity and efficiency in the workplace. Whether for better or for worse, these changes have altered the landscape of the workplace, and employers must adjust their policies and practices to address these effects.

Social media is at the forefront of this technological evolution and has undeniably changed the way we communicate. As of 2019, Statista, the German database company, estimates that 79 percent of Americans have a social media account. Prospective job candidates are frequently counseled that their social media presence can affect their job prospects as 70 percent of employers use social networking sites to research job candidates. In the European Union, General Data Protection Regulation (GDPR) guidelines state that employers may only scan social media profiles (even if they are public) if the information is relevant to the performance of the job. However, an employer’s responsibilities regarding the social media activities of current employees are less often discussed.

Social media’s growing prevalence continues to blur the line between an employee’s private conduct and work conduct, and employers are tasked with assessing their responsibilities in both scenarios. This task begins with understanding potential legal issues that can arise from an employer’s response to an employee’s on-duty or off-duty social media use.

Potential legal considerations

The National Labor Relations Act

The National Labor Relations Act, 29 U.S.C. §§ 151-159 (NLRA), gives all private-sector employees, whether union or nonunion, the right to engage in protected concerted activity, which occurs when two or more employees act together to discuss or improve any term or condition of employment (commonly referred to as Section 7 rights).

Over the years, the NLRB has recognized many types of protected concerted activity, including but not limited to:

- Discussing or complaining about working conditions, wages, hours, safety, discrimination, harassment, or a supervisor’s conduct;
- Supporting a coworker’s complaints;
- Seeking to replace company management;
- Criticizing management; and
- Forming or attempting to form a union, discussing a union, or engaging in union-related

activities.

Employers may violate the NLRA whenever they interfere with, restrain, or “chill” employees’ rights to engage in protected concerted activity.

The NLRB has broadly interpreted this potential “chilling” effect in the context of employee social media posts, even finding that an employee’s expletive-laced, public Facebook post directed toward the employee’s boss and boss’ family was protected concerted activity under Section 7 because the comments mentioned workplace concerns. If an employee’s social media activity includes content that could be construed as discussing workplace conditions or concerns, an employer should be cautious before disciplining and/or discharging the employee for the activity, even if profanity is involved.

Employers should also keep in mind that Section 7 protections only apply to “concerted” activity, meaning that two or more employees must act together. However, employees are often connected on social media and have access to the posts and/or activity of their co-workers. A simple “Like” of a post on Facebook between coworkers is likely sufficient to satisfy the “concerted” requirement for Section 7 protections.

“Free speech” concerns

It is a common misconception that the First Amendment protects employee speech in all contexts, including social media channels. The First Amendment’s protections do not apply to private-sector employers. In other words, an employee’s freedom of speech and expression can have limits and repercussions in the private-sector workplace.

For instance, if a private-sector employee goes “viral” for controversial reasons, makes comments on social media deemed inappropriate, or otherwise exhibits online conduct her employer finds unbecoming, the employer can take action. In today’s “woke” culture (Woke culture is a subculture that focuses on social justice-related issues), an employee’s poor conduct online can quickly draw the ire of the online multitudes. If that employee is then linked to his employer, the outrage-mob will often call, not only for the employee’s head, but for that of the employer. In those cases, an employer may need, and is legally allowed, to cut ties with the employee who brought about the bad press in order to distance themselves.

There are countless examples of this phenomenon — an individual’s conduct or opinion angers the online populace, leading to their firing. It is so prevalent in today’s society that it has even been given a moniker — “online shaming.” Justine Sacco is a case study on online shaming and the implications it can have for employees and employers.

In 2013, Sacco was the senior director of corporate communications at InterActiveCorp (IAC), headquartered in New York City. While traveling from New York to South Africa during the holidays, Sacco tweeted “Going to Africa. Hope I don’t get AIDS. Just kidding. I’m white!” Predictably, the tweet was not well received by the Twittersphere.

In the time it took Sacco to travel from Heathrow Airport in London to Cape Town, she became the number one worldwide trend on Twitter. Despite having a mere 170 followers at the time, her Twitter feed became a maelstrom. After a follower retweeted her comment to multiple other accounts, social justice warriors decried Sacco’s comment as offensive and outrageous. They then called into question her job in public relations for IAC. IAC responded to the insensitive remark and the tumult it

created, firing Sacco before her flight touched down.

This is just one of the many examples of outside agitators prompting a company to fire an individual because that individual's online conduct was deemed contemptable. As later discussed, it is essential for employers to develop and effectively communicate a social media conduct policy, outlining the "dos and don'ts" of online conduct. Then, when your company has a Justine Sacco moment and the company's reputation is endangered, swift action can be taken to terminate the employee "for cause."

While the First Amendment will ordinarily not shield private-sector employees from discipline for social media posts, state law may provide certain protections to employees that could extend to social media. For example, in South Carolina it is unlawful for an employer to terminate an employee "because of political opinions or the exercise of political right and privileges." If a social media post from a South Carolina employee communicates a political opinion or expression, discharge of that employee on the basis of the communication could implicate the above-referenced statute. Depending upon your jurisdiction, an employer must consider any state law that could be implicated based on the content and nature of the social media activity at issue.

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Moreover, the timing of the social media post is also potentially relevant to the employer's analysis. For example in Colorado, it is a discriminatory or unfair employment practice for an employer to terminate the employment of any employee due to that employee's engaging in any lawful activity off the premises of the employer during nonworking hours, except in the case of certain limited exceptions. Social media engagement by an employee occurring after hours and off the premises could potentially fall under the protections of this statute.

Federal and state laws

Protections for employees under federal and state discrimination statutes still apply in the context of social media. An employee's social media activity can be construed as a complaint of discrimination, a complaint regarding safety, whistleblowing, or any other potentially protected activity under federal or state law. In such an instance, discipline and/or discharge because of the activity could constitute unlawful retaliation.

While the overall number of discrimination charges filed with the Equal Employment Opportunity Commission (EEOC) decreased in 2018, the number of charges filed alleging sexual harassment increased. This increase is not surprising in light of the #MeToo movement and is particularly relevant in the context of an employee's social media usage. Employers cannot turn a blind eye to its employees' social media interactions, even if the interactions take place off duty, outside of any working time. If these interactions lead to allegations of harassment, discrimination, and/or a hostile work environment, an employer has a legal duty to investigate the allegations, despite the "off-duty" nature of the conduct.

For example, as recently as January 2019, the US Court of Appeals for the First Circuit concluded that Facebook messages sent by a plaintiff 's coworker outside of working hours could be considered in assessing a hostile work environment claim, as courts "can permit evidence of

nonworkplace conduct to help determine the severity and pervasiveness of the hostility in the workplace." The court further recognized that some of messages could potentially constitute workplace conduct, even though they occurred after hours, because the messages were about workplace conduct and were sent by the plaintiff 's coworker.

Thus, depending upon the content and nature of the social media activity, an employer may be prohibited from taking certain action against an employee, as in the case of protected activity, or may have a legal duty to act, as in the case of potential harassment, whether the activity occurs on or off the clock.

Employment contracts

Before making disciplinary decisions, an employer should consider whether a contractual protection applies to the employee. Some contract employees are bound by an employment agreement that dictates the appropriate course of discipline and/or discharge. This discipline plan could apply to social media conduct as well. The language of the contract will dictate the potential application in social media situations.

Additionally, an employee may be subject to restrictive covenants that limit the employee's ability to solicit and/or compete following the dissolution of an employment relationship. Employers should be aware that these restrictive covenants could extend to post-employment social media conduct, as was recently recognized in Kennedy v. Shave Barber Co., LLC. In Kennedy, the Court of Appeals of Georgia upheld a trial court's injunction against a former employee of a barbershop based on a restrictive covenant. In doing so, the court recognized that certain Facebook posts of the former employee supported a finding of solicitation, given that the former employee had used social media during her employment to solicit customers and her post-employment posts were targeted at informing her former clients that she was opening a new salon and attempting to solicit their business.

Employer #BestPractices

Social media policy

In light of the myriad of potential legal issues facing an employer regarding employee social media conduct, a clear, concise, and consistently applied social media policy is essential. This policy should set forth guidelines for employee social media use during work hours, including limiting an employee's ability to use their work email address to register for any social media site for personal use and potentially limiting an employee's ability to visit social media sites during working hours, unless it's for a business reason. Further, the policy should clearly communicate to employees that their off-duty social media conduct could subject them to discipline, up to and including termination.

Additionally, the policy should list specific social media conduct that is not permitted, whether on or off duty, including prohibiting revealing confidential and/or proprietary information of the employer, posting opinions that may be detrimental to the employer's reputation, posting defamatory statements, threating statements, and/or statements that might constitute harassment or bullying. In drafting this list, an employer must take caution not to include prohibitions that run afoul of an employee's Section 7 rights or any other applicable federal or state law.

Communication and enforcement

Soundly drafted policies and procedures can only be effective if they are properly communicated to employees and applied consistently. This starts with ensuring that every employee receives a copy of the social media policy, acknowledges the policy, and agrees to abide the policy. Furthermore, employers should routinely train all employees on proper social media conduct.

Just as with the application of any other policy or procedure, an employer that applies its social media policy inconsistently could face potential legal liability as well as employee morale issues. To ensure consistent application, an employer should train managers and supervisors on how to apply its social media policies in a fair and consistent matter, without regard to any nonjob-related, legally protected characteristics, such as race, color, national origin, sex, or religion.

Final thoughts

As social media continues to grow, employers' policies and practices must adjust accordingly. An updated social media policy effectively communicated and consistently applied is a great first step for employers to keep up with evolving technology. These policies, in conjunction with an understanding of the potential legal risks involved with employee social media use, can enable employers to better navigate management of its employees in the digital age.

ACC EXTRAS ON… Social media

ACC Docket

3 Forward-Thinking Social Media Strategies for Your Company (Jan. 2019).

Vetting Social Media Content: Getting Ahead of the Fast and Furious (Dec. 2018).

Social Media Policy — Still the Wild West (Sept. 2018).

Sample Forms, Policies, and Contracts

Social Media Policy for Healthcare Industry (US) (Feb. 2019).

Further Reading

See National Labor Relations Board v. Pier Sixty, LLC, 2017 U.S. App. LEXIS 6974 (2d Cir. Apr. 21, 2017).

29 U.S.C.A. § 158(a)(1); see also Lear Siegler, Inc. v. NLRB, 890 F.2d 1573, 1580 (10th Cir. 1989); Medallion Kitchens, Inc. v. NLRB, 806 F.2d 185, 191 (8th Cir. 1986).

This NLRB decision was affirmed by the United States Court of Appeal for the Second Circuit in National Labor Relations Board v. Pier Sixty, LLC, 855 F.3d 115, 124 (2d Cir. 2017), as amended, (May 9, 2017).

NLRB v. City Disposal Systems, Inc., 104 S.Ct. 1505, 1511 (1984) citing Meyers Industries, 268 N.L.R.B No. 73, at 3 (1984)("[t]he term 'concerted activit[y]' is not defined in the Act but it clearly enough embraces the activities of employees who have joined together in order to achieve common goals.")

S.C. Code § 16-17-560.

Colo. Rev. Stat. § 24-34-402.5.

Roy v. Correct Care Sols., LLC, 914 F.3d 52, 63 n.4 (1st Cir. 2019).

348 Ga. App. 298, 822 S.E.2d 606 (2018).

Id. at 309, 822 S.E.2d at 615.

Id. at 307, 822 S.E.2d at 614.

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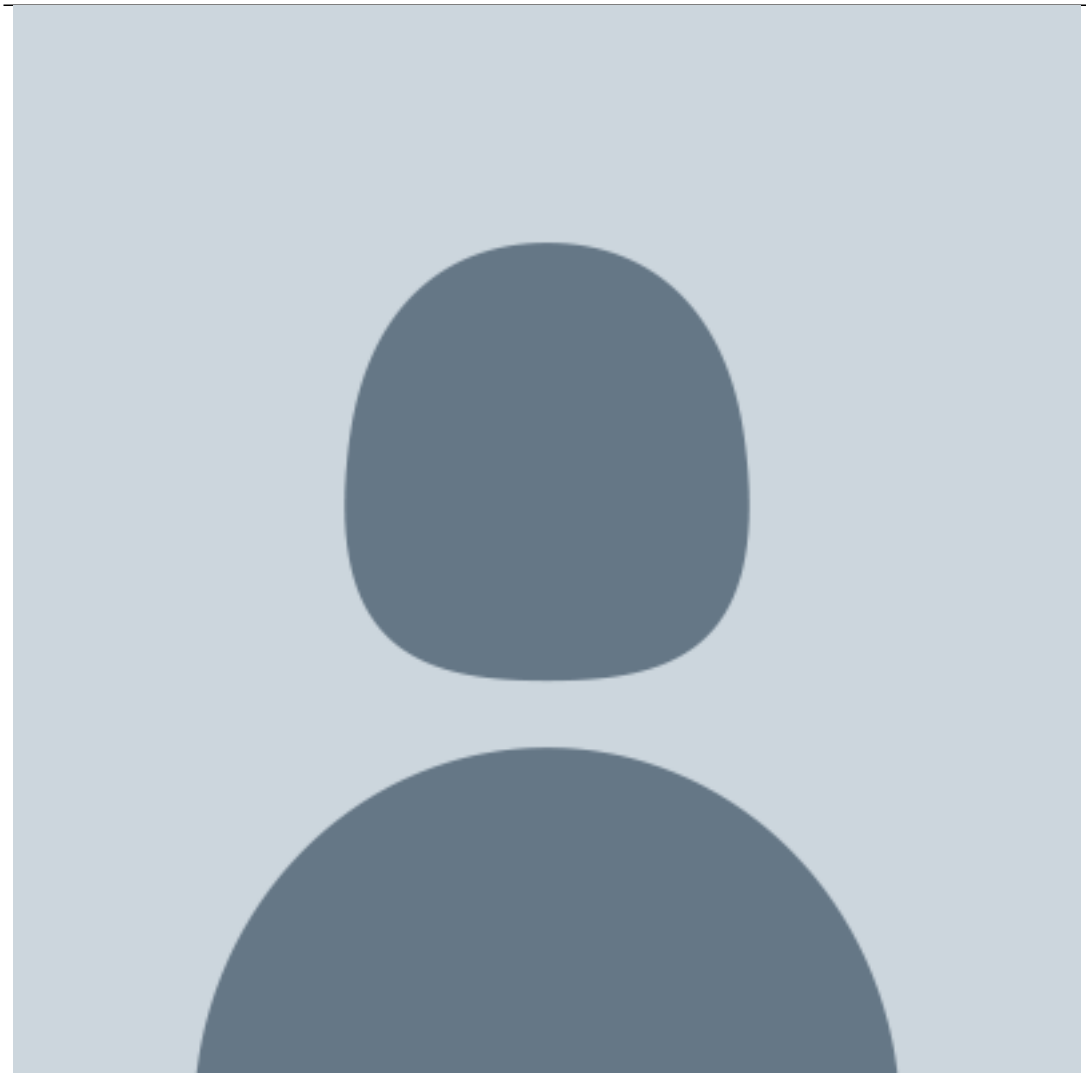

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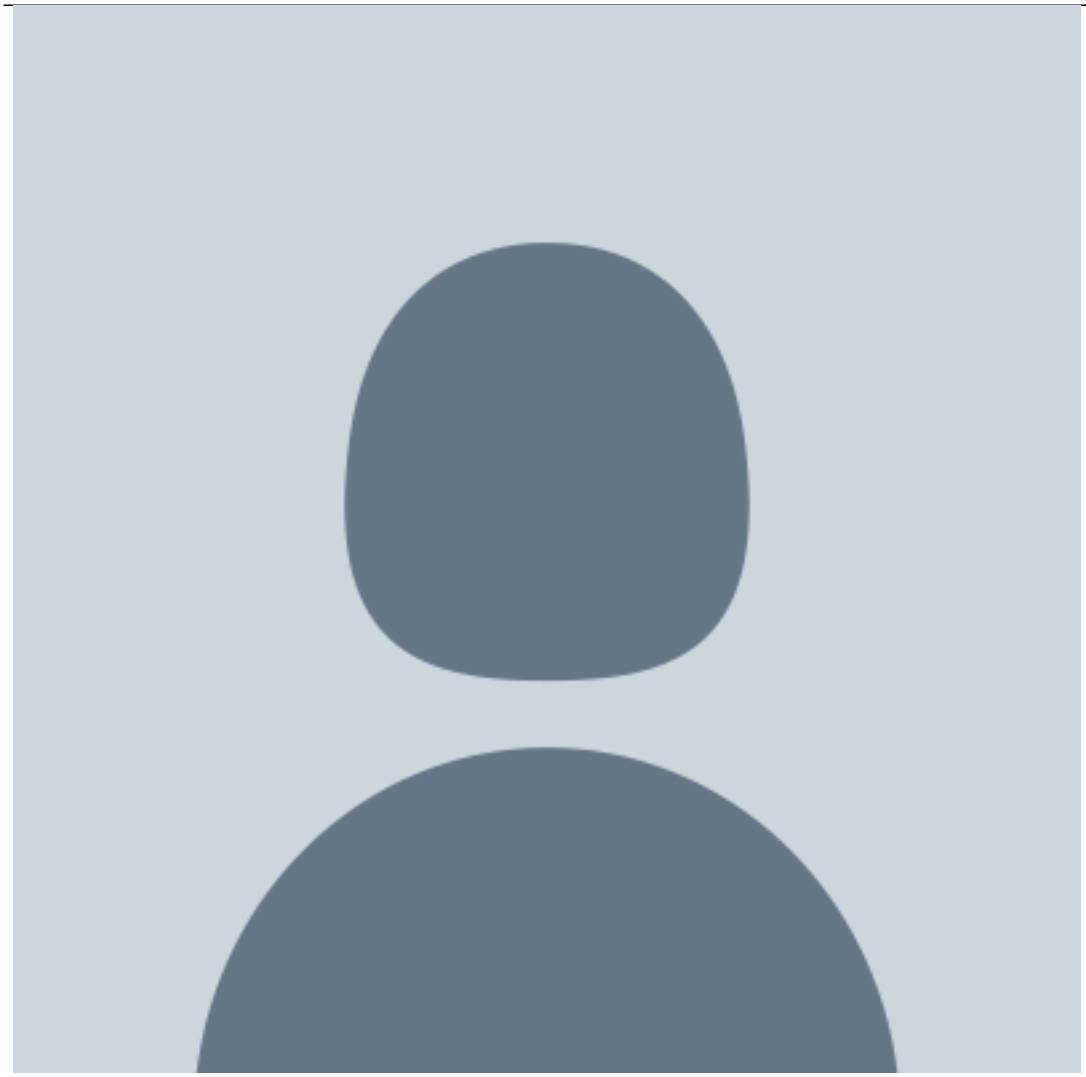

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