

GRAYROBINSON

Social Media Policies and the Law

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Presented by

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TODAY'S PRESENTER



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- Experienced in representing management (employers) in both unionized and union-free environments.
- Represent management before federal, state, and local administrative agencies including the Equal Employment Opportunity Commission, the Florida Commission on Human Rights, Public Employee Relations Commission, and the Miami-Dade Commission on Human Rights.
- Obtained successful resolutions on behalf of his clients in single plaintiff, multi-plaintiff, and class and collective actions in both state and federal courts in the employment context.

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Prevalence of Social Media in American Society

According to a 2023 Pew Research Center survey:

- Most U.S. adults report using Facebook (68%)
- Roughly half of U.S. adults report using Instagram (47%)
- One third of U.S. adults report using TikTok (33%)

How Can an Employee's Use of Social Media Affect an Employer?

- Use of social media during working hours can **distract** employees and **reduce productivity**.
- Employees might use social media to **misrepresent** your Company or cause **public embarrassment**.
- Employees might share company information on social media, which raises **confidentiality concerns**.
- Improper use of social media by employees can lead to **harassment and discrimination** claims against the employer.

Limitations on an Employer's Ability to Regulate Social Media Use

Public Sector Employers

- First Amendment of the United States Constitution
 - Employee speech (i.e., on social media) is protected if it is made in the employee's personal capacity and addresses a "*matter of public concern*."
- Public Employee Relations Act (PERA)
 - Prohibits employers from taking adverse actions against employees for engaging in protected, concerted activity, which includes discussing "*the well-being of fellow employees*" (including on social media).

Private Sector Employers

- National Labor Relations Act (NLRA)
 - Prohibits employers from restricting employees' ability to "engage in protected, concerted activity," which includes *discussing terms and conditions of employment* with one's co-workers.

PUBLIC SECTOR EMPLOYERS

Social Media Policies and the First Amendment

Social media posts may be protected by the First Amendment if the speech arguably relates to a “matter of public concern.”

- This is a broad category and may include speech that is inflammatory or offensive.

Employers can only restrict such speech by showing it disrupts their operations (and not just a mere likelihood).

For these reasons, public employers need to make sure their social media policy is not so broad as to restrict its employees’ ability to engage in speech addressing “matters of public concern”.

Social Media Policies and the First Amendment, Continued . . .

In *Hernandez v. City of Phoenix*, 43 F.4th 966, 974 (2022), the City of Phoenix police department had the following social media policy:

Department personnel are free to express themselves as private citizens on social media sites to the degree that their speech does not impair working relationships of this Department, are detrimental to the mission and functions of the Department, that undermine respect or public confidence in the Department, cause embarrassment to the Department or City, discredit the Department or City, or undermine the goals and mission of the Department or City.

- A police officer was disciplined under this policy for publishing a racially insensitive social media posts while off duty. He sued, and argued that the disciplinary action violated his First Amendment free speech rights.
- While the trial court upheld the police department's policy, the Ninth Circuit Court of Appeals ruled that the social media policy was overbroad, holding that **an agency cannot restrict speech merely because the agency may find the speech embarrassing or discrediting.**

Social Media Policies and the First Amendment, Continued . . .

As that court held, the police officer's posts, though controversial and inflammatory, constituted protected speech for the following reasons:

- **Post mocking the contributions to science made by Muslim scholars and scientists**
 - qualified as matter of public concern because it tangentially touched on matters of cultural assimilation and intolerance of religious differences in British society, which were topics of social or political concern to some segments of general public.
- **Post criticizing the U.S. government for allegedly cutting military to provide funds for Muslim Americans.**
 - qualified as a matter of public concern because it addressed subjects that received media attention at the time and sparked heated public debate.
- **Post criticizing the British media's alleged failure to cover crime conviction rates for Muslim citizens.**
 - speech criticizing media's coverage of a particular subject qualified as matter of public concern.

Social Media Policies and the First Amendment, Continued . . .

- In *Liverman v. City of Petersburg*, 844 F.3d 400 (4th Cir. 2016), the city’s chief of police issued a general order regarding social media use which prohibited the dissemination of any information “*that would tend to discredit or reflect unfavorably upon the [Department] or any other City of Petersburg Department or its employees.*”
- The court found the policy was overbroad, holding that employers cannot impose on its employees “a virtual blanket prohibition on all speech critical of the government employer.”



Social Media Policies and the First Amendment, Continued . . .

- In *Sabatini v. Las Vegas Metropolitan Police Department*, 369 F. Supp. 3d 1066 (D. Nev. 2019), two supervising officers were disciplined for posting material on Facebook that violated the Department's social media policy which *prohibited speech that impaired working relationships, performance of duties, discipline and harmony among co-workers, or negatively impacted department's ability to serve the public.*
- The officers challenged the action taken against them and the social media policy under the First Amendment.
- The Court rejected the First Amendment challenges to the department's social media policy, finding the policy narrowly sought to prevent its employees from promoting discrimination against others. The social media policy did not prohibit employees from speaking on matters of department policy or actions, and department had strong interest in maintaining public trust by prohibiting speech that caused public to question its ability to enforce the law fairly, even-handedly, and without bias.

Social Media Policies and Florida's Public Employee Relations Act

PERA prohibits employers from taking adverse actions against employees for engaging in protected, concerted activity, which includes discussing “*the well-being of fellow employees.*”

In *Orange County Professional Fire Fighters, IAFF v. Orange County Board of County Commissioners*, 38 FPER ¶ 131 (2011), the hearing officer found the following policy to be overly broad:

- “*Employees of the Department shall not criticize or ridicule or debase the reputation of the Department, its policies, its officers or other employees.*”
- The hearing officer also found other portions of the policy, which restricted employees from posting communications on social media websites that “*tend[ed] to interfere with the maintenance of proper discipline; and/or damages or impairs the reputation and/or efficiency of the Department or its employees,*” were overly broad.

Social Media Policies and Florida's Public Employee Relations Act

- However, in Florida, personal complaints about work or a supervisor's actions and "criticism for criticism's sake" are generally not considered protected concerted activity because they are not efforts to obtain a remedy over wages, hours, and other terms and conditions of employment. Therefore, if a social media postings at issue is limited to *griping alone*, it is unlikely to be considered protected activity.
- Remember: Cases involving speech or an activities that are *libelous, coercive, physically threatening, or "create[d] a real threat of immediate disruption in the workplace"* are generally not protected even if the employee acts in concert with others.

Note: these principles also apply to private employee speech under the NLRA

PRIVATE EMPLOYERS

Social Media Policies and the National Labor Relations Act

The NLRA prohibits employers from restricting employees' ability to “engage in protected, concerted activity,” which includes *discussing terms and conditions of employment* with one's co-workers.

- Employees' social media speech is protected when they are speaking truthfully about working conditions, such as by discussing the following:
 - Pay rates and pay disparity
 - Vacation time issues
 - Harassment at work
 - Whether or not to join a union
 - Unsafe working conditions
 - Illegal activity by your employer
 - Supporting workers who have been disciplined by the employer

Social Media Policies and the National Labor Relations Act, Continued . . .

Excerpt from the NLRB Website:

“Using social media can be a form of protected concerted activity. You have the right to address work-related issues and share information about pay, benefits, and working conditions with coworkers on Facebook, YouTube, and other social media. But just individually griping about some aspect of work is not “concerted activity”: what you say must have some relation to group action, or seek to initiate, induce, or prepare for group action, or bring a group complaint to the attention of management. Such activity is not protected if you say things about your employer that are egregiously offensive or knowingly and deliberately false, or if you publicly disparage your employer's products or services without relating your complaints to any labor controversy.”

Social Media Policies and the National Labor Relations Act, Continued . . .

As long as a social media post is not “malicious or reckless,” even criticism of an employer or its management may be protected when the communication is considered an attempt to garner support or rally others in the first step toward group action. For example:

- In 2010, an employer terminated an employee for posting negative remarks about her supervisor on social media from her home computer, such as, “I love how the company allows a [psychiatric patient] to become a supervisor”. This termination was found to violate the NLRA.
- In 2012, an employer terminated five employees under its “Bullying and Harassment” policy for openly discussing a co-worker’s criticism of their work performance on social media. This termination was also found to violate the NLRA.
- In 2013, a PR executive was terminated for posting the following on her personal Twitter account as she boarded a flight for vacation: “Going to Africa. Hope I don’t get AIDS. Just kidding, I’m white!” This termination *was not* found to violate the NLRA.

Social Media Policies and the National Labor Relations Act, Continued . . .

- In 2023, the NLRB reviewed an employee handbook policy that said employees were expected to “*behave in a manner conducive to efficient operations,*” and “*refrain from behavior that is damaging to the employer’s reputation.*” The policy stated that a failure to do so could lead to corrective action up to, and including, termination.
- The NLRB concluded the policy was overly broad, saying rules aimed at criticism by employees must contain clear language stating that they are aimed only at unprotected activity: “Otherwise, the failure to make that distinction would cause employees to refrain from engaging in protected activities.”
 - So, what’s the takeaway? In addition to carefully drafted policies, use effective disclaimers.

Best Practices for Creating an Effective Social Media Policy

Best Practices for Creating a Social Media Policy

1. Be clear on the purpose of the policy
2. Be specific about the content within the scope of the policy.
3. Reference established policies.
4. Distinguish company-affiliated posts from personal posts.
5. Review policy and update frequently.

Best Practices for Creating a Social Media Policy, Continued . . .

1. Be clear on the purpose of the policy

To assess whether a social media policy violates the NLRA, the NLRB balances the “nature and extent of the potential impact on NLRA rights” with the “**legitimate justifications associated with the rule**”

- In a statement announcing the *Stericycle* ruling (2023), the NLRB said it will carefully consider both the potential impact of work rules on employees **and the interests that employers articulate in support of their rules.**

Best Practices for Creating a Social Media Policy, Continued . . .

1. Be clear on the purpose of the policy (example):

“**The Company recognizes** that the internet provides unique opportunities to participate in interactive discussions and share information on particular topics using a wide variety of social media, such as Facebook, LinkedIn, X (formerly Twitter), Instagram, TikTok, Pinterest, Snapchat, Tumblr, blogs, and wikis. **However**, employees’ use of social media can pose risks to the Company’s confidential and proprietary information, reputation, and brands, expose the company to discrimination and harassment claims, and jeopardize the company’s compliance with business rules and laws.

To minimize these business and legal risks, **avoid** loss of productivity and distraction from employees’ job performance, **and ensure** that the company’s IT resources and communications systems are used appropriately as explained below, **the Company expects** its employees to adhere to the following guidelines and rules regarding social media use.”

Best Practices for Creating a Social Media Policy, Continued . . .

2. Be specific about the content within the scope of the policy

Provide definitions and examples:

| PROHIBITED CONDUCT | DEFINITION | AS MENTIONED IN THE POLICY |
|--------------------------|---|---|
| Harassment | Online behavior that intimidates, bullies, or demeans another individual. | “Refrain from intimidating or derogatory comments about colleagues, such as posting threatening remarks or personal information without consent.” |
| Confidentiality Breaches | Sharing proprietary, sensitive, or insider information about the company, its clients, or employees. | “Do not post internal reports, client data, or confidential information, like a photo that shows client data on your screen.” |
| False Information | Spreading misinformation or unverified facts that could mislead or cause harm. | “Avoid sharing unverified information about sensitive topics like company news, health information, or legal matters, such as an unconfirmed company merger.” |
| Discriminatory Remarks | Posts that treat people or groups unfairly based on characteristics like race, gender, religion, etc. | “Avoid posts that belittle or stereotype individuals/groups based on race, gender, etc., like sharing a meme that perpetuates a racial stereotype.” |

Best Practices for Creating a Social Media Policy, Continued . . .

2. Be specific about the content within the scope of the policy, continued . . .

Use effective disclaimers:

Conduct not Prohibited by this Policy

This policy is not intended to preclude or dissuade employees from engaging in activities protected by state or federal law, including the National Labor Relations Act, such as discussing wages, benefits, or other terms and conditions of employment, forming, joining or supporting labor unions, bargaining collectively through representatives of their choosing, raising complaints about working conditions for their own and their fellow employees' mutual aid or protection, or legally required activities.”

Best Practices for Creating a Social Media Policy, Continued . . .

3. Reference Established Policies

Make it clear that what applies to employee conduct, in general, applies to communications on social media:

- Confidentiality and proprietary rights policies.
- Ethics and standards of conduct policies.
- Anti-harassment policies.
- Anti-discrimination policies.
- Social media endorsement policy.
- IT resources and communications systems policies.

Best Practices for Creating a Social Media Policy

3. Reference Established Policies (example):

“Social media should never be used in a way that violates any of the Company policies or employee obligations. If your social media activity would violate any of the Company’s policies in another forum, it will also violate them in an online forum. For example, employees are prohibited from using social media to:

- Violate the Company’s IT resources and communications systems policies.
- Violate the Company’s confidentiality and proprietary rights policies.
- Circumvent the Company’s ethics and standards of conduct policies.
- Engage in unlawful harassment.
- Circumvent policies prohibiting unlawful discrimination against current employees or applicants for employment.
- Violate the Company’s privacy policies (for example, never access private password-protected sites of coworkers or other Company stakeholders without permission).
- Violate any other laws or ethical standards (for example, never use social media in a false or misleading way, such as by claiming to be someone other than yourself or by creating an artificial “buzz” around our business, products, or stock).”

Best Practices for Creating a Social Media Policy

4. Distinguish company-affiliated posts from personal posts

Personal Posts

- Personal content—Employees can generally post what they want when they are not on company time or using company technology.
 - However, you should still *encourage* employees to be responsible, respectful, and professional on social media.

Company-Affiliated Posts

- Once an employee posts content that mentions the employer, implies that they are employed by the employer, or is made through official company channels (e.g., @[employer]), the post may be company affiliated and is potentially subject to assessment and action by the employer.

Best Practices for Creating a Social Media Policy

5. Review policy and update frequently

The social media landscape changes rapidly

- As new technologies and social media platforms emerge, regulatory agencies change laws, and brands need to revise their policies to make sure they are effective, and legal.

Place Employees on notice of potential updates or modifications

- “These Guidelines will continue to evolve as new technologies and social networking tools emerge. Check back periodically to make certain you are up-to-date. FedEx may modify, suspend or withdraw the Guidelines at any time.”

Communicate any updates or modifications to employees.

Time for a quiz...

TRUE OR FALSE?

Public employee speech is not protected if it targets a particular group, or includes inflammatory or offensive content.

TRUE OR FALSE?

Since private sector employees are not protected by the First Amendment, private companies have largely unfettered discretion to discipline or terminate employees for what they post on social media.

MULTIPLE CHOICE

Which of the following should never be contained in a social media policy?

- A. A rule prohibiting “speech that undermines respect or public confidence in the employer”
- B. A rule prohibiting employees from “revealing the name of the employer on a website with sexually suggestive or violent content”
- C. A rule prohibiting “statements that damage the company or any person’s reputation”
- D. A rule prohibiting employees from “disclosing confidential or proprietary information regarding the company or your coworkers.”
- E. A rule prohibiting employees from “using the company name to endorse, denigrate, or otherwise comment on a person, product, cause, or opinion.”

MULTIPLE CHOICE

Which of the following would likely be protected conduct under the NLRA?

- A. A BMW salesman posting photos of an embarrassing accident at an adjacent Land Rover dealership.
- B. A BMW salesman posting mocking comments and photos with co-workers about serving hot dogs at a luxury BMW car event.

The background of the slide features a large, semi-transparent watermark of the GrayRobinson logo, which consists of a stylized 'G' and 'R' intertwined. The logo is centered and spans most of the width of the slide.

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Thank you

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