

Will Your Social Media Policy Withstand Scrutiny?
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MySpace, Facebook, Twitter, oh my! If you read this headline and thought, “what social media policy?” It’s time to pull out your handbook for some drafting. If you have such a policy, but drafted it more than six months ago, you need to do a review. With Facebook expected to reach one billion active users this year, no employer can afford to ignore the impact of social media any longer.

In recent months, the National Labor Relations Board (NLRB) has issued two reports and several rulings on what is, and what is not acceptable in a social media policy. In case you think the NLRB applies only to unionized workplaces, think again—most of the complaints that have been issued and decisions rendered occurred in **non-unionized** workplaces.

What Should A Policy Cover?

As with all employer policies, you will need to customize a social media policy to your work place. In general, though, employers will want to address the use of social media during work time. Employers subject to the Federal Trade Commission’s Endorsement Guidelines will want to make sure employees are aware of the rules and do not break them. Employers with sensitive, confidential, or proprietary information, will want to have rules that protect such information as well. Employers also want to give some guidance on posting generally, and bad-mouthing an employer specifically. Finally, if you have official company media, you should have a clear policy about who is allowed to use it, and perhaps, what the content of such posts should be.

What’s All the Fuss About?

The most active agency in policing social media policies is the NLRB. In general, the NLRB is concerned about protecting employees’ rights to discuss the terms and conditions of employment. This includes salaries, wages, difficult supervisors, and employer work rules, among other things. The NLRB has compared social media to a modern “water cooler” where employees might gather to discuss work-related matters.

In the first case to have a decision, *Hispanics United*, an employee in a non-unionized workplace posted comments on a facebook pages that were critical of a co-worker. Other co-workers joined in. The posting employee was fired after the employee who was the target of the posts complained. An administrative law judge of the NLRB found the posts were protected because they involved a group of employees discussing a work related problem and possible solutions.

Other cases where the Board has issued complaints alleging posts to be protected include firings for negative posts about supervisors, complaints about work rules, and complaints about a car dealership’s promotional sales event. In addition to

the Board's decisions, a New York Court has reinstated a teacher who was fired for making negative statements about her students on her facebook page, finding that the punishment was disproportionately severe.

What's An Employer to Do?

The news is not all bad—some social media policies have held up under scrutiny, and the Board has repeatedly held that mere griping about work (such as to family members who are not employees) is not protected. Here are a few guidelines for discussion when drafting such a policy:

- Beware blanket prohibitions. The Board and courts appear to favor examples over broad, blanket statements. For example, it is better to define confidential information than say posting confidential information is prohibited.
- “Teaching” statements are favored. Statements that remind an employee about the need to use privacy protections and common sense when posting to a computer website are usually acceptable.
- Vulgarity, obscenity, and harassment are not protected. In general, if you couldn't do it around a water cooler, you can't do it on-line.
- You cannot have a blanket statement prohibiting criticism of the company or its supervisors. You can have a statement prohibiting disparagement of a company's products or a competitor's products.
- Beware requiring disclaimers. It's currently ok to tell employees they cannot claim to be speaking on behalf of the company without permission, but requiring them to post a disclaimer that they are not speaking on behalf of the company has been held to be too burdensome.

These are just a few considerations to keep in mind as you draft your social media policy. As always, for specific guidance you should contact your labor and employment counsel.