

## Managing Employee Use of Social Media

Facebook. LinkedIn. Twitter. These and other social media sites have created fast-paced opportunities for individuals to network and for information to spread. However, with these opportunities come potential hazards, particularly in connection with the workplace. By formulating social media practices and policies that comply with recently issued U.S. legal standards, U.S. employers have the ability to minimize, if not eliminate, the challenges posed by employee use of social media.

### Social “NOT-working”

As the phrase suggests, the over 600 million Facebook users who log in to Facebook on a regular basis often do so from the office. Instead of focusing on their work, many social media users waste time keeping up to date with their Facebook “friends,” or “tweeting” their followers with details of what they ate for lunch. In sum, it is no secret that use of social media in the workplace is distracting and has the potential to greatly decrease worker productivity.

Employers are legally permitted to **completely block employee access to social media** sites at work. In fact, 29% of all U.S. employers have already adopted this practice, although most do so based on fears that hackers will invade company systems and wreak havoc, including loss of crucial data.

Companies that consider the practice of completely blocking employee access to social media sites at work as too drastic a measure may lawfully **monitor employee use of social media** at work, both in terms of the amount of time spent by a particular employee logged onto social media sites, and in terms of the content posted by the employee; *provided that the employer clearly communicates to the employee the employer’s monitoring practice*. The employee’s acknowledgement of this practice should be clearly documented in order to confirm that the employee’s expectation of privacy has been eliminated. As employers who have adopted such a system can attest, employees who know that their social media time and content is being monitored at work tend to spend very little time logging onto social media sites during work hours.

If either of the above options seems overly aggressive, an employer should, at a minimum, issue a policy informing employees that they are expected to **use their discretion** with respect to use of social media in the workplace, and that logging onto social media sites should be kept to a minimum during work hours.

### Negative Posts

Social media has become a venue for individuals to express their opinions, thoughts and frustrations at an unprecedented pace to a vast number of people.

Consider, for example, the Walmart employee who came home after from work, after having had an altercation with his direct manager, and posted on Facebook derogatory comments about Walmart’s management and poor customer service.

The employee's Facebook "friends," including three co-workers, expressed their sympathy for the employee's lousy day. Unfortunately for the employee, one Facebook "friend" was not sympathetic, printed out the negative posting and handed it over to Walmart's management.

Whether Walmart was then entitled to take adverse employment action against the employee revolved around the question of whether the employee's Facebook posting qualified as "protected concerted activity" under the National Labor Relations Act. As explained by the Associate General Counsel of the National Labor Relations Board ("NLRB") in a report issued on August 18, 2011: adverse employment action may not be taken against an employee when the content of employee speech made via social media was made **between employees (of the same employer) in earnest discussion of the terms and conditions of employment as a means of facilitating group action on the part of such employees**. This principle applies to both unionized and non-unionized employees.

In the above case, the post was made to a wide range of Facebook "friends," rather than to only a restricted group of co-workers, and was characterized by an individual venting and expressing gripes, rather than by a call for group activity and constructive desire to improve the group's working conditions. Therefore, even though some co-workers did happen to respond sympathetically to the employee's post, the NLRB held that the Walmart employee's Facebook posting did not rise to the level of "protected concerted activity." Walmart therefore had the right to take adverse employment action against the employee. *Walmart, Case No. 17-CA-25030, 2011 NLRB GCM LEXIS 34 (July 19, 2011)*.

### Social Media Policy

Obviously, employers would rather not be faced with the unpleasantness of chastising employees for spending excessive amounts of time logged onto social media sites at work, or with the nasty business of considering whether to terminate a frustrated employee who simply failed to think through the implications of posting confidential or negative information in a public forum. A social media policy which clearly establishes guidelines and boundaries, and is unequivocally communicated to employees, enables employees to anticipate company expectations and thereby prevent such predicaments in the first place.

However, a social media policy must be carefully drafted in order to comply with the NLRB's recently issued directives, which **prohibit employers from placing excessive restrictions on the content** of employee social media postings. While each employer should create a social media policy tailored to the particular employer's industry and workplace, the following are some bright line rules:

- Clearly communicate to employees whether social media use in the workplace will be unequivocally prohibited, monitored by the company, or discretionary within reasonable time limits. The main prerequisite from a legal standpoint is that the employee who is being monitored be made aware (and ideally sign an acknowledgement) of this practice, so that it is clear that the employee's expectation of privacy has been eliminated.

- Provide clear boundaries with respect to prohibited social media content:
  - No disclosure of confidential information about the company, co-workers, clients or customers.
  - No posting on behalf of the company unless the employee is clearly authorized to do so.
- Do NOT excessively restrict the content of employee social media postings to the extent that “protected concerted activity” among the company’s employees would be prohibited. For example, a social media policy should not ban “inappropriate discussions” about the company, management, working conditions or co-workers.
- Caution that violation of the company’s social media policy may result in adverse employment action, up to and including termination of employment.

### Practice Pointers

As a means of addressing the issue of employee social media use, an employer should:

1. Decide which social media practice will work best in the employer’s particular workplace:
  - Completely eliminating employee access to social media sites;
  - Monitoring employee use of social media (upon clearly acknowledged notice); or
  - Permitting social media use within reasonable time limits.
2. Circulate a Social Media Policy among employees, and obtain a signed acknowledgement from each employee that s/he has read and understands the Policy.
3. Prior to taking any adverse employment action against an employee on account of the content of his/her social media posting, consider whether the employee’s comments:
  - were posted on a public site accessible to a large number of people;
  - disclosed confidential information about the company, its employees, customers or clients; or
  - were directed at co-workers in a serious effort to discuss working conditions, or were simply a venue for the employee to vent personal frustration.

Most cases will not be clear cut and will involve a detailed analysis of the above and other factors, including a balance of the company’s legitimate business interests and the employee’s rights. Any decision to take adverse employment action against an employee on account of social media use should be made in consultation with legal counsel.

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