

Social Media Monitoring

An Excerpt from

HUMAN CAPITAL IN HEALTH CARE ORGANIZATIONS PLAYBOOK



Social Media Utilization by Employees

Social media usage by employees while at work has been associated with:

- Facilitating collaboration: sharing of ideas and solving problems.
- Impacting productivity: either improving it because of the collaboration impact or reducing it because of the distracting nature of using social media.

A Harvard Business Review article, “Employee Retention: Employees who use social media for work are more engaged – but also more likely to leave their jobs”¹⁶³ reported that employees using social media were more likely to leave an organization because they have engaged with potential new employers.

In developing a social media policy for an organization, the value of social media utilization must be addressed. This can be accomplished in a number of ways:

- Using surveys, focus groups and interviews with leaders, managers and non-management employees. Questions should be developed from the perspectives of productivity versus distraction.
- Addressing obvious and subtle threats by determining how to translate the threat into an opportunity. For example, create social media groups for collaboration.
- Using social media to recognize employee accomplishments, which reverses the threat of employees using social media to look for another opportunity and turns it into a recruiting and retention tool.

If social media posts reference harassment, discrimination or retaliation, the organization has a duty under Title VII to take reasonable steps to investigate and mitigate the behavior described in the posts. The organization should have a process in place to manage adverse social media posts that go viral. This process should link human resources, public relations, crisis management and legal departments and functions.

Human resources policies should address employee social media posting and should prohibit posting individual opinions, jokes, memes and articles relating to the acceptance or promotion of harassment. Pictures or videos of groups of employees of the same race, color, sex or who are wearing the same religious clothing or artifacts, and imply that they are an exclusive group can be considered evidence of harassment.

First Amendment Protection

Social media sites have become important venues for users to exercise free speech rights protected under the First Amendment. Despite an ongoing public policy debate related to scrutiny of user content and posting source, the current legal framework under the First Amendment and the Communications Decency Act of 1996,¹⁶⁴ has provided protection for lawsuits predicated on social media sites’ decisions to remove or host content.

Employees in the private sector do not have a constitutional right to free speech at work. The First Amendment does not apply to private sector employers, because it does not extend to the actions of private individuals. Conversely, public sector employment cases fall within the scope of the First Amendment protection, because the government would be the actor as the

MORE TO KNOW

Harvard Business Review reports 277 employees in a healthcare organization that employees who engage in online social interactions with coworkers may be more motivated and come up with innovative ideas; while employees who interact with their people outside of the organization are distracted and unproductive. These findings suggest that the effects of social media on productivity and creativity are dependent on with whom employees are interacting.

Source: <https://hbr.org/2018/05/employees-who-use-social-media-for-work-are-more-engaged-but-also-more-likely-to-leave-their-jobs>

IMPORTANT TO NOTE

If social media posts reference harassment, discrimination, or retaliation, the organization has a duty under Title VII to take reasonable steps to investigate and mitigate the behavior described in the posts.

FAST FACT

Onboarding is the action or process of integrating a new employee into an organization or familiarizing a new customer or client with one’s products or services.

employer. Due to the pervasiveness of social media and the reticence of the Supreme Court to establish clear guidance on First Amendment speech protections, inconsistencies are appearing in private and public employment court cases.¹⁶⁵

Both public and private employers can minimize litigation risk by implementing a carefully crafted social media policy, which can specify limitations on employee use of company time and resources (company computer or cell phone) for use of social media. This policy can address and limit discussion of the employer, as long as the limits do not refer to activity protected under other laws, such as communications protected under the National Labor Relations Act (NLRA).¹⁶⁶

National Labor Relations Board (NLRB) protects employees' discussions about the terms and conditions of their employment including wages, hours and benefits when the discussion is in concert with other employees. The NLRB has been seen as being permissive related to defining concerted activity on Facebook. When an employee "likes" another employee's post about working conditions, the NLRB considers this as acting in concert with another employee.

FAST FACT

Employer monitoring of employers on social media is not prohibited by federal laws

Regular Surveillance

There are no federal laws that prohibit an employer from monitoring employees on social media. Employer surveillance of social media is intersecting with the privacy rights of employees and if, as a result of surveillance, the employee is terminated, the action may or may not result in a wrongful termination suit.

The surveillance rights of an employer have to be understood within the framework of an individual employee's subjective expectation of privacy. There is no clear court guidance on this intersection. Employers can surveil employees' online activity for a variety of reasons including:

- Monitoring productivity.
- Viral invasions.
- Dissemination of proprietary information.
- Liability for harassment.
- Excessive bandwidth usage.

Employee surveillance can be provoked or unprovoked. Provocation can exist when the employer learns of an employee's emotional (a rant), positional (taking an adverse position related to the employer or employer's policies or customers) or unprofessional social media post.

Until there are clear precedents, the establishment of organizational policies should offer guidelines:

- The organization should be transparent about installing surveillance software, hiring third-party companies to monitor online activity and monitoring email.
- If limiting employees' online posts, employers should be specific about what is acceptable and unacceptable and make sure it is relevant to the business.

MORE TO KNOW

In one court ruling, the Second District Court of Appeals upheld the lower court's decision observing that the terminated employee's (terminated for being unprofessional and subordinate with online posts) Facebook posts was not within the zone of her seclusion, solitude and private affairs.

Source: Roberts v. CareFlite, 02-12-00105-CV, 2012 WL 4662962 (Ct. App. Tex. Oct. 4, 2012)

- The NLRB has successfully advocated against overly broad social media policies that prevent employees from exercising their collective bargaining rights (wages, hours and benefits).
- Employees should be educated about why and how proprietary information should be protected.
- Employees should be educated about compliance with state and federal laws related to violating privacy laws, being discriminatory or defamatory.