

# Employers Must Be Mindful Before Punishing Employees for Their Social Media Usage

By: Nicholas A. Gowen

Social media is an integral part of your business whether you intend it to be or not. Most businesses acknowledge that their employees are potentially their most significant asset, yet also their greatest potential liability.

Your employees are a firsthand reference for people to learn about your company, and its culture. Your employees' social media postings reflect on your organization, and they have an equal if not greater impact on the public perception of the business. Positive comments about your company are free "advertising," but the tide can turn quickly if posts turn sour. A disgruntled employee that voices his or her dissatisfaction on the internet may negatively impact your company's overall image, diminish its reputation, and diminish profits. Pew Research Center reports that of U.S. adults, nearly 70% use Facebook, nearly 25% use LinkedIn, and 20% use Twitter.<sup>1</sup> That means that the overwhelming majority of your workforce is freely sharing ideas, opinions, and information over social media. Undoubtedly, those employees are, or have been, sharing information that may be embarrassing or unflattering to your business.

Despite a business' legitimate concerns to protect its brand by limiting it's employee's social media presence, employers must reject the knee-jerk reaction to punish an employee for public comments made on social media. This article addresses pitfalls for employers to avoid in dealing with employees' use of social media, and provides tips for crafting social media policies to address certain issues before they become detrimental to your business.

## Punishing an Employee for Social Media Activity May Violate Federal Law.

It seems every week there is a news story regarding employers of all sizes terminating employees who make social media postings critical of their employer, or that otherwise harm the employer's reputation. Although employers generally have the freedom to terminate at-will employees (even for off-work activity), they must be mindful that taking adverse employment actions against employees for their social media activity is not appropriate in all circumstances.

The National Labor Relations Act ("NLRA"), which establishes the rules for the relationship between unions and management, also protects the rights of employees to communicate with one another about the terms and conditions of their employment. This right applies whether or not the workplace is unionized. While it may seem like a stretch that employees have a legal right to bash their employers on social media, the NLRA allows employees to engage in "protected concerted activities," such as group action to improve wages, benefits, and working conditions, and to engage in union activities and support a union. Section 7 of the

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<sup>1</sup> <http://www.pewinternet.org/2016/11/11/social-media-update-2016/>

NLRA guarantees employees “the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.” Section 8(a)(1) of the NLRA makes it an unfair labor practice for an employer “to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7.”

The National Labor Relations Board (“NLRB”) has actively pursued employers that fire or discipline employees for posting critical comments about the company on social media or blogs. If a group of employees post comments criticizing management or their working conditions, for example, that might be found to be protected concerted activity, for which the employees may not be disciplined or fired. The NLRB has found that disciplining employees for online posts criticizing their working terms and conditions – including their pay, their supervisors, and even their cubicles – could violate the NLRA. The NLRB has construed Section 7 of the NLRA to protect employees if they use social media to engage in activities such as: (1) bringing group complaints to the attention of management; (2) initiating a discussion with a group of employees about a term or condition of employment; (3) discussing shared employee concerns about the terms and conditions of employment; (4) criticizing an employee’s job performance and discuss this with other co-workers; (5) criticizing a supervisor’s job performance; and (6) generally complaining about a term or condition of his or her employment.

The courts have supported the NLRB’s findings when these cases are before them. For example, recently in *NLRB v. Pier Sixty, LLC* (2d Cir. 2017), a New York-based federal appellate court upheld an NLRB ruling that an employer violated the NLRA when it terminated an employee for posting on Facebook a vulgar comment directed at his supervisor. The employee’s post was visible to his Facebook “friends,” including ten coworkers, as well as to the public. The employer learned of the post and after investigating, terminated the employee. The employee filed an unfair labor practice charge with the NLRB alleging that he had been terminated in retaliation for engaging in “protected concerted activities” under the NLRA. An Administrative Law Judge decided in favor of the employee, and the NLRB affirmed the decision.

The Appellate Court upheld the NLRB’s decision on three grounds. First, the Court found that even though the employee’s message was dominated by vulgar attacks on his supervisor, the “subject matter” of the message included workplace concerns – management’s allegedly disrespectful treatment of employees, and the upcoming union election. Thus, the Court found that the NLRB could reasonably determine that the Facebook post was part of a tense debate over managerial mistreatment prior to the election. Second, the Court found important that the employer consistently tolerated profanity among its workers and had not previously disciplined employees for it. In the prior six years, the employer had only issued five written warnings to employees and terminated no one for such offenses. Thus, the Court found that the NLRB could reasonably conclude that it was improper for the employer to fire the long-term employee, two days before the union election when no other employees had been previously terminated for use of profanity. Third, the Court found that the comment was made in an online forum that serves as a key platform and tool for employee communication and organization, and not in the presence of customers, nor did it disrupt the work environment. The Court determined that the employee’s post was not so damning as to lose protection under the NLRA.

The Pier Sixty decision does not stand for the broad proposition that every profanity-laced outburst will be protected, with the Court acknowledging that the employee's conduct was at the outer-bounds of protected comments. Yet, the ruling underscores the need for employers to carefully consider all circumstances relating to employees' social media activities to determine whether a post is related to workplace concerns and even if it is, whether the conduct is so egregious as to lose protection of the NLRA. The Pier Sixty case also highlights the need for employers to be consistent when disciplining employees for similar improper conduct.

### **Employers May Nevertheless Discipline Employees for Their Social Media Posts.**

All is not lost. Despite NLRA restrictions, employers may discipline employees for their social media activity. Disciplining an employee for violating a social media policy is a delicate process that should only occur after careful investigation and conferring with outside counsel.

Employers must carefully analyze whether the activity could be deemed protected. Determining whether an employee's activity falls under the NLRA may be unclear. Employers confronted by potentially problematic social media postings should focus on the distinction between concerted activity and mere personal griping to ensure that they not discipline an employee for engaging in protected activity. Employers should determine why the employee made the comment, whether the employee's post concerns wages, hours, benefits or other terms and conditions of employment, and whether the employee's comments led to an online discussion with co-employees. Answers to these questions will help determine whether the activity is indeed protected.

If an employee's behavior is not protected by the NLRA, an employer is (generally) free to terminate an at-will employee for problematic social media activity.<sup>2</sup> Therefore, an employee who uses social media to threaten another employee, or make racist or sexist comments about another employee can (and often should) be terminated. Likewise, an employee who uses social media to merely gripe about his personal, malicious views of a fellow co-worker or customer can also be properly disciplined or terminated.

As the number of people using social media continues to grow, employers must be prepared to deal with the relocation of "water cooler" talk and workplace gossip to the web. Employers should prepare themselves by drafting appropriate social media policies that address its expectations for employees' social media usage.

### **Employers Should Preemptively Craft Appropriate Social Media Policies.**

Ideally, your employees will be encouraged and inspired to be brand ambassadors and positively promote your business on social media. Unfortunately, it is impossible to police the internet, and in most cases, against the law to control the online conduct of an employee. You can, however, establish clear and consistent social media policies and educate employees on what to do before they share, post or tweet. Employers, however, must be mindful to not violate NLRB rules by crafting social media policies that are so broad they prevent employees from discussing their wages or other conditions of employment.

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<sup>2</sup> Some states, including Illinois, have laws that protect broad categories of off-duty conduct (including social media postings or the information gleaned from them) or require employers to demonstrate a connection between an employee's engagement in an activity and the employer's business. Therefore, employers must also take that into consideration when determining whether to take an adverse action against an employee.

*The following are seven key guidelines to follow when crafting a social media policy:*

1. Ensure your policy maintains control over the company's official social media accounts. Designate an employee, internal team or third-party vendor to oversee these accounts and make sure that an authorized party can access the accounts at any time. If an employee uses social media on behalf of the company, he or she should have a separate agreement that indicates that the accounts are not for personal use and that all content and contacts are the sole property of the company.
2. Encourage employees to be respectful on social media. They should avoid threatening, discriminating or harassing statements. However, your policy should not include broadly-worded statements that prohibit or discourage any legally protected activity. The policy language should be specific and reference any appropriate company harassment and discrimination policies.
3. Employees must not create the impression that their opinions are those of the company.
4. Your policy should prohibit employees from disclosing "company confidential financial or sales information," "company marketing or strategic plans," or "internal company proprietary information not available to the general public" such as trade secrets and client lists.
5. Make sure your social media policy does not prohibit employees from discussing their wages or working conditions.
6. Your social media policy also should not prohibit the use of the company's logo. Instead, companies should restrict the use of the logo in specific terms to prevent improper use.
7. Overall, it is important that your social media policy is as specific as possible when stating the restrictions placed on employees, and provide examples when possible. A general boilerplate disclaimer stating that the policy is not intended to interfere with the employees' rights under the National Labor Relations Act is insufficient if the policy language is otherwise too broad and vague.

As the use of social media expands, so does the need for employers to have carefully crafted policies that lawfully deal with the many issues that may arise in this area. By crafting a social media policy that is not overly broad or ambiguous and focuses on restricting activity that is not protected under the NLRA, and acting against employees who stray from the NLRA's protections, employers will be able to effectively, and legally, contain their employees' social media activities. Employers who have not recently reviewed their social media policies to ensure legal compliance should consider doing so. While enforcement of facially lawful social media policies can also be a daunting proposition, the starting point for avoiding problems in this area is a carefully worded policy that can survive NLRB review.

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