



Health Care & Social Media

Best Practice HR Policies and Practical Implications

DrinkerBiddle



Speakers

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Jennifer is a partner in and the vice chair of the Health Care Practice Group. Her practice includes the general representation of health care providers including hospitals, long-term care facilities, multi-specialty physician groups and ancillary service providers, as well as the special representation of pharmaceutical companies and device manufacturers in fraud and abuse and privacy compliance matters. Jennifer focuses on hospital-physician relationships, including Stark Law and Anti-Kickback statute compliance, and regularly assists in developing and implementing legal compliance programs.

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Darren is a partner in the Intellectual Property Practice Group and chair of the Firm's Advertising and Promotions practice. He counsels clients on a variety of matters ranging from trademarks, copyrights, rights of publicity and social media to parallel imports, advertising and promotion law. Darren's practice is directed to assisting clients in better understanding the value of their intangible assets and building strategies for protecting those assets and capitalizing on their value. Darren is a published author on topics of politics and popular culture and posts regularly at www.legallysocial.com, his blog on social media, intellectual property and the law and @legallysocial on Twitter. He is also a regular contributor to Drinker Biddle's Life Sciences blog www.LifeSciencesNow.com.

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Stephanie is a partner in the Labor & Employment Practice Group. She represents employers in defending administrative and federal/state court complaints involving equal employment opportunity discrimination, retaliatory discharge, harassment, whistleblower rights, the Family and Medical Leave Act (FMLA), the Americans with Disabilities Act (ADA), the Fair Labor Standards Act (FLSA) and state wage and hour claims. Stephanie devotes a significant portion of her practice to representing hospital and health care clients in labor relations and employment matters and regularly conducts EEO and wage and hour compliance and union vulnerability audits for health care systems and stand alone health care facilities.

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Twitter — Live Coverage

- > Follow the conversation on Twitter at #dbrhealth

Health Care & Social Media: Best Practice HR Policies and Practical Implications

- > Labor & Employment Issues Created by Social Media
- > Developing Social Media Policies Specific to Your Organization
- > Enforcing Social Media Policies

Whether we like it or not...

- > 22% of employees visit social networking sites 5 or more times per week
- > 53% of employees say their social networking sites are none of their employer's business
- > 61% of employees say that even if employers are monitoring their social networking profiles or activities, they won't change what they're doing online – they know it's not private and have already made significant adjustments
- > 74% of employees say it's easy to damage a company's reputation on social media

Deloitte Workplace Ethics Survey - 2009

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Why healthcare employers care...

- > Patient confidentiality
- > Breach of confidential/proprietary business information
- > Unable to control the message
- > Undermines reputation/community trust
- > Potential negative impact on employee morale/employee relations
- > Undermines enforcement of mission, vision, and values
- > Potential "smoking guns" in litigation

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Impact of Employee Use/Misuse

- > Loss of employee productivity
- > Trade secret or proprietary information disclosure
- > Fair Credit Reporting Act
- > Federal contractor requirements
- > Privacy
- > Discrimination/Harassment
- > Wrongful termination
- > Defamation
- > Negligent referrals
- > Unauthorized use of company logos and copyrighted material

HR-Related Use of Social Media

- > Background Checks
- > Research Employee Misconduct
- > References post-term
- > Employee Relations
 - Building cross-discipline teams in organization
 - Collegial atmosphere through less formal interaction
 - Providing employees with avenue to communication issues and concerns

Table 1. Social Media Being Used in the HR Department and/or Used by Others in the Organization, by Industry

	Healthcare	Financial	Other	Manufacturing	Technology	Retail	Other	Overall
LinkedIn	83.3%	100.0%	66.7%	50.0%	100.0%	50.0%	100.0%	82.8%
Facebook	50.0	0.0	66.7	100.0	75.0	50.0	75.0	65.5
MySpace	16.7	0.0	0.0	25.0	12.5	0.0	0.0	10.3
Twitter	33.3	50.0	0.0	75.0	62.5	50.0	50.0	48.3
Blogs	33.3	0.0	33.3	75.0	50.0	50.0	35.0	41.4
Other*	16.7	50.0	0.0	0.0	0.0	50.0	0.0	10.3

*Other: Yammer, SlideShare

Table 2. Social Media Being Used in the HR Department and/or Used by Others in the Organization, by Number of Employees

	Up to 50	51 to 100	101 to 250	251 to 1,000	1,000 & more	Overall
LinkedIn	100.0%	80.0%	90.0%	66.7%	71.4%	82.8%
Facebook	75.0	80.0	70.0	66.7	42.9	65.5
MySpace	25.0	0.0	20.0	0.0	0.0	10.3
Twitter	75.0	30.0	70.0	33.3	28.6	48.3
Blogs	50.0	40.0	40.0	66.7	28.6	41.4
Other	0.0	20.0	10.0	0.0	14.3	10.3

(Source: HRFocus Social Media Survey)

Pre-Employment Screening

- > CareerBuilder.com conducted a survey of 3,169 hiring managers
- > 22% screened applicants using social networking sites
 - 34% of them used the information to reject a candidate
 - 24% of them used the information to confirm their decision to hire a candidate
- > Employers who search applicants' social media sites may obtain information they would not normally find out from a resume or interview (disability, religion, health issues).
 - If the employer decides not to hire the individual, it's best not to have information that he/she could use as a basis for a discrimination suit.



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Pre-Employment Screening

- > Background checks conducted through social media sites creates other legal risks as well:
 - The Electronic Communications Privacy Act
 - The Federal Fair Credit Reporting Act
 - OFCCP
 - NLRB
 - CEPA and other whistle-blowing/anti-retaliation laws



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Developing Hiring Guidelines

- > Conduct uniform searches limited to “business” sites: **LinkedIn**
- > Adopt policies, train HR staff and managers about the use of social networking sites as part of hiring process
- > Use a non-biased, non–decision maker to perform social media research
- > Pre-determine what types of information you are seeking
- > Do not use “inappropriate” information in decision-making process
- > Do NOT “friend” applicants to gain access to non-public information
- > Do NOT require applicant to provide Social Media password
- > Continue to use “traditional” applicant sources

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Risks **During** Employment

- > Exposure for claims of discrimination/ harassment/retaliation/defamation
- > Disclosure of Trade Secret and Confidential information
- > Unauthorized use of company logos and copyrighted material
- > Productivity concerns
- > Unprofessional behavior that reflects negatively on company
- > Privacy concerns
- > SEC and FDA: Disclosure of non-public information



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Harassment Risks:

- > **Yancy v. U.S. Airways**,
2011 U.S. Dist. LEXIS 78784 (E.D. La. 2011)
 - Customer service agent Yancy filed an EEOC Charge for **sexual harassment** after customer service supervisor posted a photograph of her on his Facebook page.
 - Photo showed Yancy hunched over her desk with her underwear visible; she appeared to be sleeping.

Defamation Claims?

Employer may sue former employees for defamation and invasion of privacy:

- **Varian Medical Systems, Inc. v. Delfino**,
Santa Clara Cty Super. Ct. (2001)
 - Santa Clara County, California jury awarded employer \$775,000 in compensatory and punitive damages against former employees for defamation and invasion of privacy (for “Cybersmearing” of employer by former employee)
 - **CAVEAT:** Case pre-NLRB activity



Social Media Performance Assessments: Risky Business.....

- > Supervisor comment – “You are the greatest!” – used to counter a discharge for poor performance in **wrongful termination** case.
- > Negative comments – “He is the worst ever!” – could be the basis for **defamation** claims.

- Train and require supervisors to limit comments on performance to formally established review process
- Prohibit managers from posting references/reviews on social networking sites

FTC Implications of Employee Use

- > Under FTC guidelines, an employer (and employee) may be liable for failing to disclose its material connection or employment relationship with an employee who posts comments on the Internet while off-duty that are false and unsubstantiated claims about the employer’s services/products.

Is There a Duty to Monitor?

> **Blakey v. Continental Airlines, Inc.,**
164 N.J. 38, 751 A.2d 538 (2000)

- NJ Supreme Court remanded case to determine whether “Crew Member Forum” electronic bulletin board was sufficiently connected with workplace to allow liability
- One judge found that a third-party electronic bulletin board was a “setting related to the workplace”
- Company has a duty to take effective measures to stop employee harassment of a co-worker when it knows or should know harassment is taking place in the workplace or work-related settings



Duty to Monitor on Sites Employees Use For Work:
No Duty on Personal Email /Sites

Can You Monitor Employee Chats?

> **Pietrylo v. Hillstone Restaurant Group d/b/a Houston's,**
2008 WL 6085437 (D.N.J. 2008)

- A Newark jury held that the employer violated federal law by secretly monitoring employees' postings on a private password-protected Internet chat room.

National Labor Relations Act's Intersection With Social Media



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Social Media and the NLRA

- > In August 2011 and January 2012 the Acting NLRB GC issued two memoranda interpreting “concerted activity” under the NLRA as it relates to employee use of social media.
 - The NLRA protects employees who engage in concerted activity for their mutual aid or protection.
 - The NLRB interprets such protections as allowing employees leeway to express their views in a manner that employers may consider rude, discourteous and/or disloyal.

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What Are The Danger Zones?

- > "...whether it takes place on Facebook or at the water cooler, it was employees talking jointly about working conditions, in this case about their supervisor, and they have a right to do that."
- > Cannot "chill" the ee right to engage in protected concerted activity (discussing wages, hours and other terms and conditions of employment).



Social Media and the NLRA

- > NLRB looks at four factors in determining whether employee comments are protected:
 - The place of the discussion;
 - The subject matter of the discussion;
 - The nature of the employee's outburst; and
 - Whether the outburst was in any way provoked by an employer's unfair labor practice.

Examples of protected employee conduct

- > Calling out and criticizing coworker with/to other employees
- > Calling supervisor “scumbag” for not allowing employee representative at meeting
- > Posting comments criticizing food and drinks employer offered at customer relations event
- > Call an employer-owner an “@#!%##” in regards to tip policy
- > Posting tweets critical of company’s editors
- > Commenting online that employer’s policy “sucked”

NLRB’s Schizophrenic Approach

Wal-Mart (Case No. 17-CA-25030 July 2011)

- > “Wuck Falmart! I swear if this tyranny doesn’t end in this store they are about to get a wake-up call because lots are about to quit.”
- > “[Manager] is a super mega p**a!...[conduct at issue is] false advertising...walmart can kiss my royal white ass!”
- > Facebook friends/co-workers respond
- > Protected Activity?

“Independent” Rants NOT Protected

JT's Porch Saloon, Case No. 13-CA-46689 2010)

- > Disgruntled employee/bartender fired due to Facebook postings reference his customers as “rednecks” and stated that he hoped they “choke on glass” as they drive home drunk
- > Key: Postings were not discussed with other employees, before or after the posting AND none of his fellow employees responded
- > **OGC Opinion:** No evidence of “protected concerted activity”

Disparaging Customers Not Protected

- > Employee of residential facility for homeless people with significant mental health issues was legitimately fired after engaging in a Facebook conversation with a non-employee/friend in which she referred to a client’s hearing of “voices,” and made other negative comments about the residents.
- > **No NLRA Violation:** Employee not seeking to induce or to prepare for group action related to her job conditions – her actions were for personal amusements.

Key Analysis: Individual Gripe vs. Group Action?

- > Did the Author Have a Target Audience?
- > Does the Post Suggest that the Author Seeks to Initiate or Induce Group Action?
- > Do Coworkers Respond?
- > Do They Just Offer Sympathy **OR** Indicate that Further Action Should be Taken

Take Away: Posts that are either intended to, or result in, "fomenting" discussion among e'ees about workplace problems likely = Protected Activity

Reading The Tea Leaves – Lawful Termination IF:

- > Evidence That Posts Interfered with Work of Employees
- > Threats of Violence or Personal Harm
- > Post Unrelated to Terms or Conditions of Employment

- Train managers and supervisors to coordinate with HR **BEFORE** disciplinary actions based on social media
- Be specific about reasons for termination – focus on highly offensive comments of a non-work nature

Disciplinary Issues If Employees:

- > Post confidential or personal health information
- > Contact co-workers with unwelcome/harassing personal messages
- > Post insubordinate messages or material that violates company policy (**Caution!**)
- > Disparage the company, supervisor or co-worker in a “public” forum (**Caution!**)

Caution: NLRB – Unlawful Policies If Prohibits:

- > Disparaging comments by employees, without limiting language
- > Ability to self-identify as employee in work-related posts
- > Solicitation of Co-workers

NLRB Review of Employer Policies

- > The NLRB will deem unlawful any social media, solicitation and/or confidentiality policy that employees could “reasonably interpret ...to prohibit protected activity...”
- > A general savings clause may not be sufficient to cure an overly broad policy

The Hard Limits

- > Can prohibit employee release of PHI
- > Can prohibit employee release of confidential business information and trade secrets
- > Can require employee disclaimers when discussing provided services
- > Can prohibit employee violations of law, including discrimination, harassment and defamation
- > Can place restrictions on employee use of social media during work time and on employer-sponsored sites?

Unlawful Employer Policies

- > Prohibiting employees from blogging about company business on personal accounts on off-duty time
- > Barring employees from posting anything they wouldn't want their manager to see or that would put their job in jeopardy
- > Prohibiting disclosure of inappropriate or sensitive information about the employer; posting any pictures or comments involving the employer/employees that could be considered to be inappropriate
- > Banning employees from revealing personal information about coworkers, customers, clients or partners without their consent, including pictures
- > Preventing employees from using employer's logo, brand, product, and pictures of stores without prior authorization

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Unlawful Employer Policies (cont.)

- > Prohibiting employees using social media that may "violate, compromise, or disregard the rights and reasonable expectations of privacy or confidentiality of any person or entity"
- > Prohibiting any communication or post that "constituted embarrassment, harassment or defamation of the hospital or any hospital employee, officer, board member, representative, or staff member"
- > Banning any statement that "lacked truthfulness or might damage the reputation or good will of the hospital, its staff or employees"

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Questions Left Unanswered

- > Can a health care provider prohibit the posting of photos taken anywhere on hospital property?
- > Can a health care provider require employees to be “respectful” in online communications?
- > Can an employer prohibit unauthorized use of hospital logos or trademarks?
- > Can an employer enforce policies outside the workplace?

Questions Left Unanswered

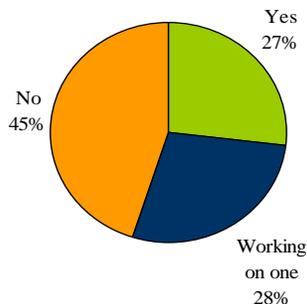
- > How can a health care employer promote its vision, mission and values in employee interactions?
- > How can we protect public image and perceptions as to quality of care?

Developing Social Media Policies Specific to Your Organization

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Social Networking Policies

Policy in Place to Address Employee Use of Social Media



n = 1463

Source: Buck Consultants, LLC – Employee Engagement Survey

Initial Considerations

- > Identify and analyze the social media usage of your workforce and markets
- > Weigh corporate culture and values
- > Determine vision, mission and goals regarding social media:
 - What image would Hospital like to create?
 - Mission-driven?
 - Cutting edge?
 - What is the goal of social media use?
 - “Grassroots” marketing through YouTube hits and Twitter followers?

Basics of Social Media Policies

- > Want to establish a company-wide policy
- > Be prepared to adapt in face of rapidly evolving technology and usage trends
- > Prohibit use of unauthorized data
- > Prohibit conduct or statements that are “contrary to the employer’s business interests”
 - Reflects poorly on employer
 - Damages customer relationships
 - Exposes employer to potential legal liability

Purpose

- > Why you are developing the policy?
 - *The purpose of this policy is to provide ABC Health System employees with requirements for participation in social media, including ABCHS–hosted social media, and in non-ABCHS social media in which the employee's ABCHS affiliation is known, identified, or presumed.*
- > Why is it important?
 - *Employees who engage in online social networking should understand that it's possible that people may perceive their personal activity to be tied to or representing the company—even when the employee doesn't specifically mention the company.*

Purpose

- > Who does the policy cover?
 - *This is a system-wide policy, covering all ABCHS employees.*
 - *This policy applies to employees using social media during work time. It also applies to the use of social media when away from work, when the employee's ABCHS affiliation is identified, known, or presumed. It does not apply to content that is non-health care related or is otherwise unrelated to ABCHS.*
- > How does the policy fit within your organization?
 - *The following standards for online social networking activity are designed to help protect the company's interests and foster a respectful work environment.*
 - *At all times employees are expected to abide by ABCHS's Code of Conduct, ABCHS's Mission, Vision and Values, Breach of Confidentiality, the Information Services Acceptable Use Policy and Standards, and the Professional Conduct and Harassment Prohibition Policy.*

Definitions

- > What is “social media”?
 - *Social media is an emerging and rapidly evolving medium for communication. It includes many platforms which change daily, such as blogs, Internet chat rooms and social networking Web sites such as Facebook, MySpace, Twitter, LinkedIn, Skype, YouTube, Flickr, Digg, Reddit, del.icio.s and many others. Social Media is defined as media designed to be disseminated through social interaction, created using highly accessible and scalable publishing techniques. Social media uses Internet and web-based technologies to transform broadcast media monologues (one to many) into social media dialogues (many to many).*
 - *This standard applies to all forms of online publishing or discussion including, but not limited to, social networking sites (such as Facebook, MySpace, Twitter, LinkedIn, etc.), blogs, wikis, external message boards, threaded discussions, personal websites and all other social networking activities.*

What's Allowed

- > Employer-Sponsored Sites
- > Non-Employer-sponsored sites
- > Work Time
- > Break Time
- > Use of Employer Property

Employer-Sponsored Sites

- > All the rules that apply to other ABCHS communications apply here, specifically: respecting patients, visitors, co-workers, vendors and others; protecting confidentiality, privacy and security; and safeguarding and proper use of ABCHS assets.
- > Employees may not post any material that is obscene, defamatory, profane, libelous, threatening, harassing, abusive, hateful, or embarrassing to another person or entity when posting to ABCHS-hosted sites.

Employer-Sponsored Sites

- > ABCHS-hosted blogs must focus on subjects related to the organization.
- > Employees may not post content or conduct any activity that fails to conform to any and all applicable state and federal laws.
- > For ABCHS and our employees' protection, it is critical that everyone abide by the copyright laws by ensuring that they have permission to use or reproduce any copyrighted text, photos, graphics, logos, video or other material owned by others.
- > Obtain pre-approval before setting up ABCHS-hosted sites. Employees must seek approval from their Senior Vice President before setting up a ABCHS-hosted blog or other social media site.

Non-Employer–Sponsored Sites

- > Whenever an employee talks about ABCHS online, whether through a blog, social network or other manner of online participation, he/she should be clear that he/she is an employee of ABCHS.
- > An employee should also be clear that he/she is not authorized to speak on behalf of ABCHS, that his/her comments reflect only his/her own thoughts and opinions and they are not the views or positions of ABCHS.
- > Employees must not say or suggest that the views and opinions they express related to ABCHS and health care topics represent the official views of ABCHS.

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Non-Employer–Sponsored Sites

- > **Under federal law, employees are required to identify themselves as ABCHS employees if they are recommending ABCHS as a hospital or place to receive healthcare services.** In addition, if an employee has a personal or business interest in the subject he/she is discussing, the employee should disclose that interest.
- > We encourage ABCHS employees to be transparent and honest on all online communications.

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Non-Employer–Sponsored Sites

- > Employees may not disclose any confidential or proprietary information of or about ABCHS, its affiliates, vendors, or suppliers, including but not limited to business and financial information, represent that they are communicating the views of ABCHS, or do anything that might reasonably create the impression that they are communicating on behalf or as a representative of ABCHS.

Non-Employer–Sponsored Sites

- > Employees may not use or disclose any patient identifiable information of any kind on any social media without the express written permission of the patient and following ABCHC guidelines.
- > Even if an individual is not identified by name within the information you wish to use or disclose if there is a reasonable basis to believe that the person could still be identified from that information, then its use or disclosure could constitute a violation of the Health Insurance Portability and Accountability Act (HIPAA) and ABCHC policy.

Non-Employer–Sponsored Sites

- > **No** pictures are allowed to be taken of patients or in patient care areas unless it is authorized by marketing or administration.
- > Pictures of patients or patient care areas may **not** be posted on any social media site.

What's Restricted

- > False or obscene statements
- > Violation of harassment/discrimination policies
- > Release of confidential business information
- > Use of company logos
- > IP
- > Photos
- > Information regarding patients, clients, vendors, competitors

General Compliance Information

- > When including educational information about health activities, include disclaimer as to medical advice
- > State that posts by others not affiliated with Hospital are the poster's own opinion and not attributable to Hospital
- > Provide notice that Hospital may review, edit or remove postings from social media pages

Disclaimers

- > Recommended or Required?
 - *"The views expressed in this blog are my personal views and they do not necessarily represent the views or opinions of my employer."*

Privacy Statement

- > Make clear to employees that they should not expect privacy in regards to their use of the Employer communication systems or equipment.
 - *“ABCHC reserves the right to monitor, intercept and review, without notice, employee activities using the Hospital’s communication systems, including internal websites, intranet and email systems.”*

Enforcement Provisions

- > Who is responsible for enforcing the policy?
- > Where can employees get more information?
- > How should employees report violations?
- > Provide that employees who violate the policy will be subject to discipline up to and including immediate discharge.
 - *Report any abuse of this policy immediately. Employees are encouraged to report violations of this policy to any person within their chain of command, the Executive Director of Human Resources or designee, Corporate Compliance, or Legal. Employees can also call the Corporate Compliance Hotline at 1-877-xxx-xxxx.*
 - *Adherence to this policy is mandatory. Non-compliance of this policy or any law may result in disciplinary action up to and including termination of employment.*

More than words on the paper...

- > Provide on-going education to HR, managers AND employees
- > Require employees to sign an acknowledgement that they have received, read and understand the policy
- > Enforce policy fairly and consistently

Recommendations of Consistent Enforcement

- > Actively enforce the policy
- > Secure and monitor Employer-sponsored sites
- > Promptly respond to complaints of social media harassment or discrimination
- > Document complaints/violations and action taken (with HR/administrative oversight)
- > Address violations directly and promptly
- > Review and revise policy on a regular basis

Best Practice Marketing Strategies

> Join us Wednesday, June 20, for our second webinar on Health Care & Social Media: Best Practice Marketing Strategies

> Register online at:
<http://www.drinkerbiddle.com/healthcaresocialmediawebinar/>

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