



Legal Implications of Social Media in the Workplace:

The Truth About What Employers Should Know About Social Media. An article by [Poul Lemasters, NCBVA Legal Counsel](#)

Read this article by Poul Lemasters, NCBVA Legal Counsel to make sure you know the risks - and more importantly - the process of how to handle and reduce your liability with social media in the workspace.

IF SOCIAL MEDIA IS ON THE INTERNET - IT ALL MUST BE TRUE

Social media is the best thing ever! Not only can people see what an amazing meal you are having tonight, they can hear about your latest trip to the store. In today's society we are a bit guilty of sharing a little too much through social media. While many believe it is going to destroy communication as we know it, you can't deny its presence. In fact, the next time you go into a restaurant, look at how many people are using their phone at the table while in the midst of communication with those at their table!

While social media is everywhere, there is still a general belief that social media is personal. With social media being more personal, we tend to overlook or not realize the implications social media plays in the workplace. So with almost all of us with a digital footprint, the question becomes how does it affect work. Specifically, can an employer use it in the hiring process? Or how about the firing process? Let's be clear, for the firing process it does not mean that you update your business's status by announcing that you just fired Bob, and then tweet Bob's fired #goodriddance. The question is when and to what extent can a business use social media when in the hiring and firing process?

And that is just the social media workplace issue between employers and employees. Businesses also have a new world of online reviews through various social media platforms. When is the last time you looked to see your business review on Yelp? Or perhaps your FaceBook business reviews? If you believe you can just sit this one out and not get involved - you are sorely mistaken. The problem with social media is that if people want to talk about you, then you are in it. Ignoring social media will not make it go away!

To top it all off, the use of social media is definitely an evolving area of law right now. When social media first started it was pretty fuzzy on what was allowed and not allowed. Then with some crazy stories and scenarios (like employers asking for passwords to social media accounts during interviews or employers making employees access their sites in their

presence) the limits on use of social media started to become clearer. So where are we right now?

The use of any social media platform can have advantages and disadvantages. The trick is knowing what you can do; what you can't do; and probably a few things you may want to do as well. The following article covers a few of the big issues. Overall this is a social media look for a business. First, we look at social media between employer and employee; and then a look at social media between business and customers. It can't cover everything, but hopefully it will get you moving in the right direction.

EMPLOYER AND EMPLOYEE

HIRING-

It seems like the easiest tool in the world. Someone gives you an application for a job and you jump on the world wide web to find out everything about them. For hiring social media could be the easiest and cheapest background check, but there is the risk of discrimination. Remember, you can't ask for a photo of an employee as part of the interview process. You also can't ask about religious affiliations, clubs, marital status, and the list goes on. The problem is that many of these things are included and listed in social media. If you pull two candidates from their resume and then decide to interview one and not the other – you need to be able to say it was not based on any protected class (race, color, gender, religion, disability status, etc).

How do you use it then? There are a few things that can *help limit your risk*.

- First, if you are going to use social media as a background check, have someone else perform the check. Let them "scrub" the information so it removes anything that would be protected. That way you only get additional information and not protected information.
- Second, consider making it part of your disclosure on your application. State that you are going to perform certain background checks to verify information and it may include public domain information on the internet which includes various social media platforms. The last thing to consider doing is to simply ask the applicant if there is anything out there in the public domain that they want to warn you about or identify. Again, this is an open-ended question and not meant to identify a protected piece of information. Instead it's just an opportunity for the applicant to say "Yeah, you know if you Google me you're gonna see a story about a kid who tried to steal a hot-air balloon, but..."

That leads to one last item. If you do use the internet/social media as a tool in hiring, make sure you have correct information. If your applicant is John Doe, verify it is the correct John Doe before you decide to consider the information.

FIRING-

Firing for use of social media can be a tricky issue. First and foremost – if you do not have a social media policy it is almost impossible to fire over social media content. With a social media policy, it becomes easier, but not necessarily easy. Oh, and don't worry; the Social Media Policy is the next topic in this article, and yes - you have the ability to get a social media policy as well.

There are several cases that have discussed whether an employer can fire an employee for posting certain things in social media context. Over the years, and through a few cases, we have very clear understanding of what works and doesn't work. In fact, from one National Labor Relations Board (NLRB) ruling, we actually have an approved social media policy.

A few key things to understand about implementing any social media policy. *You cannot blindly prohibit social media.* In fact, you should not limit social media. Instead **you should identify areas that are acceptable and identify restrictions.**

As an example, in one early case, an employee got mad at her boss and then ranted about him on her FaceBook page. She complained about him, her job, and how cheap he was because she only made a few bucks an hour. When she got to work the next day, she was fired. However, the court held that she was free to discuss those things and therefore was wrongfully terminated.

Employees have the right to discuss their job, working conditions, pay, and other work related issues. An employer cannot restrict those discussions. However, an employee cannot discuss confidential information, such as customers or families that use their business. Employees also cannot represent the business on issues, unless granted such permission, and cannot break copyright laws.

SOCIAL MEDIA POLICY-

Your Employee Policy Manual should explain the company's policy on certain areas such as confidential information; customer lists; trademark/copyright laws. Then your social media policy should identify that violations of company policies, through any means including social media, can result in discipline up to and including termination.

Of all the possible items to cover in your social media policy, consider these 3:

1. Work Related Views;
2. Privacy/Confidentiality;
3. Respect.

1. **Work related views** can be tricky. As stated above, you can't limit employer's speech on certain work items such as working conditions or work-related issues. But what you can do is limit comments that are made by employees that represent your business in their post.

As an example, consider the popular online forums where employees share issues and ask for help from other employees in the same profession. As a business it is very difficult to limit your employee's speech, especially if it is when employees are on their own time. However, if the speech is about you or your company there may be some protection for the business. While an employee can talk about workplace issues, they do not have free reign to share about day-to-day activities. More so, if they share photos and practices, this may be protected as well. To control this, your social media policy should have a section that limits any work-related views and requires that any views shared are not necessarily the views of the company.

2. This leads to the second area of a social media policy - **privacy and confidentiality**. In many situations, when employees share info about their job they are actually posting or sharing information about customers - or in the case of deathcare - families that they have served. Employees can't share private or confidential information without the consent or authorization of the family. Publication of such info can be the basis for a claim of invasion of privacy. In today's world of hyper-sensitivity over the release of personal information, this is an area where businesses really need to be diligent.

3. The third area of importance in a social media policy is **respect**. Employees must know that any posts that violate the common idea of respect will not be tolerated. This includes any type of racist remark; hate speech; or discriminatory comments. How powerful is this area of social media? Consider recent news where people have made one bad tweet - only to lose their job immediately. (Remember Roseanne Barr?) Or, even think of people who have lost jobs and careers for posts that were made years ago (Look back to James Gunn who lost his job as director for Guardians of the Galaxy after a post he made years ago resurfaced.)

BUSINESS AND CONSUMER

You can't talk about social media without covering the all-powerful consumer review or consumer rant. In today's world the consumer can become a powerful voice with the click of a mouse. A bad post on FaceBook can immediately get thousands of followers; a tweet that knocks your business can be retweeted thousands of times in just minutes; and a bad review on Yelp can last forever. Don't get me wrong, there are positives to all of this as well - but you don't need to fight the good stuff!

FOLLOW THE ACTION

Step one is getting involved. Many businesses still do not follow themselves on social media. You can't ignore social media - because you are now the one putting it out there. The reason social media is so powerful is that consumers control it. It works whether you get involved or not.

As a business you need to be proactive and start following your business on all platforms which include Google; FaceBook; Yelp; Better Business Bureau - just to name a few. If you aren't watching, you won't know when you have an issue; until it's too late.

RESPONDING TO A COMPLAINT

If there is one thing that you need to know how to handle, it is handling the negative comments or negative reviews from a family. There are a few things you should always do when you get a negative comment/review and a few things you should not do.

1. **First, stop and breathe.** Seriously. Your immediate reaction is going to be to respond to their comments, either because of anger or because you think you can fix it. The truth is that the timing will not be right. If someone has taken the time to complain on a post, they are very angry and/or disappointed. If you engage them at this point you will just be adding fuel to the fire. You need to wait - I recommend at least 24 hours - before you engage online. If you are saying to yourself, "What if it is a horrible review or completely wrong and terrible." Then wait. The worse it is, the more reason you need to wait.
2. **Second, call them.** Yes, you are allowed to still call the person even if they are posting online. So many people think that there is a rule that says if someone complains then I can't talk to them anymore. This is not true! If you know who has a complaint or an issue - call them up and talk. By the way, while you should still wait a little while, I do believe it is ok to call someone sooner than waiting to do a written online response.
3. **Third, you need to take ownership and responsibility.** Especially if you are going to respond online to a review, you need to let them know who you are, that you take this seriously, and you would like to talk to them (there's that talking part again) to try and resolve their issue. In fact, I suggest you list your phone number, business phone number that is, in your response so they can easily contact you.

Dos and Don'ts

That's the easy part - what you can and should do. What shouldn't you do?

- **Don't ignore the problem.** If you think it will just go away, it won't. You need to handle all reviews, the good and the bad. There are many reputation builders that believe a negative review, that is handled properly, can do more for your business than a good review. The first step in handling a bad review is responding (after you wait though!).
- Another don't - is **do not engage in an online debate or fight.** Many people thrive in the world of online reviews and comments and enjoy the battle. Just scroll through FaceBook and see some of the great reviews and online fights; you want no part of that world. Be prepared to make a few comments to resolve the issue, always trying to get them to go offline and discuss the problem. If you can't get a resolution, then know when to just say when. If you can't resolve it, consider a final comment stating that you are sorry that you couldn't resolve the issue, but you are available should they want to take this offline and call you to discuss the issue and a resolution.

- Lastly, **do not ever lie**. One of the biggest issues that can come from a negative post is a false statement from the business trying to explain away the problem. There are cases where these statements have been used against a business to show they falsely represented the facts and caused greater damages than would have been allowed. Keep your statements short, and honest - always.

Handling comments from an ex-employee

A last caveat on reviews/comments and that is when the person making the statement happens to be an ex-employee. This is a growing area of concern and it is becoming more and more common. The situation is basically the terminated employee loses their job; and then decides to share every bad story that has ever happened in your business. What to do?

If the reviews are on a forum such as Yelp, don't be afraid to contact Yelp and let them know that the review is from an ex-employee. There are certain times when sites, such as Yelp, will remove a review, and one of those is when the reviewer has a conflict of interest. In the case of an ex-employee there is such a conflict. (As an aside, if you can show that a bad review is actually from a competitor, it can be removed as well.) As far as bad comments on other social media posts, this is where you need language in your employee policy manual. You want to make sure that you protect confidential information and also make sure that such confidential provisions last after they are no longer employed by you.

Overall, social media is a positive that can help any business. While social media should never stand alone as the reason for hiring (or not-hiring) or firing, it can be a tool in your process. Social media is also a great platform to share your accomplishments - but beware the negative reviews that may happen. Don't treat social media as a weapon and ban it from your business. Take the time to embrace social media and communicate to your staff how it can be used. With a good social media policy, you can help your business in the long run.

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