

Employment Checklists

Federal Compliance Checklists

Work Rules and Employee Conduct

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## Checklist: Social Media Policies in the Workplace

**Purpose:** As social media use continues to expand, particularly among younger workers, employers are often confronted with a number of issues regarding their social media use policies for the workplace. Common issues include the use of a potential employee's social media posts in making hiring decisions, social media harassment, and disciplining or terminating an employee for social media posts that are critical of the employer's business. When is an employee's social media use protected and when is it not? When may an employer monitor or access an employee's social media posts and when is this prohibited? This checklist is intended to identify the legal issues that must be considered when crafting a workplace social media policy and to offer practical advice for drafting effective policies that will stand up to legal scrutiny.

This checklist was compiled by Sage R. Knauff, partner and co-chair of the employment practice group at Walsworth law firm's Orange County, Calif., office. Mr. Knauff's employment practice includes defending employers in wrongful termination claims, discrimination and harassment claims, wage and hour claims, and unfair competition and misappropriation of trade secret claims. He also provides pre-litigation counseling and advice on employee policies and procedures and training for supervisors on the prevention of workplace harassment and discrimination.



### Social Media Hiring Risks

- Discrimination Claims
  
- Retaliation Claims
  
- Disparate Impact Claims

- Fair Credit Reporting Act Claims

- Stored Communications Act Claims

### **Hiring Recommendations**

- Update policies for screening information on social media sites.

- Treat applicants consistently.

- Decision makers should not review sites.

- Maintain process for record keeping.

- Implement prohibition on access to password-protected sites.

- Be aware of potentially false or unreliable information.

### **Use of Social Media Searches in Hiring Process**

- Do not use a pretext to gain access to a prospective employee's social media site.

- Do not request personal social media account usernames or passwords.

- More than 50% of states have laws prohibiting employers from requiring applicants and employees from providing username and password information.

- Even if your state does not have an express prohibition, there is a danger of inviting discrimination, retaliation, or disparate impact claims.
- Do not retaliate against applicant for refusing to provide social media account access information.
- Be consistent with background checks or use of publicly accessible information on applicant's social media accounts.

### **Social Media Harassment**

- Employer has no active duty to monitor employees' private social media posts, but does have duty to take effective measures to stop co-employee harassment when the employer knows or has reason to know that such harassment is part of a pattern of harassment that is taking place in the workplace.
- Harassment can take many forms, such as social media posts and replies, texting, sexting, cyberstalking.
- It is permissible for employers to state in social media policies that employee's use of social media must not violate employer's anti-harassment and anti-discrimination policies.

### **Social Media Harassment Recommendations**

- Investigate claims no matter where the alleged harassment took place.
- Social media evidence is part of harassment investigations.
- Provide training for managers and supervisors.
- Review and update policies to include social media harassment.

### **Disciplining Employees for Critical Social Media Posts**

- Employer has the right to protect trade secrets and other confidential information.
  
- Employees have the right to discuss and complain about the terms and conditions of employment.
  
- Posts that may be protected by the National Labor Relations Act, which protects concerted activity of employees with regard to terms and conditions of employment:
  - Discussions about wages, benefits, work hours, and employment policies.
  
  - Posts in support of a union drive, asking employees to sign union cards, or asking employees to come to a union meeting.
  
  - NLRB will find the post protected even if it contains some off-color words or disparaging language concerning the employer.
  
- Posts for which an employer may discipline an employee:
  - Negative comments about customers or clients.
  
  - Disclosing an employer's trade secrets and confidential and proprietary information.
  
  - Violating an employer's intellectual property rights, and using protected information for business and commercial purposes.
  
  - Harassing, libeling, threatening, or defaming fellow professionals, employees, clients, or competitors.
  
- Before imposing discipline for an employee's social media post, it is important to evaluate:
  - Was the employee discussing issues with another employee that may be interpreted as protected concerted activity?
  
  - Was the employee criticizing a management policy, complaining about compensation, or other terms and conditions of employment?
  
- Before imposing discipline, identify and document the specific business disruption/impact caused by the employee's social media post.  
Examples:
  - Complaints and/or threats against customers.

- Harassing speech against a co-worker.
- Disclosure of confidential information that may harm the employer's reputation.
- Evidence of employee abuse of company policies (e.g., sick day).

### **Recommendations for Drafting Employer Social Media Policies**

- It is permissible to prohibit employees from disseminating employer's trade secret information, using an employer's logo in social media posts, or using employer's name in social media usernames or passwords.
- It is permissible to prohibit employee social media activity that violates employer's anti-harassment or anti-discrimination policies.
- It is permissible to require the use of disclaimers when an employee is commenting on social media in such a way that the employee's relationship with employer may be revealed.
- Example: "The postings on this site are my own and do not represent the views of employer."
- It is permissible to monitor employee social media use when conducted on employer's equipment during work hours, as long as all electronic activity is also subject to monitoring and employees are advised that they do not have a reasonable expectation of privacy when utilizing the employer's IT infrastructure.
- Review NLRB's General Counsel guidelines for workplace social media policies - <https://www.nlr.gov/news-outreach/fact-sheets/nlr-and-social-media>.
- Avoid the use of overbroad or sweeping prohibitions concerning the content of employees' social media posts. Examples of policies which have been found to be unlawful by the NLRB:
  - "Insubordination or other disruptive conduct"
  - "Inappropriate conversations"
  - "Engaging in unprofessional conduct that could negatively impact employer's reputation"

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- “Disclosing or communicating information of a confidential, sensitive, or non-public information concerning the company on or through company property to anyone outside the company”
  - “Publishing any representation about the company without prior approval by senior management and the law department”
  - “Social networking site communications are to be made in an honest, professional, and appropriate manner, without defamatory or inflammatory comments” regarding the employer
- Consider adding a provision stating that employer will not retaliate against any employee for reporting a violation of the employer's social media use policy or for cooperating in an investigation.
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