

Recommendations for Enhanced and More Professional Communications Within a Company, Agency and Organization

First Thursday CLE Program

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Introduction

- **Key to all aspects and goals of any company, business or agency is effective and positive communications.**
- **Corporate and in-house counsel play a vital role in helping to set the basis and expectations of professionalism in all communications at every level of the organization, and in overseeing the compliance with those expectations and entity policies regarding communications.**

Program Outline

- **Today we will discuss:**
 - **The current legal aspects of social media and workplace communications policies for private and public employers;**
 - **The current NLRB guidelines on disciplining employee speech in the workplace;**
 - **Corporate and in-house counsel's role and options for setting and maintaining standards and policies of effective professional communication in content and manner at all levels of the organization;**
 - **Best practices to address negative or poor examples of organization communication; and**
 - **Avoiding or minimizing legal liability for communication miscues.**

The current legal aspects of social media and workplace communications policies.

- **Implement policies and procedures for employee discipline that will serve as core principles and protocols for all discipline, whatever the grounds and form.**
- **Recognize that:**
 - **the harm employees may cause employers through social media often differs in nature from ordinary workplace misconduct or poor performance; and**
 - **employee social media posts implicate different employee rights from ordinary workplace misconduct or poor performance because they often occur when employees are off duty, away from the workplace, and involve communications with third parties.**

The current legal aspects of social media and workplace communications policies.

- **When considering whether to impose discipline for social media posts use:**
 - **conventional considerations before imposing employee discipline; and**
 - **the following additional considerations concerning employees' use of social media.**

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Identify Why a Social Media Post is Objectionable

Identify the specific reason for considering disciplinary action against an employee for the content of social media posts. For example, whether the comment:

- is merely offensive; or**
- causes calculable economic harm to the employer.**

Assess whether the social media comments at issue violate any of the employer's policies, such as a lawfully drafted social media policy or policies prohibiting:

- discrimination based on protected classes;**
- harassment based on protected classes;**
- threatening or intimidating conduct;**
- vulgar or obscene content; or**
- disclosure of confidential intellectual property or trade secret information.**

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Survey Any Similar Situations

- **Review whether other employees have engaged in similar social media misconduct in the past and how the employer addressed each situation.**
- **Ensure, to the extent possible, that the employer treats all incidents of social media misconduct consistently. If there are variances in the employer's responses, ensure there is a good reason for the differences and be prepared to identify legitimate business reasons for the different treatment in government agency investigations and litigation.**

The current NLRB guidelines on disciplining employee speech in the workplace.

Evaluate Whether the National Labor Relations Act Applies to the Conduct

Understand that under the National Labor Relations Act (NLRA):

- employees' social media postings that may be disloyal, insubordinate, or profane may nonetheless be protected from discipline if they are protected concerted activity; and
- employers that discipline employees for comments on social media that are protected concerted activity risk committing an unfair labor practice (ULP) and violating the employees' Section 7 rights.

Start assessing the likelihood that the NLRA will apply to protect an employee's comments on social media by evaluating whether the employer and individual are covered by the NLRA.

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Is the Employer Covered By the NLRA?

Determine whether the employer is:

Exempt from the NLRA's coverage under:

- the NLRA's terms;
- US Supreme Court precedent; or
- federal regulations issued by the NLRB.

In a category of employers over which the National Labor Relations Board (NLRB):

- chooses not to exercise jurisdiction;
- may exercise jurisdiction if certain thresholds are met; or
- chooses to exercise jurisdiction based on interstate commerce thresholds and standards from its precedent, which include retail enterprises.

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Is the Individual an Employee Covered by the NLRA?

Determine whether the individual is:

- A protected employee under the NLRA.
- A worker excluded from the NLRA's coverage, such as:
 - a supervisor;
 - a manager;
 - an independent contractor; or
 - another type of statutorily excluded worker.

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Is the Social Media Post Considered Concerted Activity?

Determine whether the employee's social media posting may be protected concerted activity under the NLRA because it:

Does one or more of the following:

- concerns employment terms and conditions, especially on subjects the NLRB holds are inherently concerted;
- seeks to initiate, induce, or prepare for employee group action;
- brings truly group employment complaints to management's attention;
- enlists support from fellow employees for their mutual aid and protection;
- stems from or logically grows out of previous concerted activity.
- seeks to discuss self-organization or other matters of mutual concern related to employment terms and conditions with fellow employees.

Is not mere personal gripes or complaints, even where other employees:

- may benefit; or
- have an interest in the subject of the employee's complaint.

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Did the Employee Forfeit the NLRA's Protection Through the Posting?

Consider the factors the NLRB relies on to determine if an employee's conduct while engaging in protected activity forfeits the NLRA's protection, including:

- **when the allegedly unprotected conduct occurred;**
- **where the allegedly unprotected conduct occurred;**
- **to whom the allegedly unprotected conduct was directed;**
- **who witnessed the allegedly unprotected conduct; and**
- **how and to what degree the allegedly unprotected conduct harmed the employer.**

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Did the Employee Forfeit the NLRA's Protection Through the Posting?

Based on those factors, consider which of its tests the NLRB would most likely apply, and, more importantly, under which test it likely would hold the employee's post or conduct was unprotected. For example, determine whether the employee's post would most likely be held to be unprotected because it:

- **sufficiently undermines supervisor or management authority;**
- **sufficiently disparages the employer's products or services or is otherwise sufficiently disloyal;**
- **sufficiently defames the employer or one of its agents; or**
- **otherwise renders the employee unfit to work for the employer under another misconduct standard.**

Understand that regardless of which test the NLRB applies, it is unlikely to hold that a concerted social media post is unprotected. An employee generally does not forfeit the NLRA's protections by posting a profane, disparaging, or defamatory statement unless the employee spurs unlawful or insubordinate acts or grievously harms an employer.

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Apply the Organization's Written Social Media Policy.

- **Review the employer's social media policy for terms that the NLRB has found unlawfully overbroad or vague. For example, overbroad and vague provisions in social media policies may include those prohibiting the following without defining the prohibition's scope:**
 - **defamation;**
 - **disparagement;**
 - **disclosure of confidential information; or**
 - **inappropriate discussions.**
- **Evaluate whether the employee's misconduct violates a valid social media policy and, if so, what discipline the policy permits or requires.**
- **Evaluate whether the employer has lawful grounds to discipline the employee, even if the social media policy it would rely on is arguably overbroad.**

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Consider Anti-Discrimination, Harassment, and Retaliation Laws

Understand that federal laws protect employees against workplace discrimination and harassment based on protected classes, and against retaliation for engaging in certain protected activity, such as reporting unlawful conduct. These laws include:

- **Title VII of the Civil Rights Act of 1964 (Title VII);**
- **Title I and Title V of the Americans with Disabilities Act (ADA);**
- **Age Discrimination in Employment Act (ADEA);**
- **Genetic Information Nondiscrimination Act (GINA);**
- **Uniformed Services Employment Reemployment Rights Act (USERRA);**
- **Section 1981 of the Civil Rights Act of 1866 (42 U.S.C. § 1981);**
and
- **Equal Pay Act (EPA).**

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Consider Anti-Discrimination, Harassment, and Retaliation Laws

Consider whether the social media comment found objectionable may:

- concern complaints of unlawful discrimination, harassment, or retaliation and, if so, whether further investigation is necessary or appropriate;
- be deemed unlawful discrimination or harassment;
- concern whistleblowing activities protected by Sarbanes-Oxley Act (SOX) (18 U.S.C. § 1514A) and the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act);
- concern whistleblowing activities protected by Occupational Safety and Health Act (OSH Act) (29 U.S.C. §§ 651 to 678), prohibiting termination for exercising rights protected by federal health and safety law, including whistleblowing; or
- concern wage rights, including those protected under the Fair Labor Standards Act (FLSA) (29 U.S.C. §§ 201 to 219), prohibiting termination for exercising wage and hour rights.

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Consider Options for Disciplinary Measures

Weigh conventional disciplinary options in light of social media post considerations:

- The harms the post caused the employer.
- The content and context of the post.
- The employer's prospective obligations to discipline the employee for the post, for example, to maintain a workplace free of discrimination and harassment.
- The employer's policies and procedures regarding social media and discipline, generally.
- The employee's prospective rights to engage in the social media posting.
- The employer's prospective waiver of rights if it does not discipline the employee for the post, for example, if the employer does not demand that the employee remove the post to stop disclosing trade secrets or other proprietary information or discipline an employee for doing so.
- The way the employer learned of the social media post.

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Consider Options for Getting the Employee to Remove the Social Media Post

- **Recognize that if the NLRB holds that an employee's social media post is concerted and protected, it will also likely construe any effort by the employer to have the employee remove a social media post as unlawful:**
 - **interference with the employee's rights, separate from any related discipline; and**
 - **retaliation against the employee for exercising Section 7 rights.**
- **Recognize that if the employee has any other legal right to post the social media comment, such as under privacy, off-duty conduct laws, or whistleblower protection laws, efforts to get the post removed will likely be considered unlawful interference or retaliation under those laws.**
- **Recognize that if an employer accessed the objectionable social media post using means prohibited by social media account privacy laws, the employer will likely face a countersuit or government agency investigation about that access, if it initiates actions against the employee.**

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Consider Options for Getting the Employee to Remove the Social Media Post

Consider the prospective merits and likelihood of success in:

- injunctive actions compelling the employee to remove the post; and
- legal claims against the employee for damages caused by the social media post.

Consider the prospective costs and benefits of:

- simply asking the employee to remove the post;
- issuing a stop and desist letter requesting that the employee withdraw the social media post; or
- pursuing any meritorious injunctive actions or legal claims.
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- **Assess the Risks of Litigation**

- **Consider the risks of litigation:**

- **if an employer terminates or imposes lesser discipline on an employee for an objectionable social media post;**
- **if an employer does not discipline an employee for an objectionable, arguably harassing social media post; or**
- **regarding an employer's efforts to safeguard trade secrets and other proprietary information, if it takes no action to stop such disclosure by an employee in a social media post.**

Thank you!

Next Meeting: December 7, 2023

**Update on Employment Law
Key Developments
and 2024 Outlook**

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