



Workplace Social Media Policies: What Law Firms Need to Know



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In a world driven more and more by tweets and posts and chats and memes, what do law firms, as employers, need to know about controlling the use of social media—especially by their lawyers?

Social media is now deeply embedded in global social and professional life. It is now so ubiquitous, instantaneous and instinctive that even the whitest-shoe law firm has to bow to a new reality: Their younger employees were born with their thumbs on their cell phone keyboards.

This is not all bad news, of course. Some of the many advantages of using social media for business operations are speed, ease, and the ability to transfer data and text seamlessly across multiple platforms.

That said, the risks are also legion. Given the special nature of legal practice, law firms need to be more aware of risks than other employers. However, perhaps in part because of the assumption that juris doctors are inherently aware of these risks, law firms are often slower than other businesses to create explicit policies that govern social media communications.

Some of these risks might seem to be just breaches of etiquette or lapses in judgment, but the consequences can be serious. For example...

- Can a law firm discipline an employee for non-work-related tweets from a private account?
- Can a partner use Instagram to check out a job candidate's background?
- If a few associates complain on Twitter that they aren't getting paid enough and are sick of working 80-hour weeks, could disciplinary action against them for violating confidentiality trigger charges of violations of their rights under Section 7 of the National Labor Relations Act (NLRA)?
- Can a law firm legally monitor its associates' social media accounts to find out if they are unwittingly exposing the firm's proprietary or confidential information?

Many companies have formal policies that regulate use of social media. In a 2012 survey, the Society for Human Resource Management (SHRM) found that 40 percent of organizations reported having a formal social media policy—leaving 60 percent of



companies without one. Among organizations with a social media policy, 33 percent reported taking disciplinary action against employees who violated their policy within the prior 12 months. Most policies include obvious prohibitions against harassment or disclosure of confidential company or client information, but many are silent on monitoring employees' personal social media.¹

The opposite should be true, according to experts. Firms' policies need to address both professional and personal communication via social media.

In an environment where a snarky tweet can go viral in a second, employers—even law firms—must establish specific rules that employees will easily understand. According to Amy Knapp of the International Legal Technology Association, a basic social media policy can be boiled down to one simple rule:

“If you wouldn't say it in front of your grandmother, don't say it on social media.”²

However attractive this simplicity is, social media policies for law firms should leave nothing open to interpretation. Policies should avoid subjective terms or standards that let the employee make the call between what's permissible and what isn't. Policies should contain specific examples of acceptable, as well as unacceptable, conduct. Employers should have their social media policy reviewed regularly by legal counsel to keep up with changes in this rapidly evolving area of employment law.

The Pitfalls at Both Extremes

Despite best efforts to encourage good behavior, there are a number of pitfalls that law firms may tumble into if they are not proactive in setting at least some parameters for what staff lawyers can and can't say online.

NLRA-protected speech

You might think that a law firm could legally bar its partners and associates from complaining online about the firm's wages and working conditions. You might be wrong.

Under the NLRA, online discussions relating to wages or working conditions may be



protected speech. Section 7 of the NLRA gives employees the right to act together to improve their pay and working conditions. If employees are fired, suspended or otherwise disciplined for taking part in this type of “concerted activity,” the National Labor Relations Board can step in with charges of unfair labor practices.

Protected concerted activity is defined as actions engaged with or on the authority of other employees, and not solely by and on behalf of the employee himself or herself, regarding terms and conditions of employment. Thus, a single employee may engage in protected concerted activity if he or she is acting on the authority of other employees—for example, by bringing group complaints to the employer’s attention, trying to persuade other employees to take group action or trying to prepare for group action.³

The NLRB has issued decisions and guidelines regarding the nature of protected employee speech under the NLRA. Under this line of authority, employees may lawfully complain about wages and/or working conditions, through social media accounts such as Facebook or Twitter.⁴

Researching backgrounds

Another trap for the unwary is searching an applicant’s online media profile for red flags during the hiring process. Searching non-password protected, public sites such as Facebook or Twitter is legal. Hacking is not. In addition, reviewing an applicant’s social media posts may provide an employer with information about the applicant’s protected characteristics, such as race, disability, and/or religious beliefs, which may not be used in hiring decisions. However, once such information is obtained, the firm may be accused of using it in making its decision and will have to defend against such allegations.

Of special interest for law firms is the practice of searching online activity of witnesses or parties to a legal action. This, too, may be problematic. For example, if an associate or an investigator “friends” a party to a lawsuit in order to access hidden spaces in the online universe, any information gained will likely be ruled inadmissible in court. It may also violate ethics guidelines.⁵

Monitoring and Restricting Social Media

One of the first questions law firm principals may ask is, “What are my associates saying online? Is there anything out there that’s going to come back and bite us?”

To find out, many employers decide to monitor their employees’ social media use. The bottom line is that an employer *can* monitor activity on a *workplace* computer or other device, such as a company-provided cell phone or laptop. Many employers regularly monitor their employees’ electronic communications.⁶ If an employer decides to monitor its employees’ communications on employer-authorized devices, the employer should advise the employees of such monitoring so that they have no expectation of privacy.

The larger question is whether law firms, given the basic level of professionalism expected of all practicing lawyers, *should* monitor—and what they can do when they find behavior that they don’t like.

Law firm social media policies run the gamut from loose suggestions to restrictive policies that link violations to disciplinary action, including termination. Nearly all, when examined closely, raise questions of overreach, NLRA violations, or simple common sense.

Case in point: One firm’s social media policy warns employees that they “do not have an absolute right to express themselves through blogging/social networking/social media, when such communications affect the Company’s legal liability and/or are contrary to protecting the Company’s proprietary information and business interests.” In addition, the policy states that certain communications are never allowed, including postings that support a competitor or negatively impact the firm’s interests or reputation. Policy violations were linked explicitly to disciplinary measures, including termination.⁷

While this may sound reasonable on the surface, the phrase “negatively impact the firm’s interests or reputation” may run afoul of the NLRA, which is being interpreted more strictly than ever before. What would have been fine even four years ago might not be permitted now. For example, in August 2016, the National Labor Relations Board held that Chipotle Services’ social media policy’s prohibition of “disparaging, false, [or] misleading” and “incomplete, confidential, or inaccurate information” was unlawful.⁸



At the other end of the spectrum, some law firms lean toward broad and simple social media policies common at many professional firms. One law blogger in 2012 adjusted the New York Times Co.'s policy for general law firm use:

First, we should always treat Twitter, Facebook and other social media platforms as public activities. Regardless of your privacy controls or the size of your follower list, anything you post online can easily be shared with a wider audience. And second, you are an X law firm associate, and your online behavior should be appropriate for an X law firm associate. Readers will inevitably associate anything you post on social media with X law firm.⁹

This approach leaves it to the individual lawyer to police his or her own behavior. But even this loose, do-your-own-thing-but-do-the-right-thing approach could be challenged, particularly because of its requirement of "appropriate behavior," as this might give the appearance that the firm is restricting employees' NLRA rights.

With such stark extremes and tricky scenarios, it's clear that each law firm needs to consider its own culture and weigh benefits and risks at both ends of this spectrum.

Social Media Policy Suggestions

Does this mean an employee can't be disciplined over a tweet or other social media post? No. Case in point: In 2013, the head of communications for a tech firm hopped on a plane for Africa. She shot out a jokey tweet as she boarded the plane: "Going to Africa. Hope I don't get AIDS. Just kidding. I'm white!" By the time she landed, her tweet had gone viral under #HasSheLandedYet. And in addition to becoming a punch line, she was fired.

But this is an exception rather than the rule. The truth is, rules are currently hard to come by: The law in this area remains very fluid. Employers should follow developments regularly and submit their social media policy for review by counsel at least annually.



Some other things law firms should keep in mind include:

Social media policies should be simple and objective, avoiding subjective terms and standards that leave the rules open to interpretation.

If subjective principles are used, the policy should provide specific examples.

Avoid overly broad rules that could be a red flag for the NLRB to find violations. Remember that the NLRA protects employees' discussion of wages, performance evaluations, workplace safety, discipline, and other terms and conditions of employment.

If a social media policy briefly addresses complex matters such as nondisclosure of confidential information, employers should provide a reference to the more detailed policy.¹⁰

As for the NLRA traps, a disclaimer should be included, such as something to the effect of: "This policy is not meant to prohibit you from discussing the terms and conditions of your employment as permitted by the NLRA and other applicable laws."¹¹ However, adding a disclaimer such as this will probably not cure a policy that otherwise violates the NLRA.

For the practicing attorney

Social media policies that pertain to attorneys should address conduct in any context, from bar association conferences to late-night tweets. Policies should also stress that attorneys maintain client confidences at all times, and avoid sharing anything that creates the appearance of establishing an attorney-client relationship with the intended recipients.

But beyond that, the prevailing trend toward stricter NLRA enforcement should give law firms pause before imposing further restrictions. Any additional restrictions should be thoroughly vetted, narrowly tailored with specific examples, and accompanied by language exempting Section 7 NLRA activity.

Many professional associations offer social media templates for law firms, but beware: Each firm's policy will need to be unique and constantly evolving, as fast as both the rapid pace of technological innovation and the shifting paradigms of labor law compliance. Templates may have difficulty keeping up.¹²



With that in mind, below are some general principles for law firms to consider when crafting social media policies, covering both personal blogging and social networking on sites such as Facebook, Instagram, Twitter and LinkedIn, as well as professional electronic communications and media relations.

- Never appear to offer legal advice.
- Never appear to endorse a product or service.
- Never post content on any site that is illegal, obscene, or threatening; that infringes on intellectual property rights; or that invades privacy
- Never use a client's name in any social media context.
- Never discuss actual cases online.
- Never use the firm's technology or equipment for a personal blog.
- Never identify a personal blog as affiliated with or endorsed by the firm.¹³

Remember, these are general principles. Policy language must be carefully drafted to avoid running afoul of the NLRA. It may be prudent to have an employment attorney review your policy prior to implementation.

Conclusion

Online activity is the archetypical blessing and curse. The power of the Internet to speed communications is inextricably linked with its power to blow up in the face of unwary employees and their employers. Social media policies can help guard against such fiascos. But, human nature being what it is, they cannot always prevent people from making fools of themselves. More importantly, a policy that fails to recognize that certain types of shared communications are legally protected could end up doing more harm than good. A solid, thoroughly vetted framework for how to deal with breaches of decorum or confidentiality—without causing breaches in a firm's NLRA compliance—will help avoid exposure and mitigate damage.

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Endnotes

- ¹ "An Examination of How Social Media Is Embedded in Business Strategy and Operations," Society for Human Resources Management, Jan. 12, 2012
- ² Knapp, Amy. "[Best Practices for a Law Firm Social Media Policy](#)," International Legal Technology Association, November 9, 2016
- ³ *First Amendment Rights in the Workplace: Issues for Employers*, Bloomberg BNA's HR Decision Support Network, March 2014
- ⁴ Hamer, Spencer. "Creating an Effective Workplace Social Media Policy," *Human Resources Report*, Bloomberg BNA's HR Decision Support Network, Aug. 12, 2013
- ⁵ Graf, Nick, "[Social Media Risks for Lawyers](#)," CNA, September 27, 2016
- ⁶ "[Should Companies Monitor Their Employee's Social Media?](#)" The Wall Street Journal, October 22, 2014
- ⁷ *Social Media in the Workplace: Minimize Risk, Maximize Opportunity*, Bloomberg BNA's HR Decision Support Network, 2012
- ⁸ Gordon, Philip L. & Appenteng, Kwabena A. "[NLRB Ruling in Social Media Case Provides Useful Guidance for Employers](#)," Littler, August 29, 2016
- ⁹ O'Keefe, Kevin. "[NY Times social media policy a good model for law firms](#)," Real Lawyers Have Blogs, October 18, 2012
- ¹⁰ Affrunti, Sherri A. & Christine E. Nielsen. "Social Media Policies and NLRB—The Growth of Social Media and the Need for Well-Drafted Policies," *Human Resources Report*, Bloomberg BNA's HR Decision Support Network, Sept. 16, 2013
- ¹¹ Peacock, William. "[Does This BigLaw Social Media Policy Go Too Far?](#)" FindLaw, December 10, 2013.
- ¹² Sharp, Cynthia. "[Social Media: The Importance of a Law Firm Policy](#)," American Bar Association, October 2014
- ¹³ "Online Social Media Policy Template," LawMarketing.com