

# "LIKES" AND "DISLIKES": BEST PRACTICES FOR SOCIAL MEDIA POLICIES AND TRAINING

## I. BRIEF INTRODUCTION TO PRESENTER AND TOPIC

## II. INTRODUCTION TO SOCIAL MEDIA AND THE WORKPLACE

- A. Show of Hands Regarding How Many Attendees Use (Facebook, LinkedIn, etc.).
- B. Social Media is a vastly expanding area of growth for companies.
  - 1. Facebook: 2.38 Billion Monthly Active Users.
  - 2. Twitter: 126 Million Daily Active Users.
  - 3. Snapchat: 186 Million Actively Daily Users.
  - 4. LinkedIn: 260 Million Monthly Active Users
- C. Social Media is Evolving and Changing the Workplace
  - 1. New collaborative workplace sites such as Facebook Workplace.
  - 2. Intra-Office Instant Messaging Systems.

## III. WE "LIKE": SOCIAL MEDIA POLICIES AND TRAINING

- A. Social Media Policies are Necessary:
  - 1. *Compliance:* Social media policies will assist with compliance with various laws.
  - 2. *Transparency:* Social media policies ensure that all employees know and understand the company's social media goals and policies.
  - 3. *Consistency:* Social media policies assist to ensure that employees post appropriate information regarding your organization on social media.

B. Evaluate Your Social Media Needs:

1. This should be your first step in determining whether a policy is right for you and in developing a social media policy. As these key questions:
  - a. Does your company utilize social media to sell its products and/or services?
  - b. How does your company currently utilize social media?
  - c. What are the goals for your social media policy?
  - d. What are the current issues with social media usage among your employees?

C. Follow These Best Practices:

1. MH Employment Team is here to help you develop your policies.
2. We recommend the following best practices:
3. Avoid "form" or "fill in the blank" type policies which are not tailored to your particular organizational needs. These may be a good starting point, but will not necessarily capture all facets of your organization.
4. Articulate a clear message for the purpose of social media use at the outset of the policy.
  - a. This should be well tailored to your organization and kept relatively simple.
  - b. Articulate the goal of your company's social media page(s) and the reasons why the social media policy is being implemented.
5. Define social media clearly in the policy.
  - a. The definition should be broad in scope to encompass all forms of social media utilized by the company.
  - b. The definition should be clear and understandable.

6. Outline an expectation of confidentiality of corporate information that should not be shared on social media.
  - a. Confidential Organization Information
  - b. Proprietary Information/Trade Secrets
7. A distinction may need to be made for private versus public social media pages if your company has public social media pages.
8. Provide a policy for the corporate social media pages, if applicable.
  - a. Specify which employees are authorized to post to any official company social media page(s).
  - b. Specify what content is appropriate for the company's official social media page(s).
9. Provide clear and precise expectations and guidelines for private social media pages.
  - a. Outline if/when social media is permitted during work hours.
  - b. Determine which websites are accessible to your employees at the worksite.
  - c. Describe how employees should talk about your company on private social media policies.
  - d. Describe when it is appropriate to "tag" your company's social media handle.
  - e. This portion of the policy must be narrowly tailored to comply with labor laws, as discussed below.
10. Reference anti-discrimination/harassment policies in social media policy.
  - a. If it's not tolerated in the workplace—it should not be tolerated on social media.



IV. WE "DISLIKE": DISCRIMINATION SUITS INVOLVING SOCIAL MEDIA

- A. The law surrounding social media is changing and evolving. We have seen an increase in discrimination lawsuits involving or incorporating social media.
- B. Social media policies and training must be tailored to comply with certain laws, including the NLRA, Civil Rights Statutes, and the WPA.
- C. National Labor Relations Act Concerns:
  - 1. An employee may file a claim with the NLRB for violations of the National Labor Relations Act.
  - 2. One consideration is whether the policy constitutes an "unfair labor practice" in violation of federal labor laws.
  - 3. Section 7 of the National Labor Relations Act, 29 USC 151 et seq., provides all employees with a right to engage in concerted activity, including collective bargaining.
  - 4. The NLRA protects concerted activity relating to working conditions. It does not protect individual griping. This covers activity such as discussing terms and conditions of employment, including wages, hours, and employer policies.
  - 5. Section 8(a)(1) of the NLRA prohibits an employer from interfering with, restraining, or coercing employees from exercising their Section 7 rights.
  - 6. Relation to Social Media Policies:
    - a. The NLRB first issued guidance in 2012 and issued more guidance in 2018.
    - b. The NLRB has concluded that Social Media Policies cannot be so broad that they prohibit activities protected by federal labor law, such as the discussion of wages or working conditions among employees.

- c. Social Media Policies also cannot expressly prohibit Section 7 activities, including discussing wages, benefits or working conditions.
  - d. The employee complaints must take place in the context allowing communication with other employees.
- 7. The NLRB has provided guidance that “employer policies should not be so sweeping that they prohibit the kinds of activity protected by federal labor laws” including discussing wages and working conditions.
- 8. Recently, the NLRB listed categories of rules that are presumptively lawful and “blanket rules” that are presumptively unlawful.<sup>1</sup>
- 9. Employers should avoid blanket prohibitions on employees:
  - a. talking about their jobs;
  - b. complaining about their jobs or company policies;
  - c. posting about discussing wages and hours;
  - d. posting about working conditions.
  - e. The NLRA covers statements that have “some relation to group action” or “seek to initiate, induce or prepare” group action.
    - i. *e.g.*, Facebook postings among coworkers intending to complain to management about their work performance;
    - ii. *e.g.*, Tweets about wages and hours.
- 10. Rules that may or may not be allowed:
  - a. Broad confidentially rules encompassing employer business or employee information;
  - b. Rules regarding disparagement/criticism of the employer;

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<sup>1</sup>file:///C:/Users/mca/Downloads/GC%2018\_04%20Guidance%20on%20Handbook%20Rules%20Post\_Boeing.pdf%20(4).pdf

- c. Rules prohibiting the use of the employer's name;
  - d. Rules restricting speaking to the media.
11. Certain prohibitions are allowed:
- a. Employers can still require employees to respect IP and proprietary information.
  - b. Employers can still require pre-approved use of the company's logos and trademarks.
  - c. A ban on disparaging the company's employees or using disparaging or offensive language is allowed.
  - d. Prohibiting employees from discussing information concerning customers, financial data, or non-public proprietary information is allowed.
12. Social media statements are generally not protected if they are "mere gripes" not made in relation to group activity among employees.
- a. The NLRA does not prohibit an employer from banning *all* forms of complaints about the company on social media.
  - b. There must be some relation to wages, hours, working conditions, etc.
  - c. *e.g.*, ABC Corp sells terrible low quality products: Not protected.
  - d. *e.g.*, ABC Corp doesn't care about its employees: May be protected.

D. Discrimination Lawsuit Concerns:

1. Statutes such as the Elliott Larsen Civil Rights Act, MCL 37.2101 *et seq.*, and Title VII of the Civil Rights Act of 1964, 42 USC 2000e *et seq.*, prohibit an employer from taking an "adverse employment action" in retaliation for an employee's engagement in a "protected activity."
2. "Protected activity" for purposes of Title VII includes "opposition" to

discrimination, and this phrase has been interpreted very broadly to include a variety of actions by employees.

3. Our firm has seen a recent uptick in lawsuits relating to posts on social media. In these cases, the plaintiffs argue that posting about discrimination or harassment by an employer or coworker on social media is a “protected activity.”
4. For example, if an employee complains on social media about her employer being racist, is that protected “opposition” to discrimination?
5. There has not been a definitive answer one way or another on this in the court system, so it is possible that these complaints on social media may constitute protected activity.

E. Whistleblower’s Act Concerns:

1. The Michigan Whistleblower’s act prohibits an employer from taking an “adverse employment action” against an employee who reports or threatens to report an alleged violation of the law to a public body.
  - a. *i.e.*, the police, governmental agencies such as MIOSHA
2. This includes taking an adverse employment action against an employee for being about to report workplace issues to the government or the police.
3. This may be construed to include an employee’s social media post regarding being about to report an alleged violation of the law to a public body.
4. For example, what if an employee posts on social media that he is going to report a working condition to OSHA and the employer sees the post? Does this constitute protected activity?
5. The law on this issue is also evolving just as with the discrimination context.

F. Hiring Practices and Discrimination Concerns:

1. Another consideration is discrimination in hiring. Consideration of factors such as gender, race, and religion is prohibited in hiring practices.
2. What if your organization learns of an employee's race, sexual orientation, or religion through a social media search?
3. In *Gaskell v. Univ. of Kentucky*, No. CIV.A. 09-244-KSF, 2010 WL 4867630, at \*10 (E.D. Ky. Nov. 23, 2010), the Court held that the plaintiff had established an issue of fact of whether his religion played a role in the decision not to hire him after the employer obtained information regarding his religion on social media.
4. In *Gaskell*, there was evidence that the employer had actually considered the religious affiliation in the hiring decision, but the case opens the door to the possibility of risk just for accessing employee information on social media.
5. The takeaway is that caution must be exercised in determining what employee information is accessed and considered from social media during the hiring process.
6. In fact, a recent SHRM study indicated as few as 22% of employers utilize social media during the hiring process due to these risks.<sup>2</sup>
7. There are concerns about accessing private social media information due to the Federal Stored Communications Act and Michigan's Internet Privacy Protection Act (2012), MCL 37.271 *et seq.*
8. It is illegal to ask for private social media passwords from employees and applicants. Specifically, the Michigan law prohibits:
  - a. Requesting an employee or an applicant to grant access to, allow observation of, or disclose information that allows access

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<sup>2</sup> [https://www.shrm.org/hr-today/news/hr-magazine/pages/0914-social-media-hiring.aspx?\\_ga=2.215897303.131493620.1558630552-1283654305.1554236678](https://www.shrm.org/hr-today/news/hr-magazine/pages/0914-social-media-hiring.aspx?_ga=2.215897303.131493620.1558630552-1283654305.1554236678)

to or observation of the employee's or applicant's personal internet account.

- b. Discharging, disciplining, failing to hire, or otherwise penalizing an employee or applicant for employment for failure to grant access to, or disclose information that allows access to or observation of the employee's or applicant's personal internet account.
- c. There are a number of exceptions:
  - i. "This act does not prohibit or restrict an employer from complying with a duty to screen employees or applicants prior to hiring or to monitor or retain employee communications that is established under federal law or by a self-regulatory organization, as defined in section 3(a)(26) of the securities and exchange act of 1934, 15 USC 78c(a)(26)." MCL 37.275(2).
  - ii. *"This act does not prohibit or restrict an employer from viewing, accessing, or utilizing information about an employee or applicant that can be obtained without any required access information or that is available in the public domain."* MCL 37.275(3).
  - iii. Disciplining or discharging an employee for transferring the employer's proprietary or confidential information or financial data to an employee's personal internet account without the employer's authorization. MCL 37.275(1)(b).
  - iv. Conducting an *investigation or requiring an employee to cooperate in an investigation* in any of the following circumstances:
    - A. If there is specific information about activity on the employee's personal internet account, for the

purpose of ensuring compliance with applicable laws, regulatory requirements, or prohibitions against work-related employee misconduct.

- B. If the employer has specific information about an unauthorized transfer of the employer's proprietary information, confidential information, or financial data to an employee's personal internet account. MCL 37.275(1)(c).
- C. Restricting or prohibiting an employee's access to certain websites while using an electronic communications device paid for in whole or in part by the employer or while using an employer's network or resources, in accordance with state and federal law. MCL 37.275(1)(d).

v. Penalties:

- A. Subject to a misdemeanor and a \$1,000 fine. MCL 37.278(1).
- B. Creates a private cause of action for violations and \$1,000 in damages. MCL 37.278(2).
- C. Provides an affirmative defense if "the employer or educational institution acted to comply with requirements of a federal law or a law of this state." MCL 37.278(3).
- D. No caselaw in Michigan has discussed this statute.

VI. WE "LIKE": TROUBLESHOOTING THESE SOCIAL MEDIA ISSUES

- A. Evaluate the social media needs of your organization.
  - 1. Evaluate whether providing employees with a social media outlet could lead to discrimination issues and/or an outlet for complaints.

2. Work with MH employment group to determine how to best suit the needs of your particular organization.
- B. Exercise caution during the hiring process.
1. Do not ask for passwords for social media pages.
  2. If you decide to examine a social media page, have HR or another designated individual do so. Do not have the decision maker do this.
  3. Keep clear records of hiring decisions and the reasons for the decision.
- C. Incorporate labor/discrimination laws.
1. As discussed above, your social media policy should incorporate the NLRB guidance and should not be so broad as to include Section 7 protected activity.
  2. Your social media policy should also not expressly prohibit employees from engaging in protected activity as defined under Title VII, ELCRA, the PWDCRA, or the WPA.
  3. Your policy should refer to your anti-harassment/discrimination policy and acknowledge that the policy applies to social media.
  4. Work with MH to incorporate labor/employment laws into your social media policy.
- D. Inform employees of channels through which they may voice their concerns.
1. Have an "open door" policy among managers or HR to listen to employee concerns.
  2. Inform employees of their channels to voice concerns.
  3. Employees who feel like they have a voice within the organization will be less likely to "vent" on social media.
- E. Conduct investigations into complaints of harassment/discrimination on social media.
1. Harassment/discrimination on social media between employees is

becoming more common.

2. It is important that employers investigate these claims just as they would any allegations of discrimination/harassment occurring on the worksite.
  3. The investigations should follow the company's ordinary policies regarding investigations of complaints of harassment/discrimination.
  4. Investigations involving "disappearing" social media may require a faster response time.
    - a. i.e., Snapchat stories are only available for 24 hours.
    - b. i.e., Deleted social media posts.
  5. Work with the MH Employment Team to assist with investigations into allegations of harassment or discrimination on social media.
- F. Take appropriate action in response to weaponization of social media.
1. Our firm has seen an increase with disgruntled employees utilizing protected activity as a weapon against possible adverse employment action.
    - a. e.g., an employee who knows he or she is going to be let go may post about the organization on social media to prevent the termination.
    - b. e.g., an employee posted on social media about her employer being racist in an attempt to avoid being fired.
  2. In these situations, disciplinary action and/or termination of the employee remains necessary, but the social media posts may be considered a "protected activity" under the discrimination laws.
  3. This is a difficult issue to navigate and is very fact-specific. MH's Employment Team is here to work with you in these situations to take the necessary steps while maintaining compliance with federal and state labor and employment laws.

- G. Maintain transparency/clarity for any disciplinary action taken.
  - 1. If part of a social media post constitutes concerted action or a protected activity, state that the disciplinary action does not concern the protected activity.
  - 2. Follow the progressive disciplinary process set up for other transgressions.
- H. Conduct social media training.
  - 1. The trainings should be fun and interactive.
  - 2. Encourage employee questions during the trainings regarding social media usage.
  - 3. Work with MH to conduct employee social media trainings tailored to your organization.
- I. Emojis and social media.
  - 1. Emojis have become a common method of communication on social media. They are highly prevalent on social media.
  - 2. Recent studies suggest that as many as 92% of individuals with an online presence utilize emojis.<sup>3</sup>
  - 3. Emojis are taking on an increasing presence in litigation. They are changing the meaning of certain information in all contexts, including the employment setting.
  - 4. [Bloomberg Law study of recent emojis]
  - 5. EX: *Murdoch v. Medjet Assistance, LLC*, 294 F. Supp. 3d 1242, 1246 (N.D. Ala. 2018). In a Title VII sexual harassment case, the Court found that the plaintiff did not find the alleged sexual harassment by her boss unwanted or offensive when she sent him numerous text messages flirting back with him. Several of the text messages

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<sup>3</sup> <https://www.socialmediatoday.com/social-networks/7-ways-use-emojis-social-media-marketing>

contained smiley faces, which the court found indicated her pattern of flirtatious conduct.

6. Issues arise when there are ambiguous emojis that have one meaning at face value but have another meaning in context.
7. Audience participation—examples that may have two meanings]
  - a. Ex. Winking Face/Face with Tongue Sticking Out can change the meaning of a message.
  - b. Ex. Corn cob/eggplant are both vulgar references to see.
    - i. *e.g.*, in 2018, former Top Chef contestant and restaurant owner was sued for sexual harassment for calling a former manager crude names and touching her without permission.<sup>4</sup>
    - ii. Among other claims, the plaintiff alleged that Mr. Isabella texted her “corn cob” emojis and referred to attractive female customers as “corn.”
8. Takeaways:
  - a. Emojis are not going anywhere and their use will only increase over time.
  - b. There are more and more emojis coming out each year, meaning there is an emoji for almost anything and everything.
  - c. Emojis can have sexual/discriminatory connotations and their meaning must be considered in context. During investigations, emojis should be considered based on possible sub contexts as well as face value.
  - d. Emojis should be incorporated into social media training.

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<sup>4</sup> <https://www.theatlantic.com/entertainment/archive/2018/03/mike-isabella-top-chef-sexual-harassment/555977/>