SOCIAL MEDIA AND EMAIL ETIQUETTE

Balancing Employer Needs and Employee Rights

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Social Media and Employment
Advantages of Social Media

- Increase in Publicity
- Facilitates Open Communication
- Potential to Increase Employee Morale
- Minimal Advertising
- Wider Business Contacts
Disadvantages of Social Media

- Distraction
- Decrease Productivity
- Discrimination
- Bullying
- Harassment
- Defamation
- Misrepresentations
- Unwanted Publicity
Social Media Use in the Workplace

Workers use social media at work for many reasons; taking a mental break is one of the most common.

% of workers who ever use social media platforms to...

- Take a mental break from work: 34%
- Connect with friends and family at work: 27%
- Make or support professional connections: 24%
- Get information that helps solve problems at work: 20%
- Build or strengthen personal relationships with coworkers: 17%
- Learn about someone they work with: 17%
- Ask work-related questions of people outside their organization: 12%
- Ask work-related questions of people inside their organization: 12%

Source: Survey conducted Sept. 11-21, 2014. "Social Media and the Workplace."
Social Media Use in the Workplace

So why bother creating a Social Media Policy?
Social Media Use in the Workplace

The same Pew Research Center study found:

- **30 percent** of workers whose employers have a Social Media Policy report using social media while on the job to take a break from work, compared with **40 percent** of workers whose employers do not have a policy.

- **20 percent** of workers whose employers have a Social Media Policy report using social media to stay connected to family and friends while on the job, compared with **35 percent** of workers whose employers do not have a policy.

- **16 percent** of workers whose employers have a Social Media Policy report using social media while working to get information that’s helpful to their job, compared with **25 percent** of workers whose employers do not have a policy.
Issues generally revolve around actions taken or policies which restrict an employee’s Sections 7 and 8 rights under the NLRA.


NLRB and Social Media Rules

- **Section 7** of the National Labor Relations Act (the Act) guarantees employees "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, "as well as the right "to refrain from any or all such activities."

- **Section 8(a)(1)** of the Act makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7" of the Act.
NLRB and Social Media Rules

- We are currently in a transition period when it comes to the NLRB’s position on social medial rules.
  - 2004 – Lutheran Heritage standard
  - 2017 – Boeing standard
NLRB and Social Media Rules

- **Lutheran Heritage** standard (2004)
  - The NLRB made it clear that any company rule—social media or otherwise—is unlawful so long as “employees would reasonably construe the language to prohibit” their rights to participate in concerted activity under the NLRA.

- The then Acting General Counsel’s agenda appeared to be to construe any potentially restrictive language in handbooks as a violation of an employee’s rights to participate in concerted activity.
NLRB and Social Media Rules

Policies NLRB found to be unlawful under the Lutheran Heritage standard:

- A policy prohibiting the sharing of “confidential information” or “payroll” information.
- A policy prohibiting “making statements that damage the Company, defame any individual or damage any person’s reputation.”
- A policy prohibiting employees from making disparaging comments when discussing the employer or the employee’s superiors, coworkers, and/or competitors.
- A policy prohibiting the use of action of a general offensive nature and rude or discourteous behavior to a client or coworker.
- A policy prohibiting employees from posting pictures of themselves in any media which depict the employer in any way.
Policies NLRB found to be at least partially unlawful:

- Restrictions on releasing "confidential information" about coworkers and "company information".
- Instructions to ensure that posts are "completely accurate and not misleading" and that they do not reveal non-public company information on any public site.
- Prohibitions on posting photos, music, videos, quotes, and personal information without the owner's permission.
- Prohibitions against posting personal information about other employees and contingent workers, commenting on "legal matters," picking fights, engaging in controversial discussions, and airing complaints online.
The Boeing Standard

- Boeing standard (2017)
  - NLRB will consider two things when evaluating a facially neutral work rule that, when reasonably interpreted, would potentially interfere with the exercise of NLRA rights:
    - (i) the nature and extent of the potential impact on NLRA rights, and
    - (ii) legitimate justifications associated with the rule.
  - Under this new standard, the NLRB seeks to strike the proper balance between asserted business justification and the validity of work rule language.
The Boeing Standard

Going forward, the NLRB has articulated three categories of work rules which stemmed from the new balancing test:

• **Category 1** includes rules that the Board designates as lawful to maintain, either because (i) the rule, when reasonably interpreted, does not prohibit or interfere with the exercise of NLRA rights; or (ii) the potential adverse impact on protected rights is outweighed by justifications associated with the rule.

  - Examples of Category 1 rules are the no-camera requirement that was the issue in the *Boeing* case, as well as rules requiring employees to abide by basic standards of civility.
The Boeing Standard

- **Category 2** includes rules that warrant individualized scrutiny in each case as to whether the rule would prohibit or interfere with NLRA rights, and if so, whether any adverse impact on NLRA-protected conduct is outweighed by legitimate justifications.

- **Category 3** includes rules that the Board will designate as unlawful to maintain because they would prohibit or limit NLRA-protected conduct, and the adverse impact on NLRA rights is not outweighed by justifications associated with the rule.
  - An example would be a rule that prohibits employees from discussing wages or benefits with one another.
Other NLRB statements of interest in Boeing:

- Although the maintenance of particular rules may be lawful, the **application** of such rules in **certain circumstances** may violate the NLRA. conduct, and the adverse impact on NLRA rights is not outweighed by justifications associated with the rule.

- What does this mean for employers?
  - An employer may implement a rule that is lawful on its face. However, the employer must carefully consider the application of the rule to the facts at issue.
The Boeing Standard

The *Boeing* balancing test effectively replaces the previous “reasonably construe” standard.
On Dec. 1, 2017, NLRB General Counsel issued a memo to all Regional Directors, Officers-in-Charge, and Resident Officers. NLRB GC requested that “cases that involved significant legal issues should be submitted to Advice.” Examples:

- Rules prohibiting “disrespectful” conduct
- Rules prohibiting use of employer trademarks and logos
- No camera/recording rules
- Finding that employees have a presumptive right to use their employer’s email system to engage in Section 7 activities
- Finding social media postings were protected even though employee’s conduct could violate EEO principles
Memorandum GC 18-02

- “These examples do not represent all such legal issues and also do not imply how the General Counsel will ultimately argue the case.”
To What Extent May Employers Limit Social Media Use?
Employer Limits on Social Media Use

- Under the Boeing standard, employers may create **facially neutral** policies to limit social media use when they have a **legitimate business reason** for doing so.
  - A *facially neutral work rule does not discriminate against a protected class, e.g., race, sex, religion, color, national origin, age, or physical or mental handicap.*
- Remember to also consider the **application** of the rule under the circumstances.
Employer Limits on Social Media Use

Questions to consider

- Is the policy **facially neutral**?
  - **A facially neutral work rule does not discriminate against a protected class, e.g., race, sex, religion, color, national origin, age, or physical or mental handicap.**

- Does the policy have a **legitimate business justification**?

- Does the **application** of the rule under the circumstances violate the NRLA?
Employer Limits on Social Media Use

- **Examples:**
  - Rules designed to curb excessive personal use during working hours
  - Breach of confidentiality rules
  - Rules prohibiting using social media to send, receive, download, or upload inappropriate language or other materials
  - Rules prohibiting using social media that would constitute a violation of company policy, e.g., Harassment Policy, Safe Workplace Policy, EEO Policy, etc.
Using Private Social Media Account for Business Purposes
Private Social Media Accounts

- **Pros**
  - Simpler to manage

- **Cons**
  - No longer “private” account
  - May be construed as the voice of the business, i.e., statements published may be attributed to the business
    - Supervisor liability
  - Wage and hour violations
    - Non-exempt employees may be working “off-the-clock”
Private Social Media Accounts

Consider the following scenarios:

- **Scenario #1**: A supervisor regularly uses his private social media account to advertise business webinars. One day, the supervisor posts a disparaging comment about women. A female subordinate reads the comment and complains.

- **Scenario #2**: An employee is contacted by a member of the media to comment on a controversial business issue. The employee gives a statement that does not reflect the employer’s view.
Private Social Media Accounts

- A better practice would be to require employees to exclusively use a business social media account for business purposes.

- Employers may also consider prohibiting employees from answering media inquiries and designating a media spokesperson to speak on behalf of the business.
Using Social Media in Hiring Decisions
Social Media Legislation

- Section 11-2-124 of the Arkansas Code broadly prohibits an employer from requiring or requesting current or prospective employees to disclose their social media account usernames or passwords.
- Additionally, an employer shall not take action against or threaten to discharge or discipline an employee for exercising his or her rights to not provide his or her social media account information, nor may an employer fail to hire a prospective employee for a failure to provide his or her social media account information.
Two narrow exceptions:

- First, an employer may view information that is publicly available on the Internet.
- Second, an employer may request an employee’s social media username and password if the employee’s social media account activity is reasonably believed to be relevant to an investigation or proceeding by the employer in connection to an alleged violation of federal, state, or local laws, or the employer’s written policies.
Social Media Legislation

• DOL rules
  ○ The following activities are not prohibited by the Act:
    ▪ 1) issuing an invitation to add an employee on a social media account,
    ▪ 2) an employer and employee adding one another voluntarily on a social media account,
    ▪ 3) an employer using social media to advertise to the general public or to recruit prospective employees, and
    ▪ 4) requiring employees to monitor their employer’s communication through email or the company website.
Social Media Background Checks

- Problem with using social media in the initial screening process:
  - Decision makers could be influenced by race, disability, ethnicity, or other protected information before deciding not to interview the individual
Social Media Background Check Reasons

- **To not Hire**
  - Candidate posted provocative/inappropriate photos/info
  - There was information about candidate drinking or using drugs
  - Candidate had poor communication skills
  - Candidate bad mouthed previous employer
  - Candidate made discriminatory remarks related to race, gender, religion, etc.
  - Candidate lied about qualifications

- **To Hire**
  - Good feel for candidate’s personality
  - Conveyed a professional image
  - Background information supported professional qualifications
  - Well-rounded, showed a wide range of interests
  - Great communication skills
  - Candidate was creative
  - Other people posted great references about the candidate
One in ten young Americans between the ages of 16-24 are losing potential job offers because of comments or pictures on their online and social media profiles,

- Nearly 75% stated that they were not concerned that their social media usage may harm their future career prospects and are not deterred from using it.
Social Media Background Checks

- No!
Should you “friend” your subordinates?

- What if you discover...
  - Subordinate uses illegal drugs.
  - Employee is suicidal.
  - Do you have a duty to address the problems and get your subordinate help?

- In reality, there are no clear answers
  - “Friending” creates ethical, if not legal, dilemmas.
Employees on Facebook

My boss is such a jerk! He is a selfish, low life prune that doesn't deserve me!

I completely agree, I don't deserve you. You have 12 hours to clear out your office, and clock out for the last time. Talk to me tomorrow about getting you your last pay check.
Employees on Facebook

OMG I HATE MY JOB!! My boss is a total pervy wanker always making me do shit stuff just to piss me off!! WANKER!

Yesterday at 18:03 · Comment · Like

Hi [Name], i guess you forgot about adding me on here?
Firstly, don't flatter yourself. Secondly, you've worked here 5 months and didn't work out that i'm gay? I know i don't prance around the office like a queen, but it's not exactly a secret. Thirdly, that 'shit stuff' is called your 'job', you know, what i pay you to do. But the fact that you seem able to fuck-up the simplest of tasks might contribute to how you feel about it. And lastly, you also seem to have forgotten that you have 2 weeks left on your 6 month trial period. Don't bother coming in tomorrow. I'll pop your P45 in the post, and you can come in whenever you like to pick up any stuff you've left here. And yes, i'm serious.

Yesterday at 22:53

Write a comment...
This message was sent with High importance.

Sent: 15 March 2015 13:51
To: CabinCrewF2, CabinCrewF1, CabinCrewCS, CabinCrewCSD
Attachments: CSD.jpg (229 KB)

Dear Colleagues,

Attached, please see a photo of a CSD who had returned heavily intoxicated to her accommodation.

She was dropped off at the entrance of her building and left there sleeping until other crew members found her and carried her up to her apartment.

I am so ashamed and disturbed by this behaviour displayed by a tenured member of our team, an adult who has been with the company for over 9 years. How can we change rules when we do not behave as mature individuals. I am very disappointed.

Best regards,

Rossen Dimitrov
Senior Vice President Customer Experience

9th Floor, Qatar Airways Tower 1
Airport Road, Doha, Qatar 22550
Hi All,

It's not easy for me to send an email about this. I've been pushing it off for some time hoping the problem would solve itself. It did not happen, and I continue getting multiple complaints from staff.

So, here's the reminder:

**Please remember to always flush the toilet after using the bathroom.**

Thank you for your cooperation
Hi All,

It’s not easy for me to send an email about this. I’ve been pushing it off for some time hoping the problem would solve itself. It did not happen, and I continue getting multiple complaints from staff.

So, here’s the reminder:

**Please remember to always flush the toilet after using the bathroom.**

Thank you for your cooperation.
Bad Boss Emails

Hello,

WEE need you to fix the IceEEEE cram machince tomoorowe at werrrk, it is working like cap. PLEEESE bring ur toUIs to wrk so u can fcx itt.

ALso, we nead yOu To improv your ADIDTUSUTE at WEORKE!

W alsu need ya tuu bring YAR sugalsossses, it weelllll be suunnhy toDAY!

WE would also APPIRCICATE it if youuuuu brought one of YEAEAR SMILLLLSS to wrok! FUCK the CUSSTOMERSERES!

SINCERERLY, Managerement.
“Bored At Work”

- Office administrator thought her job was boring and decided to tell her friends on Facebook.
- Her employer commented on her post as follows: "Following your comments made on Facebook about your job and the company we feel it is better that, as you are not happy and do not enjoy your work we end your employment with [the Company] with immediate effect."
Team Spirit

- New England Patriot Cheerleader fired for Facebook photo
  - Marking on “passed out” Texas Longhorn football player with a Sharpie:
    - Sexual obscenities
    - Racial epithets
    - Swastikas
    - Etc.
Spring Break

- Employee called in sick four days in a row
- Supervisor suspicious
  - Spring break, young employee
  - E-mailed employee to bring doctor’s excuse for absences
- Co-worker got on the employee’s Facebook page.
Employee’s Facebook Status:

“Does anyone have a doctor’s excuse I can use for work?”
Precarious Use of Social Media by Supervisors

Andrew Moskowitz
As a hiring manager, I will categorically pass over African sounding names just to spare my employees the discomfort of having to deal with someone with such a name. It creates an awkward and tense environment in the workplace. Having to pronounce and spell it, the attitude that comes with that person, it isn't worth it. I need my people to be a team and not worry about "Tamisha" and her tribal name.

1 hour ago · Like · 2
Employees on Facebook:

- Chili’s chef worked without a shirt on in the kitchen.
  - Took pictures of himself as he worked.
  - Posted those shirtless pictures on Facebook.
  - In two pictures he's lying shirtless on a table where food is prepared.
  - Labeled the pictures "Sexy Cooks Of Chili's"
  - Even tagged the restaurant in his post.
- He was fired after Chili’s learned of his conduct.
Employees on Other Social Media:

- PR executive for IAC tweeted this from her personal account before boarding a flight to South Africa.
- She was fired after the post went viral in hours.
Example from Arkansas

- KARK Channel 4 News employees posted 2 distasteful short videos on YouTube
  - Employees used KARK equipment and newsroom to make videos that poked fun at the news industry
  - Videos contained extensive profanity and employee repeatedly saying “I hate my job”

- Consequences:
  - 3 on-air employees and 1 photographer were terminated
  - At least 5 off-air employees were suspended 3 days
Discipline for Off-Duty Conduct

- When can you terminate an employee for actions taken on Social Media and E-Mail after hours? Two situations:
  - Employee violates company’s code of ethics/code of conduct
    - “Conduct Unbecoming” – requiring employees to refrain from engaging in any off-duty conduct that will tend to harm the company’s reputation or impair its effective operation.
  - Employee violated company’s privacy policy and/or social media policy
Best Practices for Creating and Updating Social Media and Email Policies
Best Practices

When drafting a social media and/or internet policy, keep the following scenarios in mind. Would your Social Media Policy address the following behaviors?

- **Scenario #1**: An employee’s excessive use of social media and/or internet during working hours is disruptive and distracting to the employee and his or her coworkers.

- **Scenario #2**: An employee uses his or her work email address to send threatening, sexually obscene or racially discriminatory messages or images to a coworker.
Best Practices

- **Scenario #3**: An employee posts a personal opinion about local politics on his or her blog and identifies himself or herself as an employee of the employer.

- **Scenario #4**: An employee operates a motor vehicle as part of his or her essential job functions.

- **Scenario #5**: An employee posts trade secrets or other confidential information of the employer to his or her social media account.
Best Practices

- Consider whether the policy (1) sufficiently addresses your concerns and goals in establishing the policy and (2) provides guidance in dealing with the situations described above.
- Outline examples of prohibited conduct, e.g., harassing statements.
- Include safe harbor language and necessary disclaimers.
  - For example: “This social media [or email] policy cannot anticipate every situation or answer every question, and the guidelines stated may not apply in every situation. Therefore, we reserve the right to change or revise policies and procedures when such action is deemed necessary, with or without notice.”
Best Practices

- Consider the new *Boeing* standard to determine if a specific rule may violate the NLRA.
  - Clearly state business justifications for prohibitions and limitations.
  - Narrow the scope of prohibitions and limitations to align with the stated business justifications. For example, if social media use is prohibited during working time, define what working time is.
- Prohibit retaliation against employees who report a potential infraction or cooperate in an investigation.
- Indicate whom the employee may contact with questions about the policy, e.g., Chief Human Resources Officer.
Best Practices

- Reserve the right to take disciplinary action for a violation of the social media and email policies.
- Review your social media and email policies at least every two (2) years, if not annually to ensure compliance with federal and state laws.
  - Multi-state employers should check the laws for each state they conduct business in.
- Consult legal counsel before taking disciplinary action based on the Social Media and Email Policies.
Finally, it is imperative that employers not only adopt and regularly update an effective social media and email policy, but that they apply the policy *equally*. A facially neutral policy that is applied differently to individuals in a protected class exposes the employer to employment discrimination laws.
FOR MORE INFORMATION:

Email: mbuckley@cgwg.com
Telephone: (501) 371-9999

QUESTIONS?