

# To 5 Tips

## for Employers Regarding Employee Use of Social Media

By Alana M. De Young

Odds are that you, or at least one person you know, have at least *some* presence on social media, be it a Facebook or Instagram profile, a Twitter handle, a LinkedIn page, or a personal blog. Employers, too, are engaging more in social media in terms of marketing to clients, recruiting and hiring employees and even connecting with employees in different offices locally, nationally or globally. Such prevalent use of social media has a range of direct and indirect consequences for employers, ranging from the multiple business impacts of employee social media use, the development and maintenance of appropriate workplace social media policies and maintaining compliance with discrimination, labor and privacy laws.

Below are the top five tips for 2015 for employers to keep in mind when navigating employment issues involving social media.

**Tip 1:** Remember that traditional workplace claims still apply in the social media realm.

Claims of harassment, discrimination and retaliation are all affected by employee use of social media. The key is *how* the employer uses and regulates the use of social media. For instance, “personal information—such as that gleaned from social media postings—may not be used to make employment decisions on prohibited bases, such as race, gender, national origin, color, religion, age, disability or genetic information.” Equal Employment Opportunity Commission Press Release, *Social Media Is Part of Today’s Workplace but its Use May Raise Employment Discrimination Concerns*, (March 12, 2014), available at <http://www.eeoc.gov/eeoc/newsroom/release/3-12-14.cfm>. Employers must be aware of—and be able to address—social media’s impact on employee claims of hostile work environment, harassment and retaliation. For example, if Employee A is posting harassing or derogatory posts about Employee B on his personal social media account, his employer may be held liable for that conduct. See *Espinoza v. County of Orange*, No. G043067, 2012 WL 420149 (Cal. Ct. App. Feb. 9, 2012). Social media posts by a manager about a fired employee could also be used to find the employer liable for a retaliation claim. *Stewart v. CUS Nashville, LLC*, 2013 WL 456482 (M.D. Tenn. Feb. 6, 2013).

**Tip 2:** Maintain updated social media policies.

It is imperative for employers to develop social media policies that address the various social media-related issues that may arise in the workplace. Implementing policies concerning social media and related technologies (such as Internet use and employee devices)



is important for at least two reasons. First, from a business perspective, such policies can serve to limit productivity lost due to employee time spent on social media; such policies should, therefore, be sufficiently clear as to what Internet and social media use (if any) is permissible in the workplace. Second, appropriate policies can serve to reduce a company’s exposure to legal claims by both employees and third parties based on employees’ statements and conduct on social media.

**Tip 3:** Craft policies that are specific, precise and narrowly tailored to the company’s business interests.

In recent years, the National Labor Relations Board (NLRB) has increasingly addressed the issue of workplace policies that, both directly and indirectly, involve social media. In 2014, the NLRB issued several decisions relating to social media, many of which found that workplace policies involving social media and technology that are too broad, vague, overly subjective, not consistently applied or not narrowly tailored to the employer’s defined and specific business interests unlawfully chilled employees’ rights to engage in protected concerted activity. See Schmidt, Michael C., *The Latest Do’s and Don’ts With Social Media Policies*, Social Media Law & Policy Report, Bloomberg BNA (July 15, 2014).

The main takeaway from these NLRB decisions is to develop and maintain social media policies that are specific, precise and narrowly tailored to defined business interests. A policy that generally prohibits employees from making “offensive,” “inappropriate” or “disparaging” remarks on social media platforms, for example, could reasonably be interpreted to prohibit protected criticisms of the employer’s policies, in violation of the National Labor Relations Act, 29 U.S.C. § 157. In contrast, a policy prohibiting employees from engaging in harassment or discrimination of co-workers both in the workplace and after hours outside the workplace would likely be permissible if it is sufficiently precise and narrowly tailored to an employer’s interest of protecting its employees from unlawful harassment and discrimination. Thus, policies that specifically outline what is prohibited, define key terms, and protect, in a narrow fashion, an employer’s valid business interests, likely will be upheld.

**Tip 4:** Do not require or request job applicants to provide access to their personal social media accounts.

In 2013, New Mexico enacted legislation prohibiting prospective employers from requesting or requiring that applicants provide their user names and passwords to their personal social media accounts.

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NMSA 1978, § 50-4-34(A). This legislation does not, however, preclude an employer from obtaining information about prospective employees that is in the public domain. Section 50-4-34(C). Nor does it preclude an employer from implementing appropriate policies regarding workplace use of the Internet, social networking sites and e-mail and from monitoring use of an employee's electronic equipment and email. Section 50-4-34(B). As discussed above, an employer should develop policies with regard to social media use by its current employees, including with regard to such use in the recruiting and hiring process.

**Tip 5:** Use a third-party service or designated employee without hiring authority to conduct social media searches in the public domain.

Social media may be a vital tool in terms of recruitment and casting a wide net for potential job applicants. Yet it also raises potential discrimination issues given that most individuals' social media sites include personal information, such as a person's gender, age, ethnicity, or religious beliefs, which could be used in violation of state and federal discrimination laws. Therefore, to the extent your company wishes to conduct social media searches of prospective employees, the

EEOC recommends such be done by either a third-party recruiter or a designated person within the company who does not have hiring authority. See EEOC Press Release, <http://www.eeoc.gov/eeoc/newsroom/release/3-12-14.cfm>. In addition, the searches should only consist of publicly available information. *Id.*

While social media can be a powerful and valuable tool for employers, these top five tips suggest employers must be cognizant of and take steps to address the varied impacts social media has upon workplace issues. Employers must keep in mind that use of social media—both by employees for business purposes such as recruiting, hiring, and marketing, as well as by employees for their own personal use—must comport with state and federal discrimination, labor and privacy laws. As such, it is essential that employers not only develop social media policies that are precise and narrowly tailored to concrete business interests, but also that employers stay up-to-date with the recent trends in this ever-changing area. ■

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