

What's in a "Like"?: Tips for Employers and In-House Counsel in Crafting Social Media Policies

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Your colleagues are on social media. Ninety-seven percent of online adults aged 16-64 say they have visited or used a social network within the last month.[1] Because social media continues to grow and constantly evolves, employers need to take a proactive approach to reduce risk and exposure to litigation related to social media.

In recent years, the National Labor Relations Board ("NLRB") and the Equal Employment Opportunity Commission ("EEOC") have made it clear that employees' rights in "traditional offline communications" and communications over social media are afforded the same protections.

The NLRB is responsible for enforcing the National Labor Relations Act ("NLRA"), which prohibits discipline against employees who engage in "**protected concerted activities**." Protected Concerned Activities are conversations and efforts to organize around terms or conditions of employment (i.e. wages, benefits, staffing, etc.). Examples of protected concerted activities on social media include posts relating to employee staffing levels implicating working conditions and posts regarding complaints and criticism about supervisor's attitude and performance. Often, the NLRB finds employers' policies "overly broad" and "vague" and concludes employees would reasonably believe the policy restricts them from engaging in protected concerted activity. Employers are most likely to have overly broad and vague provisions related to defamation, disparagement, confidentiality, and inappropriate e-mails or discussions.

The EEOC is concerned with policing workplace harassment on social media and advises employers to maintain a written anti-harassment policy, including social media considerations. The agency advises that the policy should include a process for reporting harassment and employers should communicate it to employees in multiple ways through periodic training. It is imperative that managers and supervisors are trained to handle social media harassment as they would handle workplace harassment.

If you do not have a social media policy, draft one. When drafting keep in the mind the following tips:

1. Be specific - Overly broad provisions are routinely struck down by the NLRB.
2. Provide Examples - For purposes of clarity and to ensure employee understands, provide scenarios that may warrant discipline and those that would not.
3. Include Anti-Harassment Provisions - Address harassment both in the workplace and online.
4. Be Consistent - Apply your provisions uniformly and be consistent in its application. Do not enforce with one employee, and be lax with the other.
5. Don't be Sweeping - Do not prohibit kinds of activity protected by federal labor law, like discussion of wages or working conditions among employees
6. Be Careful About What you Allow Employees to Say and Not Say - Discussing working conditions is one thing, but telling racist jokes or mocking a co-worker for a disability is another.
7. Train Holistically - Employers should include approaches beyond providing social media policy such as "bystander intervention training" and "workplace civility training." Educate and communicate policy and expectations using different methods and venues, while welcoming feedback (both positive and negative) from employees.
8. Stay Up to Date - Social media is constantly evolving landscape. Have advisors that stay informed with new developments coming out of D.C. and your statehouse.

If you need additional guidance, contact an employment attorney to review your draft policy.

[1] <https://smallbiztrends.com/2016/11/social-media-statistics-2016.html>