Introduction

As of April 2019, there are more than 3.5 billion active social media users around the world, representing 45% of the total global population. More than six new users join social media every single second. It’s not a fad, and it’s not going away. Because social media is prevalent in almost every organization, it’s important to know the rules and to craft a solid social media policy.

Key Regulatory Considerations

For US organizations, this section highlights important laws and regulations that may affect your social media activities and the activities of those in your organization. This list is not exhaustive, but is meant as a helpful starting place when building social media policies and procedures. Please note, nothing in this article is meant as legal advice.

National Labor Relations Act Rules and Interpretations

1. Section 7 of the National Labor Relations Act[^1] protects concerted activity. This includes social media activities.

[^1]: [Section 7 of the National Labor Relations Act](https://www.labor.gov/aboutus/ourwork/nlra/section7.html)
a. Social Media posts by your employees that discuss wages, hours, or working conditions are likely protected as concerted activity.

b. Employee comments on social media are generally not protected if they are mere gripes and not made in relation to group activity among employees.

c. Employees have the right to complain about work to each other, even if it is hurtful to managers or others. (Note that this does not give employees the freedom to disparage others without penalty.)

2. Determines lawfulness of social media policies

   a. Policies should not be so sweeping that they prohibit activities protected by federal labor laws, such as discussing wages or working conditions among employees.

   b. National Labor Relations Board (NLRB) guidance suggests that any policy where an employee would “reasonably construe” the policy to prohibit protected activity is an unlawful interference with employee rights.

3. Examples of policies the NLRB found to be unlawful:

   a. Rule: “Never publish or disclose [the Employer’s] or another’s confidential or other proprietary information. Never publish or report on conversations that are meant to be private or internal to [the Employer].”
      
      i. NLRB Explanation: This policy is unlawful for being unreasonably broad and vague. The broad reference to “another’s” information could reasonably be interpreted to include other employee’s wages and condition of employment.

   b. Rule: “[I]f something is not public information, you must not share it.”
      
      i. NLRB Explanation: The rule was unlawful on its face for containing broad restrictions without clarification that they did not restrict NLRA-protected communications.
Equal Employment Opportunity Commission
Concerns

The Equal Employment Opportunity Commission (EEOC) enforces legislation dealing with employment and workplace discrimination and harassment. Social media-related guidance includes:

1. Employers should not access information about an applicant’s ethnic background, national origin, age, race, veteran status, gender, sexual orientation, physical disabilities, health status, pregnancy status, genetic information, marital status, or religion during the hiring process.
   
   a. EEOC has also deemed it unlawful to search social media to obtain personal information about job applicants that you may not lawfully ask during the hiring process.

   b. Avoid this issue by implementing a clear policy on social media searches used for hiring decisions. Spell out information that is acceptable to use when assessing a candidate—as well as information that is off-limits.

   c. A best practice would be to separate staff members performing social media searches on job applicants from those making hiring decisions. Implement a process that allows for red flags to be raised to hiring managers, without those managers performing the searches personally.

2. Anything that seems like discrimination is potentially trouble.

   a. This includes using social media inconsistently. If your organization is using social media in the hiring process, be consistent. Performing social media searches on some candidates and not others may lead an applicant to claim discrimination.

3. Be careful when restricting what your employees are allowed to do or say on social media.

   a. The EEOC may find that this could bar your employees from using social media to report harassment, from sharing information related
to anti-harassment measures, or could be construed as “resisting” your employees’ rights to complain about discrimination (opening the door to a “resistance” action).

4. If an employer knows or should know of discriminatory or harassing social media conduct by an employee and fails to address it, they may be held liable for it.

   a. Social media comments made by employees may be considered actionable harassment, even if the comments are made off duty and entirely outside the workplace.

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