

The Complete Compliance and Ethics Manual 2023

Social Media Compliance

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Introduction

As of June 2022, there are more than 4.65 billion active social media users around the world, representing almost 59% of the total global population and growing by more than 10% over 2021. For every 100 people using the internet, 93 of them are on social media each month, and those 93 people average almost 2.5 hours per day on social media sites.^[2] Because social media is everywhere and touches almost every organization, it's important to know the rules and how to craft a solid social media policy.

Key Regulatory Considerations

For US organizations and those operating in the US, 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

Section 7 of the National Labor Relations Act^[3] protects concerted activity. This includes social media activities.

- Social media posts by your employees that discuss wages, hours, or working conditions are likely protected as concerted activity.
- Employee comments on social media are generally not protected if they are mere gripes and not made in relation to group activity among employees.
- Employees have the right to complain about work to each other. (Note that this does not give employees the freedom to disparage others without penalty.)
 - This right only extends to employees insofar as their gripes or complaints do not offend, abuse, harass, defame, or discriminate against others. If you would discipline the employee for saying something on your premises, you are likely allowed to discipline them for that same statement made on social media (as of June 2022).

The act determines lawfulness of social media policies. Under the Biden administration, the National Labor Relations Board (the body that interprets and enforces the NLRB) has expanded its stance to include the concept of inherently concerted activity, putting more pressure on organizations to have well-crafted social media policies.^[4]

Equal Employment Opportunity Commission (EEOC) Concerns

The Equal Employment Opportunity Commission enforces legislation dealing with employment and workplace

discrimination and harassment. Social media–related guidance includes:

- 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.
 - The 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.
 - 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.
 - A best practice is 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.
- Anything that seems like discrimination is potentially trouble.
 - 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.
- Be careful when restricting what your employees are allowed to do or say on social media.
 - 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).
- 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.
 - 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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