SOCIAL MEDIA DETOX

RIGHTS AND RESPONSIBILITIES IN THE OVERSHARING ERA

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A. Tool for Analyzing Social Media Posts Under the NLRA

NOTE: The analysis of whether a social media post is protected under the NLRA is extremely fact-specific and can be very nuanced. While the tool below provides a general guide to analyzing these issues, we recommend receiving legal advice before determining that a social media post is not protected by the NLRA.

The following framework can be used by employers in analyzing whether an employee’s social media posts are protected under the National Labor Relations Act (NLRA)

1. Is the Post Protected Under Section 7 of the NLRA?
   a. Does it discuss or relate to union activity? □ YES □ NO
   b. Does it discuss or relate to political matters that have a bearing upon employees’ terms and conditions of employment? □ YES □ NO
   c. Does it discuss or relate to terms and conditions of employment (for example, wages, benefits, hours of work, working conditions, management)? □ YES □ NO

   [If the answer to any of these is “YES,” move on to section 2. If the answer to all of these is “NO,” the post is likely not protected]

2. Is the Post Concerted?
   a. Is the employee is seeking group feedback or support (i.e., seeking to initiate group action)? □ YES □ NO
   b. Is the employee discussing shared concerns? □ YES □ NO
   c. Have other employees liked or commented on the employee’s post? □ YES □ NO
   d. Is the employee speaking on behalf of a group of employees? □ YES □ NO

   [If the answer to any of these is “YES,” move on to section 3. If the answer to all of these is “NO,” the post is likely not concerted]

3. If the Post is Protected and Concerted, has it Lost the Protection of the Act?
   a. Does it contain a threat of violence? □ YES □ NO
   b. Does it contain unlawful discrimination/harassment? □ YES □ NO
   c. Does it contain a “sharp, public disparaging attack upon the quality of the company’s product and its business policies, in a manner reasonably calculated to harm the company’s reputation and reduce its income?” □ YES □ NO
   d. Does the post divulge a trade secret or other highly sensitive confidential business information (e.g., nonpublic sales and profit data, strategic business plans, unannounced future product lines, and the like)? □ YES □ NO
   e. Does it use the Company’s logo for commercial purposes? □ YES □ NO
f. Is the employee speaking on behalf of the Company without authorization to do so? □ YES □ NO

g. Has the employee made maliciously false statements? □ YES □ NO

[If the answer to any of these is “YES,” the employee has likely lost the protection of the Act. If the answer to all of these is “NO,” the employee likely has not lost the protection of the Act and should not suffer any adverse consequences as a result of the post.]

B. Other Best Practices Checklist for Social Media Policies

Terms to Avoid

- Prohibiting disparagement, criticism, or complaints
- False statements (okay to prohibit maliciously false statements)
- Prohibitions on negativity
- Prohibitions on inappropriate discussions, being rude or discourteous
- Prohibitions on being critical of the company or management (okay to prohibit product disparagement)
- Prohibitions on profanity
- Requirements to follow the chain of command
- Prohibition on identifying self as company employee

Terms to Include

- Prohibit disclosure of trade secrets and confidential business information. Be as specific as possible and provide context and rational.
- Prohibit illegal discrimination
- Prohibit maliciously false statements about the company, management, and employees
- Prohibit abuse, harassment, and bullying
- Explain expectations for speaking on behalf of the company; consider detailed guidelines
- Provide advance notice that social media activity may not be private and could result in employment consequences

Disclaimers to Include

- This policy is not intended to interfere in any way with any applicable federal, state or local law.
- Application of this policy will be consistent with the National Labor Relations Act.
- This policy will not be interpreted or enforced in a manner that would interfere with employees’ rights to discuss work-related issues with one another and with third parties.
C. Social Media Code of Conduct Checklist

☐ Define social media (update this periodically to match changing platforms)
☐ Use plain language
☐ Explain lack of privacy
☐ State the company’s policy on using social media for business purposes (e.g., is it encouraged or not encouraged)
☐ Give guidelines for respectful posting (e.g., how to engage in civil discourse or to agree to not agree)
☐ Give guidelines and examples for responding to customer criticism and feedback
☐ Explain how and when to refer to products and services and what images and videos are permitted
☐ Address posts and comments that are detrimental to the company’s legitimate business interests
☐ Explain when and how permission is required to post company links, images, and logos
☐ Address impact of intellectual property (e.g., copyrights, trademarks)
☐ Include this in your broader social media or electronic communication policy, or reference those policies in your guidelines
☐ Obtain dated, signed acknowledgments (electronic signature is fine)
Social Media Detox: Rights and Responsibilities in the Oversharing Era

Presented by
Rebecca J. Bennett (Cleveland)
John T. Merrell (Greenville)

Moderated by
C. Thomas Davis (Nashville)
More than 2/3 of all U.S. Employees are active on social media

Social Media Users: 2.82 billion

Earth Population: 7.7 billion

Internet Users: 4.4 billion

Average time spent on social media: 142 minutes per day

Sources: Brandwatch.com, Statista.com
30 percent of employers have made a discharge decision based on employee misuse of the internet
Number of Employers Using Social Media to Screen Candidates at All-Time High

- 57% are less likely to interview a candidate they can’t find online
- 54% have decided not to hire a candidate based on their social media profiles
- 50% of employers check current employees’ social media profiles
- 70% of employers use social media to screen candidates, up from 11 percent in 2006

CareerBuilder.com 2017 Study
We found dirt on social media. Can I use it to make workplace decisions?

When you can use social media information to make workplace decisions

- Disclosure of trade secrets or confidential business information
- Violation of restrictive covenants
- Violation of company policies
  - Harassment
- Evidence of on-the-job misconduct
Is my search for applicant social media activity covered by the Fair Credit Reporting Act?

- Yes. If you use a third party to collect the information, you must comply with FCRA procedures.
What if the employer does the social media search in-house?

- You are not required to follow FCRA, BUT...
- Employer opens itself to discovering protected information, such as:
  - Religion
  - Political affiliation
  - Race, ethnicity
  - Gender
  - Age, and more...
When **should** I actively search for an employee’s social media content and activity?

- Preserve post-employment for litigation purposes
- Search during investigations of misconduct
- When an employee with restrictive covenants leaves
- When an employee with access to confidential business information leaves
How do I capture social media activity?

Capturing Social Media

- Obtain user names and identities
- Follow site privacy rules and privacy settings and get publicly available information
- When voluntarily shared by a “friend”
- Ask employees to download their content
- Background check services
- Subpoenas and releases
What about the First Amendment? What social media “speech” is protected?

Balancing Test

1. **Threshold Questions:**
   - Are you a public employer?
   - Is the speech made as part of *official duties*?
   - Does speech address a matter of *public concern*?

2. **Then Balance:**
   - Employees’ free speech interests
   - Employer’s efficiency interests
Employee complains of harassment and produces off-duty social media evidence. Can we use it?

Short Answer

- Yes, if it was obtained lawfully.
- It’s usefulness depends on its context.
Social Media and Workplace Harassment Law

- “Faster, more subtle ways to send and receive offensive comments, photos, and videos.”

- Same rules apply:
  - Offensive
  - Pervasive
  - Unwelcome

- Failure to prevent and correct
Social Media’s Impact on the He-Said/She-Said Dilemma

- May amount to better evidence to reach conclusion
- Consider context and sources

Employer’s Best Social Media Sources for Investigations

- On what sites are your employees active?

<table>
<thead>
<tr>
<th>Usual Suspects</th>
<th>Latest Entries</th>
</tr>
</thead>
<tbody>
<tr>
<td>Facebook, Messenger, Twitter, Instagram, LinkedIn, YouTube, Snap Chat, Blogs</td>
<td>Vero, Caffeine, Houseparty</td>
</tr>
</tbody>
</table>
Most Popular Social Media Sites by User

- Facebook
- YouTube
- WhatsApp
- Facebook Messenger
- WeChat
- Instagram

Can we terminate an employee who posts offensive memes off-duty?
Maybe.

- Can you point to a policy violated?
- Did the employee speak on behalf of the company?
- Does this cross into on-duty conduct?
- Is the First Amendment implicated?

Caution:

- Be mindful of differential treatment; comparative behavior
- Pretext
- Consistency
- Section 7 rights...
What about Section 7 rights and protected concerted activity?

Section 7 of the National Labor Relations Act

- Protects
  - Union activity
  - “Other concerted activities” for purpose of collective bargaining or “mutual aid or protection”
- Includes
  - Discussions about wages, hours and working conditions
  - Complaints about management (even “disparaging” ones)
What is “Concerted?”

- Whether the activity is “engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself”
  - Group activities
  - Employees discussing shared concerns
  - Individual seeking to initiate group action
  - Actions on behalf of the group (including individual action following group discussion)
  - Individual activities that are the “logical outgrowth of concerns expressed by the employees collectively”
  - Maybe just clicking “Like” on Facebook

Protected Concerted Activity

- In addition to being concerted, the activity must be “for mutual aid or protection”
  - In other words, it must relate to a workplace issue and intended to “change employees’ lot as employees”
  - Could be political activity if it relates to workplace concerns
  - Some discussions are “inherently concerted” (but current Board has indicated it may want to change this)
The Boundaries of PCA

- Personal gripes
- Threats of violence
- Unlawful discrimination/harassment
- “Opprobrious” comments/actions
- “Sharp, public disparaging attack upon the quality of the company’s product and its business policies, in a manner reasonably calculated to harm the company’s reputation and reduce its income.” (*Jefferson Standard*)
- Sharing certain confidential information

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**Atlantic Steel, 245 NLRB 814 (1979)**

- To determine whether employee HAS LOST protection of the Act due to misconduct, apply the following factors:
  - The place of the discussion;
  - The subject matter of the discussion;
  - The nature of the employee’s outburst; and
  - Whether the outburst was, in any way, provoked by the employer’s unfair labor practice.
An (Extreme) Example...

- Hernan is a caterer at Pier Sixty, a catering company
- Pier Sixty is in the midst of a union campaign
- Hernan’s supervisor is Bob

An (Extreme) Example (cont’d)

- Bob gets a little gruff with employees during an event, so Hernan logs onto Facebook during a break to post the following:

  “Bob is such a NASTY MOTHER F***ER don’t know how to talk to people!!!!!! F*** his mother and his entire f***ing family!!!! What a LOSER!!!! Vote YES for the UNION!!!!!!!!”
An (Extreme) Example (cont’d)

- Hernan has about 10 Facebook friends who are coworkers
- Management finds out and fires Hernan a few days later
- Hernan files a charge with the NLRB alleging that he was terminated for engaging in PCA

Where did the NLRB draw the line?

A. “Bob is such a NASTY MOTHER F***ER!!!”
B. “F*** his mother and his entire f***ing family!!!!”
C. “What a LOSER!!!!”
D. Hernan posting while at work (albeit on a break)
E. None of the above
The Answer Is...

- E. None of the above
- The NLRB: The post was protected (it related to rude/demeaning supervisory treatment and unionization) and the bad language didn’t cause the post to lose the protection of the NLRA.

**Pier Sixty, 362 NLRB No. 59 (Mar. 31, 2015)**
– Modified Test

- “Totality of the circumstances” test for employee social media use and other conduct outside presence of supervisor/management:
  - Any evidence of anti-union hostility
  - Whether conduct was provoked
  - Whether conduct was impulsive or deliberate
  - Location of conduct
  - Subject matter of conduct
  - Nature of content
  - Whether employer considered similar content to be offensive
  - Whether employer maintained specific rule prohibiting content
  - Whether discipline was typical for similar violations or proportionate to offense
Other Atlantic Steel Cases

- “Mind your f*cking business.” Beverly Health & Rehabilitation Services, 346 NLRB 1319, 1322-23 (2006).
- Referring to colleague as “a brown-nosing suck-ass.” Traverse City Osteopathic Hospital, 260 NLRB 1060,1061-62 (1982)
- Referring to owner as “f*cking motherf*cker” and a “f*cking crook.” Plaza Auto Center, 360 NLRB No. 117 (May 28, 2014).

Losing the Protection of the Act

- On September 5, 2019, the NLRB requested briefing on whether the Board should reconsider its standards for profane outbursts and offensive statements of a racial or sexual nature
  - NLRB specifically referenced Pier Sixty, Plaza Auto Center, and Cooper Tire
GC Memorandum 18-04 (June 6, 2018)

- Provides further guidance regarding enforceability of rules under *Boeing* standard
- Types of rules addressed (many of which implicate social media)
  - Civility
  - No Photography/Recording
  - Confidentiality
  - Rules against Defamation or Misrepresentation
  - Conflicts of Interest
  - Logos/Employer Name
  - Disloyalty

**IMPORTANT**

- While employers have more leeway to draft policies that will be upheld under *Boeing*, you still must be careful not to apply those policies to behavior that constitutes PCA
  - Facebook post with the employer name and logo saying “we need a union”
  - Encouraging employees of “XYZ Company” to join a class action employment lawsuit
- Even though the action may appear to be in violation of a lawful policy, the conduct cannot be the basis for adverse action if the conduct is PCA protected by the NLRA
More NLRA Considerations

- Must consider the NLRA in drafting social media policies
  - 3-2 decision
  - Overturned *Lutheran Heritage* “reasonably construe” standard for work rules
  - New standard evaluates:
    - Nature and extent of potential impact on NLRA rights; and
    - Legitimate justifications associated with the rule
  - Three categories of rules

What if employees use our logo in social media (and it’s not flattering)?
Employees Using the Company Name in Social Media

- NLRB GC: “Employees have a Section 7 right to use their employer’s name or logo in conjunction with protected concerted activity, such as to communicate with fellow employees or the public about a labor dispute.”
- BUT: We can control who speaks on behalf of the Company
- AND: Employees need to make it clear they are speaking in their individual capacity
What other social media dangers should employers be aware of?

Sophisticated Phishing and Other Social Engineering Scams
Global Trade Secret Conspiracies

Radicalization
BEST PRACTICES

Terms to Avoid in Social Media Policies

- Disparage/criticize/complain
- False vs. maliciously false
- Prohibitions on negativity
- Prohibitions on inappropriate discussions, being “rude” or “discourteous”
Terms to Avoid in Social Media Policies

- Critical of company or management
  - vs. product disparagement
- Prohibitions on profanity
  - Some impulsive behavior must be tolerated
- Requirements to follow chain of command
- Prohibition on identifying self as company employee

Context is Key

- Craft policy to protect information and prohibit behavior
  - Be specific
  - Explain rationale for it
Context is Key (cont’d)

- The verbiage surrounding the clause provides context
  - Confidential information/obtained without permission
  - Trade secrets
  - Copyrights
  - Illegal discrimination
  - Maliciously false
  - Abusive, profane, harassment, mental/physical abuse

What You Can Include

- Address speaking on behalf of the Company
- Address harassment, discrimination, and bullying
- Give real-life tips and examples of what is not appropriate
- Give advance notice that social media activity is not private and could result in employment consequences
Disclaimers to Include

- “This policy is not intended to interfere in any way with any applicable federal, state or local law.”
- “Application of this policy will be consistent with the National Labor Relations Act.”
- “This policy will not be interpreted or enforced in a manner that would interfere with employees’ rights to discuss work-related issues with one another and with third parties.”

Training

- Adopt a code of conduct
- Train managers and employees on:
  - Acceptable social media conduct
  - How to agree to disagree
  - Lack of privacy on social media
  - Social engineering scams
  - Cyber-bullying and harassment
- Include as part of annual training program
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There is a story behind every employment discrimination claim. Rebecca is skilled at telling your side of the story. She unravels allegations, sifts through facts, and marshals evidence to build a defense. Rebecca is a trial lawyer. Through experience and intuition, she is good at evaluating risks and drawing up a winning strategy, whether that means early resolution or preparing for a jury trial. Clients appreciate Rebecca’s cool-headed counsel in times of workplace trouble and uncertainty.

Rebecca has spent her career representing and counseling employers nationally in all aspects of labor and employment law, litigation, and compliance. As a trial lawyer, she has achieved successful results for employers through defense verdicts, arbitration awards, dismissals, appeals, and negotiated settlements, in hundreds of matters for employers in a variety of industries, including manufacturing, health care, technology, professional services, higher and secondary education, retail, non-profit, transportation, retail, hospitality, and construction. She has advised clients regarding the formation and maintenance of disadvantaged, minority and female business enterprises and voluntary supplier diversity issues. Much of her work includes advising and representing clients through workplace crises, such as data breach, criminal activity, abuse, fraud, workplace violence, accidents, and other crises requiring swift, thorough, and coordinated action.

Clients served range from Fortune 100 to closely-held start-ups.

Her specific experience includes:

- Complex employment litigation defense of claims under federal and state anti-discrimination laws, including Title VII, the Americans with Disabilities Act, Family and Medical Leave Act, Age Discrimination in Employment Act, and the Equal Pay Act, among other laws and regulations
- Unfair competition litigation and advice, including trade secret, restrictive covenant, non-compete, confidentiality, and non-solicitation litigation
- Title IX compliance, training, and litigation
- Class and collective action defense
- Wage and hour litigation and compliance
- Personnel policies
- State and federal human resources legal compliance
- Discipline and discharge counseling
- Negotiation of collective bargaining agreements
Traditional labor relations issues, including grievances, unfair labor practice charges, mediation and arbitrations;

Union avoidance, strike planning, and union elections

Prevailing wage and other government contracting requirements.

Employment contracts, including executive employment agreements, non-compete, trade secret, and confidentiality agreements

OSHA litigation

Data breach and privacy, including compliance with the General Data Protection Regulation

Affirmative action

Rebecca provides customized training programs to employers for labor and employment compliance. She is a frequent presenter, having given over 100 presentations, speeches, webinars, podcasts, and training sessions for employers.

Rebecca earned her law degree from Cleveland State University, Cleveland-Marshall College of Law, magna cum laude, in 1998, where she was the Business Editor of the Cleveland Marshall Law Review and a member of the award-winning Moot Court team. She has a Bachelor of Arts Degree with distinction in journalism, summa cum laude, from The Ohio State University. She is a proud alumnas of Saint Joseph Academy in Cleveland, Ohio.

She serves in leadership roles in her community, with clients, and with the firm. She is the past chairperson and current member of the Board of Directors of Saint Joseph Academy, the only all-girls Catholic high school in the City of Cleveland. She is the President of the Federal Bar Association, Northern District of Ohio Chapter. She is the past Chair of the Women in the Law Section of the Cleveland Metropolitan Bar Association. She has served on the Board of Directors of The Gathering Place and Berea's Animal Rescue Fund. She regularly volunteers for the Legal Aid Society of Greater Cleveland.

Through her professional and volunteer activities, Rebecca is deeply committed to the causes of empowering girls and women, as well as diversity and inclusion in the business community, workplace, and legal profession.

Rebecca has been recognized for her work in Super Lawyers, Best Lawyers, and Chambers USA rankings. In 2018, Rebecca was recognized as one of the top 25 female lawyers in Cleveland and in the top 50 female lawyers in Ohio by Super Lawyers.
C. Thomas Davis
Shareholder  ||  Nashville

After graduating from law school in 1987, Tom Davis began his legal career at Ogletree Deakins and is currently the practice group leader of the firm's Traditional Labor Practice Group. Mr. Davis represents employers in all aspects of employment law matters with a primary focus on the area of traditional labor law. He assists clients in maintaining union-free work environments through the implementation of cutting-edge, positive employee relations programs and creative leadership education. Mr. Davis is a recognized expert in the use of interactive training techniques which help management understand, in practical terms, how to effectively deal with union issues in the workplace. He also helps employers respond to union organizing efforts and handles unfair labor practice litigation before the National Labor Relations Board. Mr. Davis also helps unionized employers develop and maintain constructive relationships with the union representing their employees. This involves collective bargaining and grievance management. While Mr. Davis has experience in many industrial settings, a great deal of his time is spent dealing with these issues for clients engaged in the health care industry, the automotive assembly and auto parts supply industry and in warehousing/distribution. In addition, Mr. Davis advises clients on compliance with various aspects of the federal laws, including the Fair Labor Standards Act and state restrictive covenant laws.
John T. Merrell
Shareholder  ||  Greenville

John Merrell is an attorney in the Ogletree’s Greenville, South Carolina office. Mr. Merrell represents and counsels management on a range of labor and employment law issues, including:

- Preventive employment and labor law advice, including matters arising under The National Labor Relations Act (NLRA), Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act of 1967 (ADEA), the Family and Medical Leave Act (FMLA), the Americans with Disabilities Act (ADA), and the Fair Labor Standards Act (FLSA).

- Unfair Labor Practice (ULP) and Representation proceedings before The National Labor Relations Board (NLRB)

- Drafting employment policies and procedures

- Advising clients on their rights and legal obligations involving union organizing activities

- Employee relations

- Training on positive employee relations and other aspects of labor and employment law

- Federal and state litigation involving discrimination, harassment, retaliation, wrongful discharge, noncompetition covenants, and breach of employment agreements

John is a native of Walhalla, South Carolina. He graduated from Clemson University in 2003 with a degree in Financial Management. In 2006, he graduated from the University of South Carolina School of Law.