

Can I Fire This Twit Over That Tweet?

Social Media, Labor Law and the NLRB

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Introduction

With more than 800 million active users of Facebook, half of whom log on daily, and a plethora of other social network platforms vying for attention, social media has become a significant force both in and out of the workplace. And while it comes with certain risks, social media can also provide significant rewards for companies willing to spend the time, money and effort to leverage it. The key to maximizing the benefits and minimizing the risk is to educate employees about the proper use of social media and what they can and cannot discuss publicly.

Until recently, there has been little guidance for employers navigating these stormy waters, leaving them guessing, and often making costly mistakes. But as the NLRB deals with the increasing number of cases, the waters are becoming clearer, and it's now possible to expound on some of the lessons that have been learned.

This guide will explore:

- Creating social media policies
- Educating employees about acceptable social media use
- Guidance from recent NLRB decisions
- Protected concerted activity and why you can't fire an employee for engaging in it

In preparing this guide, we have used research gleaned from articles, blog posts and our own interviews with subject matter experts. Sources include Donna Boehme, Charlie Judy, Jon Hyman, Sharlyn Lauby, Alexandra Levit, Michelle Sherman and Heather Bussing.



Social Media Policies

Avoid Overly Broad Policies

An overly broad policy, such as one that prohibits talking about your company on social media sites, is unenforceable, illogical and is usually worse than having no policy at all. Attempts to enforce an overly broad policy can lead to a National Labor Relations Act (NLRA) violation.

Keep Policies Current

Policies must be relevant to the current social media environment, so a policy that you wrote a year ago is likely out of date today. As new social media sites are created and existing sites add new features, there might be new issues you need to review with your employees to mitigate risk. Many employment lawyers advocate reviewing social media policies every three months.

Key Points for Every Social Media Policy

A social media policy shouldn't be a list of don'ts. It should guide employees on how to use social media properly, not control what they are allowed to say. The [Edmunds.com social media policy](#) is a great example of a policy that is simple, short and easy to understand but still includes lots of information about using social media the right way.

The following points should be included in every social media policy:

- A definition of what you consider to be "social media".
- A statement of who owns work products that are created on social media sites.
- A list (and examples) of the types of social media activities that are unacceptable – defamatory comments, insults, harassment, etc.
- An explanation of what company information is confidential .
- Rules for employees who are responsible for maintaining social media accounts on behalf of the company, including what activities they are encouraged to engage in.

The guidelines should stipulate that the employer will take action against an employee who violates the policy.

Consequences

A social media policy should include information about the consequences of violating the policy. Each company has its own system for reprimanding employees for poor behavior, so the consequences will vary from company to company.

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Employee Education

Employee education is critical to the success of a social media policy. They need to know it exists and they need to have access to it.

Tailored Training

Since companies use social media to talk to the public, answer their questions, find better ways to meet their needs, make adjustments to products and increase transparency, employees who are using it on the company's behalf need specific training on how the company wants to be represented. Every employee won't be using social media in the same way, so tailor training to the various control levels. Teach employees how to use social media effectively if they are publishing content or leaving comments on behalf of the company. Provide those who are in charge of managing company social media accounts with targeted training so they know what's acceptable and what isn't.



Use Social Media

If you've got a training session on social media, use social media to deliver the message. A written code of conduct is not going to get the attention of the modern employee. Use the power of the online platform.

Real Life Examples

Make examples out of those who have failed. Tell stories of others who were fired or reprimanded for posting unacceptable information on their social media networks. Using real life examples from your own organization or those in your industry helps employees develop a better understanding of acceptable social media use because they are familiar with the situations their colleagues have encountered.

Teach employees that anything posted on the Internet is a permanent marker. Some employees need to be reminded that no matter how fast you remove a wall post, delete a tweet or edit a blog post, the damage is done the minute you upload the post, send, share, etc. Use the example of the employee responsible for managing Chrysler's Twitter account who posted a tweet that used profane language to describe some of the drivers in Detroit. Although the tweet was taken down immediately, blog posts, news stories and screen grabs of that tweet still remain.

Information Security and Confidentiality

Aside from concerns about productivity, the use of social media in the workplace brings risks for information security, that can have even greater impact, especially in public companies or environments where there is sensitive information.

Today's employees are part of the WikiLeaks generation. They believe in information sharing, so employers need to make sure they are not sharing protected or confidential information which may either compromise credibility with investors or may damage the company's brand and reputation in the market. You can do this by establishing a sound and widely understood policy and reminders. Give them concrete examples of the type of information that may not be shared.

Use Common Sense

Fostering an atmosphere of professional conduct in the workplace is a start, but basic common sense should prevail. Employees should be encouraged to think broadly about the impact of their actions.

Let Employees Know Your Door Is Open

During training sessions, encourage employees to come forward with work-related concerns rather than posting them on social media sites. Stress the fact that an employer is in a much better position to address workplace concerns than the employee's online community. When they do come forward, take the time to listen to their concerns and take appropriate action when serious issues arise.

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Protected Concerted Activity

One of the least-understood areas surrounding social media law is the issue of what constitutes protected concerted activity. An employee cannot be fired for engaging in concerted activity. It's as simple as that. However, what's not so simple is the definition of concerted activity.

The NLRB defines it as follows:

"An individual employee's conduct is concerted when he or she acts 'with or on the authority of other employees,' when the individual activity seeks to initiate, induce, or prepare for group action, or when the employee brings 'truly group complaints to the attention of management.' Such activity is concerted even if it involves only a speaker and a listener, 'for such activity is an indispensable preliminary step to employee self organization.' On the other hand, comments made 'solely by and on behalf of the employee himself' are not concerted. Comments must look toward group action; 'mere griping' is not protected."

More specifically, the NLRB protects employees from retaliation by an employer for discussing wages, hours or working conditions. These NLRA protections apply whether or not a company has a union, because they relate to "organizing" or pre-union activities. Therefore, a social media policy cannot prohibit an employee from posting negative comments about what it is like to work at a company or comments that are critical of the bosses, the customers or working conditions. A social media policy that restricts what people say can bring about NLRB fines and lawsuits.

Guidance From NLRB Decisions

In August 2011, the US Chamber of Commerce released [A Survey of Social Media Issues Before the NLRB](#). Each of the following five cases provides insight into how the NLRB might address social media cases in the future.

Case #1: Hispanics United of Buffalo, Inc.

Five employees were terminated for comments posted on Facebook about poor job performance. One employee had posted on Facebook that another employee said her coworkers did not help clients enough. In the Facebook post, the employee asked her coworkers how they felt about the situation. The employee who posted the comment, as well as the others who responded to it, were terminated.

The final decision in the case was that the employees were unlawfully terminated. In the explanation for the decision, the NLRB's Acting General Counsel said:

"We decided that the Facebook discussion here was a textbook example of concerted activity, even though it transpired on a social network platform. The discussion was initiated by the one coworker in an appeal to her coworkers for assistance.

Through Facebook, she surveyed her coworkers on the issue of job performance to prepare for an anticipated meeting with the Executive Director, planned at the suggestion of another employee. The resulting conversation among coworkers about job performance and staffing level issues was therefore concerted activity."

Case #2: American Medical Response of Connecticut

An employee was asked by her employer to prepare an incident report regarding a complaint made about the employee's performance. The employee requested that a union representative be present when she prepared the report – which was not granted. When the employee went home, she posted a comment about her supervisor on her Facebook page – including the word 'scumbag'. Coworkers responded to the comment, supporting the employee, but also sharing negative things about their supervisor. The employee was terminated for violating the company's Internet policies.

It was decided by the NLRB's Acting General Counsel that the employee engaged in protected concerted activity because the employee discussed the actions of her supervisor on her Facebook page and the 'name-calling' wasn't accompanied by threats. They also found that the employee's actions were instigated by the employer's unlawful actions, denying the employee the right to having a union representative. The NLRB's Acting General Counsel also questioned the company's Internet and blogging policy, which they concluded violated Section 8 (a) (1) because:



“It would prohibit an employee from engaging in protected activity; for example, an employee could not post a picture of employees carrying a picket sign depicting the company’s name, or wear a t-shirt portraying the company’s logo in connection with a protest involving terms and conditions of employment.”

Case #3: Karl Knauz Motors

The Knauz Motors case involves two different events involving the same employee. Robert Becker, a salesperson for Knauz Motors (BMW dealership) posted photos and comments about the choice of food and beverages served at company event for the launch of a new type of car. The employee was asked to take the photos down, and did so promptly. After that incident, the employee posted photos regarding an accident that happened on the car lot. A car had been driven into a pond by the 13-year-old son of a potential customer at the Knauz Land Rover dealership next door to the BMW one where Becker worked.

Becker was terminated, but his employer made it clear that it wasn’t for the photos and comments about the sales event, but for the photo about the accident that happened on the lot at the Land Rover dealership. The actions pertaining to the sales event were deemed protected according to the Administrative Law Judge (ALJ), since Becker felt that the food being given out at the event was sub-par for a BMW dealership and could be looked down upon by customers. The posting of the photo was ruled unprotected because it didn’t promote any employee discussion or raise concerns about working conditions.

Another part of the case was a ruling that the employer’s policy regarding social media was too broad. The ALJ concluded that the following conduct policies in the handbook were overly broad:

Courtesy:

Courtesy is the responsibility of every employee. Everyone is expected to be courteous, polite and friendly to our customers, vendors and suppliers, as well as to their fellow employees. No one should be disrespectful or use profanity or any other language which injures the image or reputation of the Dealership.

Unauthorized Interviews:

As a means of protecting yourself and the Dealership, no unauthorized interviews are permitted to be conducted by individuals representing themselves as attorneys, peace officers, investigators, reporters, or someone who wants to “ask a few questions.” If you are asked questions about the Dealership or its current or former employee, you are to refer that individual(s) to your supervisor. A decision will then be made as to whether that individual may conduct any interview and they will be introduced to you by your supervisor with a reason for the questioning. Similarly, if you are aware that an unauthorized interview is occurring at the Dealership, immediately notify the General Manager or the President.

Becker was terminated, but his employer made it clear that it wasn’t for the photos and comments about the sales event, but for the photo about the accident that happened on the lot at the Land Rover dealership.

Outside Inquiries Concerning Employees:

All inquiries concerning employees from outside sources should be directed to the Human Resource Department. No information should be given regarding any employee by any other employee or manager to an outside source.

The ALJ objected to the breadth of these policies, commenting that if employees complied with the dictates of these restrictions they would not be able to discuss their working conditions with union representatives, lawyers, or board agents.

Case #4: Wal-Mart

A Wal-Mart employee was fired for making profane comments about a store manager on his personal Facebook page. A coworker had handed the manager a copy of the comments. Some of the comments included:

“Wuck Falmart! I swear if this tyranny doesn’t end in this store they are about to get a wakeup call because lots are about to quit.” And “You have no clue ... [Assistant Manager] is being a super mega puta! Its retarded I get chewed out cuz we got people putting stuff in the wrong spot and then the customer wanting it for that price ... that’s false advertisement if you don’t sell it for that price ... I’m talking to [Store manager] about this shit cuz if she don’t change walmart can kiss my royal white ass.”

It was ruled that the comments were considered griping, which isn’t a protected activity. This means that the employer was legally allowed to fire the employee. In the advice memo regarding the case, the NLRB wrote:

“Here, we conclude that the Charging Party’s Facebook postings were an expression of an individual gripe. They contain no language suggesting the Charging Party sought to initiate or induce coworkers to engage in group action; rather they express only his frustration regarding his individual dispute with the Assistant Manager over mispriced or misplaced sale items. Moreover, none of the coworkers’ Facebook responses indicate that they otherwise interpreted the Charging Party’s postings.”



Case #5: Sodexo

Sodexo came under fire for having an overly restrictive social media policy, which said:

“It is the policy of the Company that, in releasing information with corporate implications to print and broadcast media, we must ‘speak with one voice.’ Statements from and concerning the Company to news media must be coordinated, approved and released through a central corporate source. Do not make statements or comments to the media. If you are asked by the media to speak or comment on any subject, contact your manager or Corporate Communications immediately.”

According to the Chamber of Commerce:

“The charge in Sodexo alleges that the employer, through its employee handbook, maintained rules governing employee conduct that chills section 7 rights, specifically included policies barring statements or comments to the media as well as a discriminatory bulletin board posting policy.”

Sodexo has since issued a new policy that doesn’t violate employee rights.

The charge in Sodexo alleges that the employer, through its employee handbook, maintained rules governing employee conduct that chills section 7 rights.

Sources for the Guide



Donna Boehme, Principal of Compliance Strategists. See [Risks and Rewards of the Empowered Employee](#).



Michelle Sherman, Special Counsel at SheppardMullin. See [Your Social Media Policy May Need Revamping](#).



Charlie Judy, Global Director of Human Capital Strategic Development/ Operations at Navigant Consulting. See [How to Deal with Facebook Fits and Twitter Tirades and Are Your Employees Using Social Media in the Workplace](#). Visit [Charlie's blog](#).



Alexandra Levit, business author and speaker. See [Creating a Social Media Policy that Works](#).



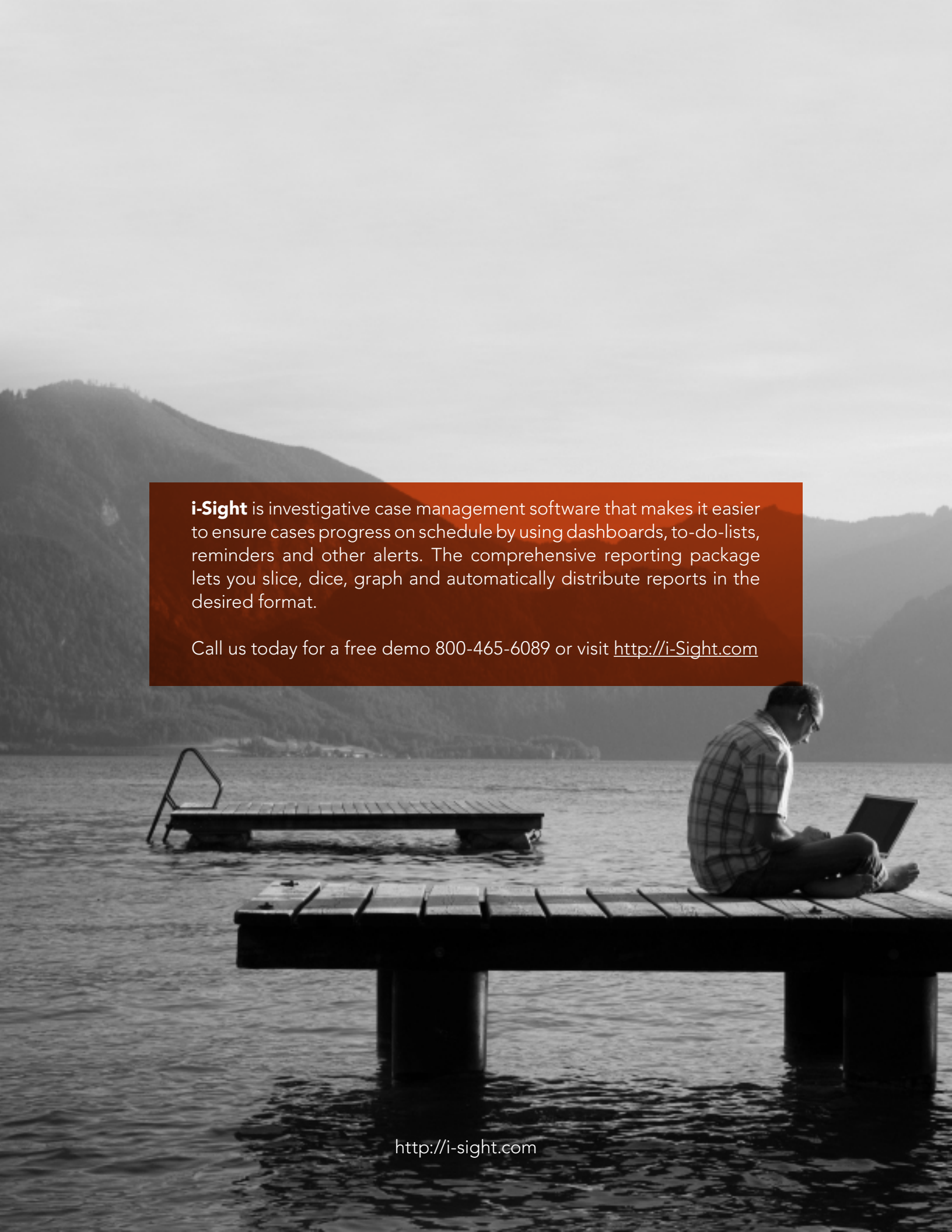
Heather Bussing, California attorney. See [8 Reasons Social Media Policies Backfire](#). Visit [Heather's blog](#).



Jon Hyman, Ohio employment lawyer. See [Fostering an Inclusive Culture in the Workplace and Employer "Look" Policies and Religious Discrimination](#). Visit [Jon's blog](#).



Sharlyn Lauby, HR consultant. See [How New Labor Guidelines Could Affect Your Social Media Policy](#). Visit [Sharlyn's blog](#).



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