# Your social media policy: What to include, what to leave out

Social media policies are essential to a company's reputation. A single tweet ricocheting across the Internet can destroy a company's good name instantly. Employers need to let workers know exactly what they cannot do on Facebook, Twitter and countless other social media sites. But draconian restrictions won't fly with regulators like the National Labor Relations Board (NLRB).

You need social media policies that don't ban legitimate criticism but also don't make it easy to devastate your reputation. Your handbook must get social media restrictions right.

## Defining social media sites for employers

Social media are websites and applications that enable users to create and share content or to participate in social networking. Common examples are Facebook, Twitter, Instagram and LinkedIn. But any employer-run website that engages with customers and consumers is also included. Your social media policies and restrictions should address both your organization's social media presence *and* your employee's usage. For example, you can have more restrictive rules on what employees say on your accounts than their own.

## NLRB restrictions and your handbook

The National Labor Relations Act (NLRA) protects employee rights of "… mutual aid or protection…. to engage in other protected concerted activities…" Employers may not make workplace rules that abridge these rights. The NLRA applies to all employers whether they are unionized or not. The NLRA guarantees your employees' rights to discuss and criticize working conditions. They can do this directly at work with other employees, through a boycott or picketing – or via social media. The bottom line is that you can never command employees to keep quiet about working conditions. But you can set limits on how that criticism is delivered. That's where social media policies and your handbook come into play.

## Balancing test

The National Labor Relations Board (NLRB) enforces the NLRA. In recent years, it has been aggressively pushing employers to revise their handbook rules on social media. The NLRB wants to see social media restrictions that don't substantially impact the right to concerted activity. That is, it wants to see social media policies that allow legitimate working condition complaints. To that end, the NLRB has developed a balancing test for all handbook rules including social media policies. It weighs employee rights to concerted activity against employer rights to manage the workplace.

Under the balancing test, a rule that bars sharing video on social media to document working conditions is suspect. Employers will have to justify the rule. In one recent case, Boeing won the right to bar video by arguing the workplace was full of classified information. Allowing cameras amounted to a security risk that out-weighted the right to document working conditions.



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CVS example: Very recently (August 2019) the NLRB looked at CVS social media handbook rules. You can read the entire memo here. It found two rules violated the NLRA but allowed several other rules to stand.

## Banned social media policies

- A social media policy that prohibited workers from disclosing "employer information" on any social media platform. It included a disclaimer that, "nothing in these rules is intended to prevent employees from discussing working conditions." The NLRB said this rule was not allowed even with the disclaimer. The policy should instead limit only trade secrets or information legally confidential like medical and personal identifying information. For example, you can prohibit employees from revealing social security numbers.

- A social media policy that required employees use their real names when discussing workplace issues. The rule applied to *all* social media usage, including personal or company sites. The NLRB nixed the rule because the NLRA allows anonymous workplace condition criticism.

## Allowed social media policies

- A social media policy that only designated employees are allowed to speak on behalf of the company on social media. It allowed other employees to speak on social media if they clarified they weren't speaking as an official company representative. This was OK.

- A policy that doesn't allow anyone other than CVS to register social media accounts using company names or logos. This restriction is allowed. However, employees can use logos on picket lines and the like. The NLRB didn't address whether registering a parody account would be allowed.

- A social media disclaimer policy. It requires employees discussing the company to clarify they are not doing so in their official capacity. This rule was allowed.

- A civility rule for social media. It states, "Do not be disrespectful or break the law. You should not post anything discriminatory, harassing, bullying, threatening, defamatory or unlawful. Don't post content, images or photos that you don't have the right to use." This rule was lawful.

- A disclosure rule that requires employees include in their Twitter bio a statement that "Tweets are my own" or "Views my own." This is a lawful rule.

- CVS also had a rule that encouraged employees to take complaints to the appropriate internal channel. The rule didn't ban doing otherwise. This was allowed.

As you can see, the NLRB has made it clear that employees are allowed to speak out on workplace issues. However, as the employer, you can require employees do so civilly and without falsely implying they speak for the organization. Recently (November 1, 2019), the NLRB announced that it is reconsidering earlier decisions on profanity and racist language. Those decisions in 2014 seemed to allow employees to use highly offensive speech in conjunction with criticism. The recent move is no doubt an effort to ensure general civility rules are allowed.

## Social media and recruiting

While we have focused on social media policies that restrict employee usage, you probably use social media to screen applicants. Be sure you do so in a way that doesn't open the company up to liability. Here's how.

- **Initial screening:** If you conduct social media searches in house, have someone who isn't part of the decision-making process conduct it. They should redact any information that indicated protected status

from their report. For example, they should remove any reference to ethnicity, race, disability, age and so on.

- **Small social media footprint?** Using a "social media influence" score may open you up to liability by disparately impacting older workers. Don't infer from a lack of a social media presence that the applicant is "too old" for the position. On the other hand, such scores are relevant if you're hiring a social media manager. It's fine to use social media footprint when it's relevant to the job.

- **Disqualification by association:** Social media relies on networks. But investigation should focus on the applicant, not his or her relatives, friends, and associates. For example, if you discover the applicant has a disabled child, you cannot use that information against the candidate. That likely violates the ADA and perhaps the Genetic Information Nondiscrimination Act. Discovering violent or racist rants or excessive social media usage are another matter.

- **Get the right person.** It's likely the candidate shares a name with several other social media users. Make sure you get the right person. That's easier on professional sites liked LinkedIn, where you can match up resumes.

**WARNING:** Some employers have social media policy rules that require candidates or employees share their passwords with the company. This is not a good idea. Although the NLRB has not yet addressed such policies, that clearly would chill NLRA rights. Plus, several states have banned the practice. For example, Utah passed a law that bars employers from requesting passwords to applicant or employee social media accounts. You can check your state here. Doing so may also violate a federal law, the Stored Communications Act. Several federal courts have concluded requiring access to Facebook does.


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