Health Law Bulletin

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Social Media and On-line Conduct Policies for Medical Employers

Most medical employers these days understand that, like other kinds of employers, they need clear-cut policies on how employees may or may not use computers while at work. Not all medical employers realize that they also should have policies on what employees may say on social media websites during their own time. Social media guidelines for employees should be drafted consistent with federal law and with the intent of protecting the reputation of the practice, preserving the confidentiality of patients, enforcing other existing workplace policies, and maximizing employee productivity during working hours.

A social media policy for a medical employer, or for any other kind of employer for that matter, should encompass employees' posting on social network sites such as Facebook, Linked In, as well as blogs, microblogs such as Twitter, and image-sharing sites such as YouTube. (Collectively referred to here as "social media.") Some of the issues that could arise on social networking sites already should be covered in the employer's personnel handbook, such as prohibitions on sexual harassment and illegal discrimination, and requirements for maintaining confidentiality of protected business information and patient information.

The need for employers to limit what employees can post on social networks stems from two features of the Internet: the ease of searching for others' postings and the fact that defamatory or illegal comments remain posted and accessible long after they are written. It is an unfortunate aspect of human behavior that people are willing to write things on the Internet that they would otherwise hesitate to write down at all.

The starting point in determining what the clinic's social media policy will be is gaining an understanding of the limits on the kinds of speech an employer can prohibit in its policies and can use as a basis for disciplinary actions.

The NLRA limits what can be restricted in a social media policy.

The federal National Labor Relations Act ("NLRA") gives many private-sector, non-union employees the right to engage in "concerted activities" for the purpose of "mutual aid or protection," and it prohibits employers from interfering with or restraining employees' exercise of these rights. At a minimum, this means employees have the right to discuss wages, hours, disciplinary matters, and working conditions with co-workers and others while they are not at work. They can have those discussions via social media. It would be illegal to have a social media policy that prohibited such discussions. When an employee's postings about a supervisor or employer are abusive, profane, or harassing, the employer understandably usually wants to discipline or fire the employee. The National Labor Relations Board, which is an independent federal agency with the power to investigate alleged NLRA violations, has taken a very narrow view on the permissible scope of any policy that restricts employees' speech. While in the past some courts have disagreed with the Board's more extreme positions on this issue, the Board continues to maintain its narrow view. In August 2011, the Board released a report on 14 investigations involving employment actions that were based on employees' use of social media. The Board continued its pattern of taking an aggressive, and some say unreasonable, stance on the types of comments that employees may make about supervisors and the workplace.

The bottom line is that you should have your social media policy reviewed by counsel in light of this recent report. It is best to include a disclaimer explaining that your policy is not intended to infringe employee rights under the NLRA. Furthermore, if a situation arises in which you want to discipline an employee based on something the employee posted on social media, you should consult with counsel before you take action.

What can be prohibited?

The National Labor Relations Board analyzes social media policies to determine whether an employee could reasonably interpret the policy as prohibiting, discouraging, or punishing the employee's protected activity of discussing wages and working conditions. If a social media policy contains an appropriate disclaimer, it should be permissible for an employer to prohibit the types of comments that would violate its other policies, such as its policies on harassment, bullying, discrimination, and workplace violence. For example, a social media policy can explain that harassing, discriminatory, abusive, obscene, or threatening statements made in social media about a co-worker or manager can subject the employee to disciplinary action just as if the employee had made the same statement aloud at the workplace.

The policy should reinforce that employees must not violate HIPAA in any of their postings and that it is never permissible to reveal any information about a patient, even without using the patient's name. Employees must understand that they should never post or discuss in social media any information or events that occur at work in connection with a patient.

A social media policy can prohibit defamatory statements, revelation of confidential or proprietary business information, use of the business' logo, etc., and invading the privacy of coworkers by posting photos or video without permission.

You don't have to let employees 'Facebook' on your time.

Two things should be made clear by the policy: (1) whether and under what circumstances employees are allowed to access social media sites while they are at work and (2) the rules for company devices versus personal devices.

It is permissible to ban all personal use of social media during working hours and to impose that ban no matter whether a company computer or an employee's personal Smartphone would be used for access. An employer also can flatly prohibit use of company computers to access social media sites at any time. Under these rules, employees still would be able to use their Smartphones to access social media during their lunch periods and official break periods.

For those medical employers such as clinics that use social media like Facebook to promote their services, they should establish a policy on employees' work responsibilities in connection with the practice's or business' social media sites, as well as a general policy on personal use of non-work social media sites during work hours.

When 'friending' creates problems.

Employers should consider whether they need guidelines on whether supervisors may send or accept Facebook "friend" requests to and from those persons they supervise. An employee may not feel comfortable in refusing to accept a friend request from her supervisor. A host of problems can arise if workers feel pressured to accept the requests and then the supervisor posts inappropriate material of any kind.

Preventing and watching out for bad associations.

Any social media policy should also make employees aware that if they use the name of the business or its principals in connection with inappropriate content, the employee may be disciplined, up to and including termination. The policy should give some examples of inappropriate content, such as sexually explicit pictures and references to the employee's own use of illegal drugs or engaging in other criminal acts. Once again, it is important that the policy makes it clear that legitimate NLRA Section 7 activity is not considered to be inappropriate content.

At least twice a month, it is prudent to Google the name of the medical practice or business and the names of all its physicians or principals to see what is being said on-line. It may be surprising how many mentions there are. Likewise, Facebook should be searched regularly.

One technique that can create bad associations on the Internet is known as "Google-bombing," which is when someone with a grudge skews the results of a Google search to divert the searcher to negative or defamatory material. Instructions for creating a Google bomb are readily available – you guessed it – on the Internet. Negative comments can be "Google bombed" so they show up first when a name is searched.

There are solutions for these situations. An employment law attorney can advise on what action can be taken against an employee who creates a bad association; resolution almost always involves the employee eliminating the reference to the employer in his posting. Companies exist that help individuals and businesses manage or repair their on-line reputations and defuse Goggle bombs.

Get professional help.

Crafting a social media policy requires consideration of several state and federal laws. Public employers are under more constraints in devising a policy. The best practice is for you to have your media policy drafted or reviewed by experienced legal counsel in order to achieve the policy's goals without running afoul of the law.