

Social Media: Emerging Trends in Employment and Health Care Law

Rachael A. Ream

Michael M. Michetti

What is Social Media?

- Any number of web sites that are based on user interaction and contain large amounts of user-generated content (i.e. Web 2.0)
- Examples
 - MySpace – was first, now on the decline. Currently has 200 million users.

What is Social Media?

- Facebook – the current leader. 400 million active users, 50% of whom log in on a daily basis. Companies and individuals use the site.
- Twitter – the relative newcomer. 105 million users, 55 million messages daily. Allows 140 character message updates to followers; each user has a news feed of information. Used by individuals and as a marketing tool.

What is Social Media?

- Photo and Video Sharing Sites – such as YouTube, Flickr, etc. Allows user-generated images a wide distribution network.
- Location-Based Media – Foursquare, Gowalla, Facebook. Allows users to “check in” at locations using a mobile device.

The Risks of Social Media

- Information is disseminated quickly and spreads exponentially.
- Information is difficult to erase/contain.
- A new generation of employees have been created, who broadcast their life to the world.
 - Younger workforce vs. traditional workforce.

Should I be on Social Media?

- Many people use it for marketing - should you?
 - 80% of the Fortune Global 100 use some form of social media.
 - 60% use Twitter, 54% use Facebook, 50% use YouTube.
 - Hospitals are increasingly using social media
 - 15% of US Hospitals have a social media presence, through Facebook and other sources.

Should I be on Social Media?

- Essentially a business / marketing question
- Commonly used for:
 - Delivering health and wellness information
 - Promoting the “brand”
 - Connecting with patients and families
 - Fostering communications

Benefits to the Institution

- Interactive Dialogue with Patients
- Interaction with other providers.
- Instantaneous communication to entire class of patients in emergency situations, such as a drug recall or disease outbreak.
- Building service lines and attracting new patients

Benefits to the Patient

- Allows patients to share information, personal experiences, and to socialize.
 - Examples of healthcare-centered social networking websites include: Google Health, Revolution Health, Organized Wisdom, and Patients Like Me.
- Allows increased connection with other people suffering from the same illness or condition.
- Empowers patients to take control of health care decisions.

Concerns for the Institution

- Interactive Dialogue with Patients
 - Increased dialogue with patients – not always positive (i.e. Twitter and airline delays, “United Breaks Guitars” – 10 million YouTube views)
- Negative Information – Domino’s (tainting food – 1 million views in 2 days); Local pet shop case.
 - Defamation, product promotion, etc.

Your Employees / Professional Staff Are Socializing

- 86% of U.S. physicians use the Internet in their professional careers to gather health and medical information. – Google, 2010.
- 34% of the 510 physicians surveyed use social media. 30% have Facebook pages and 4% use MySpace and Twitter.
– Medimix International, 2009.
- 77% of the 292 nurses surveyed have visited Facebook, 25% have visited LinkedIn, and 11% report using Twitter. – Nicholson Kovac, Inc., 2009.

Dealing with Employees Using Social Media

- HIPAA Concerns
- Employers Accessing Employee Information
- Employee Activity at Work
- Employee Activity at Home

HIPAA

- HIPAA protects a patient's protected health information, which is "all individually identifiable health information held or transmitted by a covered entity or its business associate, in any form or media, whether electronic, paper or oral." 45 C.F.R. 160.103
- HIPAA's Privacy Rule applies to providers *and their employees*.
- Violations of HIPAA can result in fines up to \$250,000 and/or imprisonment for up to 10 years for knowingly misusing individually identifiable health information.

Dangers Posed by Social Media

- Wall Posts. You have no control over contents of wall posts from “friends”.
- Status Updates, Notes, and Blogs. All could potentially disclose PHI worldwide instantaneously.
- Photos and Videos. A photo or video of a patient constitutes PHI absent patient consent.
- Open Dialogue. Responding to negative patient posts on social networking sites.
- Privacy and Perpetuity. The majority of what you do online is not private. Once you post something online, it may never go away.

[News](#) >> [Browse Articles](#) >> [Scandals](#)



2 Hospital Workers Fired for Posting Photos on MySpace

3,919 Views

17 Comments

Share

Flag as inappropriate



Heather Clark / AP
September 22, 2008

ALBUQUERQUE, N.M. — Two University of New Mexico Hospital employees have been fired for using their cell phone cameras to take photos of patients receiving treatment and then posting the images to a social networking Web site.

Director of Public Affairs Sam Giammo said Sunday the photos — mainly close-ups of injuries being treated in the Albuquerque hospital's emergency room over the past few months — were posted on an

employee's private MySpace page.

Giammo said he's never heard of a similar incident at the University of New Mexico Hospital or any other hospital.

A few other hospital employees were disciplined and the investigation is ongoing, he said.

UNMH values patient privacy "very, very highly and we will do everything we can to protect them," Giammo said. "We just won't tolerate unprofessional actions by any of our staff. We just won't stand for that."

The photos were discovered after a hospital supervisor received an anonymous tip about them Tuesday and launched an investigation.



Staten Island EMT fired for posting murder vic's pic on Facebook (flag)

www.silive.com — Staten Island EMT fired for posting murder vic's pic on Facebook STATEN ISLAND, N.Y. -- A former emergency medical technician is in hot water for snapping a photo of a murder victim in March and posting it on his Facebook page, multiple sources have told the Advance. Mark Musarella, 46, a ...



Social Media Posts May Be Admissible

- ***Romano v. Steelcase Inc.*, 30 Misc.3d 426 (S.Ct.Suff.Cty).** Plaintiff's MySpace and Facebook accounts was material and relevant to plaintiff's claim that she could no longer participate in certain activities as a result of injuries sustained in an accident.
- ***Sgambelluri v. Recinos*, 192 Misc.2d 777 (S.Ct.Nass.Cty).** Plaintiff's wedding video posted on Facebook was relevant to claims that she could no longer in certain activities as a result of injuries sustained in a motor vehicle accident

Provider Considerations

1. Providers should be cognizant of standards of patient privacy and confidentiality and must refrain from posting identifiable patient information online.
2. When using the Internet for social networking, Providers should use privacy settings to safeguard personal information and content to the extent possible, but should realize that privacy settings are not absolute and that once on the Internet, content is likely there permanently.
3. Providers should routinely monitor their own Internet presence to ensure that the personal and professional information on their own sites and, to the extent possible, content posted about them by others, is accurate and appropriate.

Provider Considerations

4. Providers must maintain appropriate boundaries of the patient-provider relationship in accordance with ethical guidelines if they interact with patients on the Internet.
5. Providers should consider separating personal and professional content online.
6. When Providers see content posted by colleagues that appears unprofessional they have a responsibility to bring that content to the attention of the individual or appropriate authorities within the organization.
7. Providers must recognize that actions online and content posted may negatively affect their reputations and may have consequences for their careers.

Institutional Policies

- Provide clear policies related to institutional posts, including guidance on who is authorized to post and what they are authorized to post.
- Implement policies for employees and staff regarding the use of social networking tools.
- Train employees about the importance of HIPAA and social networking.
- Ensure that all social networking sites are inaccessible from work computers.
- Ensure that employees are not using cell-phones and PDAs with photo and video capabilities.

Employment Law Liability

- Employers may be held liable for:
 - Unlawful access into computer systems/unauthorized interception of communications
 - Vicarious liability for illegal actions of employees performed on company systems
 - Discrimination against employees or potential employees
 - Employees' online endorsements of the employer's product if the employment relationship is not disclosed
 - Interfering with or discriminating against employees engaged in collective bargaining (unionization activities)

Social Media and Employers

- Social Media has taken private information about employees, and made it public.
 - Increased access by everyone – including employers.
 - Much more information - “Privacy is no longer a social norm.” Mark Zuckerberg – January 2011
 - Varied expectations:
 - 60% of business executives believe they have a right to know how employees portray themselves and their employer online
 - 53% of employees say their social networking is none of their employer’s business.

Employers Accessing Employee Information

- Employees frequently post information on social media sites that relates to their employment.
 - As social media becomes more prevalent, the lines between personal and professional conduct blur.
 - Work, as a major component of a person's life, becomes a major component of the social media presence.

Employers Accessing Employee Information

- Generally, employers may access employees' or potential employees' publicly available online profiles without liability for invasion of privacy.
 - Employees have no reasonable expectation of privacy in information posted online and accessible to all.
- Employees do have a reasonable expectation of privacy in private profiles and other social media.
 - Examples:
 - Private Facebook sites or private e-mail accounts (i.e. password protection)

Employers Accessing Employee Information

- Potential sources of liability:
 - Violating the Stored Communications Act (18 USC 2701)
 - Offense is committed by anyone who: “(1) intentionally accesses without authorization a facility through which an electronic communication service is provided;” or “(2) intentionally exceeds an authorization to access that facility; and thereby obtains [an] electronic communication while it is in electronic storage in such system.”
 - Hacking, passwords (even obtained from others, etc.)
 - State law privacy claims (intrusion into seclusion, etc.)
 - Example: *Pietrylo v. Hillstone Rest. Group*, 2009 WL 3128420 (D.N.J. Sept. 25, 2009) (fake “friends” case with employee Facebook page).

Employee Activity at Work

- Key questions:
 - Do you have a computer use policy?
 - Does it cover social media?
 - Does it address hand-held devices?
- Will you allow employees to engage in personal computer use?

Employee Activity at Work

- Education is Essential
 - Ensure employees receive and understand your policies
 - Educate employees about corporate culture and values – and how they apply online

Employee Activity at Work

- Set reasonable expectations about privacy
 - Establish rules regarding employee privacy (or, lack thereof) when using company computers, BlackBerries, Cell Phones, etc.)
 - Explain that you can, and do, monitor use

Employee Activity at Work

- Set clear expectations
 - Define:
 - When social media can be used
 - Who is authorized to speak for the Company
 - Control: Interactions between managers and staff / employees and customers, etc.

Using Social Media in the Hiring Process

- Applicants and employees are increasingly posting a broad range of information online.
 - Pictures
 - Comments
 - Status updates
- This information can be helpful; but also exposes employers to liability; mere possession creates issues:
 - Information about race; gender; religion, etc.
 - Information about disability (i.e. prior drug addiction)

Using Social Media in the Hiring Process

- Potential Solutions:
 - Documented, legal, basis for hiring decisions
 - Hiring discrimination is very difficult to prove – don't make it easier.
 - Consistent practices with respect to social media
 - Request “written” resumes if an applicant sends a “video” resume. View “video” resumes only after reviewing paper-based and determining qualification.
 - Third party review (HR, counsel, etc.) of decisions based on social media information.

Social Media Communication as Protected Activity

- The question – can I be fired for my post on Facebook?
 - Employees think that these activities are private
 - Employers think otherwise.
- Unsettled question – the answer is ... it depends.
 - Two scenarios:
 - Sick, but at baseball game
 - Negative postings about co-workers, job or supervisor

Social Media Communication as Protected Activity

- Over the last two years, the National Labor Relations Board (NLRB) has begun attempting to make administrative law in this area.
 - Since April 2011, the General Counsel of the Board requires all social media issues to be referred to the Division of Advice.
- The National Labor Relations Act (29 USC 201, et seq.) provides employees with a right to engage in concerted activity, including discussing the terms and conditions of their employment with their co-workers.

Social Media Communication as Protected Activity

- The issue, then, is when is a social media communication “concerted activity.”
 - A number of recent Board cases try to illustrate this issue.
 - Touchstone – look at the content and the audience.
- The NLRB has taken the position that social media policies (and related discipline) that restrain or “reasonably tend to chill ” concerted activity constitute an unfair labor practice under the NLRA.
 - Threats vs. “inappropriate” statements

Thompson Reuters Collective Bargaining

- During long, hard-fought, collective bargaining with Reuters, a reporter (Deborah Zabarenko) sent a tweet about the status of negotiations (deal honestly with the Union).
- Reuters disciplined her under a policy that prohibited statements damaging to the employer's reputation (i.e. disparagement) – a common policy the Board previously said was valid - *Sears Holdings* - 2009.
- NLRB investigated, and the Company agreed to revise its policy rather than litigate.

In re: American Medical Response (Case No. 34-CA-12576)

- Ambulance driver terminated after posting negative comments about a supervisor (including “scumbag” and worse) on Facebook; other employees respond...
- NLRB issued a formal complaint claiming that the termination was retaliation for engaging in protected activity – policy that prohibits “making disparaging, discriminatory or defamatory comments” is overly broad.
- AMR settles; revises policy to ensure that employees are permitted to discuss wages, hours and working conditions.

Hispanics United of Buffalo, Case No. 03-CA-027872

- Employee complains on Facebook about how another employee was treated; also discusses work and staffing.
- Other employees respond with their own stories about how management treated them and others.
- Company terminates those who participated in the discussions – claiming harassment.
- NLRB files a complaint alleging that the terminations were ULPs – the discussions were concerted activity.
- ALJ finds that the terminations were improper –reinstates with back pay.

Karl Knauz BMW, Case No. 13-CA-046452

- Sales employee makes comments about a sales event (bad food and drink), as well as posts about a Land Rover accident at a co-owned dealership.
- Company terminates based on “online misconduct.”
- NLRB files a Complaint. ALJ rules that the speech about the event was protected – about working conditions, but the speech about an accident was not. Upholds termination as based on the proper ground.

GC Memorandum 11-74 (Aug. 14, 2011)

- The General Counsel of the NLRB reports that a hospital employer's social media policy was overly broad where it prohibited (without examples or clarification):
 - Using any social media that may violate, compromise or disregard the privacy expectations of others,
 - Communications or posts that constitute embarrassment, harassment, or defamation of anyone,
 - Making false statements or statements that harmed the goodwill of the hospital.
- Raised in the context of a post by a nurse about an employee who always called off...

There is good news...

- The NLRB has refused to issue complaints in cases where the offensive tweets/posts were not directed at other employees, but instead at the public at large.
 - Terminations for Facebook complaints about employment terms (tips, staffing, etc.) directed at the general public, without other employees responding.
- The Board also refuses to issue complaints where the communications are not about “terms and conditions of employment” but instead matters of public concern.
 - Discipline based on “unprofessional and inappropriate” tweets by a reporter about homicides.
 - Posts on Senator’s web page about employer.

Lessons

- Two touchstones in the “concerted activity” cases:
 - Comments made between or among two or more employees
 - Comments about “terms and conditions of employment”
 - Includes comments about supervisors, etc.
 - Does not include malicious defamation (knowing or reckless), unlawful harassment, etc.
 - Does not include patently disloyal activity (posting confidential information)
- Careful consideration is warranted, and thick skin is a necessity.

Other NLRA related issues

- Even where access is proper, employers cannot conduct “surveillance” on employee organizing activity.
 - *Konop v. Hawaiian Airlines*, 302 F.3d 868 (9th Cir. 2002).
 - Employer accesses private website used to try and organize employees into a union. Threatens employee with discipline/lawsuit for activities.
 - “Chills” organizing activity.
 - Especially bad when the information is used to support other unions, or to coerce/intimidate employees.
 - Threats/discipline for comments

Other Discipline Issues

- Some states (i.e. New York, Minnesota, etc.) have laws preventing termination for lawful behavior while off duty (i.e. drinking alcohol)
- Retaliation
 - Title VII and Ohio law prevent retaliation for opposing unlawful conduct (i.e. reporting harassment, safety concerns, etc.)
 - Generally, a social media post is not, alone, a “report” that would trigger the law – but does the post re-state a previous report?

Other Discipline Issues

- Discriminatory enforcement of social media rules
 - Ex. Simonetti v. Delta Airlines – female flight attendant disciplined for posting provocative pictures of herself in uniform on web; male employees not disciplined for similar behavior.
- Discrimination based on information in profiles (associational discrimination; religion, etc.)
 - Too much information is not always a good thing.

Vicarious Liability for Employees' Social Media Use

- Rare; but can happen – especially when the employer knew/should have known, and did nothing.
- Based on common law agency principles
 - Scope of employment
 - Authority
 - Etc.
- Possible claims
 - Copyright infringement
 - Defamation
 - Securities law violations
 - Breach of confidentiality
 - Discrimination & Harassment
 - Malpractice
 - Spamming

Vicarious Liability

- Liability in such cases arises when the employer knew (or should have known) and does nothing; or when the employer authorized the activity.
 - Authorized – copyright violations
 - Knowledge – Doe v. XYZ Corp. – employee uses work computer to post illegal pictures; company managers knew and did nothing.

Harassment and Social Media

- Title VII, the ADA, etc. apply with equal force to online conduct. This means that an employer has a duty to respond to employee complaints of harassment based on social media.
 - Blakey v. Continental Airlines (2000) – employer had a duty to protect female pilot from harassing comments on company-sponsored bulletin board. Company failed to remedy activity once reported by victim.

Product Endorsements by Employees

- FTC regulations require an employee commenting on the employer's products to disclose the employment relationship
 - 16 C.F.R. § 255.5; see Example 8
- The FTC considers an employer's policies and procedures before bringing such an action
 - Unlikely to bring an action for a rogue employee violating company policy