

# What To Consider When Implementing a Social Media Policy

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When it comes to monitoring what employees say on social media, companies have more wiggle room than workers do, with some exceptions.

In the digital age, employers might feel like they carry the full weight of their workers' social media presences—every tweet, selfie, or

impromptu Instagram Live has the potential to tarnish a brand's image.

There are myriad examples of workers' personal social media conduct resulting in internal turmoil and bad press for employers. Most recently, in March, longtime Levi's executive Jennifer Sey quit her job following an internal dispute partially regarding her tweets about school closures and public-health policy during the pandemic, the New York Times reported. If an executive like Sey, who was said to be a candidate for the company's next CEO, could ostensibly derail her career in part over social media activity, what wiggle room is there for employees with less seniority to share their innermost thoughts with abandon?

"A lot of people just have a basic misunderstanding of the First Amendment and whether it provides them protection to be able to say what they want to say," Peter Whelan, a partner at employment law firm Bernabei & Kabat, told HR Brew. "If you're employed by a government entity, like a state government, you may have a lot more protections under the First Amendment than you would if you were employed by a private employer. A private employer is not subject to the First Amendment at all."

Although it's not enshrined in the Bill of Rights, there are some legal limits when it comes to private companies disciplining employees for statements made on personal social media accounts. This crucial distinction applies to what the National Labor Relations Board (NLRB) calls "concerted activity."

Social police. Julie Via used to lead HR for Flying Tee, which she described as "a three-story driving range with two restaurants and four bars" in Jenks, Oklahoma (it's since been acquired and rebranded as Golf Suites). When a water main broke on-site in 2017, Flying Tee had to close for "two or three weeks," and workers "were popping off on all kinds of social media saying '[management is] a bunch of liars,'" Via said. The online invective came from a real place of "financial hardship" endured by workers, Via explained. "They were at least getting a paycheck, but they weren't getting tips."

The “owners didn't like some of the stuff they were seeing on social media,” Via said, so she drafted the company’s first social media policy at the owners’ request. It was simple, she summarized: “Just be mindful when you’re on social media. If you’re referring to us, it may appear you are representing our brand. Please make it clear, you’re not.” In terms of dispersing the policy, each worker “from the CEO on down” signed a physical copy of the agreement.

Anything more, Via said, would have, in her view, gone beyond the legal definition of concerted activity.

Do’s & don’ts. Federal law protects workers’ right to engage in “protected concerted activity,” like addressing “work-related issues and shar[ing] information about pay, benefits, and working conditions with coworkers on Facebook, YouTube, and other social media.” Currently, 26 states and Guam have laws prohibiting employers from “requesting passwords to personal internet accounts to get or keep a job,” according to the National Conference of State Legislatures.

According to Whelan, however, the protection afforded to workers engaging in concerted activity is somewhat narrow. He said that “most of the time” when workers who’ve been fired get in touch with his firm, “it’s a situation where they did post something that was offensive and they have no legal remedies.”

Companies “have a right to protect their brand,” Via said.

Citing the example of Juli Briskman, who lost her job after she flipped off former President Trump’s motorcade and photos of the event went viral, Via explained that someone can be punished by a company when they defy their employer’s “code of ethics.” In the case of Jennifer Sey, Levi’s determined that with her tweets, “she went far beyond calling for schools to reopen and frequently used her platform to criticize public-health guidelines and denounce elected officials and government scientists,” Kelly McGinnis, SVP of corporate affairs at Levi’s, told the New York Times.

The employees Whelan does represent were often terminated after they “posted something in communication with their coworkers about some kind of workplace problem, whether it’s their hours...During Covid, there was a lot of communication about workplace safety and masking or lack of masking,” he explained.

The bottom line. Ultimately, any policy governing employee social media use can be likened to drawing a line in the sand: it has to be clearly stated before it can be enforced, Via maintained. “Here's where we stand, and you decide whether or not you work for us.”