



PLC Law Department presents

Social Media Policy

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An employee policy for appropriate use of social media and related rules and prohibitions. It can be incorporated into an employee handbook or used as a stand-alone policy document. This Standard Document has integrated notes with important explanatory and drafting tips.

DRAFTING NOTE

General

The use of social media by individuals in and outside of the workplace is widespread and continues to proliferate. However, improper and inappropriate use by employees carries tremendous legal risk for the employer, including:

- Potential unauthorized disclosure of the company's confidential and proprietary information.
- Infringement of third party intellectual property rights.
- Employee harassment and privacy violations.

Social media is technology that enables online users to interact and share information (including video, audio, photographs and text) publicly or privately with one another. Social media includes a variety of internet-based communication tools, such as Facebook, Twitter, blogs and wikis (for a more detailed discussion of social media, see *Practice Note, Social Media: A Quick Guide* (us.practicallaw.com/0-501-1442)). Setting up a pragmatic and enforceable social media policy allows an employer to minimize risk associated with employee use of social media by proactively defining acceptable and unacceptable uses in the context of the employment relationship.

To craft a social media policy that will be effective in a given workplace, an employer should carefully consider the purpose and objectives of the policy. Instrumental to this determination is a balancing of factors including the employer's attitude toward social media use in its workplace, the nature of the employer's business and characteristics of the employees and workplace environment. For example, the employer should consider whether:

- Employee use of social media will be encouraged, discouraged or simply tolerated.
- The policy will apply only to employees' use of social media in the workplace and with the company's IT resources, or will also address employees' personal use outside of the work environment.

This social media policy includes alternate clauses to allow an employer to tailor the policy according to the above considerations. Although this policy is drafted primarily to address employees' use of social media in the workplace and use of company resources, optional clauses addressing outside use of social media are included.

However, if an employer actively encourages its employees to participate in social media for marketing and other business purposes, a separate policy outlining relevant guidelines should also be adopted. For sample guidelines, see *Standard Document, Company Social Media Use Guidelines* (us.practicallaw.com/9-501-1640).

It is also important to keep in mind that laws regulating the social media environment are under development and evolving. Certain industries may develop their own regulations regarding business use of social media. For example, in January of 2010, the Financial Industry Regulatory Authority (FINRA) issued guidance on how its rules regarding communications to investors are affected by social media (for more information, see *FINRA Guidance on Blogs and Social Media Networking* (www.finra.org/web/groups/industry/@ip/@reg/@notice/documents/notices/p120779.pdf)). Although this guidance only affects FINRA-regulated firms, other industries may release similar guidance in the future regarding business use of social media.

PURPOSE

[EMPLOYER NAME] recognizes that the internet provides unique opportunities to participate in interactive discussions and share information on particular topics using a wide variety of social media, such as Facebook, Twitter, blogs and wikis. However, employees' use of social media can pose risks to [EMPLOYER NAME]'s confidential and proprietary information, reputation and brands, and can jeopardize the company's compliance with business rules and laws.

To minimize these business and legal risks, to avoid loss of productivity and distraction from employees' job performance and to ensure that the company's IT resources and communications systems are used only for appropriate business purposes, [EMPLOYER NAME] expects its employees to adhere to the following guidelines and rules regarding use of social media.

Apart from personal use of social media in accordance with this policy, [[EMPLOYER NAME] encourages its employees to participate responsibly in these media as a means of generating interest in [EMPLOYER NAME]'s [products/services] and creating business opportunities so long as all of [EMPLOYER NAME] rules and guidelines regarding social media usage, particularly in a business context, are adhered to] OR [[EMPLOYER NAME] takes no position as to its employees' participation in these media for business purposes].

COMPLIANCE WITH RELATED POLICIES AND AGREEMENTS

All of [EMPLOYER NAME]'s other policies that might apply to use of social media remain in full force and effect. Employees should always adhere to them when using social media. In particular, the following policies should be kept in mind: [LIST RELATED POLICIES AND AGREEMENTS IN BULLET FORM.]

Social media should never be used in a way that violates any other [EMPLOYER NAME] policies or employee obligations. If your post would violate any of [EMPLOYER NAME]'s policies in another forum, it will also violate them in an online forum. For example, employees are prohibited from using social media to:

- Violate [EMPLOYER NAME]'s IT resources and communications systems policies.
- Violate [EMPLOYER NAME]'s confidentiality and proprietary rights policies.
- Circumvent [EMPLOYER NAME]'s ethics and standards of conduct policies.
- Defame or disparage [EMPLOYER NAME] or its affiliates, customers, clients, business partners, suppliers, vendors or other stakeholders.
- Harass other employees in any way.
- Circumvent policies prohibiting unlawful discrimination against current employees or applicants for employment.
- Violate [EMPLOYER NAME]'s privacy policies (for example, never access private password protected sites of co-workers or other [EMPLOYER NAME] stakeholders without permission).
- Violate any other laws or ethical standards (for example, never use social media in a false or misleading way, such as by claiming to be someone other than yourself or by creating an artificial “buzz” around our business, products or stock).

[Employees should also never provide references for stakeholders on social or professional networking sites, as such references, positive and negative, can be attributed to [EMPLOYER NAME] and create legal liability for yourself and [EMPLOYER NAME] (such as interference with prospective business contracts and allegations of wrongful termination)].

Employees who violate [EMPLOYER NAME] policies will be subject to discipline, up to and including termination of employment.

DRAFTING NOTE

Compliance with Related Policies and Agreements

It is important to remind employees that other, related company policies may also apply to social media use and that employees must comply with them. Certain policies are especially important to reference and reiterate, given the special risks for employers associated with social media use. Of particular importance, an employer should remind its employees of:

- **Social media usage for business use policies.** These policies provide specific guidance to employees using social media for business purposes. For sample guidelines, see *Standard Document, Company Social Media Use Guidelines* (us.practicallaw.com/9-501-1640).
- **IT resources and communications systems policies.** See *Standard Document, Electronic Communications and IT Resources Policy* (us.practicallaw.com/8-500-5003).
- **Confidentiality and proprietary rights policies.** While the fact that social media makes the dissemination of information to the masses easy is exciting, it also creates risk for employers trying to protect their valuable confidential and proprietary information (including trade secrets), and avoid infringing third-party intellectual property rights (for more information, see *Practice Note, Protection of Employers' Trade Secrets and Confidential Information* (us.practicallaw.com/5-501-1473)).
- **Disclosure of material non-public information policies.** These policies are relevant if the employer is a publicly-traded company.
- **Ethics and standards of conduct policies.** See *Standard Document, Standards of Conduct Policy* (us.practicallaw.com/0-500-4347).
- **Anti-defamation policies.**

- **Anti-harassment policies.** Harassment between employees via social media triggers the same employer obligations to respond to complaints and investigate that other harassment in the workplace triggers.
- **Anti-discrimination policies.** Employees' use of social media increases the potential for discrimination against candidates for employment and current employees by providing employers with protected class information that may not lawfully be relied on when making employment-related decisions (for more information, see *Practice Note, Background Checks and References: Background Checks Using Online Searches and Social Networking Websites* (us.practicallaw.com/6-500-3948). Also see *Federal Employment Anti-Discrimination Laws Checklist* (us.practicallaw.com/5-500-4793)). In particular, to minimize risk of discrimination, employers should:
 - consider using social media tools in background checks only after initial interviews (where protected class information becomes obvious) to minimize claims that hiring decisions were made by protected class criteria discovered in social media searches;
 - require verification of any information obtained on the internet before relying on it; and
 - prohibit employees or anyone else from "friending" or otherwise connecting with an applicant via social media to investigate their background, to minimize risk of privacy or ethical violations.
- **Privacy policies.**

PERSONAL USE OF SOCIAL MEDIA

[Personal use of social media is never permitted on working time or by means of the company's computers, networks and other IT resources and communications systems.]

OR

[We recognize that employees might work long hours and occasionally may desire to use social media for personal activities at the office or by means of the company's computers, networks and other IT resources and communications systems. We authorize such occasional use so long as it does not involve unprofessional or inappropriate content and does not interfere with your employment responsibilities or productivity. While using social media at work, circulating chain letters or other spam is never permitted. Circulating or posting commercial, personal, religious or political solicitations, or promotion of outside organizations unrelated to company business are also prohibited.]

DRAFTING NOTE

Personal Use

Alternative clauses are presented here to allow an employer to determine whether to allow personal use of social media at work or by means of the employer's IT resources and communications systems. While some employers tolerate occasional personal use of social media (as they do occasional personal e-mail and internet access), others do not.

Employers should keep in mind that allowing employees to use social media at work increases the risk of employees accessing and disseminating the company's confidential and proprietary information, and of infringing third party intellectual property rights.

NO EXPECTATION OF PRIVACY

All contents of [EMPLOYER NAME]'s IT resources and communications systems are the property of the company. Therefore, employees should have no expectation of privacy whatsoever in any message, files, data, document, facsimile, telephone conversation, social media post, conversation or message, or any other kind of information or communications transmitted to, received or printed from, or stored or recorded on the company's electronic information and communications systems.

You are expressly advised that in order to prevent misuse, **[EMPLOYER NAME] reserves the right to monitor, intercept and review, without further notice, every employee's activities using the company's IT resources and communications systems, including but not limited to social media postings and activities, and you consent to such monitoring by your acknowledgement of this policy and your use of such resources and systems.** This might include, without limitation, the monitoring, interception, accessing, recording, disclosing, inspecting, reviewing, retrieving and printing of transactions, messages, communications, postings, log-ins, recordings and other uses of the systems as well as keystroke capturing and other network monitoring technologies.

The company also may store copies of such data or communications for a period of time after they are created, and may delete such copies from time to time without notice.

Do not use the company's IT resources and communications systems for any matter that you desire to be kept private or confidential from the company.

DRAFTING NOTE

No Expectation of Privacy

The law on employees' rights to privacy in their electronic communications (company or personal) varies by jurisdiction and continues to develop generally. While some courts have held that employees never have the right to privacy in personal communications using employer resources, other courts have held that they may in some circumstances. See, for example, *Stengart v. Loving Care Agency, Inc.*, 408 N.J. Super. 54 (N.J. Super. A.D., 2009), holding that a litigant did not waive her attorney-client privilege by communicating with her attorney on her employer-owned computer because the employer's policy regarding review of personal communications was ambiguous and because there was not an adequate business justification for review of the e-mails and waiver of the privilege.

To maximize the chances that a court will side with an employer on the right to review employee personal communications made using employer resources, it is highly recommended to include this clause in your Social Media Policy, and to ensure that this policy is widely and regularly disseminated to employees and easily accessible in the workplace. Finally, employers should be prepared with a business justification for their practice of reviewing personal communications, such as periodic review to ensure non-disclosure of confidential company information.

BUSINESS USE OF SOCIAL MEDIA

If you are required to use social media as part of your job duties, for the company's marketing, public relations, recruitment, corporate communications or other business purposes, you should carefully review [EMPLOYER NAME]'s [NAME OF SOCIAL MEDIA BUSINESS USE GUIDELINES]. If your job duties require you to speak on behalf of the company in a social media environment, you must still seek approval for such communication from [YOUR MANAGER/DEPARTMENT NAME], who may require training before you do so and impose certain requirements and restrictions with regard to your activities. Likewise, if you are contacted for comment about [EMPLOYER NAME] for publication, including in any social media outlet, direct the inquiry to [DEPARTMENT NAME] and do not respond without written approval.

Business Use of Social Media

This policy is not designed to address all of a particular companies' guidelines and restrictions related to business use of social media. For clarity's sake, it is recommended that a separate set of guidelines or rules regarding business use of social media be provided to employees whose job duties include business use of social media. For a sample set of guidelines, see *Standard Document, Company Social Media Use Guidelines*. (us.practicallaw.com/9-501-1640).

GUIDELINES FOR EMPLOYEES' RESPONSIBLE USE OF SOCIAL MEDIA

The above material covers specific rules, policies and contractual obligations that employees must follow in using social media, whether for personal or business purposes, in consideration of their employment and subject to discipline for violations. The following sections of the policy provide employees with common-sense guidelines and recommendations for using social media responsibly and safely, in the best interests of [EMPLOYER NAME]. These guidelines reflect the "duty of loyalty" every employee owes its employer, and are intended to add to, not contradict, limit or replace, the applicable mandatory rules, policies and contractual obligations above.

Guidelines for Employees' Responsible Use of Social Media

While articulating rules for social media use by employees, employers must be careful not to infringe on employee rights, including the right to:

- Participate in legal, off-duty and off-site conduct.
- Organize.
- Protest working conditions.
- Report illegal activity.
- Freedom of speech.

However, employers do have the right to expect employees to respect the "duty of loyalty" they owe their employers. Traditionally this duty includes obedience, confidentiality and loyalty obligations. It has been interpreted to prohibit employees from such actions as disparaging or competing with their employer, disclosing trade secrets and other confidential information and disrupting employer relations. However, this common law duty varies by state and employers should check the specifics of the duty in any state before relying too heavily on it. This policy language is phrased broadly to apply to all jurisdictions.

This section is intended to make recommendations to employees for responsible use of social media concerning their employer, without risking infringing employee rights by making them mandatory.

PROTECT THE COMPANY'S GOODWILL, BRANDS AND BUSINESS REPUTATION

[EMPLOYER NAME]'s [EMPLOYEE HANDBOOK/CONFIDENTIALITY AND PROPRIETARY RIGHTS AGREEMENT] prohibits you from posting disparaging or defamatory statements about the company or its business interests (see above), but you should also avoid social media communications that might be misconstrued in a way that could damage the company's goodwill and business reputation, even indirectly.



Make it clear in your social media postings that you are speaking on your own behalf. Write in the first person and use your personal e-mail address when communicating via social media.

You are personally responsible for what you communicate in social media. Remember that what you publish might be available to be read by the masses (including the company itself, future employers and social acquaintances) for a long time. Keep this in mind before you post content.

If you disclose your affiliation as an employee of [EMPLOYER NAME], it is recommended that you also include a disclaimer that your views do not represent those of your employer. For example, consider such language as “the views in this posting do not represent the views of my employer.”

If you communicate about your work or [EMPLOYER NAME] in general, you should disclose your connection to and role at [EMPLOYER NAME], but be sure to reiterate that your views do not necessarily represent those of [EMPLOYER NAME]. Use good judgment about what you post and remember that anything you say can reflect on [EMPLOYER NAME], even if you do include a disclaimer. Always strive to be accurate in your communications about [EMPLOYER NAME] and remember that your statements have the potential to result in liability for yourself or [EMPLOYER NAME]. Be respectful to [EMPLOYER NAME] and be professional and honest in your communications.

If you are uncertain or concerned about the appropriateness of any statement or posting, refrain from making the communication until you discuss it with [YOUR MANAGER/DEPARTMENT NAME].

If you see content in social media that disparages or reflects poorly on [EMPLOYER NAME] or its stakeholders, you should contact [YOUR MANAGER/DEPARTMENT NAME]. Protecting [EMPLOYER NAME]’s goodwill, brands and reputation is every employee’s job.

RESPECT INTELLECTUAL PROPERTY AND CONFIDENTIAL INFORMATION

[EMPLOYER NAME]’s [CONFIDENTIALITY AND PROPRIETARY RIGHTS AGREEMENT/EMPLOYEE HANDBOOK] restricts employees’ use and disclosure of the company’s confidential information and intellectual property (see above). Beyond these mandatory restrictions, you should treat the company’s valuable trade secrets and other confidential information and intellectual property accordingly and not do anything to jeopardize them through your use of social media. In addition, you should avoid misappropriating or infringing the intellectual property of other companies and individuals, which can create liability for yourself and for [EMPLOYER NAME].

Do not use the company’s logos, brand names, taglines, slogans or other trademarks, or post any confidential or proprietary information of the company, without prior written permission from the [EMPLOYER NAME] legal department.

To protect yourself and the company against liability for copyright infringement, where appropriate, reference sources of particular information you post or upload and cite them accurately. If you have any questions about whether a particular post or upload might violate the copyright or trademark of any person or company (outside of “fair use” exceptions), ask the [EMPLOYER NAME] legal department before making the communication.

RESPECT AND COMPLY WITH TERMS OF USE OF ALL SITES YOU VISIT

Do not expose yourself or [EMPLOYER NAME] to legal risk by using a social media site in violation of its terms of use. Review the terms of use of all social media sites you visit and ensure your use complies with them. Pay particular attention to terms relating to:

- Prohibitions or restrictions on the use of the social media site, including prohibitions or restrictions on use for advertising, marketing and promotions or other commercial purposes (for example, *Facebook’s*

Statement of Rights and Responsibilities (www.facebook.com/terms.php) (its terms of use) prohibit businesses from administering promotions through Facebook without Facebook's prior written consent).

- Ownership of intellectual property used on, or information collected or generated through use of, the site (for example, any of the company's copyrighted material and trademarks that might be posted on the site, or customer information the company collects through the site).
- Requirements for licenses or other grants allowing use by the site owner and other third parties of the company's trademarks or other intellectual property.
- Privacy rights and responsibilities of the site owner and users.

RESPECT YOUR CO-WORKERS AND OTHER [EMPLOYER NAME] STAKEHOLDERS

Do not post anything that your co-workers or [EMPLOYER NAME]'s customers, clients, business partners, suppliers, vendors or other [EMPLOYER NAME]'s stakeholders would find offensive, including ethnic slurs, sexist comments, discriminatory comments, insults or obscenity.

Do not post anything related to your co-workers or [EMPLOYER NAME]'s customers, clients, business partners, suppliers, vendors or other [EMPLOYER NAME]'s stakeholders without their written permission.

ACKNOWLEDGEMENT OF RECEIPT AND REVIEW

I have received and read a copy of the [EMPLOYER NAME] Social Media Policy and understand its contents. I understand that [EMPLOYER NAME] expressly reserves the right to change, modify or delete its provisions without notice.

[EMPLOYEE NAME]

[Date]

DRAFTING NOTE

Acknowledgment of Receipt and Review

If this policy is maintained as a stand-alone document, this Acknowledgement of Receipt and Review should be required to be signed by all employees to maximize the enforceability of the policy. If the policy is instead included in an employee handbook, this separate acknowledgement is unnecessary, as an Acknowledgement of Receipt and Review should be required for the handbook as a whole (see *Standard Document, Employee Handbook Acknowledgment* (us.practicallaw.com/7-500-4363)).

Final Considerations

To further minimize risk associated with employees' use of social media, consider the following:

- A policy is only as good as its enforcement. Ensure that your policy is made widely available and enforced consistently. Discipline violators.
- Update your recruiting policies to include social media considerations as described in the drafting note Compliance With Related Policies and Agreements.
- Do not prohibit participation in any social media discussions that could be characterized as employee organizing or concerted activity to ensure that your organization does not violate the National Labor Relations Act (for more information, see *Practice Note, Labor Law: Overview* (us.practicallaw.com/6-500-9554) and *Practice Note, Union Organization Process* (us.practicallaw.com/5-501-0280)). Examples of protected activity include any discussion of terms and conditions of employment, a desire to organize or anything related to labor or unions.
- Promptly respond to complaints of harassment or discrimination via social media, just as your organization would in non-social media contexts.
- Consider setting up internet monitoring and alerts to maintain awareness of discussions and specific comments being made about the company.
- Ensure that any employer-sponsored blogs or other social media are maintained securely. Consider password protection, encryption, anti-virus and anti-hacker software.
- Regularly review and update your policy to ensure it is kept current with changing law, technologies and business practices.
- Recognize and respect employee rights, including the right to:
 - participate in legal, off-duty and off-site conduct;
 - organize;
 - protest working conditions;
 - report illegal activity; and
 - exercise freedom of speech.

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