

# Social Media While Socially Distant: Addressing Employees' Online Activities During the Pandemic



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# Why is this important now?

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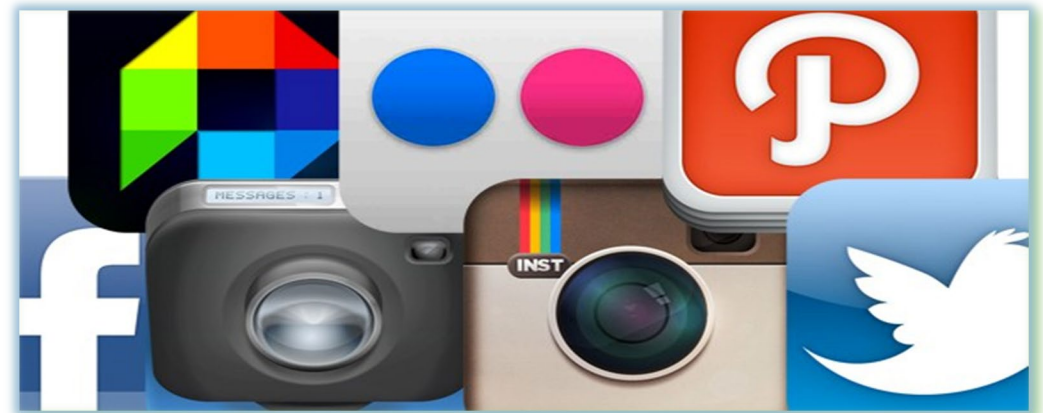
- Covid-19
- Social issues
- Presidential election
- Evolving legal standards
- Social media growth
  - Facebook, Instagram, Twitter, Reddit, Snapchat, Zoom, LinkedIn, Nextdoor, TikTok, dating sites and apps, private message boards...



# Social Media Use

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- 69% of adults use Facebook – consistent across age groups
- 74% of Facebook users visit the site at least once a day
- Snapchat and Instagram are more popular with users age 18-29 than older age ranges.
  - Snapchat: 62% vs. 24% overall
  - Instagram: 67% vs. 37% overall



# Social Media Use

## Substantial 'reciprocity' across major social media platforms

% of \_\_\_ users who also ...

	Use Twitter	Use Instagram	Use Facebook	Use Snapchat	Use YouTube	Use WhatsApp	Use Pinterest	Use LinkedIn
Twitter	–	73%	90%	54%	95%	35%	49%	50%
Instagram	50	–	91	60	95	35	47	41
Facebook	32	47	–	35	87	27	37	33
Snapchat	48	77	89	–	95	33	44	37
YouTube	31	45	81	35	–	28	36	32
WhatsApp	38	55	85	40	92	–	33	40
Pinterest	41	56	89	41	92	25	–	42
LinkedIn	47	57	90	40	94	35	49	–

Source: Survey conducted Jan. 3-10, 2018.

"Social Media Use in 2018"

PEW RESEARCH CENTER

90% of LinkedIn users  
also use Facebook

# How can these factors affect employers?

- Productivity issues
- Company's values
- Negative press
- Loss of business
- Tension between employees



# What can employers do about it?

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- Laws Affecting Employers Abilities to Regulate Social Media Conduct:
  - National Labor Relations Act (NLRA) Sections 7 & 8 (PERB)
  - California Labor Code
- Constitutional Protections Impacting Public Employers
- Impact of Covid Pandemic



# Social Media and the National Labor Relations Act/Board

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# National Labor Relations Act

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- Goal:
  - Protect the rights of employees and employers
  - Encourage collective bargaining
  - Curtail certain private sector labor and management practices
  
- Jurisdiction:
  - Private sector employers
  - Union and non-union
  - Does not apply to most independent contractors





# NLRA and Concerted Activities

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- Section 7: Grants employees the right to engage in concerted activities:
  - Employees shall have the right to self-organize, form, join, or assist labor organizations
  - Collective bargaining
  - Engage in other **concerted activities**
- Section 8: Makes it an unfair labor practice to interfere with the rights granted by section 7

# Concerted Activity

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- Group action or action on behalf of other employees
- Activity seeking to initiate or prepare for group activity
- Bringing a group complaint to the attention of management (Does not include individual complaints raised in a group setting)

(*Meyers v. Indus., Inc.*, (1984) 268 N.L.R.B. 493, 497-98; reaffirmed on remand, *Meyers II* (1986), 281 N.L.R.B. 882, 887; *Alstate Maintenance, LLC* (2019) 367 NLRB No. 68.

# Concerted Activities

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- Talking with one or more co-workers about wages and benefits or other working conditions
- Circulating a petition asking for better hours
- Participating in a concerted refusal to work in unsafe conditions
- Joining with coworkers to talk directly to your employer, to a government agency, or to the media about problems in a workplace

# Social Media and the NLRA

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- What types of posts are considered concerted activities?
- What does the NLRA allow employers to include in their social media policies?

# Social Media and the NLRA: Social Media Posts

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- **More likely to receive protection:**
  - Discuss employer policies or practices or terms of employment
  - Discuss the potential for bringing issues before management
  - Involve conversation between employees (but not necessary)

# Protected Activity

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In a response to a tweet about free Chipotle, an employee tweeted “nothing is free, only cheap #labor. Crew members only make \$8.50hr how much is that steak bowl really?”

- Tweets concerned wages and working conditions
- Tweets are not purely individual concerns, (like his own raise)
- It did not matter that he did not consult with other employees before tweeting. Tweets had the purpose of educating the public and creating sympathy and support for hourly workers in general and Chipotle’s workers in specific.

*(Chipotle Servs. LLC (2016) N.L.R.B. Case No. 04-CA-147314.)*



# Protected Activity

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“Maybe someone should do the owners of Triple Play a favor and buy it from them. They can’t even do the tax paperwork correctly!!! Now I OWE money... Wtf!!!!”

- Several coworkers were involved in a discussion about working conditions
- Employees commented and liked the status
- The like was also a protected activity

*(Three D, LLC d/b/a Triple Play Sports Bar and Grille (2014) 361 N.L.R.B. No. 31.)*

# Protected Activity

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“Bob is such a NASTY MOTHER FUCKER don’t know how to talk to people!!!!!! Fuck his mother and his entire fucking family!!!! What a LOSER!!!! Vote YES for the UNION!!!!!!!!!!”

- Visible to public - including coworkers
- Part of ongoing protests regarding mistreatment by managers
- Connected to a drive for union representation

*(Pier Sixty, LLC (2015) 362 N.L.R.B. No. 59, slip op. at 1-2)*

# When do posts lose protection?

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- Egregiously offensive
- Knowingly and maliciously false
- publicly disparage the employer's products or services without relating those complaints to any labor controversy

# Not Protected

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- An employee got into a confrontation with a supervisor at work and later posted on Facebook that she would have “sliced his throat open if it didn’t happen at work.”
  - Personal complaint
  - Any protected content was lost because of the threat

(*Cummins v. Unemployment Comp. Bd. of Review* No. 1944 C.D. 2017, 2019 WL 1574856, at \*1 (Pa. Commw. Ct. Apr. 12, 2019).)

# Not Protected



Employees at a childcare program had the following conversation on Facebook:

“I don’t feel like bein’ their bitch and making it all happy-friendly-middle school campy. Let’s do some cool shit, and let them figure out the money. No more [former manager] Let’s fuck it up.”

“Im glad im done with that its to[o] much and never [appreciated] so we just [gonna] have fun doin[g] activities and the best part is WE CAN LEAVE NOW hahaha I AINT [GONNA] NEVER BE THERE even [though] [former manager] gone its still hella stuck up pplthere that don’t [appreciate] nothing.”

“they start loosn kids I aint helpn....Let’s fuck it up.”

- Insubordination, neglecting job duties, safety concerns

*(Richmond Dist. N’hood Ctr . (2014) 361 N.L.R.B . 833, 834-837.)*

# Social Media and the NLRA: Drafting Policies

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- **When a facially-neutral work rule, if reasonably interpreted, would potentially interfere with Section 7 rights, the Board will evaluate two things:**
  - The nature and extent of potential impact on employee's Section 7 rights
  - The employer's legitimate business justifications for the rule

*(The Boeing Co. (Dec. 14, 2017) 365 N.L.R.B. No. 154.)*



# Social Media and the NLRA: Drafting Policies

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- **Category one:** Rules that are generally lawful to maintain
- **Category two:** Rules warranting individual scrutiny
- **Category three:** Rules that are unlawful to maintain

# Category One

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- Rules deemed lawful by because (1) the rule, when reasonably interpreted, does not prohibit or interfere with exercising NLRA rights; or (2) justifications associated with the rule outweighs the potential adverse impact on protected rights.
  - Behavior that is rude, condescending, or otherwise socially unacceptable is prohibited
  - Disparaging the company's employees is prohibited
  - Employees may not post any statements, photographs, video or audio that could reasonably be viewed as disparaging to employees

# Category One

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- Employees speaking on social media posts about the company must make it clear that they are employees, but are not speaking on behalf of the company.
- All company branded (name or logo) social media accounts must be approved in advance.
- Do not be disrespectful or break the law: Do not post anything discriminatory, harassing, bullying, threatening, defamatory, or unlawful.
- Do not take or share photos from non-public areas or internal meetings or share photos of company presentations or slides on any social media platforms or channels.

# Category Two

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- Rules that merit scrutiny on a case-by-case basis as to whether they prohibit or interfere with NLRA rights, and if so, whether legitimate justifications outweigh any adverse impact on NLRA-protected conduct

# Examples of Lawful Policies

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- Rules regarding the employer's name
- Rules restricting speaking to the media or third parties
- Rules banning off-duty conduct that might impact the employer
- Rules against false or inaccurate statements

(NLRB Guidance on Handbook Rules Post-Boeing (June 6, 2018).)

# Examples of Unlawful Policies

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- Employees who choose to mention or discuss their work, colleagues, or company products must identify themselves by their real name and where relevant, title or role.
- Protect personal and confidential information. Our Code of Conduct makes clear the importance of protecting the privacy and security of PHI [protected health information], PII [personally identifiable information], and employee information. It is not permissible to disclose this information through social media or other online communications.

(NLRB Advice Memorandum Re: CVS Health, Case 31-CA-210099 (September 5, 2018).)



# Category Three

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- Rules that are unlawful to maintain because they would prohibit or limit NLRA-protected conduct, and justifications associated with the rule do not outweigh the adverse impact on NLRA rights.
  - Confidentiality rules regarding wages, benefits, or working conditions
  - Rules restricting joining outside organizations or voting on matters concerning employer

# Other Employer Restrictions:

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- Cannot prohibit employees from disclosing information about wages or working conditions.
- Cannot have policies that prevent employees from or requires them to engage in political activities.
- Cannot require an employee to:
  - Disclose a personal social media username or password to gain access
  - Access personal social media in the presence of the employer
  - Divulge any personal social media (except in certain circumstances)

(Lab. Code §§ 232, 232.5, 980, 1101.)

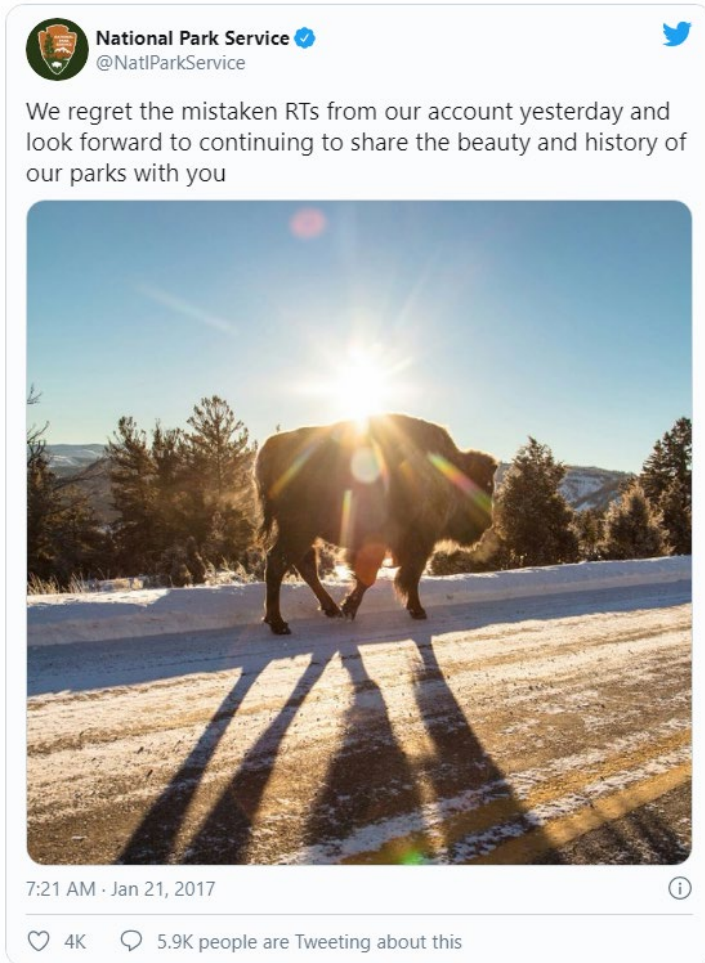
# Public Employers: First Amendment Concerns

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*"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."*

*~ The First Amendment*

# Official Job Duties

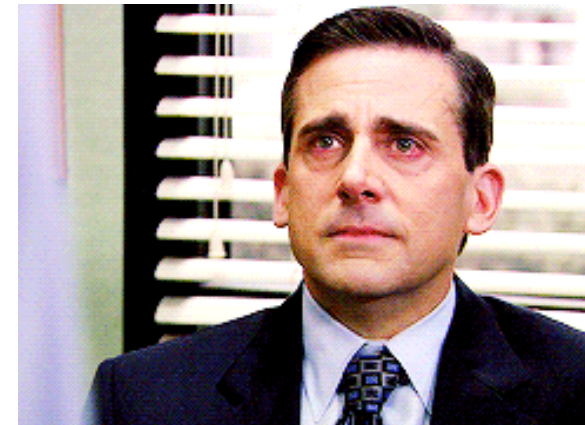


- **Government employees are only protected by the First Amendment when they are speaking as *private citizens*.**
- **If speech is part of the employee's official job duties, then the employee can be fired or disciplined for it.**
- *(Garcetti v. Ceballos, 547 U.S. 410, 419 (2006).)*

# Private Speech

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- If employee was speaking as a private citizen, speech is generally protected when it is a matter of **public concern**.
- Even when the statements are directed at supervisors.



*(Pickering v. Board of Ed. of Tp. High School Dist. 205, Will County, Illinois (1968) 391 U.S. 563, 567.)*

# Matters of Public Concern

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- Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record.

(*Connick v. Myers* (1983) 461 U.S. 138, 147–148.)



# Public Concern?

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- “I’m not a teacher- I’m a warden of future criminals!” and “They had a scared straight program in school-why couldn’t I bring my 1st graders?”
- A court clerk complains about the building’s lack of air conditioning on Twitter.
- Public Employee “likes” the Facebook page of a political candidate



# Like Button as Speech

- “On the most basic level, clicking on the “like” button literally causes to be published the statement that the User “likes” something, which is itself a substantive statement. In the context of a political campaign’s Facebook page, the meaning that the user approves of the candidacy whose page is being liked is unmistakable. That a user may use a single mouse click to produce that message that he likes the page instead of typing the same message with several individual key strokes is of no constitutional significance.”
- (*Bland v. Roberts* (4th Cir. 2013) 730 F.3d 368, 386, as amended (Sept. 23, 2013).)

# Balancing Test

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- When an employee's speech is a matter of public concern, courts will weigh several factors against an employee's interest in speaking out.



# Balancing Test

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- Whether the speech would interfere with the employee's responsibilities;
- The nature of the working relationship between the speaker and those at whom the criticism was directed;
- Whether the relationship between the speaker and the person criticized was sufficiently close that the speech would create disharmonious relations in the workplace;
- Whether the speech would undermine an immediate superior's discipline over the employee; and
- Whether the speech would compromise the loyalty and confidence required of close working employees.

# Balancing Test

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- “These considerations, and indeed the very nature of the balancing test, make apparent that the state interest element of the test focuses on the effective functioning of the public employer's enterprise. Interference with work, personnel relationships, or the speaker's job performance can detract from the public employer's function; avoiding such interference can be a strong state interest.”

*(Rankin v. McPherson (1987) 483 U.S. 378, 388.)*

# Example

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- A Florida state attorney announced that she would not seek the death penalty in any cases that were assigned to her. The Assistant Financial Director for the Clerk of Court for a county in Florida disagreed with the decision and posted a social media comment stating: “maybe she [Ayala] should get the death penalty” and “she should be tarred and feathered if not hung from a tree.”

# Covid-19 Considerations

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# Continuous Work Day Rule

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- “[D]uring a continuous workday, any walking time that occurs after the beginning of the employee’s first principal activity and before the end of the employee’s last principal activity is . . . covered by the FLSA.”

(See 29 C.F.R. § 790.6(b); *IPB Inc. v. Alvarez* (2005) 546 U.S. 21, 37.)



# Continuous Work Day Rule

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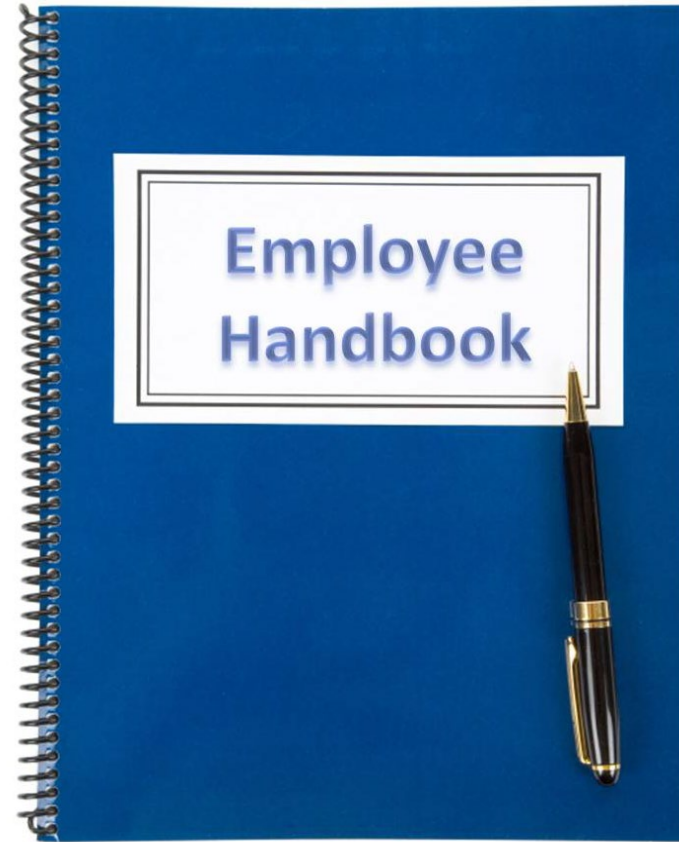
- “§ 790.6 and its continuous workday guidance are inconsistent with the objectives of the FFCRA and CARES Act only with respect to such employees.”

(DOL Temporary Rule (April 1, 2020) 85 FR 57678.)

# Work From Home Policy Drafting

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- Timekeeping policies
- Social media policies
- Technology use policies



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# QUESTIONS?



# Thank You!



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