



InstaMetaTwitTokFace

Patients, Employees and Social Media

Presented
by:



Kelly Zimmerer
Associate
Bricker Graydon Wyatt LLP



Mallory Monhemius
Assistant General Counsel
OhioHealth Corporation

Social Media Legal Issues

Privacy and
Security

Dealing with
Reviews

Screening
Employees

Employee
Posts

Sexual
Harassment

Social Media
as Evidence

Professional
Guidelines

Social Media Statistics

- Facebook is the world's most popular and widely used social media platform. With 3.07 billion monthly active users, that means 37% of the world's population uses it at least once per month.
- Facebook's biggest user group is males aged 25 – 34, with males aged 18 -24 ranking second.
- TikTok is the fastest-growing platform.
- In 2026 there are estimated to be 5.66 billion total social media users worldwide.
- People spend an average of 2 hours and 21 minutes per day on social media.
- In the US, 93% of people are active on social media.

Patient Privacy: Common Privacy Concerns

- Provider or employee posts patient info (“PHI”) without authorization
 - E.g., nurse describes day at the facility
- Provider/agent posts or sends unauthorized photo or video
 - E.g., photo includes confidential information about others
- Patient posts critical comment and provider or employee responds directly
- Assuming posts are deleted or private when they are not
 - E.g., Snapchat



POLICING PATIENT PRIVACY



Inappropriate Social Media Posts by Nursing Home Workers, Detailed



Below are details of 65 incidents since 2012 in which workers at nursing homes and assisted-living centers shared photos or videos of residents on social media networks. The details come from government inspection reports, court cases and media reports.



by Charles Ornstein and Jessica Huseman, June 23, 2017, 7:59 a.m. EDT



Patient Privacy

Center for Clinical Standards and Quality/Survey & Certification Group

Ref: S&C: 16-33-NH

DATE: August 5, 2016

TO: State Survey Agency Directors

FROM: Director
Survey and Certification Group

SUBJECT: Protecting Resident Privacy and Prohibiting Mental Abuse Related to
Photographs and Audio/Video Recordings by Nursing Home Staff

Memorandum Summary

- **Freedom from Abuse:** Each resident has the right to be free from all types of abuse, including mental abuse. Mental abuse includes, but is not limited to, abuse that is facilitated or caused by nursing home staff taking or using photographs or recordings in any manner that would demean or humiliate a resident(s).
- **Facility and State Agency Responsibilities:** This memorandum discusses the facility and State responsibilities related to the protection of residents. Specifically, at the time of the next standard survey for both the Traditional survey and QIS, the survey team will request and review facility policies and procedures that prohibit staff from taking, keeping and/or distributing photographs and recordings that demean or humiliate a resident(s).

Background

Recent media reports have highlighted occurrences of nursing home staff taking unauthorized photographs or video recordings of nursing home residents, sometimes in compromised positions. The photographs are then posted on social media networks, or sent through multimedia messages.



Individually
Identifiable
Health Info

45 CFR 160.103

Identifies the individual OR
provides a *reasonable basis to
believe it can be used to
identify the individual.*

HIPAA Penalties

Criminal – fines up to \$250,000, prison up to 10 years for intentional violations, including use for personal or commercial gain or malicious harm

Civil – fines up to \$50,000 per violation, depending on culpability, how quickly corrected

HIPAA Enforcement Methods

Required self-reporting of breaches



State AG can bring suit



Employer must sanction employees who violate



HHS Audits



No private right of action

HIPAA Compliant Authorization

- Not combined with any other consent or authorization
- Required elements
 - Info to be disclosed
 - Entity(ies) who may disclose info
 - Entity(ies) to whom info may be disclosed
 - Purpose of disclosure
 - Expiration date or event
 - Signature and date

HIPAA Compliant Authorization

- Required Statements
 - Individual's rights to revoke authorization
 - Generally, cannot condition treatment on authorization
- Disclosed informed may be redisclosed and not protected

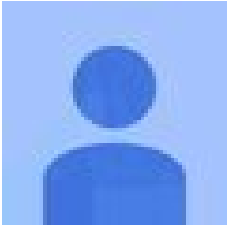
HIPAA Privacy

Does the HIPAA Privacy Rule permit health care providers to use e-mail to discuss health issues and treatment with their patients?

Answer: Yes.

The Privacy Rule allows covered health care providers to communicate electronically, such as through e-mail, with their patients, provided they apply reasonable safeguards when doing so. See 45 CFR § 164.530(c). For example, certain precautions may need to be taken when using e-mail to avoid unintentional disclosures, such as checking the e-mail address for accuracy before sending, or sending an e-mail alert to the patient for address confirmation prior to sending the message. Further, while **the Privacy Rule does not prohibit the use of unencrypted e-mail ...**, safeguards should be applied to reasonably protect privacy, such as limiting the amount or type of info disclosed through the unencrypted e-mail. In addition, covered entities will want to **ensure that any transmission of electronic protected health information is in compliance with the HIPAA Security Rule requirements** at 45 CFR Part 164, Subpart C.

Negative Reviews



Taylor T.

if i could give 0 stars I would. XXXXXXXXX were awful taking care of my daughter in the emergency department when it turned out that she had rsv. They didnt do a chest xray and they swabbed her but never ran the tests! Not only that but I work here and they make us pay to park our own vehicles even though we are employees. We have to park far away in the cold and rain no matter what. The parking officers are very hateful and rude. They stalk you in the garage as well and harass you over parking and tickets.

How to Respond to Negative Reviews

- Catch-22: You can't really defend yourself
- Complaints rarely go anywhere
- Don't acknowledge the poster was a patient
- Can explain your policies, desire to provide quality care
- Can invite direct message or other form of private complaint
- Other Options
 - Contact patient directly
 - Leave it alone

Consumer Review Fairness Act (CRPA)



Protects consumers' ability to share honest opinions of goods and services in any forum, including social media. Violation is a deceptive trade practice enforceable by FTC and state AGs.



Prohibits contracts, including online terms of use, that restrict ability to review goods or services, impose fees or penalties or requires relinquishment of IP rights in their content.



It is ok to prohibit or remove reviews that ...

Contain confidential or private information

Are libelous, harassing, vulgar, obscene, etc.

Are unrelated to company products

Are clearly false or misleading

Consumer Review Fairness Act (CRPA)

- Not ok to edit if the message is altered to look more favorable
- FTC discourages making any incentives conditional, encouraging positive reviews or discouraging negative ones
- Reasonable processes to weed out fake reviews ok
- Disclose how you collect and publish reviews

Myth or Fact Lightning Round!



HIPAA prohibits emailing patients

MYTH



Private Facebook posts are private

MYTH



You can't remove negative reviews

DEPENDS




A photo of an empty hospital room can still violate HIPAA

FACT



A HIPAA authorization can be combined with a general consent form


MYTH



Employment Issues

Employment Issues – Screening via Social Media

A 2020 Harris Poll survey found that 71% of employers approved of research candidates' social media profiles to screen potential employers



Facebook, X and LinkedIn are the platforms most commonly checked



Red flags may include illegal activities, offensive comments, violent or aggressive behavior, sexually explicit material, confidential info



What about political opinions?

Hazards of Using Social Media to Screen

Claims of Discrimination

- Age
- Race
- Color
- Religion
- Sex (including pregnancy and sexual orientation)
- National origin
- Disability
- Genetic Information



Freedom of Speech Violations

Social Media for Screening

Gaskell v. University of Kentucky (2010)

- During the hiring process for a founding director of the MacAdam Observatory, a member of UK's committee found the personal website of one of the candidates with an article he wrote titled "Modern Astronomy, the Bible, and Creation."
- UK went with a different candidate.
- The candidate filed a complaint with the EEOC charging UK with religious discrimination and later sued.
- The parties reached a settlement in 2011 in which UK paid Gaskell **\$125,000**.

Employee Social Media Posts: Privacy Issues

Generally, social media content is **not privileged or protected** by a right to privacy.

“[A]lthough private information in a social media account is discoverable, litigant has no right to serve overbroad discovery requests that seek irrelevant information” *Howell v. The Buckeye Ranch, Inc.*, No. 2:11-cv-1014 (S.D. Ohio Oct. 1, 2012).

Employee Social Media Posts: Privacy Issues

Federal Laws

- Electronic Communications Privacy Act (ECPA): Federal law that protects electronic communications from unauthorized access
- Stored Communications Act: Part of the ECPA that requires third parties to obtain legal authorization (valid court order or subpoena) to access stored electronic communications

Can Employee Be Fired for Social Media Post?

In general, employees at will can be fired if there is a nexus between the post and the workplace.



Does the post

Conflict with employer's values?

Threaten the company's reputation?

Threaten harm to workplace productivity?

Employee Posts About Work or Patients

Talbot v. Desert View Care Center, 328 P.3d 497 (Idaho 2017).

Nursing home LPN posted on Facebook:

“Ever have one of those days where you’d like to slap the ever loving bat snot out of a patient who is just being a jerk because they can? Nurses shouldn’t have to take abuse from you just because you are sick. In fact, it makes me less motivated to make sure your call light gets answered every time when I know that the minute I step into the room I’ll be greeted by a deluge of insults.”

What If: Post Establishes Employee Lied?

- In *Jaszczyn v. Advantage Health Physician Network*, 504 Fed. Appx. 440 (6th Cir. 2012), employee was on intermittent FMLA leave due to back injury. Co-workers spotted facebook posts of her drinking at a local festival. After further investigation, employer terminated her for fraud.
- In her suit alleging retaliation for her FMLA claim, the Sixth Circuit affirmed summary judgment for the employer.
- Employer's "honest belief," after investigation, that employee engaged in fraud absolved it of violating FMLA.



When can an employer get in trouble for firing based on a social media post?

A Violation of NLRA

Violation of free speech

Illegal discrimination



National Labor Relations Board



About NLRB



Most Popular Pages

- [Who We Are](#)
- [National Labor Relations Act](#)
- [Cases & Decisions](#)
- [Recent Charges & Petitions Filings](#)
- [The Law](#)
- [The Right to Strike](#)
- [Case Search](#)
- [Contact Us](#)
- [Frequently Asked Questions](#)

Social media

Whether or not you are represented by a union, federal law gives you the right to join together with coworkers to improve your lives at work - including joining together in cyberspace, such as on Facebook.

Federal law protects your right to engage in not only union activity, but also "protected concerted" activity. You have the right to address work-related issues and share information about pay, benefits, and working conditions with co-workers and with a union. You have the right to take action with one or more co-workers to improve your working conditions by, among other means, raising work-related complaints directly with your employer or with a government agency, or seeking help to form a union. Using social media can be a form of protected concerted activity. You have the right to address work-related issues and share information about pay, benefits, and working conditions with coworkers on Facebook, YouTube, and other social media. But just individually griping about some aspect of work is not "concerted activity": what you say must have some relation to group action, or seek to initiate, induce, or prepare for group action, or bring a group complaint to the attention of management. Such activity is not protected if you say things about your employer that are egregiously offensive or knowingly and deliberately

National Labor Relations Act (“NLRA”)

- NLRA Section 7 applies to non-union and union employers
 - Protects concerted activity for employees’ mutual aid and protection.
 - Gives employees the right to discuss terms and conditions of employment.
- Recently, NLRB has brought action against employers for adverse action taken against employees for social media posts, and overly broad social media policies.
- An employee’s conduct is concerted when he/she “seeks to initiate, induce or prepare for group action,” or when the employee brings “truly group complaints to the attention of management.”

NLRB Decision

- NLRB decision in re: *Karl Knauz BWM* upheld an employee's termination following a Facebook post:
 - Derogatory comments about incident at another dealership where 13-year old drove Land Rover into pond was found unrelated to terms and conditions of employee's employment and not protected; this justified firing.
 - Derogatory comments about employer's decision to serve allegedly low-budget snacks at BMW sales events was protected, but was not the basis for firing.
- NLRB also found rule in employee handbook about "courtesy" was illegal and overbroad, could chill exercise of §7 rights.

NLRB on Employer Policies

- An employer's rule or policy is unlawful if it "reasonably tends to chill employees in the exercise of their Section 7 rights"
- NLRB Acting General Counsel Memorandum concerning social media policies
 - Social media policies may be overbroad if employees could "reasonably construe" them to prohibit employee's right to communicate regarding wages, hours and working conditions.
 - Policy should expressly state that it does not prohibit NLRA protected activity and provide clear examples of protected conduct.
 - NLRB provided sample of approved social media policy. (See Memorandum 12-59 (5/30/12))

Freedom of
Speech:
Marquardt v.
Carlton,
971 F.3d 546
(6th Cir. 2020)

- EMS captain employed by city was fired after posting (off-the-clock) on Facebook about the shooting of 12-year-old Tamir Rice, who was killed by police after pointing a gun, which turned out to be an airsoft gun, at people in a park.
- Post included profanity, referred to the boy as a “ghetto rat,” and said, “I am glad he is dead.”
- In suit alleging violation of civil rights, district court granted summary judgment.

Marquardt v. Carlton (con't.) “Public Concern”

- On appeal, Sixth Circuit laid out three-part analysis:
 - Was employee’s speech protected?
 - Would employer’s response chill the actions of a person of “ordinary firmness”?
 - Was the protected speech a motivating factor for employer’s adverse action?
- The Court’s analysis focused on the “protected speech” prong, having two parts: was it a matter of public concern and if so, do the employee’s free speech rights outweigh employer’s efficiency interest?
- Court held that the shooting of Tamir Rice was a matter of public concern as opposed to a “personal grievance”; the shocking nature of it is irrelevant.

Private Employers: Illegal Discrimination

Johnson v. Georgetown University,
No. 25-cv-1540 (D.D.C. Mar. 31, 2026)



Sexual Harassment and Social Media

Prevalence



41% of Americans have experienced online harassment



75% of most recent incidents of online harassment



25% of Americans have experienced severe forms of online harassment, including physical threats.



Effects



Higher rates of depression, anxiety, trauma, and body image issues

Social Media as a Platform for Sexual Harassment

Direct Messaging

- *Okonowsky v. Garland*, 109 F.4th 1166 (9th Cir. 2024): Title VII claim of a hostile work environment based on a coworker's sexually offensive Instagram posts (done off-duty).

Cyberstalking

- 55% of stalking victims were sent unwanted messages using the internet or social media and 32% of victims were monitored using social media.

Non-consensual distribution of intimate images

- ORC 2917.211 prohibits knowingly distributing images/videos of another adult in a state of nudity or a sexual act without permission.

Social Media as Evidence: Preservation Challenges

- Content may auto-delete
 - For example, images and messages on Snapchat are only available for a certain amount of time
- Tips for preservation
 - Screenshots of messages
 - X1 Social Discovery: enables screenshots, HTML copies, and metadata of social media accounts
 - FTK Imager: retrieval of metadata and deleted social media content
 - WebPreserver: preserves digital content in original, time-stamped form

Social Media as Evidence: Admissibility

- FRE 401/ ORE 401/ CR 26.02 (Relevance)
 - *State v. Miller*, 2012-Ohio-1263: Photographs obtained from MySpace were deemed relevant and admissible as a fair and accurate representation of individuals displaying gang signs.
 - *State v. Shropshire*, 2016-Ohio-7224: Held that probable cause existed to search a phone for social media because members often document crimes online.
 - *State v. English*, 1st Dist. Hamilton No. C-180697, 2020-Ohio-4682: Confirmed a low burden for authenticating Facebook printouts.

Social Media as Evidence: Admissibility

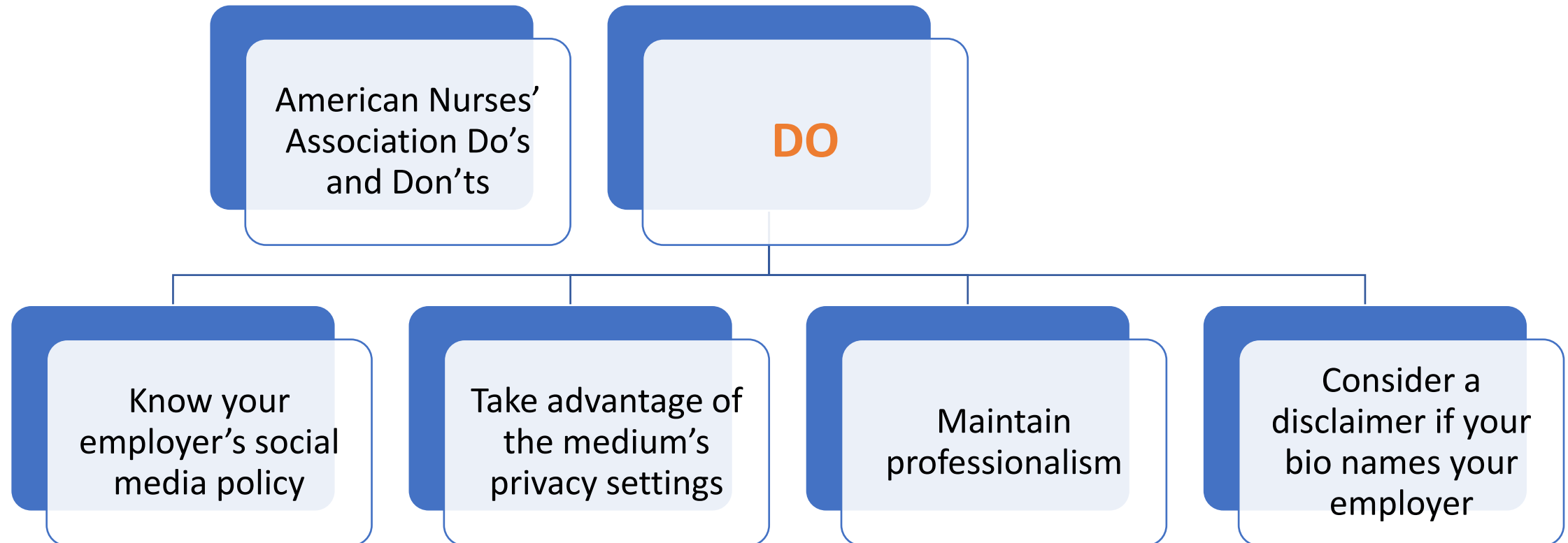
- FRE 901/ ORE 901 (Authentication)
 - “The evidence necessary to support a finding that the document is what a party claims it to be has a very low threshold, which is less demanding than the preponderance of the evidence.” *State v. Gibson*, 2015-Ohio[1]1679, ¶46 (6th Dist.) (quoting *State v. White*, 2004-Ohio-6005, 61 (4th Dist.)). See also *State v. Padgette*, 2020-Ohio-672 (8th Dist.)

Posts by Individual Professionals

- AMA Code of Medical Ethics
- 2.3.2 Professionalism in Use of Social Media
 - Be aware that complete separation of personal persona from professional is not possible; consider potential for posts to damage reputation or impugn the integrity of the profession
 - Respect privacy and confidentiality; get consent
 - Maintain boundaries in interaction with the patients
 - Use privacy settings; remember that content is permanent
 - Disclose financial interests
 - Ensure that medical info is useful and accurate



Guidelines for Professionals



Guidelines for Professionals



General Advice

- Separate personal and professional social media sites
- Don't "friend" patients or family members
- Don't respond to patient or family comments through social media
- Don't provide patient care through social media
- Err on the side of assuming it could be a HIPAA violation

Questions?



Kelly Zimmerer
Associate
Bricker Graydon Wyatt LLP



Mallory Monhemius
Assistant General Counsel
OhioHealth Corporation