

March 6, 2015

Electronic Communication by the Book: Keeping It under Control and Within the Rules

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Overview

- ▶ Understanding NLRB Rules
- ▶ BYOD: Beyond Privacy and Security
- ▶ Digital Distractions
- ▶ Texting Orders
- ▶ Physician Ratings Sites

Walking the Tightrope

▶ Employees' Rights

- Speech
- Organizing activity
- Privacy



▶ Employer's Interest

- Privacy
- Reputation
- Patient safety

NLRB's Turning Point

- ▶ National Labor Relations Act
 - *NLRB v. American Medical Response*
 - ▷ EMT suspended, fired for complaining about supervisor on Facebook
 - ▷ NLRB concluded that social media is an extension of the workplace
 - Employees' right to “concerted activity”

Sources: NLRB. Complaint alleges Connecticut company illegally fired employee over Facebook comments 2010 Nov 2. <http://mynlrb.nlr.gov/link/document.aspx/09031d45803c4e5e>; Martinez J. NLRB v. American Medical Response: A Rare Case of Protected Employee Speech on Facebook. *Berkeley Tech. L.J.* 2011 Mar 7. Available online: <http://btj.org/?p=1111>.

What Is Organizing Activity?

- ▶ Discussions of terms and conditions of employment
 - Grievances
 - Labor disputes
 - Wages and rates of pay
 - Hours of employment
 - Conditions of work
- ▶ No need for formal union or labor organization

Source: National Labor Relations Act, Chapter 7. <http://www.nlr.gov/resources/national-labor-relations-act>

Not Permission to Say Anything You Want

- ▶ 2009 Advice Memo re: Sears social media policy
- ▶ Not protected:
 - Confidential or proprietary information of company, clients, partners, vendors, suppliers
 - Embargoed information (launch dates, release dates, pending reorganization)
 - Company intellectual property such as drawings, designs, software, ideas, innovation
 - **Disparagement of company's or competitors' products, services, executive leadership, employees, strategy, and business prospects**
 - Explicit sexual references; reference to illegal drugs; obscenity or profanity
 - Disparagement of any race, religion, gender, sexual orientation, disability or national origin

Source: NLRB. Advice response memo 18-CA-019081. <http://www.nlr.gov/case/18-CA-019081>.

Two Broad NLRB Principles

- ▶ Employer policies should not be so sweeping that they prohibit the kinds of activity protected by federal labor law, such as the discussion of wages or working conditions among employees.
- ▶ An employee's comments on social media are generally not protected if they are mere gripes not made in relation to group activity among employees.
- ▶ *Remember: It's not just policy. Supervisors' actions count.*

Source: NLRB. The NLRB and social media. <http://www.nlr.gov/news-outreach/fact-sheets/nlr-and-social-media>

What Makes a Policy “Overly Broad”?

- ▶ Collection agency staffer transferred against her will
- ▶ Complains on Facebook, conversation includes coworkers and supervisor
- ▶ Staff member is fired; policy prohibits

“[m]aking disparaging comments about the company through any media, including online blogs, other electronic media or through the media.”

Source: NLRB. Report of the acting general counsel concerning social media cases. <http://mynlrb.nlr.gov/link/document.aspx/09031d45807d6567>

NLRB: Rule Is Overly Broad



- ▶ “reasonably be construed to restrict Section 7 activity”
- ▶ Policy prohibits statements that the employer is
 - Not treating employees fairly
 - Not paying employees sufficiently
- ▶ Policy contains no limiting language

Source: NLRB. Report of the acting general counsel concerning social media cases. <http://mynlrb.nlr.gov/link/document.aspx/09031d45807d6567>

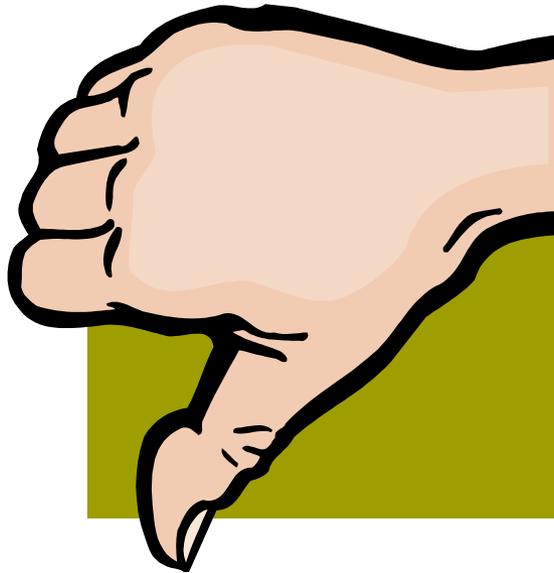
Exception for Discussing Employment

- ▶ Home improvement store employee reprimanded in front of coworkers
- ▶ Goes to break room, posts to Facebook that employer doesn't care about its employees
- ▶ Worker later fired based on posts. Policy states:

“employees should generally avoid identifying themselves as the Employer’s employees, unless there was a legitimate business need to do so or when discussing terms and conditions of employment in an appropriate manner.”

Source: NLRB. Report of the acting general counsel concerning social media cases. <http://mynlrb.nlr.gov/link/document.aspx/09031d45807d6567>

NLRB: Attempt at Exception Not Enough



- ▶ “discussing terms and conditions of employment in an appropriate manner”
- ▶ The word “appropriate” implies that there is an “inappropriate” manner as well
- ▶ No definitions or examples

Source: NLRB. Report of the acting general counsel concerning social media cases. <http://mynlrb.nlr.gov/link/document.aspx/09031d45807d6567>

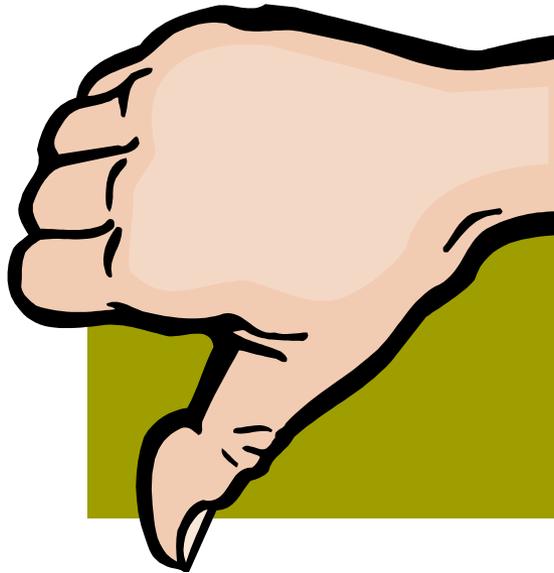
Prohibition on Unprofessional Communication

- ▶ Phlebotomist has history of conflict with coworkers
- ▶ Resolutions through supervisor, EAP unsuccessful
- ▶ Angry Facebook post, says she hates her coworkers
- ▶ Terminated for violating social media policy:

“prohibits employees from using social media to engage in unprofessional communication that could negatively impact the Employer’s reputation or interfere with the Employer’s mission or unprofessional/inappropriate communication regarding members of the Employer’s community.”

Source: NLRB. Report of the acting general counsel concerning social media cases. <http://mynlrb.nlr.gov/link/document.aspx/09031d45807d6567>

NLRB: Some Examples Protected



- ▶ Could be interpreted to restrict protected activity
- ▶ Good: contained examples of prohibited activity (like sexually explicit images)
- ▶ Bad: some of the examples were protected (like sharing confidential info and personnel actions)

Source: NLRB. Report of the acting general counsel concerning social media cases. <http://mynlrb.nlr.gov/link/document.aspx/09031d45807d6567>

National Retail Pharmacy Chain

- ▶ Policy provisions include:
 - Restriction of social media activity to personal matters if securities regulations or other laws require
 - Prohibition on disclosure of patients' personal health information
 - Ban on disclosing embargoed information (e.g., product release dates)
 - Must indicate views are own and not those of employer
 - Employees cannot publish promotional content

Source: NLRB. Report of the acting general counsel concerning social media cases. <http://mynlrb.nlr.gov/link/document.aspx/09031d45807d6567>

NLRB: Context Matters; the Policy Is OK



- ▶ Context of policy shows restrictions have to do with compliance, not restriction
- ▶ Employer and employees must comply with legal restrictions (securities, privacy)
- ▶ Organizing activity is not engaging in promotion on behalf of employer

Source: NLRB. Report of the acting general counsel concerning social media cases. <http://mynlrb.nlr.gov/link/document.aspx/09031d45807d6567>

Employment: Staff Privacy

- ▶ Reasonable expectation of privacy
 - Don't be sneaky
 - Do you really need to know?
- ▶ Stored Communications Act (18 U.S.C. §§ 2701-2712)
 - *Konop v. Hawaiian Airlines, Inc.* 302 F.3d 868 (9th Cir., 2002)
 - *Pietrylo v. Hillstone Restaurant Group*, Civil Case No. 06-5754 (Dist Ct NJ, 2009)

Litigation: Invasion of Employee Privacy

- ▶ Nurse is acting president, later president, of union for EMS personnel
- ▶ Facebook friend allows management to see protected profile
- ▶ Management takes screenshots of posts, including criticisms of paramedics who cared for Holocaust Museum shooter
- ▶ Nurse fired, sues hospital for invasion of privacy
- ▶ Court: public websites have no expectation of privacy, password-protected sites have some privacy, even when shared with many people

Source: *Ehling v. Monmouth-Ocean Hosp. Serv. Corp.*, Civ. No. 2:11-cv-03305 [D.N.J. May 30, 2012].

Facebook Photos Show FMLA Abuse

- ▶ *Lineberry v. Detroit Medical Center*
- ▶ RN on FMLA following back injury
- ▶ Posts Facebook photos of Mexico vacation
- ▶ Coworkers show photos to management
- ▶ RN fired; termination upheld in federal court

Source: *Lineberry v. Detroit Medical Center*. United States District Court Eastern District of Michigan 2013 Feb 5. http://www.gpo.gov/fdsys/granule/USCOURTS-mied-2_11-cv-13752/USCOURTS-mied-2_11-cv-13752-0/content-detail.html.

Beyond NLRB: Common-Sense Rules

- ▶ Patient privacy and data security
- ▶ Limit distractions—and worse
- ▶ Assume you're being recorded
- ▶ What about texting orders?
- ▶ Dealing with physician rating sites

Digital Distractions

- ▶ Multitasking is nothing new, but smartphones make it easier (and worse)
- ▶ 2010 survey of perfusionists:
 - 50% texted during heart-lung bypass surgery
 - 15% accessed Internet
 - 3% used social media
- ▶ 2012 survey of OR clinicians:
 - 50% received reports of distractions in the OR
 - 41% personally witnessed mobile device distractions
 - 5% saw personal mobile device use linked to adverse event

Source: Smith T, Darling E, Searles B. 2010 survey on cell phone use while performing cardiopulmonary bypass. *Perfusion* 2011 Sep;26(5):375-80; Patterson P. Smartphones, tablets in the OR: with benefits come distractions. *OR Manager* 2012 Apr;28(4):1, 6-8, 10

An Interrupting Text Message

- ▶ Resident using smartphone to enter order in CPOE to stop warfarin
- ▶ Personal text message interrupts, and resident responds
- ▶ Never goes back to complete CPOE order, warfarin continues
- ▶ Patient eventually needs emergency open-heart surgery
- ▶ “Detaching” from patient care

Source: Halamka J. Order interrupted by text: multitasking mishap. WebM&M 2011 Dec. <http://webmm.ahrq.gov/case.aspx?caseID=257>

Anesthesiologist Accused of Texting, Patient Dies

- ▶ 61-year-old patient dies 10 hours after AV node ablation
- ▶ At deposition, cardiologist accuses anesthesiologist of being distracted:
 - Alleges he “made up” data for medical record
 - Didn’t notice low O₂ levels until patient had been blue for 15-20 minutes
 - “He was doing something either [with] his cell phone or pad or something.”
 - Attorneys identify Facebook post made during a different surgery

Source: Burger J. Another reason why you should ban smart phones from the OR. *Outpatient Surgery* <http://www.outpatientsurgery.net/surgical-facility-administration/legal-and-regulatory/another-reason-why-you-should-ban-smart-phones-from-the-or--04-03-14>

Anesthesiologist Suspended for Sexting during Surgery

- ▶ State health officials: patient safety compromised in “a variety of ways”
- ▶ Sent explicit texts and images during surgery
 - To his girlfriend, and to a patient
- ▶ Looked at patients’ medical records “for his own... gratification”
- ▶ Wrote at least 29 unauthorized prescriptions
- ▶ Medical license, medical staff memberships suspended

Source: Zuckerman L. Seattle physician suspended over allegations of sexting during surgery. <http://www.reuters.com/article/2014/06/10/us-usa-sexting-washington-idUSKBN0E03N20140610>

Recorded Conversation during Colonoscopy

- ▶ Patient records instructions for postoperative care
- ▶ Phone stays on, records anesthesiologists:
 - Stating that another provider would “eat [patient] for lunch”
 - Joked about firing a gun up patient’s rectum
 - Anesthesiologist says to unconscious patient “And really, after five minutes of talking to you in pre-op I wanted to punch you in the face and man you up a little bit.”
 - Joked that a penile rash was syphilis
 - Described patient as “retard” and “big wimp”

Source: Abbott R. Unconscious patient says doctors mocked him. *Courthouse News Service* 2014 Apr 22. <http://www.courthousenews.com/2014/04/22/67225.htm>.

Managing Distractions

- ▶ Work with your medical staff, nursing leadership
- ▶ Recognize you won't stop all interruptions—and some may be necessary
 - Try to limit personal interruptions, allowing clinical issues
- ▶ Start with obvious issues like texting during surgery and high-risk areas
- ▶ Highlight patient safety risks
- ▶ Remind staff their online activity will be discoverable
- ▶ Enforce rules consistently

Source: Rivera-Rodriguez AJ, Karsh BT. Interruptions and distractions in healthcare: review and reappraisal. *BMJ Qual Saf Health Care* 2010 Apr 8. <http://qualitysafety.bmj.com/content/early/2010/04/06/qshc.2009.033282.abstract>.

Texting Orders

- ▶ Joint Commission: “it is not acceptable for physicians or licensed independent practitioners to text orders for patients to the hospital or other healthcare setting”
- ▶ Can’t verify sender or recipient
- ▶ Messages not saved to validate orders or medical record
- ▶ Autocorrect

Source: Joint Commission. Standards FAQ details: texting orders. http://www.jointcommission.org/standards_information/jcfaqdetails.aspx?StandardsFAQId=401&StandardsFAQChapterId=79

But They're Going to Text Anyway

- ▶ Assess threats: device loss/theft; improper disposal; data interception
- ▶ Prohibit texting of PHI or limit the type of information shared via text (e.g., condition-specific information or identifying information)
- ▶ Workforce training on the appropriate use of work-related texting
- ▶ Password protection, encryption for devices that create, receive, or maintain PHI
- ▶ Inventory mobile devices used for texting PHI (provider-owned or personal devices)
- ▶ Proper removal of PHI when devices are “retired”
- ▶ Require note in medical record when info received by text influences a medical decision
- ▶ Specify retention period (or immediate deletion) of all texts that include PHI
- ▶ Consider alternative technology (e.g., vendor-supplied secure messaging application)

Source: Greene AH. HIPAA compliance for physician texting. *J AHIMA* 2012 Apr;83(4):34-6

Physician Ratings Sites

Survey of 2,137 Adults (2014)

19%	Ratings sites “very important” when choosing a provider
37%	Of those who looked at ratings sites, avoided a physician because of bad ratings
35%	Of those who looked at ratings sites, chose a physician because of good ratings
26%	Concerned about physician retaliation after a negative review

Review of 112,000 Physicians’ Ratings on RateMDs.com (2012)

3.93/5	Average physician rating
45.8%	Rated a perfect 5/5
11.8%	Rated less than 2/5

Sources: Hanauer DA, Zheng K, et al. Public awareness, perception, and use of online physician rating sites. *JAMA* 2014 Feb 19;311(7):734-5; Gao GG, McCullough JS, et al. A changing landscape of physician quality reporting: analysis of patients’ online ratings of their physicians over a 5-year period. *J Med Internet Res* 2012 Jan-Feb;14(1):e38. <http://www.jmir.org/2012/1/e38/>

Responding to Negative Posts

▶ Probably OK:

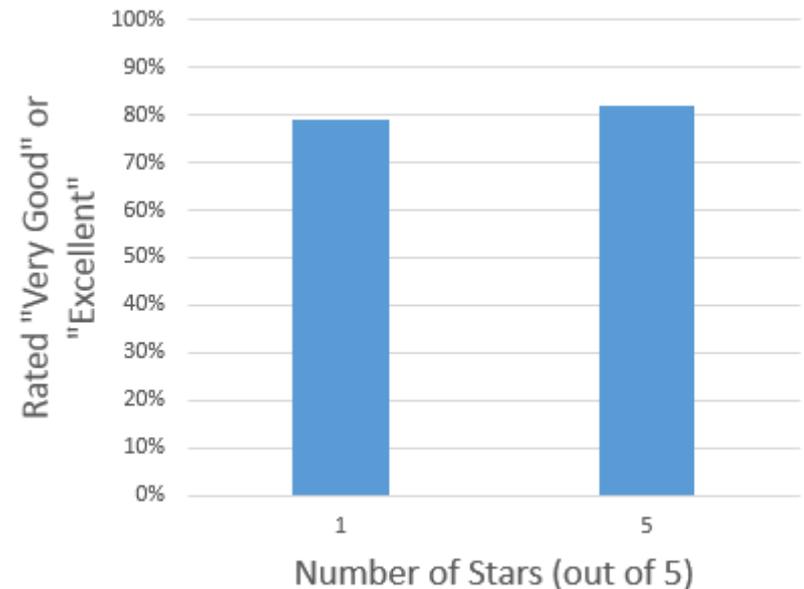
- Ask them to remove negative posts.
- Counteract with positive stories.
- Counteract with your own brand.

▶ Not so much:

- Have patients sign agreements not to post negative reviews
- Make up positive stories
- Respond to posts to “clarify”
- Attack the poster

Ratings and Quality: No Real Relation

- ▶ Comparison of physician quality measures and website ratings for 1,299 U.S. physicians
- ▶ “no evidence that physician website ratings were associated with clinical QMs”
- ▶ Limited relationship between ratings and overall patient satisfaction survey results



Source: Gray MB, Vandergrift JL, Gao G, et al. Website ratings of physicians and their quality of care. *JAMA Int Med* 2015 Feb; 175(2):291-3. <http://archinte.jamanetwork.com/article.aspx?articleID=1936577>

Learn from Criticism

“ First we did what anyone would do, we just ignored it...Then new patients were actually canceling appointments because of reviews and we realized this could be more serious than we thought.”

Source: Reddy S. Doctors check online ratings from patients and make change. Wall St J 2014 May 19. <http://online.wsj.com/news/articles/SB10001424052702304422704579571940584035918>

What about Suing Them?

- ▶ Patient has nose job, suffers skin infection
 - Sets up website criticizing the plastic surgeons
- ▶ 2008: Judge orders website taken down
- ▶ Patient files professional complaints, continues online campaign
- ▶ 2011 verdict: \$12 million total damages

Source: Gallegos A. Doctors win redress in online defamation suits. *Am Med News* 2012 Feb 20. <http://www.ama-assn.org/amednews/2012/02/20/prsb0220.htm>

MN Court: Posts Not Defamatory

- ▶ Patient's son posts online about neurologist's "rude and insensitive" behavior
- ▶ Calls neurologist "a real tool"
- ▶ Court:
 - "pure opinion" protected by the First Amendment
 - "cannot be reasonably interpreted as stating a fact and . . . cannot be proven true or false."

Source: *McKee v. Laurion*. Minnesota Supreme Court Case No. A11-1154. 2013 Jan 30. <http://mn.gov/lawlib/archive/supt/1301/OPA111154-0130.pdf>

“No Evidence Posts Were Knowingly False”

- ▶ Patient complains about results of multiple cosmetic surgeries
 - “I hope that she can live with herself knowing what she has done.”
 - “These doctors should be held accountable for their mistakes and not be covered up.”
- ▶ Complaints to state medical board also rejected; patient accuses courts, medical board, physicians of a conspiracy
- ▶ In Kentucky, *opinions* only defamatory they rely on “undisclosed defamatory facts”

Source: *Loftus v Nazari*. Eastern Dist Kentucky. Civ Action 10-279 2013 May 13. http://www.gpo.gov/fdsys/pkg/USCOURTS-kyed-2_10-cv-00279/pdf/USCOURTS-kyed-2_10-cv-00279-0.pdf

Walk the Line

- ▶ Reasonable vs. impermissible restrictions on activity
- ▶ Take advantage of mobile devices while managing distractions
- ▶ Learn from ratings sites without letting them get you down



Resources

▶ National Labor Relations Board

- National Labor Relations Act. <http://www.nlrb.gov/resources/national-labor-relations-act>
- Report of the acting general counsel concerning social media cases. <http://mynlrb.nlrb.gov/link/document.aspx/09031d45807d6567>
- The NLRB and social media. <http://www.nlrb.gov/news-outreach/fact-sheets/nlrb-and-social-media>

Resources: Texting and Distractions

- ▶ John Halamka. “Order interrupted by text: multitasking mishap.” <http://webmm.ahrq.gov/case.aspx?caseID=257>
- ▶ Joint Commission. Standards FAQ details: texting orders. http://www.jointcommission.org/standards_information/jcfaqdetails.aspx?StandardsFAQId=401&StandardsFAQChapterId=79

Resources: Physician Ratings Sites

- ▶ Healthgrades: <http://www.healthgrades.com/>
- ▶ RateMDs: <http://www.ratemds.com/>
- ▶ Vitals: <http://www.vitals.com>
- ▶ Angie's List: <http://www.angieslist.com>
- ▶ Yelp: <http://www.yelp.com>



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