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Treating and Tweeting: Examining Social Media Policies in the Health Care Practice

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This article examines recent developments related to employee use of social media in the health care practice setting and recommends practical tips and guidance for health care employers worried about effectively and legally policing employee "sharing."

An outbreak of social media activity has plagued the workplace in recent years, and health care employers have not been immune. Social media communications are seemingly contagious, as popular outlets such as Facebook, Twitter, Instagram, Snapchat, YouTube, Google+, and LinkedIn continue to add subscribers and users at a staggering rate. For the health care employer, federal and state privacy laws protecting patient health information—most notably the Health Insurance Portability and Accountability Act (HIPAA)—heighten the risks associated with employee "sharing" through social media communications. The practical tips and guidance below are prescribed as an "ounce of prevention" to assist in the implementation of an effective and legal social media policy for the health care workplace.

Any effort to implement a social media policy must strike a balance between these competing concerns: effectiveness and lawfulness. If a policy is too lenient (or non-existent), it can invite abuse and expose the employer to liability for employee violations of federal and state privacy laws, such as HIPAA. By comparison, a policy that is too strict can have a chilling effect on the workplace; it can lead employees to harbor feelings of mistrust or alienation towards the employer. Of course, employers also must remain mindful that the National Labor Relations Act (NLRA) has been interpreted as prohibiting the policing of certain social media communications. The practical and legal implications of both HIPAA and the NLRA on social media policies are examined below. However, it is equally important to understand that social media activity can implicate other penalties arising under state privacy laws, private causes of action for privacy violations, investigation by state medical boards and resulting penalties—monetary and non-monetary, and the suspension or termination of medical licensure, depending on the applicable laws of the employer's jurisdiction.

HIPAA

Employers that fit within the definition of "covered entities" or "business associates" under HIPAA, including most health care providers and their workforces, are prohibited from using or disclosing protected health information (PHI) without a written authorization from the individual to whom the information pertains, except in limited circumstances.[1] Under this standard, to use or disclose a patient's information without obtaining the patient's consent, the disclosed information must be for treatment, payment, or health care operations, or otherwise as permitted or required by the Privacy Rule.[2] An employer also has the ability to "de-identify" the information so that the information does not identify the patient and there is no reasonable basis to believe that the information can be used to identify the patient.[3] Even this exception is fraught with peril, however, as 18 different identifiers must be removed before patient information can be disclosed under this standard.[4] The better course of action for the employer is to avoid the disclosure of PHI altogether.

An employer can be liable for the conduct of an employee when the employee is acting within the scope of employment, which means that an employer can be liable for an unauthorized disclosure of a patient's PHI by an employee on a social networking site. Potential HIPAA violations can arise in a variety of ways. In one seemingly innocent example, a couple of enterprising nurses began using Facebook to provide unauthorized shift-change updates to their coworkers. In a more startling example, a paramedic posted details about a rape victim on his MySpace page in sufficient detail that the victim's identity (and the subsequent police investigation) were compromised.[5] Although no HIPAA penalties resulted from the disclosed information, the victim's resulting civil complaint alleged that the employer negligently hired, trained, and supervised the paramedic.[6]

The penalties involved in HIPAA disclosures can be substantial. An employer's failure to comply with HIPAA or the Privacy Rule can result in civil and criminal penalties.[7] HIPAA violations can result in monetary penalties in wide-ranging amounts, from $100 to $50,000 per violation (and up to $1.5 million within a single year).[8] State attorneys general now have the ability to bring civil actions on behalf of state residents,[9] and the U.S. Department of Health and Human Services (HHS) and its Office for Civil Rights (OCR) conducted a series of training courses, now publically available, to encourage these types of actions beginning in 2011.[10] The damages recoverable on behalf of state residents in such actions are $100 per violation up to $25,000 per calendar year.[11]

NLRA

Past AHLA articles have stressed that all health care employers, unionized and non-unionized, should endeavor to understand the NLRA's impact on the employer/employee relationship.[12] Section 7 of the NLRA guarantees employees:

> the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities . . . [13]

Section 8(a)(1) of the NLRA makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7."[14]

The National Labor Relations Board (NLRB) enforces the NLRA and has issued several reports "in response to requests from employers for guidance" and in an effort to "ensure consistent enforcement actions" in this developing area.[15] These three reports, issued on August 18, 2011, January 25, 2012, and May 30, 2012, respectively, explain a total of 35 cases. Of these, 19 involved employer policies pertaining to social media and led NLRB to offer the following two "main points" on its website:

1. 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; and
2. 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.[16]

In other words, NLRB continues to look for the types of "concerted activities" protected by Section 8(a)(1) of the NLRA to find unlawful conduct on the employer's part.

Recent cases illustrate this point well. In one example, NLRB determined that an employer's "Internet/Blogging" policy violated the NLRA because it discouraged online communications involving "confidential or proprietary information about the [employer], or . . . inappropriate discussions about the company, management, and/or co-workers." NLRB determined that the policy violated the NLRA because employees could reasonably interpret it as "proscribing any discussions about their terms and conditions of employment [that the employer] deemed 'inappropriate'" including, in that case, the employer's failure to withhold the proper amount of state income tax from their paychecks.[17]

In another case, NLRB determined that an employer's social media policy that threatened employees with discipline for, among other things, publicly sharing information "related to the company or any of its employees or customers" was unreasonably broad and vague under the NLRA. NLRB concluded that employees "could reasonably interpret this policy language as restraining them in their . . . right to communicate freely with fellow employees and others regarding work issues and for their mutual aid and protection."[18] A trend has developed from these cases and others, and employer efforts to strictly police social media communications are clearly unlawful in situations where broadly written policies can be interpreted as restraining employees' Section 7 rights.

Employers also are cautioned against wholesale reliance on a disclaimer or "savings clause" in their social media policies to save an otherwise unlawful policy. An example of such a disclaimer would state that the employer's social media policy should not be interpreted or applied so as to prohibit NLRA-protected concerted activity. Without an otherwise narrowly drawn social media policy, these types of disclaimers generally are ineffective.[19]

Recommendations

Against this background, the following three-part approach is recommended to facilitate the implementation of an effective and lawful social media policy:

Revise the Employee Handbook

The employee handbook must be revised to incorporate clearly written and well-defined social media policies and procedures that dictate how employees should protect patient information. No health care employer can safely assume that its employees understand how to protect patient information in the absence of such policies. An effective social media policy must emphasize the compliance responsibilities of the employer both within the workplace and after hours, whether using the employer's computer systems or using a network at home. Policies should emphasize professional behavior, in compliance with all other company policies involving electronic communications. Policies should not degrade the viability of social media communications or attempt to ban their use outright. It is important to stress that not all social media communications are forbidden. To the contrary, some authors have even commented that "[s]ocial media can be a highly effective mechanism that allows for the cultivation of professional connections; promotes timely communication with patients and family members; and educates and informs consumers and health care professionals."[20]

A social media policy should accomplish the following:

- Emphasize and recite standards regarding patient privacy and confidentiality;
- Emphasize and recite standards regarding employer confidentiality;
- Recommend privacy settings to safeguard personal information and social media content;
- Prohibit all social media communications regarding patients, even in very general terms;
- Prohibit social media communications regarding conditions, treatments, and research regarding patients, except in general terms;
- Prohibit, in narrow terms, any social media communications regarding confidential or proprietary information about the employer;
- Prohibit the combining of personal and professional social media accounts, activity, content, and communications (i.e., accepting patients as "friends");
- Prohibit the taking of photos or videos of patients with personal devices;
- Require the prompt reporting of any breach (or suspected breach) of privacy or confidentiality; and
- Include a "savings clause" that disclaims interference with any NLRA-protected activity.

In addition, a stand-alone acknowledgement (in addition to the employment handbook acknowledgment) is recommended following distribution of a social media policy. Employers should require employees to acknowledge receiving and reading the social media policy. The employee handbook remains the most effective measure against employee misuse of social media.

Engage in Employee Training

Many health care employers are familiar with "in-service" type training, and implementation of a social media policy should involve a similarly robust training program. Health care employee training should already include HIPAA, but employees can be quick to overlook the intersection of PHI and social media. Again, many disclosures result from seemingly innocent activities. Employees need to understand the importance of protecting patient information through specific examples; they need to understand that certain information related to the health care practice must stay within the walls of the practice. This likely will require more than the employer simply handing out and reviewing the social media policy with employees—practical guidance and exam-

ples are necessary to enable a fuller understanding of the consequences of an unauthorized disclosure. An employer can never assume that employees understand the substantial risks involved.

Actively Police Compliance

Finally, every health care employer must play an active role in policing employee compliance with its social media policy. It is not enough to implement a clearly written and well-defined social media policy if the employer does not actively enforce it. Employees should be reminded, among other things, not to post information about patients on any social media outlet; not to take pictures of patients, charts, or X-rays; and not to share confidential information. This is an ongoing responsibility of the employer. All employers should actively police compliance by looking for reasons to remind employees of their obligations and enforcing the social media policy when appropriate.

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1 45 C.F.R. § 164.502.
2 *Id.*
3 45 C.F.R. § 164.514.
4 *Id.*
5 *Jane Doe v. Simon P. Green*, Case No. 0704-04734, Circuit Court for the State of Oregon, Multnomah County.
6 *Id.*
7 42 U.S.C. § 1320d-5.
8 42 U.S.C. § 1320d-6.
9 42 U.S.C. § 1320d-5.
10 *HIPAA Enforcement Training for State Attorney General - United States Department of Health and Human Services*, Web. Oct. 24, 2014, *available at* www.hhshipaasagtraining.com.
11 42 U.S.C. § 1320d-5(d)(2).
12 Maria Greco Danaher, *Does Your Employee Handbook Violate the Law? Based on recent NLRB decisions, it's likely.* AHLA Connections at 10 (July 2014).
13 29 U.S.C. § 157.
14 29 U.S.C. § 158(a)(1).
15 NLRB.gov., *The NLRB and Social Media*. Web. Oct. 24, 2014, *available at* www.nlrb.gov/news-outreach/fact-sheets/nlrb-and-social-media.
16 *Id.*
17 Triple Play Sports Bar and Grille, Nos. 34-CA-012915, 34-CA-012926 (2014).
18 Durham School Servs., L.P., 360 N.L.R.B. 85 (2014).
19 Chester, Robert, *Giant Eagle, Inc.; Case No. 6-CA-37260*, National Labor Relations Board, June 22, 2011.
20 Spector, N., Kappel, D., *Guidelines for Using Electronic and Social Media: The Regulatory Perspective*, OJIN: The Online Journal of Issues in Nursing Vol. 17, No. 3, Manuscript 1 (Sept. 30, 2012).

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FLSA Collective Action Trends and Strategic Mitigation in the Health Care Workplace

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Introduction

During the last several years, there has been an explosion in health care workers suing their employers for purported violations of wage laws under the federal Fair Labor Standards Act of 1938 (FLSA)[1] and state and local wage laws. It is critical for health care employers to get out in front of these issues. Wage claims often start with a disgruntled employee who may have a legitimate complaint, for example, regarding unpaid overtime. If that concern is not resolved before a lawsuit is filed, it can quickly blossom into a substantial matter in the hands of a plaintiff's attorney. This article identifies issues involving the latest FLSA trends in the non-unionized health care workplace and provides strategic advice to mitigate against these costly claims, particularly collective actions under Section 216(b) of the FLSA and the corresponding state law actions under Federal Rule of Civil Procedure 23.

Off-the-Clock "Work": Remote Work, Emails, Texting, Calls, Pages, Mandatory Training, and Boot-Up Time

Virtually all industries currently face a glut of wage lawsuits regarding activities preliminary and postliminary to, or associated with, the workday, and health care is not immune. Under the FLSA, "principle activities" are integral and indispensable to the work the employee is employed to do and are considered "work."[2] The threshold issue is whether the activities, such as emailing and texting, are considered work under the FLSA, such that they are both integral and indispensable to the employee's principal activities.[3] "Work" is not defined under the FLSA. Rather, to determine whether an activity constitutes work, courts consider whether the activity is "controlled or required by the employer and pursued for the benefit of the employer."[4] Courts also examine whether the employer knew or had reason to know the work was being performed, and how the employer managed the work.[5] A similar yet detailed analysis is applied to determine the compensability of training time, for example, for competencies, certifications, or licenses.[6]

Health care employees have an ever-increasing ability and opportunity to perform work-related activities away from the workplace. Regulations are vague, and case law is constantly developing, making what constitutes work under the FLSA a moving target. And, pursuant to the FLSA's recordkeeping requirements, employers have the burden to accurately maintain timekeeping records for this work.[7] In light of this, employers must regularly evaluate how, when, and where their employees perform work, and ensure that payment for such work is compliant with wage laws.

For example, many non-exempt or hourly health care employees now have the ability to: (1) check their work email remotely (e.g., on their smart phones or home computers); (2) receive after-hours automatic text messages or calls from their employers regarding staffing requests or from co-workers regarding work; (3) complete mandatory trainings or competencies outside of working hours; or (4) even work remotely. And employees who work remotely generally have to boot up their computers to work. Similarly, as addressed below, many non-exempt employees may receive calls, texts, pages, or in-person interruptions to their meal breaks. In this brave new world, it is critical for employers to evaluate which of these tasks their employees are able to do remotely and ensure that, to the extent employees perform such work outside of normal working hours, the employees know how to be compensated for such time and use the exception procedures addressed below.

Timekeeping Systems: Autodeduct vs. Swiping and the Importance of Exception Procedures

Health care employers generally track non-exempt employees' meal-break time either with an "automatic deduction" (autodeduct) or a "swiping" timekeeping system. Under an autodeduct system, an employee's meal break, usually 30 minutes, is automatically deducted from that employee's timekeeping records for the day. Under a swiping system, employees are responsible for physically clocking out when they take their meal break, again, usually 30 minutes, and then clocking back in at the end of that break. Both systems are legal; however, the devil is in the details. Specifically, regardless of the timekeeping system utilized, the employer must offer an exception procedure (such as a log book); train employees and supervisors on this procedure; and compensate for all entries made pursuant to the exception procedure. Many health care employers utilize a log book system for employees to enter "exceptions" (e.g., a missed meal-break swipe or, under autodeduct, when an employee worked through a meal). It is critical that employers: (1) train employees regarding the existence and use of this log book upon hire; (2) reinforce its use for all employees; (3) do not discourage use; and (4) always compensate employees for all proper entries made in the book. Even better, employers may consider having employees sign acknowledgment forms upon hire that they understand and know where the log book is located and will use it, and regularly follow up with employees who do not use it.[8]

Meal Breaks: Preserving "Bona Fide" Meal Breaks

Increasingly, non-exempt health care employees complain that their meal breaks are so interrupted that the breaks are no longer "bona fide," such that they should be compensated for this time. This complaint serves as the basis of a significant number of wage collective/class actions being filed (regardless of whether under autodeduct or swiping). In an era when health care workers often carry employer-issued cell phones or pagers, or may choose not to leave their work stations for meal breaks, it is important for employers to understand what an uninterrupted meal break should look like. They also should encourage their employees to obtain these uninterrupted breaks, and implement an exception procedure for employees when they fail to receive their uninterrupted meal break.

Although federal law does not require an employer to provide meal breaks to employees, most employers provide meal breaks pursuant to applicable state laws. And, the FLSA requires any meal breaks provided to be "bona fide."[9] Specifically,

> [t]he employee must be completely relieved from duty for the purposes of eating regular meals. Ordinarily 30 minutes or more is long enough for a bona fide meal period. A shorter period may be long enough under special conditions. The employee is not relieved if he is required to perform any duties, whether active or inactive, while eating.[10]

The U.S. Department of Labor's (DOL's) Field Operations Handbook indicates that to determine whether an employee is completely relieved from duty, even if the meal period is less than 30 minutes, employers must conduct a case-by-case determination, evaluating factors including:

> (a) Work related-interruptions to the meal period are sporadic and minimal. (b) Employees have sufficient time to eat a regular meal. Periods less than 20 minutes should be given special scrutiny . . . (c) The period involved is not just a short break for snacks and/or coffee but rather is a break to eat a full meal, comes at a time of day or shift that meals are normally consumed, and occurs with no more frequency than is customary. (d) There is an agreement (*e.g.* CBA [collective bargaining agreement]) between the employees and employer that the period of less than 30 minutes is sufficient to eat a regular meal. (e) Applicable State or local laws do not require lunch periods in excess of the period indicated.[11]

Importantly, geographic restrictions alone, such as those restricting the employee to the medical campus during the employee's meal break, do not negate the bona fide meal period.[12] Under these circumstances, the authors recommend that the employees not take their meal breaks in their work areas, not carry work-issued pagers or cell phones during their meal breaks (or turn them off), not be subject to frequent interruptions, and have access to an exception procedure for compensation when the employee's meal break is interrupted.

Scrubs: Donning and Doffing vs. Uniform Maintenance Claims

Lawsuits addressing non-exempt health care employees' scrubs generally address one of two types of claims. On the one hand, employees may argue that they should be paid for the time it takes to change into and out of scrubs at their hospital. On the other end of the spectrum, employees have sued for uniform maintenance claims i.e., the time it takes employees to launder and maintain their scrubs outside of work.[13] There are many good arguments regarding why none of this time is compensable, be it that the time is *de minimis* or not even "work" under the FLSA or the Portal-to-Portal Act of 1947.[14] Given the existence of these suits, however, health care employers would be well advised to ensure their policies are clear on when and where scrub changing should occur, and the compensability of the same.

General Wage and Hour Litigation Trends: What We've Seen and What We Can Expect in 2015

The authors have observed the following wage and hour litigation trends in the past year and expect these to continue into 2015:

- *Automatic-deduction lawsuits, despite the significant case law indicating that automatic deduction systems are not per se illegal.* In *Corcione v. Methodist Hospital*, plaintiffs filed a collective action lawsuit on behalf of nurses and other health care employees, arguing that the hospital's automatic deduction practices are impermissible because employees are still required to remain "on duty" and are never completely relieved from duty.[15] In *Desilva v. North Shore-Long Island Jewish Health System, Inc.*, however, the court decertified and denied class action certification on these automatic deduction claims.[16]
- *Misclassification lawsuits.* In *Lukas v. Advocate Health Care Network and Subsidiaries*, plaintiffs made collective and class action misclassification allegations on behalf of home health clinicians, including registered nurses (RNs), occupational therapists, and physical therapists (PTs) paid on visit and hourly rates.[17]

- *Courts granting conditional certification of collective actions under the low standards required at this phase, which results in a court-ordered notice going to all members of the putative collective class.* In both *Coricone* and *Lukas*, addressed *supra*, the courts granted conditional certification and authorized notice to these employees.[18]
- *Courts decertifying collective actions, and/or denying certification to class actions, due to individualized employment settings, as well as individualized damages issues that predominate.* In *Cosentino v. Transcend Services*, the court decertified a collective class of 700 medical language specialists who work from home and were paid under a piece-rate system.[19] Similarly, in *Beckworth v. Senior Home Care, Inc.,* the court decertified a collective action on behalf of registered nurses and other home-health employees for unpaid overtime on grounds that putative class members' employment settings were too disparate to support a class in the case.[20] And, in *Desilva*, addressed *supra*, the court decertified an automatic deduction case due to the disparate factual setting of the employees and the individualized defenses available.[21]
- *Re-litigation of already-litigated claims*. In *Belle v. University of Pittsburgh Medical Center,* a meal-break case against a group of hospitals, plaintiffs attempted to re-plead nearly identical claims that the district court and Third Circuit in the *Davis v. Abington Memorial Hosp.* case already had dismissed.[22] The *Belle* district court found that where the same facts and legal issues are material to both actions, even if the claims differ somewhat, the motion to dismiss on the basis of issue preclusion was appropriate.[23]
- *Delayed enforcement of the home care worker wage regulation*. Due to the significant operational challenges faced by employers as a result of this regulation, DOL announced that it will delay enforcement actions regarding wage rules affecting home care workers under the domestic service employment regulations for the first six months of the policy's 12-month duration.[24]

Conclusion

The fast pace of most health care environments makes prophylactic change difficult. However, the consequence of failing to clearly address these wage issues can be collective/class actions that are cumbersome and expensive to defend, even when they have little merit. For the issues identified above, employers would be well advised to review and clarify their policies regarding work time and compensation to ensure that the policies clearly address the compensability of work-related activities, as well as the steps an employee must take to receive compensation for work performed outside of normal business hours and during meal breaks. Moreover, employers should take proactive steps to ensure supervisors are regularly trained on and regularly follow-up with their employees regarding these issues.

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1 Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201-219.
2 *See* 29 C.F.R. § 785.24.
3 *See, e.g., Alvarez v. IBP, Inc.*, 339 F.3d 894, 902-04 (9th Cir. 2003); *see also* 29 C.F.R. § 785.7 ("work" constitutes all hours employees are required to give to their employers, except those that are preliminary or postliminary).
4 *See, e.g., De Asencio v. Tyson Foods, Inc.,* 500 F.3d 361, 373 (3d Cir. 2007).
5 *See generally* 29 C.F.R. §§ 785.11-13.
6 *See* 29 C.F.R. §§ 785.27-32.
7 *See* 29 C.F.R. § 516.2.
8 *See, e.g., White v. Baptist Mem'l Health Care Corp.,* 699 F. 3d 869, 876 (6th Cir. 2012) (autodeduct system is lawful under the FLSA because the employer had no knowledge of meal-break work not noted in log books, and the employer did not discourage use of the log book).
9 29 C.F.R. § 785.19(a).
10 *Id.*
11 U.S. DOL Field Operations Handbook Ch. 31 § b(23) (rev. Dec. 15, 2000).
12 *See* 29 C.F.R. § 785.19(b) ("It is not necessary that an employee be permitted to leave the premises if he is otherwise completely freed from duties during the meal period.").
13 *See, e.g., Dinkel v. Medstar Health, Inc.*, No. 1:11-cv-00998 (D.D.C., filed May 26, 2011).
14 29 U.S.C. § 254.
15 Case No. 3:14-cv-00160, Doc. #1 (S.D. Tex. May 9, 2014).
16 2014 WL 2534833 (E.D.N.Y. June 5, 2014).
17 Case No. 1:14-cv-02740, Doc. #1 (N.D. Ill. Apr. 16, 2014).
18 Case No. 3:14-cv-00160, Doc. #1 (S.D. Tex. May 9, 2014); Case No. 1:14-cv-02740, Doc. #1 (N.D. Ill. Apr. 16, 2014).
19 Case No. 1:12-cv-03627, Doc. #284 (N.D. Ill. Sept. 25, 2014).
20 Case No. 3:12-cv-00351-MCR-EMT, Doc. #283 (N.D. Fla. Sept. 5, 2014).
21 2014 WL 2534833 (E.D.N.Y. June 5, 2014).
22 *Belle v. Univ. of Pitts. Med. Ctr.*, 2014 WL 4828899, at *2 (W.D. Pa. Sept. 29, 2014); *Davis v. Abington Mem'l Hosp.*, No. 12-03512 (3d Cir. Aug. 26, 2014).
23 *Belle*, 2014 WL 4828899, at *2-3.
24 U.S. DOL WHD Application of the Fair Labor Standards Act to Domestic Service, Announcement of Time-Limited Non-Enforcement Policy, 79 Fed. Reg. 60974 (Oct. 9, 2014).

Has Your Handbook Had a Checkup Recently? What Every Health Care Employer Needs to Know About the National Labor Relations Act

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If a health care organization's employee policies have not been reviewed in a while, there might be some surprises. The National Labor Relations Act (Act) does not just apply to unionized workforces; it applies to almost all workplaces, including most small businesses. The federal agency responsible for enforcing the Act, the National Labor Relations Board (NLRB), has made headlines lately by pursuing non-union employers. Here's a look at a few employer policy areas that NLRB has targeted recently.

At-Will Statements

Organizations might be surprised to know that NLRB has been scrutinizing at-will employment statements in handbooks and penalizing employers with some innocent-sounding policies. For example, when NLRB looked at the following at-will statement used by the American Red Cross: "*I agree that the at-will employment relationship cannot be amended, modified or altered in any way,*"[1] NLRB decided that the statement was too broad and could discourage an employee from engaging in protected activity—in this case, joining a union. A union would, typically, change the at-will status of an employee since terminations in union shops require "just cause," and thus are not "at-will." NLRB determined that the statement above could restrict Section 7 activity because the language does not consider that the at-will status could be changed if the employees choose to unionize. This determination applies, even if there is no hint of a union.

On the other hand, NLRB determined the following policy to be acceptable:

> The relationship between you and the company is referred to as "employment at will." This means that your employment can be terminated at any time for any reason, with or without notice, by you or the company. No manager, supervisor or employee of the company has authority to enter into any agreement contrary to the foregoing "employment at will" relationship.[2]

If an employer's policy looks more like the one from the Red Cross than the one above, now would be a good time to make some changes.

Communication Policies

Standard policies against releasing or discussing confidential information or working conditions also can become a problem for employers. Policies that prohibit employees from contacting outside organizations to discuss working conditions are a big red flag. This includes social media policies that advise employees that they cannot post work-related information online. One employer had a policy stating that employees could be disciplined if they were to electronically "defame any individual or damage any person's reputation or violate the policies outlined in the [Company's] Employee Agreement."[3]

While defamation and damaging reputations certainly sound like actions that should be avoided, NLRB found that this policy *could* discourage protected communication among workers, and therefore was illegal.

Here's another actual policy, ripped from the headlines/decision: "You agree that you will not publicly criticize, ridicule, disparage or defame the company or its products with or through any written or oral statement or images. . ."[4] The NLRB judge found even this policy too much to ask of employees and therefore unlawful.

On the other hand, protecting patient privacy is extremely important and a legal duty. Health care employers should ensure that their social media policies inform employees that if they share confidential or proprietary information, they do so at the risk of losing their job and possibly even ending up as defendants in a civil lawsuit. Here's a policy that passed muster with NLRB and employers may want to use:

> While your personal social medial use is generally not subject to any restriction by the Company, the Company urges all employees not to post information regarding the Company, their jobs, or other employees which could lead to morale issues in the workplace or detrimentally affect the Company's business. This can be accomplished by always thinking before you post, being civil to others and their opinions, and not posting personal information about others unless you have received their permission.[5]

Health care employers may want to see how their policy stacks up against these examples, particularly if it has been a while since they have looked at their policy. At the very least, they should ensure that their policy includes something like the following: "Nothing in this policy is intended to prevent any employee from engaging in any legal and protected activity."

Investigations

It has been standard practice to routinely ask employees who make internal complaints not to discuss the matter with co-workers while the employer investigates the complaint.

Health care employers may have the very same practice or policy in place. However, because federal law prevents employers from restricting discussions about the workplace, employers may wonder how NLRB might view this practice. As a matter of fact, NLRB looked at one employer's policy requiring confidentiality in all investigations and ruled that "this [employer's] generalized concern with protecting the integrity of its investigations is insufficient to outweigh employees' rights to engage in discussions about the workplace."[6]

So what is best practice for employers when conducting an investigation? For starters, they should not fall into the trap of automatically issuing blanket prohibitions on discussions between employees. Fortunately, NLRB stated that in some cases a prohibition on discussing the matters under investigation may be permissible, but not all the time in every case.[7] An employer's showing of a "legitimate business justification" for confidentiality will outweigh employees' rights to engage in protected concerted activity.

A legitimate business justification could include the following:

- Actual concerns about the destruction of evidence;
- Concerns that employees will coordinate their stories instead of telling the truth; and
- Ensuring that those involved need not worry that the information they share will be "leaked" when they complain about their supervisor.

To show that confidentiality is justified in a particular case, an employer should develop a standard investigation handout to provide to employees involved in the investigation. This handout should detail the reasons the employer is requiring confidentiality. As most have undoubtedly heard many times, documentation is the key.

Next Steps

Employers should take a look at their policies if anything in this article causes concern. And if it has been more than a couple of years since their policies were revised, employers should consider having an experienced employment attorney review their handbook. As we all know, prevention is always the best route.

**Mike Harrington, JD, MBA, provides strategic, practical counsel. With more than 20 years of experience, Mike focuses his practice on labor and employment issues affecting the workplace.*

1 American Red Cross Arizona, Case No. 28-CA-23443 (Feb. 1, 2012).
2 Landry's Inc., Case No. 32-CA-118213 (June 26, 2014).
3 Costco Wholesale Corporation and United Food and Commercial Workers Union, Local 371. 358 NLRB No. 106 (Sept. 7, 2012).
4 Quicken Loans, Inc., 359 NLRB No. 141 (June 21, 2013).
5 Landry's Inc. and its wholly owned subsidiary Bubba Gump Shrimp Co. Restaurants, Inc. 32-CA-118213; JD(SF)-31-14; Houston, TX. Administrative Law Judge Gerald A. Wacknov issued his decision on June 26, 2014.
6 Banner Health System, 358 NLRB No. 93 (July 30, 2012).
7 *Id.*

Call for Practice Group, Task Force, and Affinity Group Leaders and Volunteers

Have you volunteered for a Practice Group, Task Force, or Affinity Group project or activity in the past and want to share more of your time and expertise with your colleagues? Do you enjoy receiving all of the benefits that these groups provide including email alerts, executive summaries, member briefings, newsletters, web-based toolkits and tutorials, discounted webinar and in-person luncheon registrations, free roundtable discussions, and a whole lot more? Now is your chance to express interest in joining the leadership teams that make all of this possible. If you are not able to commit to a leadership position, we would welcome your involvement in any activities, projects, and events sponsored by these groups.

Practice Groups are composed of volunteer members who share a similar work setting or interest in specific areas of health law and who wish to increase their level of expertise in and knowledge of health law issues, grow professionally, gain valuable leadership experience, and network with health lawyers from across the country.

Task Forces are created to address health law topics that cross over the domains of several Practice Groups. They develop and produce collaborative, substantive resources for the benefit of the sponsoring Practice Groups' members.

Affinity Groups are sub-groups of Practice Groups and are created to facilitate networking and provide unique educational opportunities for members who share similar professional interests in a specific area of health law.

Leadership Application

If you would like to nominate yourself or another member for the position of chair or vice chair of a Practice Group, Task Force, or Affinity Group for program year 2015-2016 (one-year appointments are effective June 27, 2015), please complete the online leadership application in full by **Monday, January 12, 2015**. If you are selected to serve in a leadership position, you will be notified by mid-April 2015.

Volunteer Form

If you are interested in volunteering for any Practice Group, Task Force, or Affinity Group-related activities, please complete the online volunteer form. Your submission will be shared with the specific Practice Group, Task Force, and/or Affinity Group leadership(s).

Please visit the Practice Groups section of our website to learn more about the 16 Practice Groups, four Task Forces, and 24 Affinity Groups and their activities.

Please contact Senior Manager of Practice Groups Magda Wencel at (202) 833-0769 or mwencel@healthlawyers.org with any questions.

AHLA Practice Groups

Upcoming Webinars

ACOs and Clinically Integrated Networks: What You Need to Know about Their Impact on Hospital Tax-Exempt Bonds
December 2, 2014 2:00 PM-3:30 PM Eastern

P4P Arrangements: Understanding Structures and What to Look for in a FMV Opinion
December 3, 2014 2:00 PM-3:30 PM Eastern

Medicare Chronic Care Management: Billing, Compliance, and Implementation Issues
December 9, 2014 2:00 PM-3:30 PM Eastern

Litigating a False Claims Act—Tips and Tactics from the Trenches

Part IV: Dispositive Motions and Preparing for Trial—Pretrial Motions and Jury Issues
December 10, 2014 12:00 PM-1:30 PM Eastern

Strategic Considerations for Academic Medical Centers in Developing Regional Health Networks
December 11, 2014 1:00 PM-2:30 PM Eastern

Shifting Paradigms: Medical Ethics, Public Health Ethics, and the Law

Part III: Ethics and the Law: Mapping the Patient Safety Terrain
December 16, 2014 2:00 PM-3:30 PM Eastern

The Heat is On: Developments in Nonprofit Executive Compensation
December 19, 2014 2:00 PM-3:30 PM Eastern

See more at: www.healthlawyers.org/Pages/webinars.aspx

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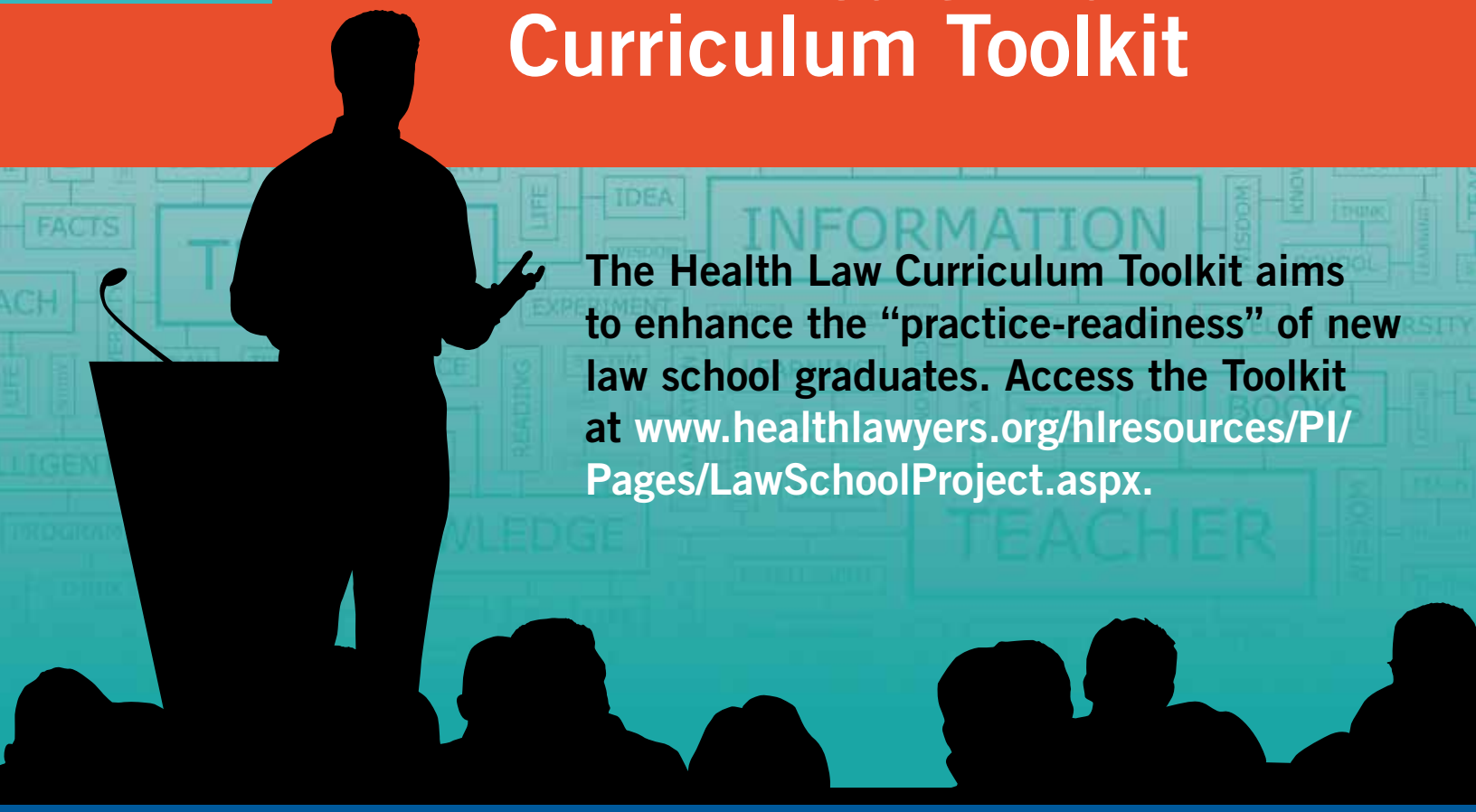
AHLA Health Law Curriculum Toolkit



The Health Law Curriculum Toolkit aims to enhance the "practice-readiness" of new law school graduates. Access the Toolkit at www.healthlawyers.org/hlresources/PI/Pages/LawSchoolProject.aspx.

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