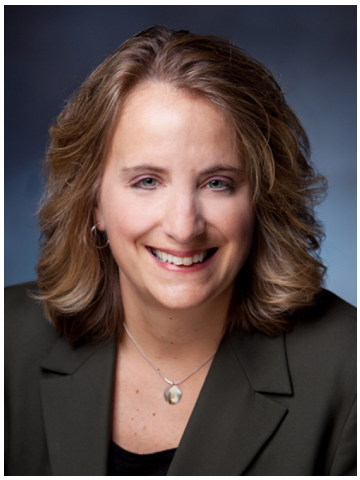
Oregon Healthcare News

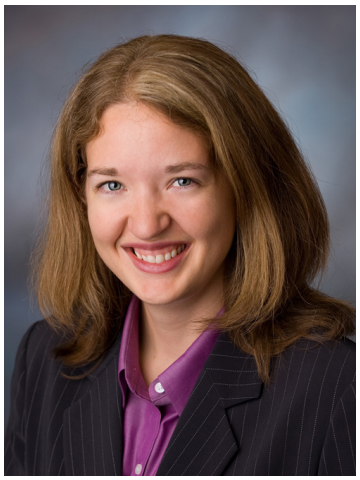
orhcnews.com | Articles, Interviews and Statistics for the Healthcare Executive

Social Media in the Medical Workplace

By Barbara A. Bloom
Shareholder
Bullard Law



By Emily Q. Shults
Associate
Bullard Law



Accordingly to a report by the LA Times[1], last year a patient arrived at the emergency room at St. Mary Medical Center in Los Angeles with gruesome wounds. Much to the later chagrin of the hospital, instead of focusing their efforts on treating him, nurses and other hospital staff took photos of the dying man with camera equipped phones and circulated these photos via Facebook and text messages.

Social media, generally defined as the variety of internet-based technology tools that enable people to communicate, creates concerns for all employers and special concerns for hospitals, which by design, regularly handle confidential medical information. The speed and ease with which employee and patient information can be shared renders it imperative that hospitals address social media concerns and expectations with their employees.

Simultaneously, hospital employers are faced with their employees' legal expectations of privacy, right to engage in protected concerted activity pursuant to labor laws, freedom of speech rights if the hospital is a public hospital district, and a growing body of case law that imports these legal protections into the social media arena. Because of the challenge of balancing these competing interests, the following considerations are important for hospital employers when developing and implementing a social media policy:

1. **<u>Update, Educate and Inform.</u>** Employers should notify employees in a written policy of their expectations regarding business related and personal use of social media as it relates to the workplace and patient confidentiality. Such a policy should specify the extent to which the employer may monitor employees' use of social media. Employers also should notify employees that violations of the social media policy may result in discipline up to and including discharge to the extent permitted by applicable law. The policy should be reviewed, revised as necessary, and regularly disseminated to employees to insure they are aware of employer expectations.

2. **<u>HIPAA and ADA Confidentiality Requirements.</u>** Health care employers should remind employees that references on social media that could identify a patient may constitute a Health Insurance Portability and Accountability Act (HIPAA) Privacy Rule violation as well as a breach of obligations of confidentiality. In addition, the Americans with

Disabilities Act (ADA) requires employers to keep medical information related to its employees confidential. Employees should be warned not to share any such confidential information on social networking sites.

3. **National Labor Relations Act Implications.** Private sector employers subject to the National Labor Relations Act (NLRA) should remember that union-represented and non-union employees are protected by the NLRA to engage in "protected concerted activity" for the purpose of collective bargaining or for their "mutual aid and protection." Generally, this means that employees have the right under the NLRA to discuss their wages, hours and working conditions with each other on or off duty, including through the use of social media, and employers should be cautious disciplining employees for such activity. It is important to note in a social media policy, and remember when enforcing that policy, that it is not intended to infringe on any rights employees may have under applicable employment and/or labor laws.

4. **Workplace Harassment/Violence Claims Can Arise On or Off Duty.** Employees engaging in inappropriate conduct through social media toward others in the same workplace (including co-workers, patients, visitors, vendors, etc.) should be investigated by the Employer in the same way as any other potential harassment or violent situation, regardless of whether the action took place on or off duty, if the conduct effects the employment setting or the ability of individuals to work together. Supervisors also should be trained to report any potential workplace harassment/violence issue that they become aware of as soon as possible, including those learned from an employee's social media use.

5. **Whistleblower Laws May Protect Employee Comments.** Statements made by employees on social networking sites may be protected by state and/or whistleblower laws. Oregon's Private Sector Whistleblower Law (ORS 659.199) protects private sector employees from adverse employment action because the employee has in good faith reported information that the employee believes is evidence of a violation of federal or state law. Oregon's Public Sector Whistleblower Law (ORS 659A.200-224) contains the same protection for public sector employees, as well as reporting information that the employee reasonably believes is evidence of mismanagement, gross waste of funds or abuse of authority.

6. **Using False Means to Gain Access to Employee Information.** Employers should not use false means to gain access to an employee's social media profile or group set to private, nor should an employer require another employee to give them access to their co-workers' restricted social network information. Doing so could subject an employer to a statutory claim under applicable privacy laws, including the Stored Communications Act and/or Electronic Communications Privacy Act, as well as common law claims like invasion of privacy.

7. **Comply with Potential Duty To Bargain Requirements.** In unionized workplaces, an

employer should take steps to comply with any potential duty to bargain requirements that may be applicable when considering the adoption of a social media use policy and/or changing its past practices in regard to monitoring employees' social networking sites and other related technology use.

8. **Using Information Protected by Anti-Discrimination Laws.** Employers using social media to screen applicants or in connection with a workplace investigation should take care regarding the use of protected status information that may be learned through such a search (i.e., age, religion, sexual orientation, etc.). Employers should consider processes to keep any information reflecting a protected status away from the hiring decision maker, to avoid even the appearance that protected status information learned through social media was a factor in the hiring decision.

A well crafted social media policy that is implemented effectively will increase privacy protections for patients and employees, and it will form a sound basis for disciplining employees for inappropriate and unprofessional use of social media.

[1]Available at http://articles.latimes.com/2010/aug/08/local/la-me-facebook-20100809

This article should not be considered legal advice appplicable to specific situations.

Barbara Bloom, a shareholder at the firm, practices exclusively in the area of management labor and employment law. Barb's primary areas of practice include collective bargaining, conducting workplace training seminars, labor agreement administration, labor arbitrations, review of personnel policies and practices, and managing discipline and discharge issues. Barb's recent workplace training seminars and webinars for healthcare organizations include "Managing Workforce Performance," "Promoting Appropriate Workplace Conduct," and "Supervisor's Guide to Discipline and Discharge." She can be reached at bbloom@bullardlaw.com.

Emily Shults is an associate with the firm and a former judicial clerk for The Honorable Richard Allen Griffin of the Sixth Circuit Court of Appeals and The Honorable Joseph H. McKinley, Jr. of the Western District of Kentucky. Emily has substantial writing experience in a range of federal and state labor and employment issues, including benefit administration and compliance, class-action litigation, employment legislation, anti-discrimination and wage and hour compliance, and federal administrative agencies, on both the trial and appellate levels. She can be reached at eshults@bullardlaw.com.

Reprinted with permission from the Oregon Healthcare News. To learn more about the Oregon Healthcare News visit orhcnews.com.