

**Can We? Must We? Should We?:
What Employers Need to Know
About COVID-19 Policies and About
the National Labor Relations Act**

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COVID-19 Policies

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Federal Authority affecting COVID-19 policies

- EEOC
- Executive Order 14042 (100+ employees)
- Executive Order 14043 (government contractors)
- OSHA guidance
- CDC guidance

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Vaccine Mandates?

- Employers can mandate vaccinations
- Employers do not have to mandate vaccinations unless required to do so by Executive Orders 14042 or 14043

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EEOC Exemptions from mandate

- Apply to Executive Order and voluntary mandates
- Americans with Disabilities Act (ADA)
- Title VII of Civil Rights Act of 1964 (Title VII)
- Apply to employers with 15 or more employees

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ADA

- Requires employers to reasonably accommodate employees with disabilities to allow them to perform essential functions of their jobs
- Not a reasonable accommodation if creates undue hardship or creates a direct threat to employee or co-workers
- Involves individualized (case by case) interactive discussion of options

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ADA (cont'd)

- Disabilities include anything that interferes with basic life functions
- Typical COVID-19 related disabilities include weakened immune system; adverse reactions/allergic reactions to vaccines; mental distress issues.

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Title VII

- Prohibits discrimination against employees based on their sincerely held religious beliefs
- Requires employers to reasonably accommodate employees' sincerely held religious beliefs
- Not a reasonable accommodation if creates an undue hardship – in practice, standard not as stringent as for a disability, but has to more than *de minimus*

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Title VII (cont'd)

- Although a sincerely held religious belief can be non-traditional, the EEOC is clear that social, political, or economic philosophies, or personal preferences, are not "religious" beliefs under Title VII.

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Employer inquiries

- ADA – can provide description of essential functions of job and request documentation from medical provider whether employee is medically able perform essential functions of job, with or without reasonable accommodation

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Employer inquiries (cont'd)

- Title VII – Although there is a presumption that a request for a religious accommodation is sincerely held, an employer can inquire concerning or require some substantiation of the nature of the religious belief when not readily apparent

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Possible Accommodations

- Remote work
- Physical isolation
- Testing/masking

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Executive Order 14042 (100+ Employees)

- Detailed requirements set out in OSHA COVID-19 Vaccination and Testing Emergency Temporary Standard (ETS)
- <https://www.osha.gov/coronavirus/ets2>
- Suits challenging enforceability consolidated in Sixth Circuit Court of Appeals

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OSHA ETS guidance

- Applies to employers with 100+ employees (NOT government contractors)
- Proposal, so changes possible
- Mandates vaccination or weekly COVID-19 testing and a face-mask requirement for those electing to test (or exempted) instead of vaccination

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OSHA ETS guidance (cont'd)

- Deadline for vaccination extended to January 4, 2022
- Requires employers pay for up to 4 hours for each vaccination during working hours and reasonable time (2 hours presumed reasonable) and paid sick leave to recover from any side effects
- Employers are not required to pay for the costs of testing for non-vaccinated employees (issue as to pay for testing time as hours worked)

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Executive Order 14043 (federal contractors) (ETS)

- Mandates vaccination (no provision for testing and masking unless required as accommodation)
- Deadline for vaccination extended to January 4, 2022

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Executive Order 14043 (federal contractors) (ETS) (cont'd)

- No provision requiring pay for time spent in obtaining vaccination (but standard wage & hour law would apply requiring pay since required for employment)
- Detailed guidance at Safer Federal Workforce Task Force COVID-19 Workplace Safety: Guidance for Federal Contractors and Subcontractors
<https://www.saferfederalworkforce.gov/contractors>

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CDC Guidance

- Employees who are NOT fully vaccinated and come into close contact with someone with COVID-19 should get tested immediately. If their test result is negative, they should get tested again 5–7 days after their last exposure or immediately if symptoms develop.

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CDC Guidance (cont'd)

- Employees who have NOT been vaccinated and who have been in close contact with someone who has COVID-19 must quarantine for a period of at least 10 days without symptoms or at least 7 days after receiving a negative laboratory test result (the test must occur on day 5 after exposure or later).

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CDC Guidance (cont'd)

- Employees who HAVE been fully vaccinated do NOT need to quarantine after close contact with someone who had COVID-19 unless the employees have or develop symptoms. However, fully vaccinated employees should get tested 5-7 days after their exposure, even if they don't have symptoms.

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CDC Guidance (cont'd)

- Fully vaccinated employees who develop symptoms must quarantine for a period of at least 10 days without symptoms or at least 7 days after receiving a negative laboratory test result.

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National Labor Relations Act (NLRA)

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National Labor Relations Act (NLRA)

- Section 7, 29 U.S.C. §157
- Employees shall have the right to . . . engage in other **concerted activities** for the purpose of . . . **other mutual aid or protection** . . .

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Administered by National Labor Relations Board

- We are in Region 10, subregion office in Winston-Salem
- Applies to all private employers engaged in commerce, regardless of number of employees
- Not restricted to employers with unions or union campaigns
- Protects employees who are engaged in job related concerted activities

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Concerted Activities

- Typically, 2 or more employees acting together to improve wages or working conditions
- Action of a single employee can be concerted if the employee involves other employees or if employee acts on behalf of other employees

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Violation of Section 7 is an unfair labor practice

- NLRB can
 - Investigate
 - Prosecute violations
 - Obtain injunctive relief
 - Recover damages

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NLRB enforcement position on social media

- Overly restrictive social media policies are an unfair labor practice
- Policies are overly restrictive if
 - Policy *could be construed* to restrict employees from discussing wages or working conditions
 - With either
 - other employees, or
 - third parties

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Examples of policies the General Counsel considers to be unlawful

- An instruction that an employee is not to “release guest, team member or company information”
- Since this could be reasonably interpreted as prohibiting employees from discussing and disclosing information regarding their own conditions of employment, as well as the conditions of employment of employees other than themselves.

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Examples of policies the General Counsel considers to be unlawful *continued...*

- A prohibition instructing employees not to share company information with co-workers unless the co-workers need the information to do their jobs, and not to have discussions regarding company information in the break room, at home, or in open areas and in public places.
- Since such a restriction could be construed as prohibiting discussing information regarding the terms and conditions of employment.

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Examples of policies the General Counsel considers to be unlawful *continued...*

- Provisions threatening discharge or criminal prosecution for failing to report unauthorized access to or misuse of confidential information, without defining and restricting the “confidential information” covered by the provision.
- Since the prohibition could apply to discussions of wages and working conditions.

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Examples of policies the General Counsel considers to be unlawful *continued*...

- An instruction not to “reveal non-public company information on any public site”, defining non-public information as “any topic related to the financial performance of the company, information that has not already been disclosed by authorized persons in a public forum, and personal information about another employee, such as performance, compensation, or status with the company.”
- For the reason that as worded, employees could construe the policy as precluding them from discussing terms and conditions of employment among themselves or with non-employees.

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Examples of policies the General Counsel considers to be unlawful *continued*...

- A provision cautioning employees that when in doubt as to whether a given post falls into one of the prohibited categories, the employee was not to post, but rather was to check with the employer to see if it is a good idea.
- For the reason that a rule that requires employees to secure permission from the employer as a precondition to engaging in concerted activities violates the NLRA.

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Examples of policies the General Counsel considers to be unlawful *continued...*

- A provision prohibiting employees from posting photos, videos, and quotes and personal information of others without obtaining their permission and prohibiting employees from using employer's logos and trademarks.
- For the reason that such provision could be construed as prohibiting use of photos and videos of employee demonstrations and picket signs containing the employer's logo.

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Examples of policies the General Counsel considers to be unlawful *continued...*

- An instruction that "offensive, demeaning, abusive or inappropriate remarks are as out of place online as they are offline"
- For the reason that this language is broad enough to preclude protected criticism of the employer's labor policies or treatment of employees.

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Examples of policies the General Counsel considers to be unlawful *continued...*

- A provision instructing employees to “think carefully about ‘friending’ co-workers”
- Because it would discourage communications among co-workers.

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Examples of policies the General Counsel considers to be unlawful *continued...*

- A rule prohibiting disclosure of personal information about the employer’s employees and contingent workers
- Because, in absence of clarification, employees would reasonably construe the rule to include information about employee wages and their working conditions.

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Examples of policies the General Counsel considers to be unlawful *continued...*

- A warning not to “pick fights” and to avoid topics that might be considered objectionable or inflammatory, such as politics or religion and reminding employees to communicate in a “professional tone”
- Since such restriction could be construed to prohibit robust but protected discussions about working conditions.

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Examples of policies the General Counsel considers to be unlawful *continued...*

- A provision encouraging employees to resolve concerns by speaking directly with co-workers, supervisors and other management-level personnel, rather than by posting complaints on the Internet
- For the reason that the probable effect would be to preclude or inhibit employees from the protected activity of seeking redress through alternative forums.

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Examples of policies the General Counsel considers to be unlawful *continued...*

- A provision prohibiting employees from expressing their personal opinions to the public regarding “the workplace, work satisfaction or dissatisfaction, wages, hours or work conditions”
- Because it precludes employees from discussing and sharing terms and conditions of employment with non-employees.

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Examples of policies the General Counsel considers to be unlawful *continued...*

- A prohibition on making “disparaging or defamatory” comments
- Because employees could reasonably construe that prohibition to apply to protected criticism of the employer’s labor policies or treatment of employees

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Examples of policies the General Counsel considers to be unlawful *continued*...

- A provision precluding employees from contact with the media without prior employer involvement
- Because employees have a protected right to seek help from third parties regarding their working conditions, including going to the press, blogging, or speaking at a rally or talking to government agencies

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“Disclaimer” language in the policy does not cure

- Ex: Statement that policy would be administered consistently with applicable laws and regulations, including Section 7 of NLRB

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Policies must be drawn narrowly

- Sufficiently narrowly so that a reasonable reading would not restrict employee's rights to participate in concerted activities

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Examples of provisions that are not unlawful

- A provision prohibiting employees from discussing safety performance of the employer's product (as contrasted with safety of the workplace).

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Examples of provisions that are not unlawful

- A provision prohibiting health care employees from disclosing HIPPA protected personal information except to authorized recipients.

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Examples of provisions that are not unlawful

- A provision cautioning employees to respect copyright and other intellectual property laws.

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Examples of provisions that are not unlawful

- A prohibition on online harassment and bullying (“harassment, bullying, discrimination or retaliation that would not be permissible in the workplace is not permissible between co-workers online, even if it is done after hours, from home and on home computers”).

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Examples of provisions that are not unlawful

- A provision prohibiting postings on the Internet in the name of the employer or in a manner that could reasonably be attributed to the employer without prior written authorization from the president or the president’s designated agent.

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Examples of provisions that are not unlawful

- A provision prohibiting representation of any opinion or statement as the policy or view of the employer or of any individual in their capacity as an employee or otherwise on behalf of employer.

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Examples of provisions that are not unlawful

- A provision requiring that employees expressly state that their postings are “my own and do not represent employer’s positions, strategies or opinions.”

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Examples of provisions that are not unlawful

- A provision requiring employees to maintain the confidentiality of the employer's trade secrets and private and confidential information, where the employer provided examples of prohibited disclosures "information regarding the development of systems, processes, products, know-how, technology, internal reports, procedures, and other internal business-related communications" so that the employees would understand that the prohibition does not reach protected communications about working conditions.

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- Sample policy that has been approved by NLRB General Counsel is included in your materials

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Take away for employers

- Draft Social Media policies narrowly, so that the policies could not be reasonably construed to prohibit protected activities such as discussions on wages and working conditions
- Use examples to clarify, and
- Avoid taking adverse personnel action against employees who either raise issues that
 - affect more than one employee, or
 - advocate on behalf of other employees concerning working conditions.

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**OFFICE OF THE GENERAL COUNSEL
Division of Operations-Management**

MEMORANDUM OM 12-59

May 30, 2012

TO: All Regional Directors, Officers-in-Charge
and Resident Officers

FROM: Anne Purcell, Associate General Counsel

SUBJECT: Report of the Acting General Counsel
Concerning Social Media Cases

Attached is an updated report from the Acting General Counsel concerning recent social media cases.

/s/
A. P.

Attachment

cc: NLRBU
Release to the Public

MEMORANDUM OM 12-59

Social Media Policy

Updated: May 4, 2012

At [Employer], we understand that social media can be a fun and rewarding way to share your life and opinions with family, friends and co-workers around the world. However, use of social media also presents certain risks and carries with it certain responsibilities. To assist you in making responsible decisions about your use of social media, we have established these guidelines for appropriate use of social media.

This policy applies to all associates who work for [Employer], or one of its subsidiary companies in the United States ([Employer]).

Managers and supervisors should use the supplemental Social Media Management Guidelines for additional guidance in administering the policy.

GUIDELINES

In the rapidly expanding world of electronic communication, *social media* can mean many things. *Social media* includes all means of communicating or posting information or content of any sort on the Internet, including to your own or someone else's web log or blog, journal or diary, personal web site, social networking or affinity web site, web bulletin board or a chat room, whether or not associated or affiliated with [Employer], as well as any other form of electronic communication.

The same principles and guidelines found in [Employer] policies and three basic beliefs apply to your activities online. Ultimately, you are solely responsible for what you post online. Before creating online content, consider some of the risks and rewards that are involved. Keep in mind that any of your conduct that adversely affects your job performance, the performance of fellow associates or otherwise adversely affects members, customers, suppliers, people who work on behalf of [Employer] or [Employer's] legitimate business interests may result in disciplinary action up to and including termination.

Know and follow the rules

Carefully read these guidelines, the [Employer] Statement of Ethics Policy, the [Employer] Information Policy and the Discrimination & Harassment Prevention Policy, and ensure your postings are consistent with these policies. Inappropriate postings that may include discriminatory remarks, harassment, and threats of violence or similar inappropriate or unlawful conduct will not be tolerated and may subject you to disciplinary action up to and including termination.

Be respectful

Always be fair and courteous to fellow associates, customers, members, suppliers or people who work on behalf of [Employer]. Also, keep in mind that you are more likely to resolve work-related complaints by speaking directly with your co-workers or by utilizing our Open Door Policy than by posting complaints to a social media outlet. Nevertheless, if you decide to post complaints or criticism, avoid using statements, photographs, video or audio that reasonably

could be viewed as malicious, obscene, threatening or intimidating, that disparage customers, members, associates or suppliers, or that might constitute harassment or bullying. Examples of such conduct might include offensive posts meant to intentionally harm someone's reputation or posts that could contribute to a hostile work environment on the basis of race, sex, disability, religion or any other status protected by law or company policy.

Be honest and accurate

Make sure you are always honest and accurate when posting information or news, and if you make a mistake, correct it quickly. Be open about any previous posts you have altered. Remember that the Internet archives almost everything; therefore, even deleted postings can be searched. Never post any information or rumors that you know to be false about [Employer], fellow associates, members, customers, suppliers, people working on behalf of [Employer] or competitors.

Post only appropriate and respectful content

- Maintain the confidentiality of [Employer] trade secrets and private or confidential information. Trade secrets may include information regarding the development of systems, processes, products, know-how and technology. Do not post internal reports, policies, procedures or other internal business-related confidential communications.
- Respect financial disclosure laws. It is illegal to communicate or give a "tip" on inside information to others so that they may buy or sell stocks or securities. Such online conduct may also violate the Insider Trading Policy.
- Do not create a link from your blog, website or other social networking site to a [Employer] website without identifying yourself as a [Employer] associate.
- Express only your personal opinions. Never represent yourself as a spokesperson for [Employer]. If [Employer] is a subject of the content you are creating, be clear and open about the fact that you are an associate and make it clear that your views do not represent those of [Employer], fellow associates, members, customers, suppliers or people working on behalf of [Employer]. If you do publish a blog or post online related to the work you do or subjects associated with [Employer], make it clear that you are not speaking on behalf of [Employer]. It is best to include a disclaimer such as "The postings on this site are my own and do not necessarily reflect the views of [Employer]."

Using social media at work

Refrain from using social media while on work time or on equipment we provide, unless it is work-related as authorized by your manager or consistent with the Company Equipment Policy. Do not use [Employer] email addresses to register on social networks, blogs or other online tools utilized for personal use.

Retaliation is prohibited

[Employer] prohibits taking negative action against any associate for reporting a possible deviation from this policy or for cooperating in an investigation. Any associate who retaliates against another associate for reporting a possible deviation from this policy or for cooperating in an investigation will be subject to disciplinary action, up to and including termination.

Media contacts

Associates should not speak to the media on [Employer's] behalf without contacting the Corporate Affairs Department. All media inquiries should be directed to them.

For more information

If you have questions or need further guidance, please contact your HR representative.