



NATIONAL  
AUTOMOBILE  
DEALERS  
ASSOCIATION

# Proceed With Caution: Social Media in Hiring and Firing



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### **Upon completion of this workshop, you will be able to:**

- ✓ Interpret the laws that impact you're your dealerships' use of Social Media related to job applicants and employees
- ✓ Identify many common dealership policies and practices that may appear harmless, but are actually illegal.
- ✓ Recognize when you can discipline or terminate an employee for a social media post, and when you need back off and possibly involve legal counsel.
- ✓ Develop handbook policies that address your use of social media, and keep you on the right side of the law.

### **Social Media – Continued Growth in Popularity**

- 72% of online adults use Facebook – 1.55 Billion Monthly Active Users.
- 25% of Facebook users log in to their account more than 5 times each day.
- 65% of Adults use Social Media Networking Sites.
- Some Colleges and Universities are no longer issuing email addresses to incoming freshman.
- 59% of Twitter users are over 35.
- 25% of Facebook's users are 55+ years old.

# Social Media Mishaps!

People are doing lots of stupid things on Social Media and posting them out for the world to see! In return, their employers are gaining a lot of negative attention.

Do you want these individuals working at your dealership and ***damaging your reputation?***

1. McDonalds Employee lures a homeless man in with the promise of a free burger, and then ends up throwing water in his face instead. The incident was recorded and uploaded to YouTube. It quickly went viral.








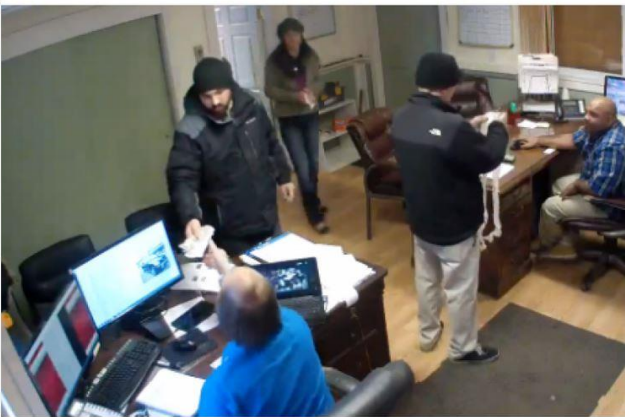
2. Dealership employees in Westport, MA harassed a pizza delivery guy because of a disagreement over a \$7.00 tip. The incident was caught on a security camera and video uploaded to YouTube. It quickly went viral.

### Internet Revolts Against Local Car Dealership that Harassed Pizza Delivery Guy Over Tip

*F&R Auto Sales in Westport, Mass. was flooded with negative reviews after a video showed workers berating the man over a \$7 tip.*

By JASON CLAFFEY (Patch Staff)  
© January 16, 2015

Share      301 Comments



*Warning: video contains graphic language and gestures*

3. Six months after the tragic events in Boston, an office worker in Michigan dressed up as a Boston Marathon Bombing victim for an office Halloween Party. She posted the pictures to Twitter. The pictures quickly went viral.



**Alicia Ann Lynch**  
@SomeSKANKinMI

I have been fired from my job. I am paying for what I thought was a simple joke. I know it was wrong now. I wasn't thinking.

11:54 PM - 1 Nov 13

Reply Retweet Favorite

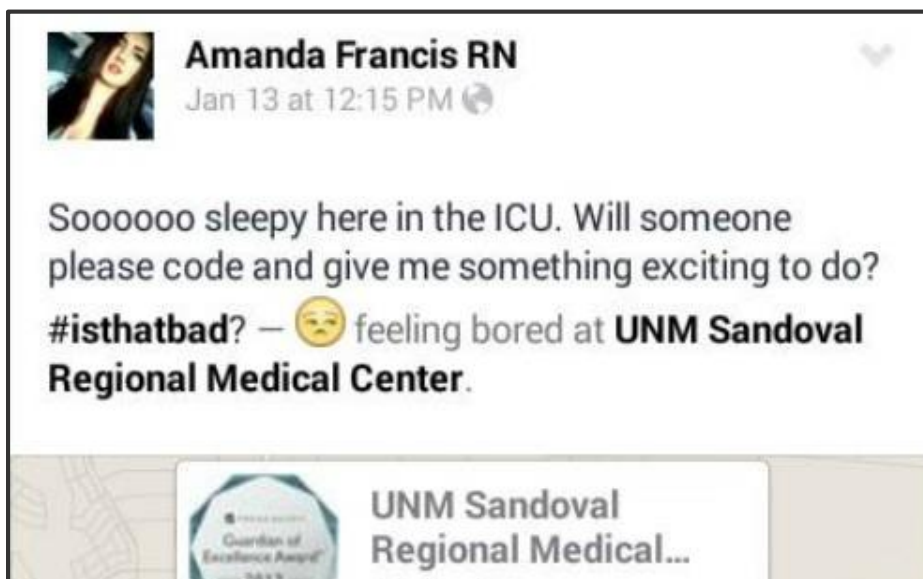
**Alicia Ann Lynch**  
@SomeSKANKinMI

I'm sorry.

12:04 AM - 2 Nov 13

Reply Retweet Favorite

4. A nurse at UNM Sandoval posted this on Facebook, and tagged the hospital in the post, while on shift. This post went viral.



5. School bus driver in Ohio posted a selfie, with a beer to her mouth, behind the wheel of a bus. This post quickly went viral.



## 2015 CareerBuilder Social Recruitment Survey

*“Researching candidates via social media and other online sources has transformed from an emerging trend to a staple of online recruitment”*

The % of employers using social networking sites to research job candidates is on the rise:

- 2015 – 52%
- 2014 – 43%
- 2013 – 39%

35% percent of employers who screen via social networks have requested to “be a friend” or follow candidates that have private accounts. Of that group, 80% say they’ve been granted permission.

48% of hiring managers who screen candidates via social networks said they’ve found information that caused them not to hire a candidate.

### **The most common reasons:**

- Provocative or inappropriate photographs – 46%

- Information about candidate drinking or using drugs – 40%
- Candidate bad-mouthed previous company or fellow employee – 34%
- Poor communication skills – 30%
- Discriminatory comments related to race, religion, gender, etc. – 29%

**38% found information that made them more likely hire a candidate, including:**

- Candidate's background information supported job qualifications – 42%
- Candidate's personality came across as good fit with company culture – 38%
- Candidate's site conveyed a professional image – 38%
- Candidate had great communication skills – 37%
- Candidate was creative – 36%

**A separate survey found that some savvy job seekers are using social media to their own benefit.**

- Job applicants check out hiring managers on social media – 15%

**Legalities of Social Media in Hiring:**

**Laws to consider:**

- Title VII of the Civil Rights Act
- The Age Discrimination in Employment Act
- The Genetic Information Nondiscrimination Act
- Uniform Guidelines on Employee Selection Procedures
- Immigration Reform and Control Act
- Pregnancy Discrimination Act
- Family Medical Leave Act
- Americans with Disabilities Act
- Americans with Disabilities Act Amendment's Act
- Uniformed Services Employment and Reemployment Rights Act
- Equal Pay Act
- Rehabilitation Act

## **Federal Law Prohibits Discrimination based on:**

- Age (40 or older)
- Race / color
- Disability
- Religion
- Sex (Including Pregnancy)
- Sexual Orientation
- National Origin
- Military Status
- Arrest / Conviction Record
- Genetic Information
- Retaliation

## **Discrimination is prohibited in all aspects of the employment relationship including:**

- Recruiting
- Interviewing
- Hiring
- Promotion
- Demotion
- Job transfer
- Compensation
- Training
- Discipline
- Benefit Administration
- Termination/Dismissal

## **What are your options when it comes to Applicant Social Media Searches?**

### **1. Don't do the search at all**

- Ensure your staff is not searching candidates behind your back!

### **2. Outsource the social media search**

- Background check companies can perform these types of searches.
- They will return a packet that is “scrubbed” clean of protected information.
- Downfall of using a 3rd party - Fair Credit Reporting Act.

### 3. Have a non-decision maker in your dealership run the search

- They can act as a 3<sup>rd</sup> party.
- Train them on the laws.
- Define what is to be searched and at what point in the hiring process (preferable later along with references).
- Only search publicly available information and validate the results.
- They can give the hiring team a packet that is “scrubbed” clean of protected information.
- There must be a **“hermetic seal”** on the protected information.

## Social Media in Employment

### *4 Types of Social Media issues employers face:*

#### 1. Dishonesty

*Example:*

An employee, Kevin Colvin sent an email to his manager to request time off on short notice.

-----Original Message-----  
From: Kevin Colvin [mailto:[kevin.colvin@toyota.com](mailto:kevin.colvin@toyota.com)]  
Sent: Wednesday, October 31, 2007 3:55 PM  
To: Jill Thompson (North America)  
Cc: Paul Davis (North America)  
Subject:  
  
Paul/Jill -  
  
I just wanted to let you know that I will not be able to come into work tomorrow. Something came up at home and I had to go to New York this morning for the next couple of days. I apologize for the delayed notice.  
  
Kind regards,  
  
Kevin



Later that day, he posted a picture of himself in costume attending a Halloween party that same day. A coworker saw the post and brought it to their manager's attention.



**From:** Paul Davis (North America)  
**Sent:** Thursday, November 01, 2007 4:54 PM  
**To:** Kevin Colvin; Jill Thompson (North America); Kevin Colvin (North America)  
**Subject:** RE:

Kevin,

Thanks for letting us know--hope everything is ok in New York. (cool wand)

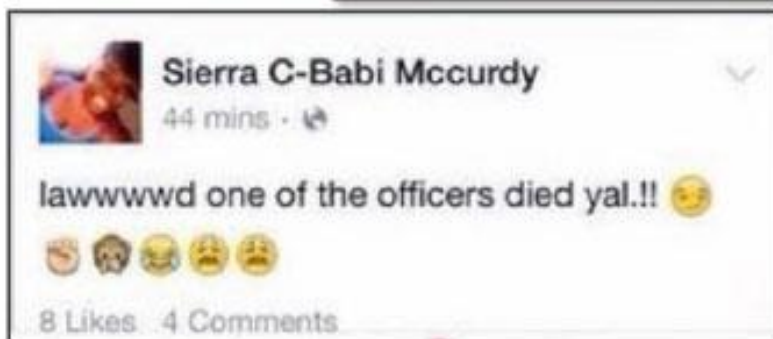
Cheers,  
PCD

- In this instance, if the employee has lied and abused your sick time policy, you can discipline.
- NOTE: A policy outright banning dishonesty is illegal according to the NLRB. The NLRB sees a difference between "false" information and "maliciously false" information. This example is clearly maliciously false.

## 2. Lapse in Judgment

*Example:*

A subway employee took to Twitter to post a “selfie” and celebrate fatal shooting involving two police officers in Hattiesburg, MS on May 9, 2015.



The posts went viral and angry Twitter users called for a boycott of the Subway restaurant by starting #BoycottSubway.

Subway responded quickly and issued a statement:



"This kind of behavior is unacceptable and does not represent the values and ethics of our brand," a Subway spokesperson said in an email to The Clarion-Ledger. "The unfortunate choice of one individual should not reflect on the more than 400,000 honest, hardworking Sandwich Artists worldwide. The franchisee has terminated the employee, effective immediately."

This rapid response prompted the quick removal of the #BoycottSubway movement and they Subway was applauded for their handling of the situation.

### 3. Harassment / Cyber Bullying

*Example:*

Employees at Orange County Correctional Facility created a blog to mock a disabled coworker, Ralph Espinoza. Ralph was born missing fingers on his right hand and frequently walked around the prison with his hand in his pocket to hide his disability.



*I will give anyone 100 bucks if you get a picture of the claw. Just take your hand out of your pocket already!!!!!!!!!!!!!!*

After an initial complaint, the harassment worsened.



*F\*\*k you one hand bandit! You can shove that claw of yours up you're a\*\*! Once a rat always a rat!*

Espinoza was diagnosed with high blood pressure, insomnia, and depression and was placed on disability. He sued the city.

Espinoza v. County of Orange - \$820,000 harassment verdict!!!

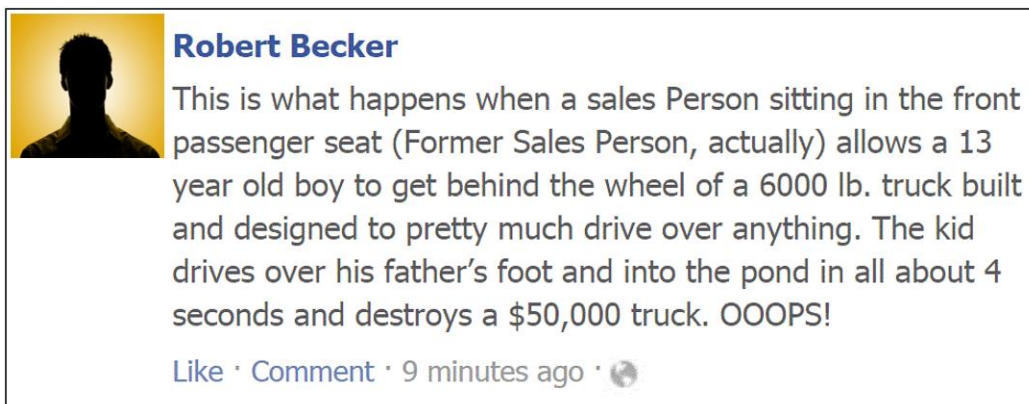
Orange County was found liable for having knowledge of the harassment but failing to take corrective action.

#### 4. Workplace Related Posts

Knauz BMW. As the dealership was preparing for its Ultimate Driving Event, Management informed the sales staff that they would be bringing out a hot dog cart and bottled water for customers at the event. The sales team, including a salesperson named Robert Becker, complained saying that they should be offering better food to customers. When management ignored the complaint, Becker took to Facebook.



Later that same day, there was an accident at the Knauz Land Rover dealership next door. Becker posted photos of the accident to his Facebook page along with the following post:



Becker was terminated and filed a complaint with the National Labor Relations Board (NLRB). After an investigation, the NLRB issued a formal complaint on his behalf.

## ***Knauz BMW, 358 N.L.R.B. No. 164 (Sept. 28, 2012)***

### **Three key outcomes:**

1. Becker's posts regarding the BMW dealership may have been protected.
  - a. Employees were concerned about the effect of the low-cost food on their ability to sell cars, therefore, the direct impact it would have on sales and commissions.
2. Becker's posts regarding the Land Rover accident were not protected.
  - a. No discussion with other employees and no connection to terms and condition of employment.
3. The Knauz Courtesy rule was at the forefront of the case, and turned out to be a significant decision.

"Courtesy is the responsibility of every employee. Everyone is expected to be courteous, polite, and friendly to customers, vendors and suppliers as well as to their fellow employees. **No one should be disrespectful or use profanity or any other language which injures the image or reputation of the Dealership.**"

### ***Unlawful – Unfair Labor Practice!!! Why?***

1. This rule encompasses protected section 7 activities.
2. Statements of protest would be viewed as rule violations.
3. Nothing reasonably suggested that protected communications were excluded.

### ***Lawful Policy Example:***

1. "Employees will not be discourteous or disrespectful to a customer or any member of the public **while in the course and scope of [company] business.**"
  - *Requires employees to be respectful to customers*
  - *No mention of the company or its management*
  - *Focuses on the course and scope of business, not activities outside of work*

## **National Labor Relations Act of 1935 (AKA the Wagner Act) guaranteed rights to workers to:**

- Organize unions
- Strike in opposition to working conditions
- **Section 7** of the NLRA gives employees the right to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection..."

## **National Labor Relations Board:**

- Independent government agency
- Oversee elections for labor union representation
- Prosecute violations of the NLRA - Referred to as Unfair Labor Practices (ULP)

## **When does a social media post become off limits under the NLRA? Generally speaking...**

1. Posted by a nonsupervisory employee
2. Constitutes a **protected, concerted activity**.
  - **Protected** –Topics related to wages, safety, working conditions, and other *terms and conditions of employment*
  - **Concerted** – Two or more employees take action for their mutual aid or protection regarding terms and conditions of employment (\*Or a single person acting on the authority of others)

## **March 18, 2015 - NLRB Memo:**

Employees have the right, under Section 7, to criticize or protest their employer's labor policies or treatment of employees.

Rules prohibiting employees from engaging in "disrespectful," "negative," "inappropriate," or "rude" conduct towards the employer or management, absent sufficient clarification or context, will usually be found unlawful.



## Social Media Policy Tips:

- ✓ Define prohibited conduct & give *specific* examples.
- ✓ Ensure that Section 7 communications excluded from any prohibitions (although a blanket savings clause it not sufficient).
- ✓ Define your process for use of Social Media during hiring OR have a policy prohibiting the use.
- ✓ Train your managers and employees on your Social Media Policy.
- ✓ NLRB Memos / Court Decisions
- ✓ Wal-Mart Social Media Policy – The NLRB ruled that Wal-Mart’s entire social media policy is lawful. This is publicly available and can be used as a guide.
- ✓ Update all handbook policies, not just Social Media Policies:

## *Other Policies the NLRB is targeting for prohibiting Section 7 rights:*

- **Confidentiality:** Any rules that are overly broad and restrict disclosure of employee information, including terms and conditions of employment, are considered unlawful. Any employer may restrict sharing of trade secrets and proprietary Company information (business secrets, processes, technology, internal reports, financial and marketing strategies). By giving specific examples of prohibited conduct, employees will understand that the prohibitions do not reach protected communications about working conditions.
- **Outside Communications:** Media contact rules can be lawful if employees would reasonably interpret them to mean that employees should not speak on behalf of the company, not that employees cannot speak to outsiders (i.e. Media or Government Agencies) on their own (or other employees') behalf.
- **Solicitations:** Blanket prohibitions against soliciting, collecting funds, or distributing literature without proper approvals are unlawfully overbroad because employees have a Section 7 right to solicit on non-work time and distribute literature in non-work areas.
- **Logo / Trademark Use:** Any rules that contain broad restrictions that employees would reasonably read to ban fair use of the employer's intellectual property (i.e. Employer Logos) in the course of protected concerted activity are considered unlawful. An employee cannot use your log for commercial use, but they have the right to use it on picket signs, pamphlets and picket material.
- **Photography and Recording:** Any rules that could be reasonably read this rule to prohibit all unauthorized employee use of a camera or video recorder, including attempts to document health and safety violations and other protected concerted activity are considered unlawful. There is no clear guidance on how to proceed in states that require two-party consent prior to recording legally.



## **Helpful Resources:**

**NLRB Operations Management Memo:** <https://www.nlr.gov/reports-guidance/operations-management-memos>

Navigate to Memo Number "OM 12-59 - Report of the Acting General Counsel Concerning Social Media Cases" (Dated 5/30/2012).

***Pages 22 – 24 include the text from the updated Wal-Mart Social Media Policy that was ruled, in full, to be lawful by the NLRB. (NOTE: Just because this policy was ruled lawful at one point, does not mean it is guaranteed to be lawful in the future as new case law and interpretations can alter their stance). The earlier pages review other policies and describe what made them unlawful.***

**NLRB General Counsel Memo:** <https://www.nlr.gov/reports-guidance/general-counsel-memos>

Navigate to Memo Number "GC 15-04 - Report of the General Counsel Concerning Employer Rules" (Dated 3/18/2015).

This memo describes why the NLRB feels rules that prohibit employees from engaging in "disrespectful," "negative," "inappropriate," or "rude" conduct towards the employer or management, absent sufficient clarification or context, will usually be found unlawful. This memo also covers examples of lawful and unlawful handbook policies.

**National Labor Relations Act:** <https://www.nlr.gov/resources/national-labor-relations-act>

This link will bring you to the complete text of the National Labor Relations Act (NLRA).

**EEOC Fact Sheets:** <http://www.eeoc.gov/eeoc/publications>

These sheets describe in more detail the types of discrimination that are prohibited by federal law in all aspects of hiring and employment.