# Employee Use of Personal Social Media to Discuss Workplace Issues: What Are the Rules?

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**Q: Can you provide some guidance as to what our association can do to control employee discussions of association policies on social media?**

**A:** Associations need to understand some basic rules regarding employees' use of personal social media accounts to discuss workplace issues. The National Labor Relations Act (NLRA) broadly protects employee communications that involve the employees' right to organize and engage in "concerted activities for the purpose of collective bargaining or other mutual aid or protection." Several recent decisions have confirmed that conversations on social media, including Facebook, Twitter and blogs, are among the protected communications. Employers that restrain or otherwise interfere with employees' use of social media may be deemed to violate the act. The NLRA protections apply to all employers, not just those that employ union workers and engage in formal collective bargaining negotiations.

At the same time, employers have a right to prevent the disparagement of their products and services and to protect the reputation of their businesses. The net result is that an employee's communications, including those conducted on social media, may lose legal protection, and may be grounds for termination, if they amount to criticisms of the employer disconnected from any ongoing employment issue or dispute, or if they amount to knowingly false or recklessly false statements regarding the employer or its services.

A recent decision indicates that associations should expect the courts to grant considerable deference to employees in protecting their communications over social media. In *Triple Play Sports Bar and Grille v. NLRB,* the employer fired two employees for complaining online about the employer's tax-withholding policies in a series of Facebook posts that included obscenities. In the specific online discussion at issue, one employee posted the following comment to her Facebook page: "Maybe someone should do the owners of Triple Play a favor and buy it from them. They can't even do the tax paperwork correctly!!! Now I OWE money… Wtf!!!" A co-worker "liked" the comment and then added, "I owe too. Such an a@*hole." After hearing about the Facebook discussion from another employee, Triple Play fired both employees for violating its internet and blogging policy.

The employees sued Triple Play for wrongful termination. In upholding the initial NLRB decision, the U.S. Court of Appeals for the Second Circuit found that the employees' speech was protected because it was made in the context of an "ongoing dispute over income tax withholdings," and because the comments "did not even mention the employer's products or services, much less disparage them."

Triple Play tried, but failed, to defend the terminations on the basis of an earlier Second Circuit decision, *NLRB v. Starbucks*, in which the court acknowledged that an employee may lose the protection of the act if he or she has an outburst using obscenities in the presence of customers. The court distinguished the facts of Starbucks, which involved activity that occurred inside the coffeehouse, from the online activity of Triple Play. Specifically, it reasoned:

"(Accepting the idea that) the Facebook discussion took place 'in the presence of customers' could lead to the undesirable result of chilling virtually all employee speech online. Almost all Facebook posts by employees have at least some potential to be viewed by customers. Although customers happened to see the Facebook discussion at issue in this case, the discussion was not directed toward customers and did not reflect the employer's brand."

Finally, the court concluded that Triple Play's internet/blogging policy, which broadly prohibited employees from "engaging in inappropriate discussions about the company, management and/or co-workers," was in direct violation of the employees' rights to engage in concerted communications regarding their employment.

The outcome in *Triple Play Sports Bar and Grille v. NLRB* confirms that associations should proceed thoughtfully and carefully to draft policies that restrict employees' personal social media activity in a manner that aligns with the developing law. In that regard, consider the following guidelines:

1. Phrase social media or blogging policies in employee handbooks such that they prohibit the disparagement of association policies and services but do not restrict discussions of conditions of employment.
2. Adopt policies that provide specific guidance instead of vague, sweeping language. For example:
   - Policies that prohibit "inappropriate postings" or "inappropriate conversations," either in person or online, without further guidance as to what makes those discussions "inappropriate," are likely to be deemed unlawful. In contrast, those that prohibit the use of social media to post comments regarding the employer or fellow employees and are vulgar, harassing, or in violation of the employer's anti-discrimination and anti-harassment policies are likely to be upheld.
   - Policies that prohibit employees from "commenting on trade secrets and proprietary association information" should be adopted instead of those that require employees to obtain the association's permission before making comments on social media about its "business, policies or employees."
   - Policies that prohibit employees from disclosing personal health information of other employees or association members should be upheld inasmuch as the importance of protecting those privacy interests is easily understandable.
3. Consult with your attorneys before adopting policies that restrict employees' personal use of social media and before terminating an employee for making disparaging comments online about the association, its employees or its policies.

*The answers provided here should not be construed as legal advice or a legal opinion. Consult a lawyer concerning your specific situation or legal questions.*