



Staff Photo  
 Meghan Sullivan says employers serious about regulating social-media use need to understand their legal boundaries and enforce rules consistently.

# Status Update

## In the Realm of Social Media, Workers Have More Rights Than Employers Might Think

By JOSEPH BEDNAR

**M**eghan Sullivan has some advice for businesses thinking about crafting policies for their employees' use of social media: "get a good lawyer."

That's because what may seem to businesses like a common-sense rule, such as barring workers from publicly criticizing the company online, crosses into issues of free speech that are thornier than many employers may have guessed.

"If they set this up wrong, they're going to get sued," said Sullivan, an attorney with Sullivan, Hayes & Quinn in Springfield, citing recent cases in which the National Labor Relations Board (NLRB) has determined that posts on social-media sites, including criticism of an employer, is protected speech.

"So employers have to treat that speech the same way they would Norma Rae standing on the table in the middle of the workplace."

Take, for example, the case of American Medical Response, which terminated an employee for posting negative comments about her supervisor on her Facebook page.

According to attorney Alice Pizzi of Sullivan, Hayes & Quinn, who recently conducted a presentation for area employers on issues of 'the digital workplace,' the NLRB issued a complaint alleging that those postings about American Medical Response (AMR) constitute 'protected concerted activity,' defined as activity employees may

legally undertake without fear of employer retaliation.

Under the terms of the eventual settlement, the NLRB noted in a statement, "the company agreed to revise its overly broad rules to

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*"A lot of employers use social media to screen out employees, but there's some risk in doing that. If an employer takes a look at an employee's Facebook page, and if the candidate fails to secure employment, you won't be able to say, 'I didn't know you fell into a protected category.'"*  
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ensure that they do not improperly restrict employees from discussing their wages, hours, and working conditions with co-workers and others while not at work, and that they would not discipline or discharge employees for engaging in such discussions.”

Michael Leahy, an attorney with Skoler, Abbott & Presser in Springfield, said the leeway granted to employees to publicly discuss the terms and conditions of their employment strikes many business

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“If employees are communicating with each other over social media, complaining about their work conditions — ‘I don’t like my boss,’ ‘I don’t like my work hours,’ ‘I don’t like the terms and conditions of my employment’ — and employers take action based on that, it could be a violation of the National Labor Relations Act.”  
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executives as counterintuitive.

“I think most employers, when they look at the language she used — it was a bit salty — would think this is someone who’s not fit for employment, but the National Labor Relations Board disagreed. She brought a complaint against AMR, and AMR settled the case,” he said.

That’s far from the only such case. In one instance,

Pizzi noted, a non-union employee of Build.com was discharged after posting comments about the company on her Facebook page. The employee claimed the discharge was in retaliation for posting comments about possible state labor-code violations, which drew responses from other employees who were her ‘Facebook friends.’

That case, too, was settled — not only with full back pay, but with a posted notice from the employer stating that employees have the right to post comments about the terms and conditions of their employment on their social-media pages and will not be disciplined for doing so.

These are developments that, frankly, baffle many employers, said attorney Amy Royal, of Royal LLP in Northampton, who said companies need to be proactive in updating their policies regarding this new online environment — and educate themselves on what, exactly, they’re allowed to regulate.

“I think employers definitely have concerns,” Royal said. “I have assisted businesses in developing policies in relation to social-media guidelines, and what employers can and can’t do relative to social media in the workplace and outside of it.”

For this issue’s focus on the Modern Office, *BusinessWest* examines perhaps the most ‘modern’ development affecting employees’ lives — their online identity, specifically how their social-media presence affects their work life, and why the issue



Staff Photo

has caught many employers off guard.

**Mike Leahy says using social media to screen job applicants carries its own set of risks.**

**Point and Click**

Social-media use, Leahy said, “is definitely something a lot of our clients are concerned about. There are a lot of areas where companies can expose themselves to liability.”

However, “the general rule of thumb is that employees have the same rights — and employers have the same obligations to them — in the online world as they have in the real world.”

Those rights begin during the application process, he noted, because of the perception that a hiring decision might have been made based on information — age, race, religion, sexual orientation, and the like

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— that should not factor into the process.

“A lot of employers use social media to screen out employees, but there’s some risk in doing that,” Leahy said. “If an employer takes a look at an employee’s Facebook page, and if the candidate fails to secure employment, you won’t be able to say, ‘I didn’t know you fell into a protected category.’”

Monitoring the social-media activities of current employees can also be troublesome, because if an employer uncovers questionable activity that later impacts the company but does nothing about it, he could face liability for taking no action.

But what the NLRB has mainly been debating, Leahy said, is whether social-media content — postings on Twitter, Facebook, and the like — really do consti-

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*“If you want to say, ‘I work for Coca-Cola, and here’s the secret formula,’ that’s not protected. Probably far more speech is protected than isn’t, but I don’t think anyone should be surprised when employees cross the line and are shocked when they’re terminated.”*  
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tute the modern water cooler, and whether speech that would be protected in a casual conversation should be given the same treatment in the very public arena of the Internet.

“If employees are communicating

with each other over social media, complaining about their work conditions — ‘I don’t like my boss,’ ‘I don’t like my work hours,’ ‘I don’t like the terms and conditions of my employment’ — and employers take action based on that, it could be a

violation of the National Labor Relations Act,” Royal said.

Clearly, momentum is on the side of employees’ rights — with one large caveat.

“So long as the subject matter is your work conditions, that content is generally going to be protected,” Leahy said. “If it’s just out-and-out name-calling unconnected to employee conditions, it’s unlikely that will be protected.”

As evidence, he cited the recent case of a reporter for the *Arizona Daily Star* who was terminated last fall based on a series of sarcastic Tweets, first mocking the paper’s own headline writers, then the city of Tucson itself; typical were “Hope everyone’s having a good Homicide Friday, as one Tucson police officer called it,” and “What?!?!? No overnight homicide? WTF? You’re slacking, Tucson.”

After several warnings, the reporter was fired, and the NLRB upheld the action — even though the newspaper had no written social-media policy and had encouraged its reporters to Tweet — because “he was terminated for writing inappropriate and offensive Twitter postings that did not involve protected concerted activity.”

However, employees often don’t recognize the difference in such cases and, indeed, may not even consider the ramifications of mixing work and social media.

Royal cited a national survey conducted in 2009 by Deloitte, an international business consulting firm, regarding some of these issues in the workplace, and 53% of respondents said their use of social media isn’t their employers’ business.

“Obviously, they might be posting things on social-media sites that employers should be concerned about in terms of their images and reputation, or posting things that could potentially be confidential,” she said.

In addition, 27% of respondents said they never consider the ethical or other business concerns in posting photos or videos online. Clearly, many workers struggle to define what’s legal and appropriate as much as employers do.

“If you want to say, ‘I work for Coca-Cola, and here’s the secret formula,’ that’s not protected,” Sullivan said. “Probably far more speech is protected than isn’t, but I don’t think anyone should be surprised when employees cross the line and are shocked when they’re terminated.”

“The mistake that employers are making is not understanding what’s protected activity,” she continued. “Or they have a policy in place regarding computer use and electronic information that, perhaps, didn’t contemplate social media when it was written, and now the policy is too broad and infringes on that right to speech. You have to review the policy and update it as laws and technology change.”

That’s a challenge for employers who haven’t kept up with the surging pace of the social-media explosion, she added.

“In the old days, someone would sit down and write a letter to the newspaper, and on Sunday employees would read it, and they’d talk about it at the water cooler,” Sullivan said. “But it’s the sheer amount of information being generated through social media that’s taking people aback.”

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## At the Top

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both you and your team.

- **Persist.** In his book, *Half Time — Changing Your Game Plan from Success to Significance*, Bob Buford says that there is nothing in life less important than the score at halftime. No matter what your age, your position, your success, or lack thereof, you have the opportunity to do new and exciting things with your life in the second half. Re-evaluate, reinvent, reposition, and go for it.

- **Have fun.** Join the 'Compliment of

the Day Club.' Find somebody doing something right, every day, and celebrate it publicly. It's easy to find people doing things wrong. Change the lenses through which you view your company. Look for the good, not the bad. Change your perspective — and celebrate!

### Bottom Line

For anyone who has been there, the top spot in a company can be a lonely place. Typically they have worked hard, made sacrifices, and dedicated themselves to their job and their company. Then they get there and wonder, is this all there is? Now what?

Both personally and professionally, senior-level executives need to repeatedly take stock of where they are. You must

recognize and remember that you didn't get there alone. You must re-engage yourself in your life, both at work and at home. You must remember that your purpose lies in your service to others, to your family, to your employees, and to your customers.

You must care. Do that, and it won't be so lonely at the top.

Good luck. ■

*James S. Bain, MBA, is an author, speaker, consultant, and coach. He is the founder of Focus on the 5, a division of Falcon Performance Institute, a consulting and corporate-training firm focused on productive performance; www.falconadv.com*

## Social Media

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### Building a Firewall

So, in an environment that seems to be leaning so heavily in employees' favor — the Tuscon case aside — what should employers do? Leahy said they should start by developing a policy that reinforces their own established rights, such as prohibiting the misuse of the company's logo, trademark, photographs, and other proprietary information.

"Certainly, employers are really left with balancing their interests in maintaining their reputation and image with employees' rights under the National Labor Relations Act," he said. In addition, employers with a multi-state presence need to consider that laws governing workplace conduct can vary by region.

"Where they get into trouble is when they use a cookie-cutter social-media policy pulled from the Web," Leahy noted. "The policy needs to be tailored to meet the employer's needs."

Pizzi said it's an employer's duty to adequately secure company information and to adopt and enforce a social-media policy that adheres to the law and doesn't punish protected activity.

The use of social media in the workplace itself may be an easier landscape to navigate, Royal said, if only because employers have the right to require employees to do their job while on work time. Even those companies that allow workers to access social-media sites during the workday for marketing purposes should have clearly delineated policies governing its use.

Pizzi added that there should be no expectation of privacy at work, and that includes establishing written policies regulating Internet use on company time and on company equipment — an area in which the law continues to be on the side of employers.

"The policy should put employees on notice that, when they're using the employer's property or networks, they may be monitored, and that they really shouldn't be wasting their time on social-media Web sites, but also should not unlawfully chill employees' rights," Leahy said.

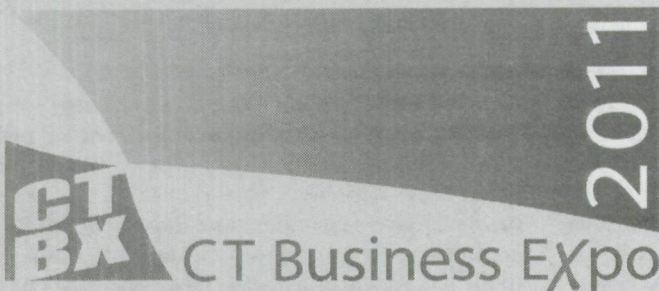
Consistent enforcement is critical, Sullivan said. "There's a notion that, if you're using my equipment, you don't have an expectation of privacy. But at the end of the day, we see lots of employers with beautifully worded policies that have not been consistently enforced. Then, the first time you want to enforce the policy about the use of Facebook, someone might say you're discriminating against them."

Still, with a carefully crafted policy that's enforced fairly, employers should be in good shape, Leahy said. "When drafting a policy, it's fair game to say employees are not allowed to use Facebook when they're supposed to be working."

Outside the office, however, it's often a much different story — and one that may still be evolving, 140 characters at a time. ■

Joseph Bednar can be reached at [bednar@businesswest.com](mailto:bednar@businesswest.com)

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