

## Why You Need a Comprehensive Social Media Policy

*Last issue, we discussed using social media sites to conduct pre-employment screening and the importance of having a sound and legally defensible social media policy. A number of surveys have shown that approximately half of all employers still lack a social media policy. Even if you have one, if it hasn't been reviewed by legal counsel that is familiar with the rapidly developing law in this area (particularly in the last six months), it's probably out of date. This article focuses on a few of the reasons you need an up-to-date social media policy to protect your organization from a litany of legal risks, including damage to its reputation, employee claims, and litigation by third parties.*

### Hiring Issues

Although not all surveys yield the same result, a 2011 survey by the Society for Human Resource Management (SHRM) found that 59 percent of employers never have used (and don't plan to use) online search engines for screening applicants. However, if your organization feels that online screening is necessary, then certain steps should be taken to minimize the legal risk associated with those inquiries. Those measures can include:

- Not asking applicants for their Facebook password and login information;
- Getting advance consent for online inquiries if they are performed by an outside entity;
- Having the information screened by someone other than the decision maker to avoid the argument that the decision maker learned of a protected characteristic (e.g. race, religion or disability) that motivated an adverse hiring decision;
- Ensuring that your policy isn't enforced in a discriminatory manner – for example, by performing inquiries only on certain applicants (e.g. applicants with Middle Eastern-sounding names); and
- Providing the applicant an opportunity to explain any apparently disqualifying information gathered using social media.

### Dangers of Not Having a Social Media Policy

Not having an appropriate social media policy can cause your organization to suffer reputational harm, competitive harm, lost productivity, and liability in a wide variety of ways. A recent survey found that one in ten companies reported that social media activities by employees had damaged the corporate brand. Some of you may recall the 2009 YouTube video of Domino's Pizza employees engaging in unsanitary food handling practices. The video went viral, with more than a million views before it was removed two days after it was posted. Numerous other employers have suffered from employee's misconduct ranging from embarrassing Facebook postings to inappropriate YouTube videos to damaging tweets that reflected poorly on the employer.

Additionally, your company can incur fines and other civil liability for Federal Trade Commission (FTC) violations if one of your employees or contractors touts your products or services online without disclosing that he works for or has a contractual relationship with your organization.

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**Employees-Safe Drivers?**

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## Harassment and Discrimination Concerns

When employees interact with co-workers on social networks, it creates a myriad of potential problems. For example, inappropriate communications or postings can create a hostile work environment. Allowing supervisors to “friend” or “link” with their subordinates can create pressure on a subordinate to accept the connection. Moreover, if a supervisor or manager likes or recommends a subordinate who is later terminated, defense of a discrimination claim may become much more challenging.

**...inappropriate communications or postings can create a hostile work environment...**

## Non-compete, Non-solicitation, and Trade Secret Concerns

Without a carefully drafted and enforced policy, you may find that an employee has “linked to” (via LinkedIn) or “friended” (via Facebook) a number of customers who suddenly become visible to competitors if the employee doesn’t have the appropriate privacy settings in place. Moreover, if a salesman with a non-solicitation agreement leaves his employer, his sales contacts might all be advised, via Facebook or LinkedIn, that he is now working for a competitor. These issues require careful thought and planning on the front end of an employment relationship and may necessitate revising existing employee non-competition and non-solicitation agreements to protect your business’ relationships with its key customers.

## NLRB Issues

The National Labor Relations Board (NLRB) has been extremely aggressive in pursuing both unionized and nonunionized employers that have taken disciplinary action against employees for what would appear to be inappropriate social media postings about their employers or co-workers or their employer’s products. The Board takes the position that it is unlawful for an employer to adopt a social media policy that restricts (or could reasonably be construed to restrict) employees in the exercise of their Section 7 rights under the National Labor Relations Act (NLRA) – for example, the right to engage in protected concerted activities such as discussing wages, working conditions, and unionization.

Unfortunately, drafting a social media policy that passes muster under the NLRA *and* provides adequate protection to an employer isn’t an easy task and generally requires the use of complex disclaimers and examples. We strongly encourage you to have your social media policy reviewed by counsel who is familiar with the guidance issued by the office of the NLRB acting general counsel in the last year.

**...strongly encourage you to have your social media policy reviewed by counsel...**

*If you have questions about developing a social media policy, e-mail North Dakota Employment Law Letter at [loliver@vogellaw.com](mailto:loliver@vogellaw.com).*

*You can find sample language for creating your social media policy in the subscriber’s area of [www.HRHero.com](http://www.HRHero.com), the website for the North Dakota Employment Law Letter. Just log in, scroll down to HR Tools, and click on “Sample Policies & Procedures” ([www.HRHero.com/lc/policies](http://www.HRHero.com/lc/policies)). If you need help, call customer service at 800-274-6774.*

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visit our website

## RISK SERVICES

### Are Your Employees Safe Drivers?

Statistics show it is likely you don't check the driving records of your employees. This puts your entity at a higher risk for an employee being involved in an on the job accident. You can't tell which employees will have an accident by their looks, job performance, or their work habits. Past performance is a good indicator of driving habits and past performance can be found on a Motor Vehicle Record (MVR). Perform a driving record or MVR check prior to hiring an individual and recheck on a regular basis throughout an individual's employment. Don't forget to check those states where the prospective employee recently lived, including attending a college or university.

The quality of driving performance reflected in the MVRs is important. Substandard driving performance could affect your automobile liability and physical damage claims frequency, severity and ultimately future coverage costs. Also, the ability to defend a claim against an individual with a poor driving record could significantly increase the potential loss.

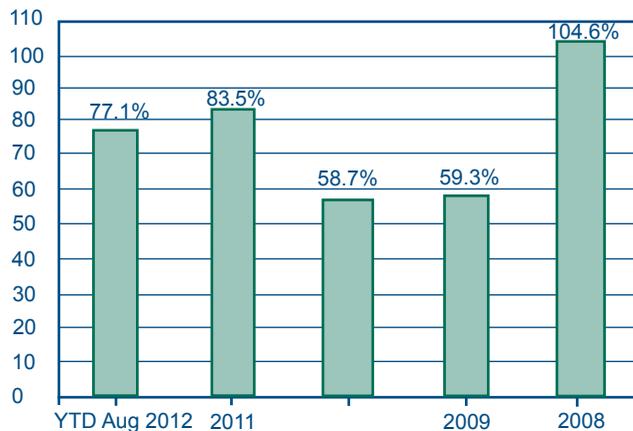
To minimize the possibility of employing unsafe drivers:

1. Include a provision in the employment application authorizing your organization to conduct a MVR check prior to an offer of employment. This check should be performed annually on all employees that drive your vehicles as a part of their normal job duties.
2. Request and keep on file a photocopy of prospective and current employee driver's licenses. *If the prospective employee will not be required to drive one of your vehicles for their position, you cannot require them to provide a copy of their driver's license prior to employment.*
3. Check motor vehicle records of employees at least once a year and keep them on file.
4. Require, as a condition of employment, employees to notify their supervisor of any driving violations they receive.

Your policy manual should address the issue of employees who receive driving violations while operating your vehicles and how your organization will handle these. Remedial driver's training courses, discipline, and/or termination are all options. ■

## FINANCIAL INSIGHTS

### OPERATING RATIO



The operating ratio shown above is the sum of NDIRF's loss and expense ratio less the investment income ratio. The operating ratio is a measure of NDIRF's profitability and is the principal determinant of the fund's financial solvency and stability. A ratio of less than 100% means that a company is profitable and the lower the ratio the more profitable a company is. ■

## FROM THE CEO

The NDIRF frequently publishes articles covering various aspects of employment-related litigation. The reasons for all this attention are: First, these types of claims are expensive to defend and successful claimants could receive significant damage awards, even beyond North Dakota's statutory "tort caps" and possibly including payment of a prevailing plaintiff's attorney fees; Second, such claims are highly preventable if attention is given to development and application of appropriate policies and procedures concerning the relationship between a political subdivision and its employees.

These issues are mentioned as a preamble in calling your attention to two online resources that provide assistance to NDIRF members in dealing with employment-related matters. The NDIRF Public Employers Handbook is intended as a quick reference guide, is revised each year and posted on the NDIRF's website ([www.ndirf.com](http://www.ndirf.com)). Also available on the NDIRF website is the Human Resources Reference Guide for Local Governments in North Dakota – a more comprehensive treatment of human resources topics. These online resources are easily accessed from statewide association websites as well as by clicking on the "Online HR Guide" tab in the Shortcut Menu on NDIRF's website. They are the best, most easily available tools we have ever had on this subject – and I encourage you to take advantage of them! ■

## NDIRF WELCOMES KEITH J. PIC

For the first time in more than twelve years, the North Dakota



Insurance Reserve Fund has added a new staff member. Keith J. Pic has joined the NDIRF as an Outside Claim Adjuster.

He is a Walsh County, North Dakota native and a graduate of North Dakota State University with a degree in Criminal Justice. In addition to recently completing an advanced course in claim handling, Mr. Pic has had previous claim adjusting

experience and holds the insurance industry designations of Associate in Claims and Associate in General Insurance. He continues to remain active as a member of

the North Dakota Army National Guard in the 191st Military Police Company, located in Fargo, and enjoys outdoor recreational activities. Keith and his family now make Bismarck their home and we welcome them to the NDIRF community, as well. ■

## Mark Your CALENDAR

Oct

7-10: ND Association of Counties  
Annual Conference & Expo  
Ramkota Inn, Bismarck

26-27: ND School Board Association  
Annual Convention,  
Ramkota Inn, Bismarck

Dec

06: NDIRF Board of Directors  
Meeting  
NDIRF offices, Bismarck

### Take The Long View After A Setback

So you didn't get the promotion you wanted, or another co-worker got the prize project. Don't let disappointment get the better of you. Try these two tips:

- **Ask for feedback—and learn from it.** Find out why you weren't the best candidate for the job. Then use that information to address whatever reason you didn't make the cut.
- **Request a performance review.** Sometimes we're not aware of how the boss really perceives our abilities and career potential. Have regular performance reviews and discussions with the boss about your career development. ■

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