AUTO/MATE DEALERSHIP SYSTEMS

The Auto Dealer's Guide to

Social Media in the Workplace

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Introduction

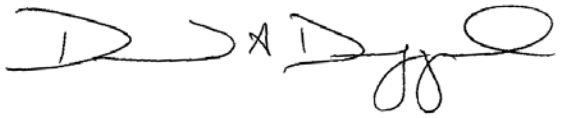
Like it or not, social media has become pervasive in all of our lives, and not just on the personal front. Social media as it relates to workplace issues is a hot topic in government agencies these days.

Recently car dealerships have been finding themselves on the losing end of court battles. Why is this? The laws and regulations have not been able to keep pace with emerging social media technology, so government agencies and courts are forced to apply outdated laws to modern day cases. To date, their stance has been extremely employee friendly.

This ebook is designed to educate dealers about the laws and regulations surrounding the use of social media in the workplace. Are you allowed to check out the social media profiles of a job applicant? Can you fire an employee for posting something inappropriate on social media? The answers to these questions may surprise you.

My hope is that by following the recommendations in this ebook, you will understand how laws are being interpreted and be able to keep your dealership out of legal trouble.

Sincerely,



David Druzynski, SPHR, SHRM-SCP
Director of Human Resources
Auto/Mate Dealership Systems

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Director of Human Resources

Part I:

Social Media in Hiring

When it comes to hiring practices, social media is a two-edged sword. Understand how to wield it or suffer the consequences.

Is Your Dealership Breaking the Law?

Have you ever Googled a job applicant or checked out their Facebook profile? If so, you may have gained access to information that is protected by law. The U.S. Equal Employment Opportunity Commission (EEOC) enforces federal anti-discrimination laws, which prohibit discrimination on the basis of:

- Age
- Race/Color
- Disabilities
- Religion
- Sex/Sexual Orientation
- Genetic Information
- Arrest/Conviction Record
- National Origin
- Pregnancy

Think about all the information you can access by viewing a social media profile. If a social media search isn't performed properly, it's almost certain you will have knowledge of one or more of the above criteria that you are not allowed to use in the hiring process.

If a job applicant discovers that you have viewed their social media profile and then passed on them in favor of another job applicant, your dealership will have a very hard time defending itself in a discrimination lawsuit.

Yet there is a lot of valuable information you can learn from a person's social media profiles. Often you can get a sense of the person's character, work ethic, judgment and attitude. Access to this type of information can save you from the costs and headaches associated with a bad hire.

The good news is that you are allowed to use some information from a job applicant's social media profiles in your hiring decision. The key is that a social media search must be performed properly and in accordance with EEOC guidelines.

How Courts are Interpreting Cases

When faced with a discrimination charge, hiring managers must prove that they did NOT consider protected information in the hiring process. The standard for evidence in a discrimination case is not "beyond a reasonable doubt" as it is in criminal cases. A judge will determine which side has a more "convincing" argument.

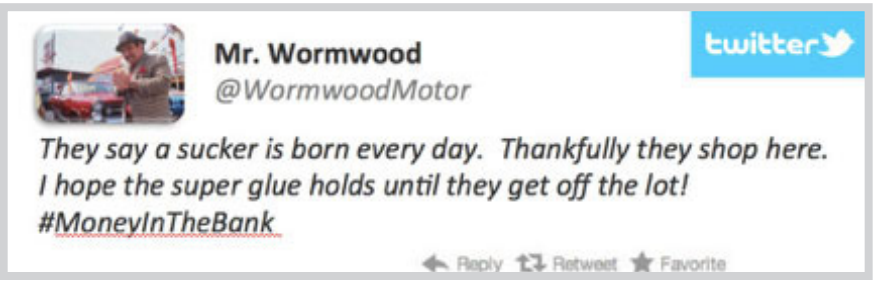
The EEOC and the National Labor Relations Board (NLRB) are clear in stating that if there is any evidence that the person doing the hiring used protected information to make an adverse employment decision, a violation has occurred.

Imagine if you saw this tweet posted by a job candidate:

What have you learned? The gender of this person is difficult to discern. If you believe she's female, then she's probably gay. You may also infer from the pink ribbon and the hashtag #MissYouMom that she has a genetic predisposition for cancer. This person is also over the age of 40 and may be Jewish. That is five pieces of protected information in a single tweet!

If you did not hire this person, and even if you did not discriminate against this person in any way, the fact that you viewed this tweet can still pose a problem.

What Social Media Can Tell You About Job Applicants



Don't you want to know if someone with this character is interviewing at your dealership? If potential customers are researching your dealership and salespeople, this could very well prevent them from doing business with you.

Information related to a candidate's character, judgment, work ethic and attitude is absolutely allowed to be used in a hiring decision. You can also use information posted on social media to verify claims made by job applicants, such as work history, education and awards / accolades.

In a CareerBuilder survey, 43 percent of employers said they use social networking sites to research job candidates. Of these, 51 percent said that they have found content that caused them not to hire a candidate. The most common reasons for passing on a candidate are:

- Provocative or inappropriate photographs / information – **46 %**
- References to drug or alcohol use – **41%**
- Bad mouthing previous employers and coworkers – **36%**
- Discriminatory comments – **28%**
- Lied about job qualifications – **25%**

Alternately, 33 percent said that they found content that made them more likely to hire a candidate because they conveyed a professional image, backed up their professional qualifications and demonstrated they would match the culture of the organization.

How to Legally Run a Social Media Search

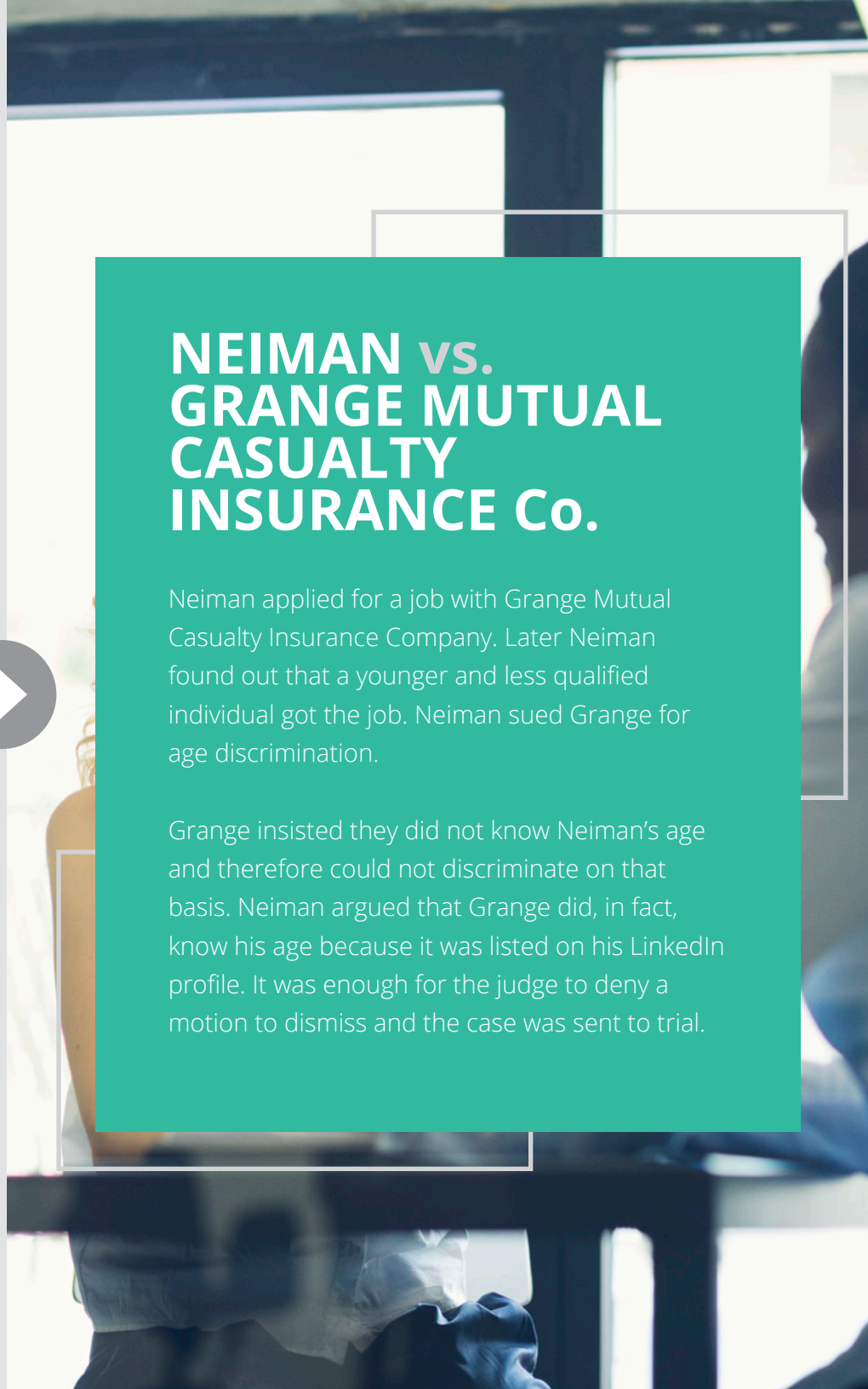
For dealerships there are three options when it comes to applicant social media searches:

1) Don't Research Applicants on Social Media

If you never have access to protected information, you will have a strong defense in a discrimination suit. However, a growing concern with this option is in negligent hire cases. Believe it or not, you can be held accountable for the actions of an employee if there was information readily and publicly available about that individual at the time of hire that should have prevented you from hiring them in the first place.

It has long been recommended that companies perform due diligence on all potential employees. In the past this was adequately covered by drug tests, criminal background checks and reference checks. Recently however, there have been calls to include social media checks as part of this routine.

Take this example...if you hire an individual who has a history of posting racist remarks on public social media sites, and they eventually harass another one of your employees on the basis of their race, does the individual who fell victim to the harassment have a negligent hire claim against your dealership? There is not much case law out there to support this, but many people in the human resources and legal communities believe that social media searches will become the "new normal" based on this concern.



NEIMAN vs. GRANGE MUTUAL CASUALTY INSURANCE Co.

Neiman applied for a job with Grange Mutual Casualty Insurance Company. Later Neiman found out that a younger and less qualified individual got the job. Neiman sued Grange for age discrimination.

Grange insisted they did not know Neiman's age and therefore could not discriminate on that basis. Neiman argued that Grange did, in fact, know his age because it was listed on his LinkedIn profile. It was enough for the judge to deny a motion to dismiss and the case was sent to trial.

2) Outsource the Search

Many background check companies now offer social media searches as a service. Outsourcing protects your dealership because you will only see information about a candidate that you are allowed to use in the hiring decision.

The downside to this option is that these searches are subject to the Fair Credit Reporting Act (FCRA) requirements. That means if you do find a piece of information about a candidate that you used in your decision to not hire them, you must notify that candidate in writing and give them an opportunity to dispute the information. The issue here is that if you misinterpreted a post (that was perhaps posted as a joke, or not actually posted by the applicant) then you make yourself more vulnerable to a lawsuit because you have provided the information in writing.

3) Train Someone in Your Dealership to Conduct Searches

The third option is to train someone within your dealership to conduct social media searches. Choose someone who is trustworthy and train that person on anti-discrimination laws. Then train them again. Define in writing what information can be passed to the hiring managers and what information is protected.

This person cannot be involved in the hiring process and must never allow anybody who is involved in the hiring process to view protected information. Again, this must be someone who can absolutely be trusted to keep information confidential. The NLRB and EEOC have given their approval of this method, but require that the barrier between the hiring manager and the person who runs the applicant social media search must be "hermetically sealed."

Additional Tips for Running a Successful Social Media Search

- Never, under any circumstances, ask a job applicant to provide you with their social media login information or passwords. Many states have passed laws forbidding this.
- Never, under any circumstances, require a job applicant to login to their social media profiles while you look over their shoulder. Some states have passed laws forbidding this.
- Be sure to abide by each website's terms & conditions
- Only search information that is publicly available
- Do not run afoul of Federal Stored Communications and Wiretapping laws.
- Keep a record of search criteria and all information that is sent to the hiring manager
- Don't rely on search results without verification. For example, if "Tom Jones" is applying for a position, be sure to verify that the social media search you are doing is for the correct "Tom Jones." Sometimes people will set up fake social media accounts in order to impersonate or bully other people. If you can't verify a social media account is legitimate, or that the applicant is the one who posted it, disregard the information.
- Don't let a candidate fall off the social media radar after an offer is made. There have been several incidents where employees

started griping about their new job online before they even showed up for their first day at work!

A real tweet that was sent out by a Texas teenager in 2015. The manager of the pizza shop where she was supposed to start work tweeted this response: "No you don't start that FA job today! I just fired you! Good luck with your no money, no job life!" Cella responded by tweeting, "I just got fired over Twitter."

Part II:

Social Media in Firing

In many ways social media has become the medium for water cooler talk. Many employees who used to gossip and complain about their bosses, co-workers and other working conditions around the water cooler are now taking to social media to have these same conversations.

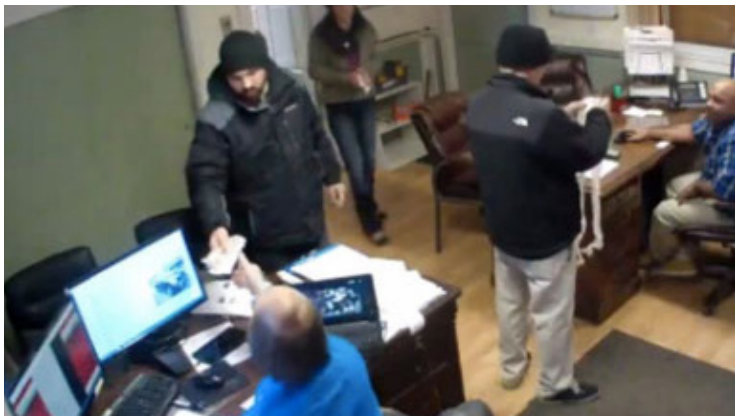
Unlike a water cooler, however, complaints posted on social media aren't limited to a few sets of ears. When managers see these complaints online, sometimes their first response is an emotional one and they quickly fire the person. As you'll learn, this type of knee jerk response is a mistake.

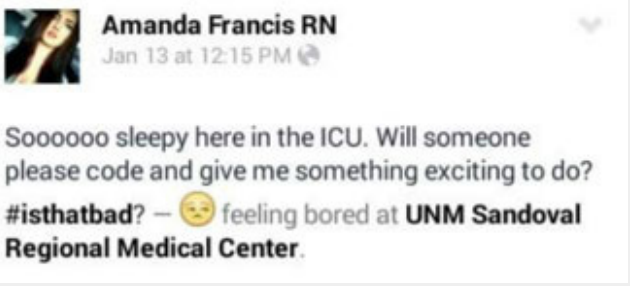
Employees Post the Most Outrageous Things!

It's amazing how many people post offensive content without fully understanding the consequences of their actions. Here are just a few examples of viral social media mishaps:

A McDonalds employee lured a homeless man to a drive-through window with the promise of a free hamburger. As the homeless man approached, the employee withdrew the hamburger and splashed a glass of water in the man's face. The employee's friend videotaped the incident and uploaded it to YouTube. The video went viral, causing much negative publicity for McDonald's.

Employees at a used car dealership harassed a pizza delivery person over a dispute regarding a $7 tip, then uploaded the video to YouTube. The video went viral and the car dealership got slammed on social media and in the news. People who saw the video felt so bad for the pizza delivery person that they started a GoFundMe page for him.





#yesthatsbad After this was posted hundreds of people called the hospital and flooded its social media accounts with angry comments.

After the shooting deaths of two police officers in Hattiesburg, MS a Subway employee celebrated by tweeting a selfie and sending out a series of offensive tweets.

What happened as a result of these posts? Angry consumers and media did not confront the individuals directly. Instead, they swarmed the social media profiles and phone lines of the employers and demanded the employees' termination, all while gaining a lot of negative attention for the companies.

Can You Fire Employees for Inappropriate Postings?

All it takes is a single, momentary lapse in judgment by one employee for your dealership to come under a social media firestorm. The good news is that an immediate, public and appropriate response can quickly deescalate the situation!

But should you automatically terminate every employee who posts something you think is inappropriate? Not so fast. First, you must be sure you are not violating the National Labor Relations Act (NLRA).

The 1935 National Labor Relations Act gives workers the right to organize unions and to protest working conditions. The National Labor Relations Board (NLRB) is an independent federal agency that enforces violations of the NLRA, commonly referred to as "unfair labor practices." The NLRA gives employees the right to engage in protected concerted activities, which is another way of saying employers cannot retaliate against employees who take action for their mutual aid or benefit, and/or who seek to improve terms and conditions of employment.

While the NLRB has historically focused on unionized workplaces, the use of social media has brought employment issues at non-unionized employers to the limelight. In recent cases the NLRB has been taking an incredibly employee-friendly stance.

So, when can't you discipline someone for a social media post? When the post is considered a protected, concerted activity, which is a fancy way of saying that employees are seeking to improve terms or conditions of employment. For example, if employees have an online discussion surrounding safety concerns at work or discriminatory pay practices.

Protected Social Media Postings

Social media posts by employees are generally protected under "Section 7" of the NLRA if they involve two or more employees who are banding together for mutual aid or protection, and include protected topics related to terms and conditions of employment such as:

1. Working hours
2. Conditions of employment
3. Safety concerns
4. Discriminatory pay practices

According to the NLRB, these types of posts are protected as long as they are posted by non-supervisors. Supervisors are considered agents of the company and are therefore exempt from the provisions of the NLRA.

So let's look at what this means. What would you do if you saw one of your employees post the following about you (his boss) on his Facebook page?

Your initial reaction might be to fire them on the spot! That is exactly what this person's employer, Pier Sixty LLC did. The terminated employee filed an unfair labor practice charge against Pier Sixty. In a shocking decision, the NLRB sided with the employee. They did so for two reasons: 1) Because he mentioned a union vote, the post was connected to terms and conditions of employment, and 2) This type of vulgar language was typically tolerated throughout their workplace.

In another example, an employee at a sports bar posted a negative comment about his workplace and was fired for it. But another employee had liked the post. The mere fact that a co-worker liked the post made it a concerted activity, and the termination was declared as illegal.

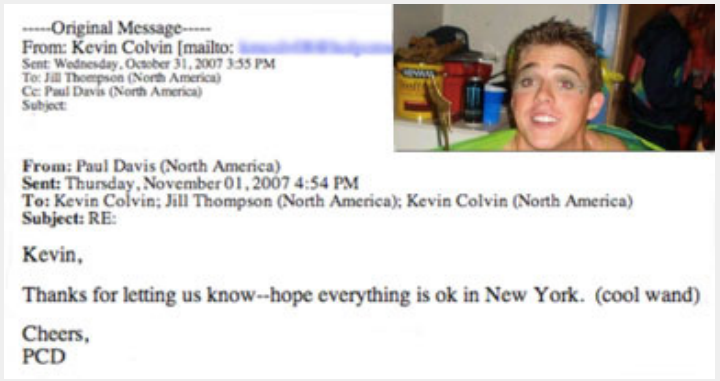
Unprotected Social Media Postings

Does that mean all workplace related posts are off limits for discipline? Fortunately, no! Social media posts by employees are generally not protected by the NLRA if they include the following types of content:

1. Evidence of attendance policy violations
2. Evidence of violations of the Family Medical Act Leave (employees who are out on disability or workers comp)
3. Bullying or harassing co-workers
4. Lapse in judgment/offensive posts

Let's review examples:

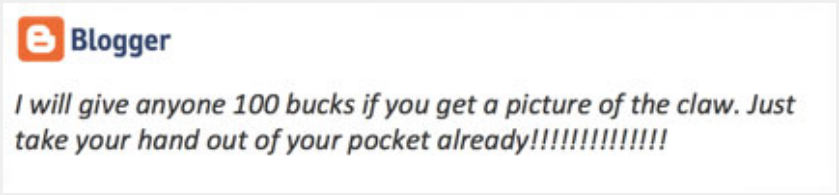
Case #1: An employee called in sick on Halloween. Later that night, he posted a picture of himself on Facebook at a Halloween party. In this instance, you would be okay to discipline the employee because this would be a clear violation of your attendance policy. And if you can come up with a classic response like this guy's boss did, so much the better!



Case #2: An employee claimed her back hurt and brought in a doctor's note stating that she was completely incapacitated for several weeks and would be unable to work. While she was out on Family Medical Leave (FMLA), she posted pictures of herself attending a festival on Facebook. Her employer used the information to terminate her. In this case, a completely incapacitated individual who is unable to work, would also be unable to attend a festival. This is clearly an example where the employee was abusing her FMLA Leave, and her own Facebook posts were the "smoking gun."

Case #3: If an employee is bullying or harassing a co-worker online the posts are not protected. Not only that, but your dealership has a responsibility to try and halt the activity, even if it is not happening during work hours.

In one case, several Orange County Corrections officers created a blog specifically to mock a disabled co-worker who was missing several fingers on his right hand, and his harassers would refer to it as "the claw."



The employee complained to his manager, who sent out an email telling the offenders to stop the nonsense. The harassment not only continued, but it became worse. Unfortunately the manager failed to follow up with the employee to make sure the harassment had stopped.

The employee eventually went out on disability due to insomnia, depression and high blood pressure. He then sued Orange County for failing to protect him from a hostile work environment. The employee won an $820,000 verdict. The reason for the judgment was because Orange County had knowledge of the harassment and failed to take any action to correct it.

Case #4: All of the postings in the section titled Employees Post the Most Outrageous Things! fall under the lapse in judgment and/or offensive category. In the case of the Subway employee, Subway did a terrific job of handling the situation by immediately terminating the employee and issuing an apologetic statement.

As a company, when an employee posts something offensive you will likely have to make an immediate decision: stand by the person or fire them. If you think that's always an easy decision, think again. What if it's your top producing salesperson? What if it's the Office Manager who has been with you for 35 years and nobody else is capable of doing her job?

Becker vs. Knauz BMW

Knauz BMW planned a sales event for customers. When it was discovered that the dealership planned to serve hot dogs at the event, several of the salespeople complained. A salesperson named Becker posted this on his Facebook page:

> ***"I was happy to see that Knauz went 'all out' for the most important launch of a new BMW in years…but to top it all off..the Hot Dog Cart. Where our clients could attain an over cooked wiener and a stale bun. No, that's not champagne or wine, it's 8 oz. water."***

Later that day, an accident occurred at the neighboring Land Rover dealership. Becker snapped a photo of the incident and posted it on Facebook along with this comment:

> ***"This is what happens when a sales person sitting in the front passenger seat (former sales person actually) allows a 13 year old boy to get behind the wheel of a 6,000 lb. truck built and designed to pretty much drive over anything. The kid drives over his father's foot and into the pond, all in about 4 seconds and destroys a $50,000 truck. Oops!"***

The dealership fired Becker, who then filed a complaint with the NLRB. The NLRB ruled that the first post about the sales event may have been protected because it was a protest against working conditions. But Knauz was able to prove that they ultimately fired Becker because of the Land Rover post, so the termination was upheld.

However, the NLRB also ruled that the existence of a Courtesy Rule in the Knauz handbook that placed a ban on disrespectful behavior was an unfair labor practice.

The NLRB stated that the courtesy rule was unlawful because a reasonable employee could interpret a ban on disrespectful behavior as encompassing their right to protest working conditions, and such protests would likely be viewed as disrespectful.

The Surprising Truth About Courtesy Rules

Many dealerships include some form of a courtesy rule in their employment handbooks. The Knauz courtesy rule looked like this:

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.

The NLRB has ruled that this type of courtesy rule is unlawful because of the term "disrespectful." The NLRB felt this was an overly broad term and as written this would prohibit employees from exercising their legally protected right to protest working conditions in fear that their actions may be viewed as "disrespectful," or viewed as "injuring the reputation of the dealership" and subject to discipline.

Section 7 of the NLRA guarantees employees "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection," as well as the right "to refrain from any or all such activities."

According to the NLRA, the last sentence in the courtesy rule was overly broad because it encompasses protected Section 7 activities. A statement of protest by an employee would be considered a violation of the courtesy rule because protected activities were not specifically excluded.

If you want to keep your courtesy rule, be sure to make it clear that protected Section 7 communications are excluded from the rule. Better yet, remove the generalities, and give specific examples of the types of communications that are forbidden, so that employees do not read them to include communications that are protected by law. For example, state that "any posts that may be viewed as offensive to a fellow employee on the basis of their race, sex, disability, religion, or any other status protect by law" is forbidden.

Tips for Drafting a Social Media Policy

To keep your dealership out of legal trouble, draft a social media policy and distribute it to all managers and employees. If you're looking for a good example, start with Walmart's social media policy *(This is not future proof, the NLRB has reversed their stance on previous decisions in the past)*. This policy has been approved by the NLRB so you can use it as a guideline for your dealership. Just Google "Walmart social media policy" to find copies online.

Additional tips include:

1. Have your social media policy and employee handbook reviewed by legal counsel.
2. Train your employees and your managers on your social media policy.
3. State that employees have no reasonable expectation of privacy when posting information to public social media sites.
4. You are only allowed to access employees' social media posts that are public or other employees freely bring to your attention. Never force an employee to give you their login information or passwords. Never force employees to log on to their social media profiles while you look over their shoulder. Never force employees to accept a friend or connection request with co-workers or managers.
5. When confronted with an emotionally charged post, take a moment to think before acting.
6. Keep an eye out for new NLRB rulings that may impact your interactions with employees.
7. When in doubt, involve your legal counsel.

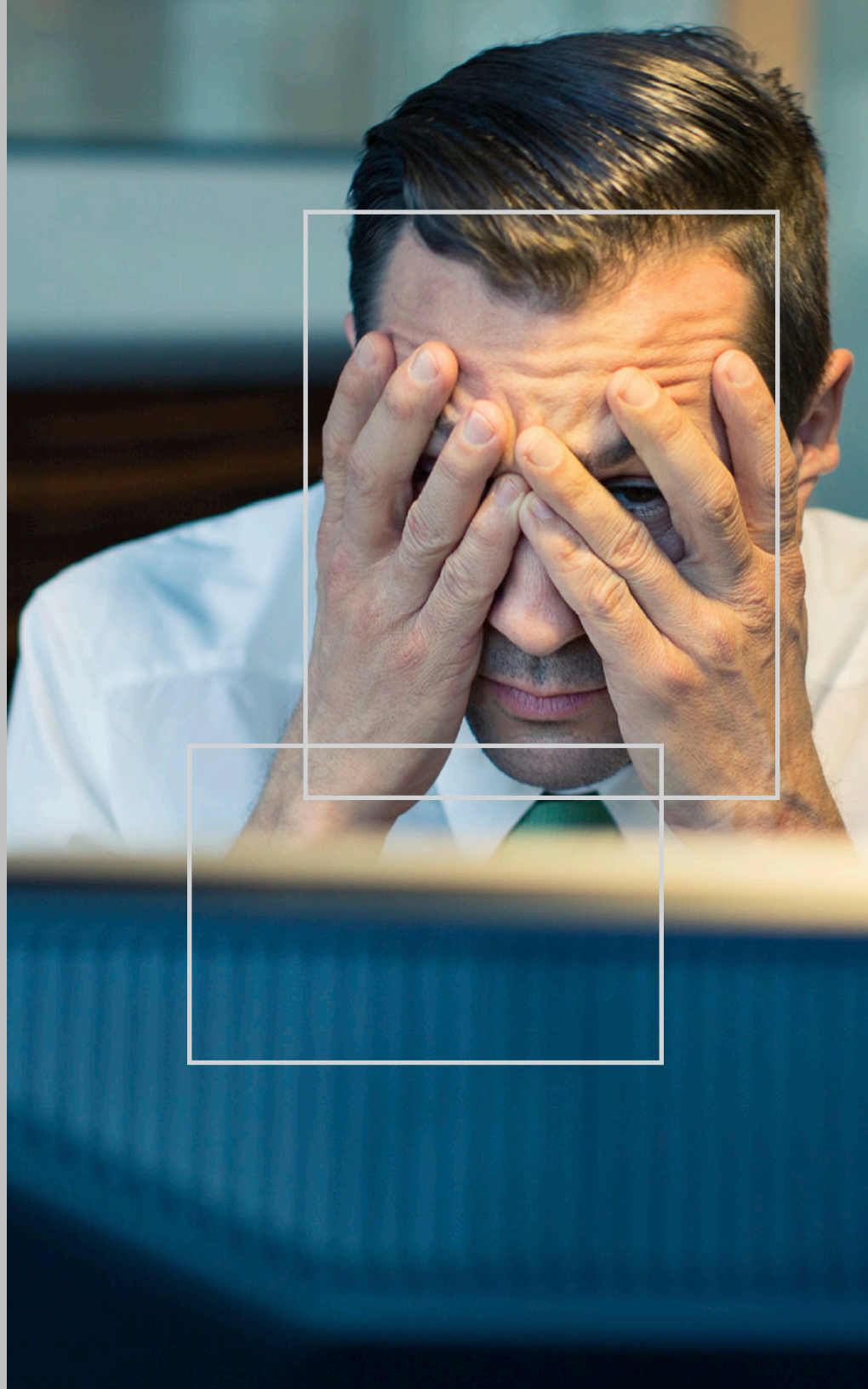
Conclusion

When it comes to social media, there seems to be a disconnect between how employees and their employers perceive its usage in the workplace.

Many employees believe they have a right to privacy, and that employers shouldn't be viewing their social media profiles. It's important to understand that if you, as an employee, willingly connect with co-workers or make your profiles public, then you have no reasonable expectation of privacy.

As an employer, it's important to understand that the laws being used to interpret social media usage are very outdated. In 1935 no-one could have conceived that concerted activities would encompass co-workers liking each others' Facebook posts. But that's how the NLRB is currently interpreting the law, and their interpretation continues to evolve as new cases are brought to them.

Eventually the laws may catch up to modern day technologies, but not before many businesses get hit by expensive lawsuits. Don't let your dealership be one of them. Hopefully, this ebook will help keep you out of legal trouble.



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