



# Weekly Auditing and Compliance Tip

National Alliance of Medical Auditing Specialists | 877-418-5564 | [namas.co](http://namas.co) | [namas@namas.co](mailto:namas@namas.co)

## Managing Social Media Risks

Social media has become an ubiquitous aspect of modern life. Even if a physician practice does not itself maintain social media accounts, it must grapple with employees who do.

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Unfortunately, despite what one might initially think, crafting effective employee social media use policies is not as easy as it might seem. Physician practices must navigate federal guidelines on the type of conduct that an employer may restrict in the social media setting, while also complying with HIPAA requirements. This article briefly addresses these issues.

### Limiting the Limitations

If an employee bad-mouths their employer online, can the employer fire them? The annoyingly lawyerly answer is, "It depends." In a general sense, employers are permitted to condition employment on some aspects of what their employees say in public (and therefore on social media platforms). However, many employers - including physician practices - may be unaware of the limitations on how far they may go in controlling employee conduct in public. The National Labor Relations Act (NLRA) restricts just how far an employer's policies regarding employee behavior may go. The NLRA, which is itself administered by the National Labor Relations Board (NLRB), applies

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to most employers. Within the health care arena specifically, it applies to employers who have an annual gross volume of business of \$250,000 or more.[1]

The NLRB has published guidelines regarding social media policies.[2] These guidelines attempt to implement the NLRA's requirements within the social media context, and generally stand for the proposition that employers may not prohibit employees from engaging in "concerted activities for the purpose of mutual aid and protection"[3]. These types of activities would include things like picketing outside of an employer, or conversing with other employees in an attempt to improve working conditions. As applied to social media, the NLRB has provided general guidance, and has ruled in specific cases on whether various social media policies are permissible under the NLRA, and whether employees terminated for violating such policies were terminated wrongfully. In broad strokes, an employer's policies cannot be so sweeping as to include what could be considered "concerted activities." However, the NLRB also recognizes that mere griping about work may not rise to the level of "concerted activities" if the gripes are not made in relation to group activity among employees.

In practice, this has resulted in the NLRB striking down policies that, for example, simply prohibit disparaging the company in the online context, due to the potential breadth of the policy. However, the NLRB has also upheld the termination of employees for behavior such as posting offensive or inappropriate social media messages when their postings were not related to "concerted activity," or because the employee was only posting on the employee's own behalf and not in any effort to improve work conditions. Given how fact-specific the NLRB's rulings have been, physician practice employers must carefully consider how to draft their social media policies to avoid prohibiting "concerted activity," and how to apply such policies to employees who engage in inappropriate online conduct.

## HIPAA and Social Media

The NLRB's restrictions on employer social media policies do not, however, mean that an employer cannot place any restrictions on employee conduct online. One of the chief areas where physician practice employers can and should develop social media policies is with respect to HIPAA compliance. If an employee posts confidential protected health information (PHI) pertaining to a patient, that employee should be disciplined; and the employer

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Employee should be disciplined, and the employer should have a policy in place that explicitly prohibits such conduct. However, it is not enough to simply have such a policy, nor to simply discipline employees when they violate the policy; an employer must also engage in effective training with respect to PHI in the social media context.

The definition of PHI includes any individually identifiable information.[4] While employees likely understand this concept in a basic sense (e.g., do not post information such as names or social security numbers), many employees may not realize how easy it is to post PHI, nor even what might constitute PHI in a social media setting.

For example, photographs clearly showing the patient's face would constitute PHI under the definition above. Thus, posting a selfie photo that captures a patient's face in the background would constitute an improper disclosure under HIPAA. We represent a multispecialty clinic that had to carefully analyze the facts of a potential disclosure when an employee posted a photo of an apple given to the employee by a patient, where the apple was resting atop a charge sheet for the day.

Fortunately, the photo was cropped so that no PHI was clearly visible, but the incident illustrates how seemingly innocuous behavior can cross a line into a violation of HIPAA.

To help ensure compliance, physician practices must train employees how to recognize PHI in a social media context. This can be done through training exercises that, for example, show "dummy" PHI[5] in a post, and which require the employee to identify where the PHI is in the post. Such exercises can also be used to demonstrate how quickly and widely information can be spread online. Ultimately, the goal of all such training should be to encourage employees to think twice before posting to social media during or about work, so as to avoid their inadvertent or foolish posting of PHI.

## Conclusion

Given the prevalence of smartphones, and the popularity of social media, physician practices will have to grapple with how to educate their employees on social media behavior, and on how to recognize and avoid posting PHI on social media. Towards this end, they will need to establish clear, compliant social media policies. With respect to HIPAA compliance, having and enforcing social media policies regarding disclosure of PHI is part of a physician practice's duties to develop policies and procedures to address risks posed to electronic



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PHI. However, what might seem like a common-sense restriction must be carefully drafted to avoid running afoul of NLRB guidelines. Experienced health care counsel can help in these efforts.

[1]<https://www.nlr.gov/rights-we-protect/jurisdictional-standards>

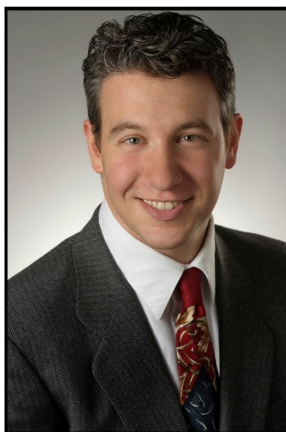
[2]<https://www.nlr.gov/news-outreach/fact-sheets/nlr-and-social-media>

[3] 29 USCA § 157.

[4] 45 CFR § 160.103.

[5] I do not recommend performing this exercise with actual PHI.

### This Week's Audit Tip Written By:



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Mr. Shay is an attorney with Alice G. Gosfield and Associates, P.C., which focuses on health law and health care regulation focusing primarily on physician representation, fraud and abuse compliance, Medicare Part B reimbursement, and

HIPAA compliance in the physician context.

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