

MEDICARE COMPLIANCE

HIPAA, National Labor Relations Act Put Social Media Use in Hospital Crosshairs

Emergency room technician Kathryn Knott was fired from Lansdale Hospital-Abingdon Health in Pennsylvania last year after complaining about patients on her Twitter account and posting pictures of them — including a severed finger — and in the process became a vivid example of how social media can go awry in health care. This and other incidents underscore the importance of implementing a social media policy.

“We can’t leave it up to chance,” said Jennifer Maggione, CEO of Red Balloon Inc. in Phoenix. “Never assume employees will use the same good judgment that you would.”

With the social-media revolution — Americans spend 510 minutes on Facebook a month on average, she said — compliance and privacy officers are considering how it implicates different laws, including HIPAA and the National Labor Relations Act (NLRA). Employers may assume that Facebook posts that bash or embarrass them are grounds for employee termination, but that’s not necessarily the case, says Minneapolis attorney Norah Olson Bluvshstein, with Fredrikson & Byron. The answer is it depends. If employees post a picture of themselves taking a bath in a sink at work, fire away, she says. “But other situations are more complicated,” with the National Labor Relations Board (NLRB) putting the cutting-edge fact patterns of social media through the prism of the 1935 NLRA. It probably doesn’t help that only one-third of health care organizations have social media guidelines (see box, p. 3), Maggione said.

Front and center in social media use is the risk to patient privacy and potential HIPAA violations. Against a backdrop of respect for free speech, hospital and clinic employees are held to certain restrictions, says Nickie Braxton, privacy officer at Boston Medical Center. Health care workers may not mention patients or post photos of them on social media sites they use privately, she says. Employees may think it’s none of the hospital’s business because they use their own devices and personal accounts for Facebook, Twitter or other social media sites, and employees have blurred the lines sometimes between professional and personal. The superseding message: “What you learn in the hospital stays in the hospital,” Braxton says.

But it may sometimes seem like hospitals are talking out of both sides of their mouth. Hospitals have their own Facebook pages for communication and education, but they warn employees not to talk about their patients on their personal Facebook pages and, to some extent, the hospitals themselves. “On the one hand we are fostering the use of social media, and on the other hand we are saying, ‘you have to be very careful when you go on social media, and you can’t share patient information in any way or refer to patients in any way under threat of discipline,’” Braxton says. “It goes against the general cultural norm for employees who are so used to sharing their lives on social media.” In particular, nurses and other clinicians can form intimate relationships with patients and may be tempted to friend each other on Facebook or Instagram, she says. “The challenge is to help people understand there is a professional life and there is a personal life. In your professional life, you are expected to be friendly toward patients, but you are not expected to friend a patient,” Braxton says. “People come here not because we are friends but because we uphold a certain professionalism and standard of care that we are expected to maintain at all times.”

Pictures on social media are off-limits. Even when everyone has agreed to take pictures, there is still a risk. Maybe the patients misunderstood or changed their mind later, or unrelated patients in the background show up in the picture and they haven’t given consent, Braxton says.

Social Media Fires Up NLRB

Anonymous postings will not protect employees and physicians, a lesson learned in a blogger case, Maggione said at a May 13 Health Care Compliance Association webinar. A Boston pediatrician, who was a popular, award-winning but anonymous blogger, shared his experiences in medicine. “People loved it,” Maggione said. “Things took a wrong turn when he published blogs” about serving as an expert witness for the defendant in a wrongful death case. The blogger, known as “Flea,” revealed too much, she said. The blogger was outed in 2007 as physician Robert Lindeman, and he admitted it, according to *The Boston Globe*. “There’s no such thing as anonymity online,” Maggione cautioned. People have the illusion of invisibility, and “that fans the fame of aggres-

sive behavior.” Employees should be trained to post only items they can stand behind, she said. “Be proud of those posts, and if not, don’t post them,” she said.

Employees also use social media to comment on hospitals and other employers, and how they react — firing employees for nasty posts, for example — may have consequences. The NLRB, which enforces the NLRA, may uphold the termination, or not, which means back

pay for the employee and reinstatement. The NLRA applies to union and non-union workers, Bluvshstein says.

Sec. 7 of the NLRA gives employees the right to discuss the terms and conditions of employment. It’s construed broadly, she says, and covers wages, other compensation and how their supervisors treat them. That means employees can talk to each other critically about management, she says. Social media is turning into a

Policy on Use of Social Media

Here is Boston Medical Center’s policy and procedure on the use of social media. Contact Privacy Officer Nickie Braxton at Nickie.Braxton@bmc.org.

Purpose: To provide guidance to the Boston Medical Center (BMC) workforce on the appropriate use of social media as it relates to BMC and its patients.

Policy Statement: BMC is committed to providing exceptional care without exception, as well as maintaining a work environment that is respectful, ethical, and compassionate. Like many organizations, BMC participates in social media to help educate potential patients, current patients and families about BMC and the care that we provide. Only workforce members specifically designated by BMC have the authority to speak on behalf of the organization using social media or any other medium. BMC recognizes that workforce members take part in social media, but all workforce members must respect patient privacy, our organization and other workforce members who work here. **Workforce members may not share information about BMC patients or hospital business matters on any social media sites.**

Application: BMC’s workforce and its subsidiary corporations, including, but not limited to, the Faculty Practice Foundation, Inc. and providers at community health centers who are credentialed at BMC.

Exceptions: None

Definitions:

Social media: text messages, audio, video, images, blogs, wikis, message boards, chat rooms, electronic newsletters, online forums, social networking sites and other sites and services that permit users to share information with others

Workforce members: employees, Licensed Independent Practitioners (as defined in the Medical/Dental Staff Bylaws), interns, house staff, volunteers, and all others who work or provide services on behalf of BMC including contractors.

Procedure: Workforce member’s behavior on social

media sites should be handled carefully to avoid reflecting poorly on BMC.

I. *General Behavior on Media Sites*

1. Information posted on social media is public for an extended period of time. Workforce members must be mindful of the effect their posts may have on BMC’s image as well as their own.
2. Workforce members must use their **personal e-mail addresses, not their BMC e-mail addresses**, as their primary means of identification on social networking sites.
3. HIPAA and applicable Commonwealth of Massachusetts privacy rules and regulations apply at all times. **Posting any information about a current or past BMC patient is prohibited.** This includes not only BMC patient names but also descriptions of patients and those who visit patients at BMC. **Patient photos must never be posted on social media sites, even with the patient’s permission.**
4. Never use profane, obscene, or sexually explicit language on social media sites.
5. Workforce members must promptly report any identified breach of this policy or other BMC confidentiality or privacy policies to their supervisors, to the BMC Privacy Officer or to the BMC Compliance Hotline at 800-586-2627.
6. Any inappropriate social media activity that violates BMC’s Code of Conduct may result in disciplinary action up to and including termination of employment.
7. Personal use of social media sites on work time is prohibited and may result in disciplinary action.

II. *Professionalism on Social Media Sites*

1. All BMC workforce members must be careful to maintain professional relationships with BMC patients and their families. Although it is important for workforce members to be friendly, it is inappropriate for workforce members to become

flash point with the NLRB, which is “heavily focused on social media firing cases,” Bluvshstein says.

Here are a couple of examples:

◆ **American Medical Response:** A paramedic was fired in 2010 after posting remarks on Facebook about her supervisor, Bluvshstein says. The paramedic wrote that “looks like I’m getting some time off. Love how the company allows a 17 to be a supervisor,” referring to a psychiatric-patient code. A colleague asked what happened, and the paramedic responded that the supervisor was being a jerk (using a vulgar word). “Chin up,” the co-worker said. The NLRB declared the

paramedic’s termination unlawful, Bluvshstein says, because “employees have the right to criticize supervisors.” The NLRB protected her posts also because “her fellow employees posted support,” Maggiore said. “They voiced their frustration.” The lesson here, Maggiore said, is that managers and human resources are not grasping the fact that social media is another communication tool that’s often protected.

◆ **SkinSmart Dermatology:** An employee was fired from the dermatology clinic after daring her supervisors to do it on a social media site, Bluvshstein says. The employee said the supervisors were full of it and

social media “friends” with our patients or their families. Workforce members must consistently uphold professional boundaries in relation to BMC patients, former patients and their families. The fact that a patient may initiate or invite contact does not permit an employee to engage in a personal relationship with the patient. If an employee has a question about social media relationships, the employee should consult with the appropriate supervisor for guidance.

2. BMC Workforce members’ participation in social media is expected to be courteous and respectful at all times. Workforce members must not engage in disparaging remarks on social media sites regarding BMC, other workforce members, or current or past patients, and may not threaten, harass, degrade or embarrass them, even if they are not identified. This includes use of inflammatory language regarding race, creed, color, religion, sexual orientation or gender.
3. Workforce members must be aware of and comply with BMC information security policies regarding the use of employer-owned computers, cameras and other electronic devices, and use of personal devices in the workplace.

III. Representing Boston Medical Center on Social Media Sites

1. If a workforce member is contacted by the press or another media outlet about something that was posted on a social media site, all questions should be referred to the Communications Department at BMC.
2. BMC logos, trademarks, and photographs may not be used on social media sites without written permission from the BMC Communications Department. Workforce members must always respect copyright laws and reference sources appropriately. Workforce members should also be aware that they can be liable for plagiarism in online posts if they copy content not their own without the permission of the original author or creator.

3. Workforce members should not post or discuss any information about BMC that is considered to be confidential. If you have a question about what is appropriate to post, please contact the Privacy Officer or the Chief Compliance Officer.
4. If a workforce member is offered compensation to participate in an online forum about BMC s/he should consult with her/his supervisor prior to accepting the offer. Compensation for the use of BMC medical information is prohibited. If an employee is uncertain about participation s/he should consult with her/his manager or supervisor.
5. BMC’s social media site is the responsibility of the Communications and Marketing Departments and the Development Office, and only they are authorized to respond to questions and concerns posted by patients and others. If workforce members wish to add a comment in response to a question or issue on the site, they **must receive prior written approval** from the Communications and Marketing Departments.
6. Particular employee grievances should never be posted on BMC’s site, but should be brought to the appropriate individual or department for resolution (i.e., HR, supervisor, the Compliance Office).
7. Individuals and departments of BMC **may NOT create their own BMC sites** without the written permission of the Communications and Marketing Departments.
8. BMC workforce members are not authorized and may not respond to health questions posed on social media sites, including BMC’s own site, unless authorized by the Communications or Marketing Departments. For example, if a patient posts a question about flu vaccines, a nurse, employed by BMC, should never respond or provide health care information without prior written authorization from the Communications and Marketing Departments.

Nothing in this policy is intended to or will be applied in a manner that limits employees’ rights to engage in protected concerted activity as prescribed by the National Labor Relations Act.

seemed to be steering clear of her because she didn't bite her tongue anymore. "She claimed the post was protected because she has a right to badmouth her supervisor," but that was not upheld by the NLRB. "No co-workers joined in the criticism. To be protected, it can't be a single employee," Bluvshstein says.

Because social media is a popular forum to comment on jobs, Maggiore suggested employers ask their employees to include a disclaimer with their posts. "The NLRB says you can't require a disclaimer, but you may suggest it," she said. The disclaimer can be very simple — "opinions expressed are my own" — and preserve the objectivity of the comments, whether positive or negative.

Boston Medical Center continually trains employees on social media, Braxton says. She distributes the policy, writes articles and does email blasts. "It's not just about what you can and can't do, but why," she says. "It's trying to let people understand the reasoning behind the rules." Braxton attends meetings with the leadership forum — managers, executives and directors — to talk about compliance issues, including social media. "We have huddle cards sent every week to our hospital managers, which they discuss with their teams, and social media issues are on a number of them," she says.

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