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presents

Social Media, Healthcare and the Law 2011 Update

Midwest HIMSS Fall Technology Conference 2011
November 15, 2011

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OUTLINE

- 1. Social Media**
 - description
 - importance
 - changes since Midwest HIMSS 2010
- 2. Legal Issues**
 - overview (federal and state)
 - changes since Midwest HIMSS 2010
- 3. Revisions to your Social Media Policy**
 - things to consider and example

OUTLINE

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WHAT IS SOCIAL MEDIA?

- **A method of communication**
- **Create and disseminate ideas and information**
 - Instant
 - Efficient
 - Low Cost (Mayo Clinic spent \$1500)
 - User-generated content
 - Collaborative
 - No degree required, everyone is an expert
 - Anyone can make a difference



SOME EXAMPLES

- Facebook
- Twitter
- YouTube
- Medscape (from WebMD)
- Sermo
- Healthy Place (for mental health)
- Patients Like Me



WHY DOES SOCIAL MEDIA MATTER?

- **Facebook** (Facebook Statistics)
 - More than 800 million active users *(compared to 500 million last year)*
 - Average user has 130 "friends"
 - More than 7 million apps and websites are integrated with Facebook

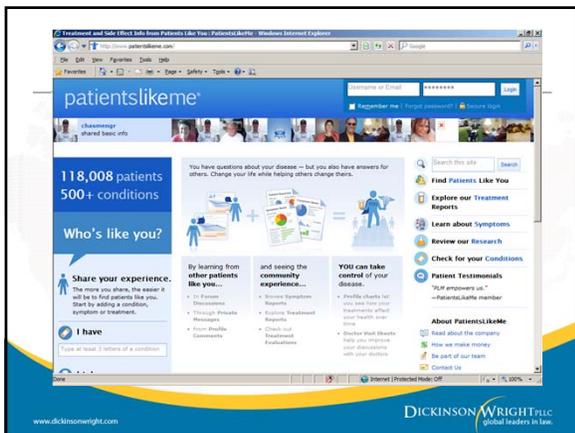


WHY DOES SOCIAL MEDIA MATTER?

- **Twitter** (Mark Hachman, PC Mag, 2011)
 - More than 100 million active users (compared to 75 million users last year)
 - o Which is an 82% increase since the beginning of 2011
 - About 50 million tweet on a daily basis
 - On pace to add 26 million new users before the end of the year

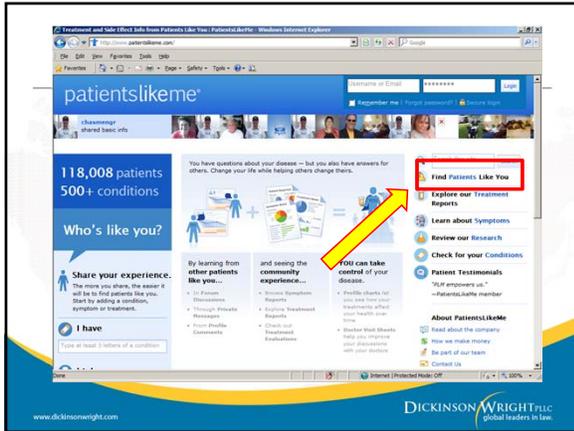
WHY DOES SOCIAL MEDIA MATTER?

- **Patients Like Me** (Health 2.0 Conference, Our Speakers, 2010)
 - Last year:
 - o More than 45,000 users
 - o Patients voluntarily revealing protected health information
 - o Tracking 19 diseases



WHY DOES SOCIAL MEDIA MATTER?

- **Patients Like Me**
 - Has *completely revamped* itself:
 - o More than 118,000 patients (compared to 45,000)
 - o Tracking 500+ conditions (compared to 19)
 - o Patients *voluntarily and publicly* revealing their conditions



WHY DOES SOCIAL MEDIA MATTER?

- **Patients Like Me**
 - Individuals voluntarily disclosing their
 - o Conditions (bipolar, ALS, MS, ADHD, depression, HIV)
 - o Age
 - o Pictures
 - o Treatment protocols
 - o Time have had condition

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WHY DOES SOCIAL MEDIA MATTER?

- **Patients want to be in control**
 - Of the 74% of adults who use the internet
 - 80% of internet users have looked online for information about health related topics
 - 34% of internet users, or 25% of adults, have read someone else's commentary or experience about health or medical issues on an online news group, website, or blog
 - 24% of internet users, or 18% of adults, have consulted online reviews of particular drugs or medical treatments

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WHY DOES SOCIAL MEDIA MATTER?

- **Peer professionals want to share**
- **Everyone wants to participate**

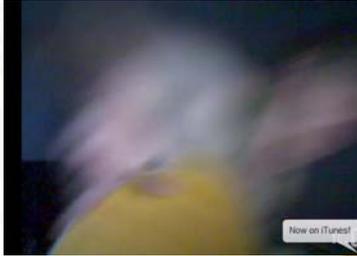
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WHY DOES SOCIAL MEDIA MATTER?

- **Easy**
- **+ Fast**
- **+ Popular**
- **= Lots of Potential for TROUBLE**

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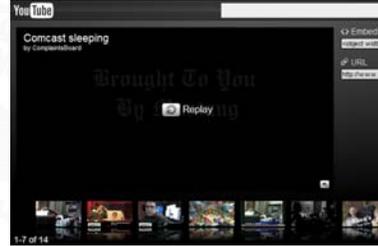
EXAMPLES OF TROUBLE - STARBUCKS



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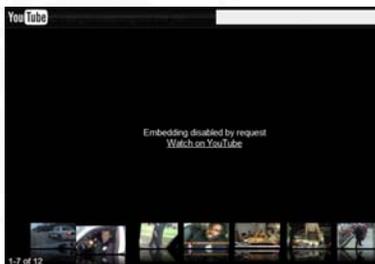
EXAMPLES OF TROUBLE - COMCAST



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EXAMPLES OF TROUBLE - PHILLY POLICE



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EXAMPLES OF TROUBLE - A FEW LESSONS



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EXAMPLES OF TROUBLE



➤ Last year

- Federal prosecution
 - Case in Pennsylvania
- State issues
 - o Incidents in all Midwest HIMSS states **except** Illinois and Indiana
 - o Issues in Iowa, Michigan, Minnesota and Wisconsin were **all related to posting PHI on Facebook**

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EXAMPLES OF TROUBLE

➤ This year has been more of the same

2011

- In general, people continue to make bad decisions
- **At the Federal Level - Federal prosecution**
 - Virginia, psychiatrist on trial for calling a patient's employer months after patient fired psychiatrist and disclosing PHI (Nov. 2, 2011)

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EXAMPLES OF TROUBLE



- Federal prosecution cont.

- o The Department of Justice or Attorneys' General tend to prosecute when
 - Medical records and identities are stolen to commit healthcare fraud
 - Medical records were stolen to embarrass or threaten to embarrass someone
 - » 2011 Arizona case
 - » 2009 Indianapolis case
 - Medical records were stolen to commit fraud against private businesses

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EXAMPLES OF TROUBLE

- Federal prosecution cont.

- o During 2011, Federal prosecutors working with the FBI brought charges cases charging 16 individuals and obtained 16 convictions
- o Federal prosecutions are expected to continue
 - As of early **November 2011**, the FBI has **56 pending investigations** associated specifically with violations of the **HIPAA statute**
- o Actual number is higher because the above numbers do not reflect cases where the HIPAA statute is not charged



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EXAMPLES OF TROUBLE

- At the State Level

- Still nothing for Illinois (at least as reported by the newspapers)
- But, Indiana has had an incident

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EXAMPLES OF TROUBLE



➤ Indiana

- Certified nursing assistant took a picture of a paraplegic patient in a compromising position
- CNA says to her coworker: "This is too funny. I need to take a picture of this."
- Coworker: Please don't take the picture. Coworker notices picture on Facebook wall. *Reports to employer (as required under HIPAA/HITECH!)*

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EXAMPLES OF TROUBLE



➤ Indiana

- **Problem:** revealed PHI
- Results for CNA:
 - o Fired by employer after she admitted taking the photo
 - o Referred to the State Department of Health which oversees CNAs
 - o Arrested and facing a voyeurism charge

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EXAMPLES OF TROUBLE



➤ Rhode Island (Boston Globe, 2011)

- First (publicized) incident involving a doctor
- Westerly Hospital fired doctor for posting information about a patient on her Facebook account
- Reprimanded by the Rhode Island Medical Board for "unprofessional conduct"
- *Did not mention name, but Board concluded revealed enough for others to identify the patient*

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EXAMPLES OF TROUBLE



➤ Mississippi

(WLB 3, Dec. 2009)

- *Governor tweeted*: "Glad the Legislature recognizes our dire fiscal situation. Look forward to hearing their ideas on how to trim expenses."
- *Nurse tweeted back*: "Schedule regular medical exams like everyone else instead of paying UMC employees overtime to do it when clinics are usually closed."
- **Problem**: Nurse *indirectly* referenced PHI because she *tweeted back* to the Governor

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EXAMPLES OF TROUBLE



➤ Lawsuit

- **University of Louisville** (April 2011)
 - o Dismissed nursing student from its program after she made unflattering remarks on her MySpace page after watching a live birth
 - o Based on violating its Honor Code and the course's confidentiality agreement
 - o The student sued alleging First (free speech) and Fourteenth (due process) Amendment violations
 - o She won on summary judgment
 - o The decision was reversed on appeal and remanded to the District Court

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EXAMPLES OF TROUBLE

➤ Lawsuit

- **University of Louisville** (Nov 2011)
 - o During the pendency of the appeal
 - Yoder was reinstated to the nursing program pursuant to the injunction
 - Yoder completed her coursework
 - Yoder obtained her nursing degree
 - Yoger left the University
 - o Generally, case would be moot
 - But here, issue of damages was not initially settled
 - University has another 30 days to respond
 - Stay tuned!

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WHAT'S REALLY THE PROBLEM?

➤ Blurring of the lines between professional and personal

- People do not consider the potential impact of their communications (ignorance is not bliss)
- Personal opinion v. professional advice
- Eric Schmidt, CEO of Google, prediction to the WSJ

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WHAT'S REALLY THE PROBLEM?

➤ Once you send, you CAN'T UNSEND

- WayBackMachine - <http://www.archive.org>
- Remember this picture?

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WHAT'S REALLY THE PROBLEM?

➤ Once

- Wa

- Re



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WHAT ABOUT THE GOOD?

- **Hospitals sharing information – as of October 2011, hospitals accounted for:**
 - **575** YouTube channels (compared to **398** in August 2010)
 - **1068** Facebook pages (compared to **631** in August 2010)
 - **814** Twitter accounts (compared to **634** in August 2010)
 - **149** Blogs (compared to **87** in August 2010)
- **Good for patients because they can stay informed, have more control over their own healthcare and learn from *actual* experts**

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LEGAL ISSUES WITH SOCIAL MEDIA

Privacy Issues



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LEGAL ISSUES WITH SOCIAL MEDIA: PRIVACY

- **State and Federal Laws**
 - Strict privacy requirements and related data security laws and regulations
 - Revealing that the person is a patient is itself a problem
 - Limits your ability to respond to others online because you would be disclosing PHI

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LEGAL ISSUES WITH SOCIAL MEDIA: PRIVACY

- **HIPAA/HITECH**
 - Privacy Rule
 - Keep protected health information secure
 - Disclosure allowed under certain defined circumstances
 - **HIPAA is STILL under revision, advised to expect new regulations by the end of the year (which means December 28, 2011!)**

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LEGAL ISSUES WITH SOCIAL MEDIA: PRIVACY

- **HIPAA Complaint Facts**
 - **HIPAA Privacy Rule** - From April 2003 - Sept. 2011, HHS received **64,000+ complaints**
 - **HIPAA Security Rule** - Since Oct. 2009, OCR has received **470+ complaints**
 - Of the above, ~22,500 eligible for enforcement
 - o ~15,000 - OCR required CEs to take corrective actions
 - o ~7,500 - OCR found no violation

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LEGAL ISSUES WITH SOCIAL MEDIA: PRIVACY

➤ HIPAA Complaint Facts cont.

- Most common issues
 - o Employee misbehavior
 - o Improper disposal of records
 - o Organizations failing to give individuals copies of their records

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LEGAL ISSUES WITH SOCIAL MEDIA: PRIVACY

➤ HITECH Breach (HHS and FTC)

- "the **unauthorized** acquisition, access, use, or **disclosure** of protected health information which **compromises the security or privacy** of such information, **except** where an unauthorized person to whom such information is disclosed would **not** reasonably have been able to **retain** such information"
- If posted online, **retained** for a very long time
- Not covered by any of the breach exceptions

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LEGAL ISSUES WITH SOCIAL MEDIA: PRIVACY

➤ HITECH Breach (HHS and FTC) –

➤ *Who is under Obligations?*

- Covered Entity
- Business Associate
- Subcontractor Requirements

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LEGAL ISSUES WITH SOCIAL MEDIA: PRIVACY

➤ HITECH Breach (HHS and FTC) –

➤ *What are you required to do?*

- Required to investigate
- Required to give notice
- Required to reprimand
- Required to record/notify Secretary

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LEGAL ISSUES WITH SOCIAL MEDIA: PRIVACY

➤ Investigation and Notice

- CEs must provide notification (where warranted) "without unreasonable delay" but in no event longer than 60 days after a breach is "discovered"
- A breach is **discovered** when it is **known**, or by exercise of reasonable diligence, would have been known *by a member of the covered entity's workforce*
- People in your workforce who spot a breach on another employee's site start the clock running

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LEGAL ISSUES WITH SOCIAL MEDIA: PRIVACY

➤ State AG's have power to enforce HITECH breach provisions

- At last year's presentation, noted enforcement by Connecticut, Indiana and Vermont
- For those AG's, that are just learning, OCR has kindly offered training sessions that took place:
 - o Dallas, Texas- April 4 & 5, 2011
 - o Atlanta, Georgia - May 9 & 10, 2011
 - o Washington, DC (metro area) - May 19 & 20, 2011
 - o San Francisco, CA- June 13 & 14, 2011
 - o In attendance? **Reps from 45+ States and territories**

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LEGAL ISSUES WITH SOCIAL MEDIA: PRIVACY

➤ State AG's have power to enforce HITECH breach provisions cont.

- This year, OCR has provided technical assistance on enforcement to the State Attorneys General in:

- o California
- o Connecticut
- o **Illinois**
- o Massachusetts
- o **Michigan**
- o Rhode Island
- o South Carolina
- o Texas
- o Washington
- o Wyoming

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LEGAL ISSUES WITH SOCIAL MEDIA: PRIVACY

➤ HIPAA Breach Facts

- As of Nov. 12, 2011, OCR received and posted **364 reports** of breaches involving **more than 500 individuals**
 - o Each of the 6 largest breaches this year impacted between 175,000 - 4.9 million individuals
 - o Reports from organizations in the Midwest
 - Illinois - 17 / 242,682
 - Indiana - 11 / 66,938
 - Iowa - 1 / 19,222
 - Michigan - 11 / 118,596
 - Minnesota - 10 / 47,804
 - Wisconsin - 5 / 16,888

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LEGAL ISSUES WITH SOCIAL MEDIA: PRIVACY

➤ HIPAA Breach Facts Cont.

- As of Nov. 4, 2011, OCR received **36,000+** reports involving **fewer than 500 individuals**.

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HITECH ACT PENALTIES: PRIVACY



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LEGAL ISSUES WITH SOCIAL MEDIA: PRIVACY

➤ Expensive to clean up a breach

- \$268 per record
- cost to rapidly respond to average data breach (Ponemon Institute 2010)

Breach Type	Cost 2010	Cost 2009
First timer YES	\$326	\$228
Malicious or criminal attack YES	\$318	\$215
Third party mistake YES	\$302	\$217
Quick response YES	\$268	\$219
Lost or stolen device YES	\$258	\$225
Security effectiveness NO	\$255	\$207
CISO leadership NO	\$232	\$236
External consulting support NO	\$229	\$231
Negligence NO	\$227	\$237
System failure NO	\$216	\$225
System failure YES	\$210	\$166

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LEGAL ISSUES WITH SOCIAL MEDIA: PRIVACY

➤ High stakes if employees violate patient's privacy

- Liability under HIPAA and state laws, including criminal liability (meaning jail time)
- PR problems
- \$\$\$

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LEGAL ISSUES WITH SOCIAL MEDIA: STATE LAWS

State Laws



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LEGAL ISSUES WITH SOCIAL MEDIA: STATE LAWS

> Some of the Applicable State Statutes

- Illinois:
 - o Medical Patient Rights Act, 410 ILCS 50
 - o Genetic Information Privacy Act, 410 ILCS 513

- o **Additional Resource(s)**:
Illinois Hospital Association –
<http://www.ihatoday.org/issues/it/hipaa.html>

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LEGAL ISSUES WITH SOCIAL MEDIA: STATE LAWS

> Some of the Applicable State Statutes

- Indiana:
 - o Health Records, IC 16-39 *et seq.*
 - o Health Records and Identifying Information Protection, Act No. 356

- o **Additional Resource**:
Indiana Health Coverage Programs –
<http://indianamedicaid.com/ihcp/ProviderServices/hipaa.asp>

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LEGAL ISSUES WITH SOCIAL MEDIA: STATE LAWS

> Some of the Applicable State Statutes

- Iowa:
 - o Acquired Immune Deficiency Syndrome, Iowa Code § 141A
 - o Hospitalization of Persons with Mental Illness, Iowa Code § 229.25

- o **Additional Resource**:
Iowa Dept. of Human Services –
<http://www.dhs.state.ia.us/Consumers/Health/HIPAA/Home.html>

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LEGAL ISSUES WITH SOCIAL MEDIA: STATE LAWS

> Some of the Applicable State Statutes

- Minnesota:
 - o Chapters 144 – 159 cover Health
 - o Minnesota Health Records Act, Minn. Stat. §§ 144.291 *et seq.*
 - o Healthcare Bill of Rights, Minn. Stat. §§ 144.651 *et seq.*

- o **Additional Resource**:
Univ. of Minnesota, Privacy & Security Project –
<http://www.ahc.umn.edu/privacy/home.html>

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LEGAL ISSUES WITH SOCIAL MEDIA: STATE LAWS

> Some of the Applicable State Statutes

- Michigan
 - Mental Health Code, Act 258 of 1974, MCL 330.1001 *et seq.*
 - Michigan Medical Records Access Act, Act 47 of 2004, MCL 333.26261 *et seq.*

- **Additional Resource**:
Michigan Bar, Healthcare Law Section –
<http://www.michbar.org/health/hcresources.cfm>

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LEGAL ISSUES WITH SOCIAL MEDIA: STATE LAWS

- **Some of the Applicable State Statutes**
 - **Wisconsin**
 - Chapter 51: State Alcohol, Drug Abuse, Developmental Disabilities and Mental Health Act
 - Chapter 153: Healthcare Information
 - Chapter 252: Communicable Disease
 - **Additional Resource:**
HIPAA Collaborative of Wisconsin (HIPAACOW) –
<http://hipaacow.org/home/home.aspx>

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LEGAL ISSUES WITH SOCIAL MEDIA

➤ Other Legal Issues



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LEGAL ISSUES WITH SOCIAL MEDIA: OTHER LEGAL RISKS

- **Discrimination**
- **Harassment**
- **Stored Communications Act of 1986**
 - Violation to gain unauthorized access
 - Employees with "private" pages

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LEGAL ISSUES WITH SOCIAL MEDIA: OTHER LEGAL RISKS

- **Negligence / Malpractice**
- **Defamation**
- **Intellectual property infringement**
- **Afterhours work by nonexempt employees**
- **FTC Endorsement Guidelines**

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LEGAL ISSUES WITH SOCIAL MEDIA: OTHER LEGAL RISKS

- **Malpractice**
 - Is tweeting during a medical procedure negligence?
- **Litigation**
 - Tweets discoverable
 - Facebook posts discoverable (probably)

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NATIONAL LABOR RELATIONS ACT

- **The NLRB has been the hotbed of social media activity**
 - **National Labor Relations Act**
 - Enacted to protect employees' rights to collective bargaining
 - But has been broadly applied to include employers who do not have unions



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NATIONAL LABOR RELATIONS ACT

- **The NLRB has been the hotbed of social media activity**
 - Since 2010, has issued about 15 opinions on various employer actions related to handling of situations involving social media
 - **Typical case:** employee sees something doesn't like, posts on Facebook, employer finds out and . . .

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NATIONAL LABOR RELATIONS ACT

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NATIONAL LABOR RELATIONS ACT

- **But, employers cannot fire employees when employees are *engaging in***
 - Concerted activity
 - o Employee acts "with or on the authority of **other employees**, and not solely by and on behalf of the employee himself"
 - Protected activity
 - o Implicates **working conditions** (e.g., salary, hours, safety, etc.)
 - *Protection can be lost under certain circumstances*

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WHY HAVE A SOCIAL MEDIA POLICY?

- **To protect your patients' rights**
- **To instill professionalism throughout your enterprise**
- **To protect your organization from liability**
- **To protect your employees from liability**

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WHY HAVE A SOCIAL MEDIA POLICY?

- **If the organization *does not know* that employees are posting PHI but knows of the popularity of social networking websites and that its employees use such websites**
 - Under Proposed HIPAA changes – *may be* "willful neglect" if no policies and procedures in place
 - In the HIPAA *proposed* rule, HHS focused on lack of policies and procedures

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WHY HAVE A SOCIAL MEDIA POLICY?

- **Rogue employee defense**
 - Can shield employers from liability to the extent the conduct occurred in spite of and contrary to reasonable safeguards, including documented *training*

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WHY HAVE A SOCIAL MEDIA POLICY?

- **Will not work if**
 - Cannot demonstrate a strict policy
 - Cannot demonstrate training structure designed to prevent the "rogue" conduct

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FORMULATING A SOCIAL MEDIA POLICY

- **What is your stance?**
 - Does your organization want to allow the use of social media? If so, with whose "tools"?
 - Allow use only under certain circumstances?
- **Review current communications policies and procedures**
 - Can generally be modified to address social media
 - Good opportunity to review all policies

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FORMULATING A SOCIAL MEDIA POLICY

- **Focus on what employees can do**
 - Be transparent and authentic
 - Be responsible for what you write
 - Protected PHI and proprietary information
 - Use common sense and common courtesy
 - Think twice before you hit post!

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FORMULATING A SOCIAL MEDIA POLICY

- **Be consistent with your policies**
- **Enforce your policies – having policies will not help if they are not properly enforced**
- **Review policies periodically**
- **EMPLOYEES MUST BE AWARE OF POLICIES AND RAMIFICATIONS OF VIOLATIONS**

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FORMULATING A SOCIAL MEDIA POLICY

- **Complying with the NLRB Act**
 - Policies may not be overly broad - examples of overly broad language
 - o prohibit employees from using any social media that *may violate, compromise, or disregard* the rights and reasonable expectations as to **privacy or confidentiality of any person or entity**
 - o prohibit any communication or post that constitutes **embarrassment, harassment or defamation of the organization** or of any organization employee, officer, board member, representative, or staff member
 - o making statements that **lack truthfulness** or that **might damage the reputation or goodwill** of the organization, its staff, or employees

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FORMULATING A SOCIAL MEDIA POLICY

- **Complying with the NLRB Act**
 - **Why** were those examples overly broad?
 - **NO** definition or guidance as to what is private or confidential
 - **NO** exclusion for protected activities
 - ▶ Employees **could reasonably interpret policies to prohibit protected** employee **discussions** on wages and other terms and conditions of employment

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FORMULATING A SOCIAL MEDIA POLICY

- **Complying with the NLRB Act cont.**
 - No right to:
 - Make untrue statements
 - Disloyal statements to damage a company's reputation
 - **BUT**, if you investigate, and the above statements are made in the **context of a group of employees discussing working conditions**, call your attorney **prior** to taking action

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POLICY EXAMPLE: KAISER PERMANENTE

- Statement
- Purpose
- Scope
- Definitions
- Hosted Sites / Non-Hosted Sites
- Blogging Best Practices
 - If allow comments, see the Mayo Clinic comments policy
- Other considerations
 - Facebook
 - Twitter
 - Off Hours Discussions
 - Discussing Patients
 - Discussing Work
- Regulatory Audit
- Enforcement
- Training

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OTHER POLICY EXAMPLES

- **Mayo Clinic**
 - Participation Guidelines for the Public – Basic rules of the road for blogs, etc. - <http://sharing.mayoclinic.org/guidelines/>
 - Comments Policy – How the Mayo Clinic handles submitted comments - <http://www.mayoclinic.org/blogs/comment.html>
 - Guidelines for Employees & Code of Ethics - <http://sharing.mayoclinic.org/guidelines/for-mayo-clinic-employees/>
- **Vanderbilt University Medical Center**
 - Social Media Toolkit <http://www.mc.vanderbilt.edu/root/vumc.php?site=socialmediatoolkit>

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OTHER POLICY EXAMPLES

- **Social Media Governance**
 - <http://socialmediagovernance.com/policies.php>
 - 174 Policies available

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You are encouraged to consult with an attorney if you have specific questions relating to any of the topics covered in this presentation

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