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presents

Social Media, Healthcare and the Law 2011 Update

Midwest HIMSS Fall Technology Conference 2011
November 15, 2011

Brian Balow Partner
Tatiana Melnik Associate

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

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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



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SOME EXAMPLES

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



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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

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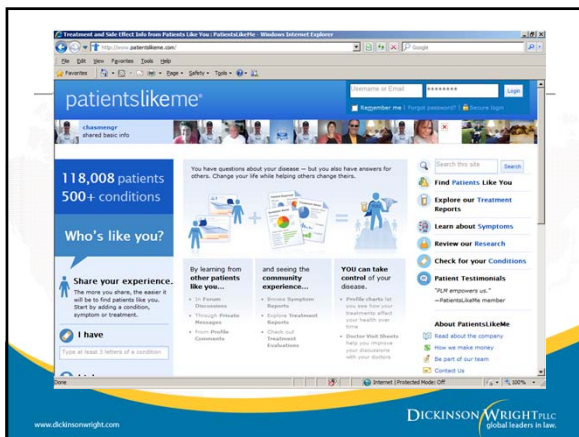
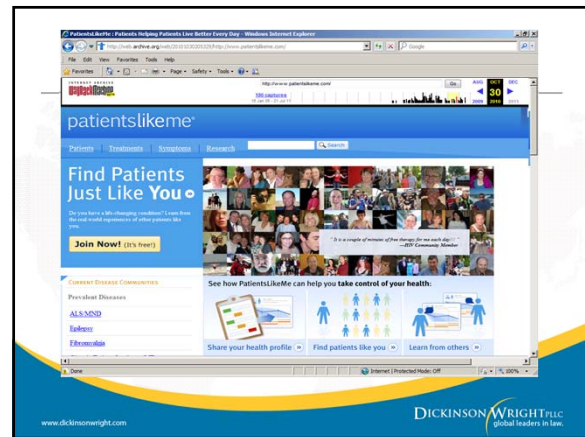


WHY DOES SOCIAL MEDIA MATTER?

- **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

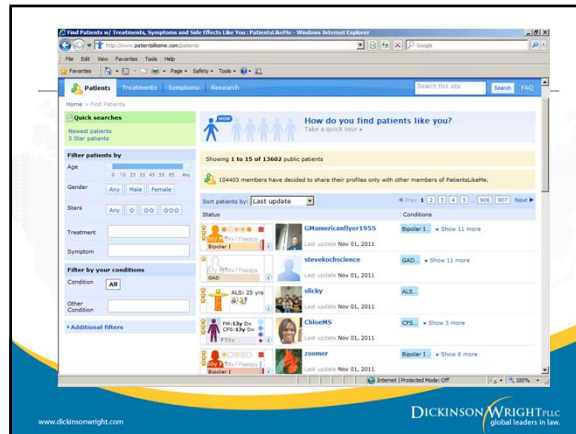
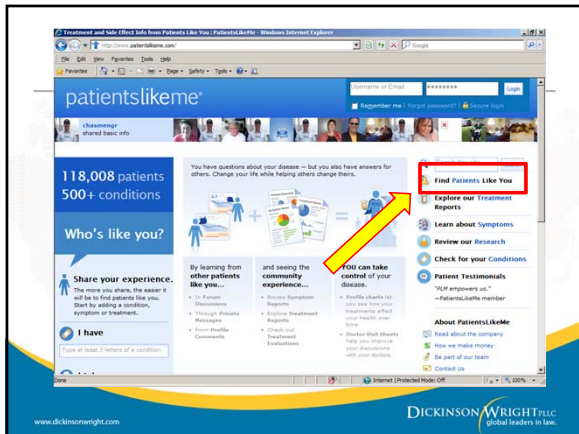
WHY DOES SOCIAL MEDIA MATTER?

- **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**

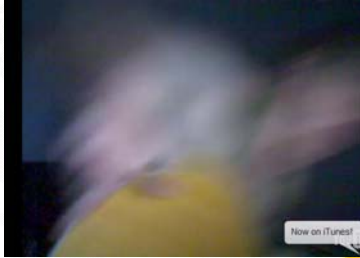
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WHY DOES SOCIAL MEDIA MATTER?

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

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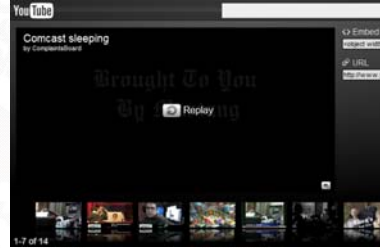
EXAMPLES OF TROUBLE - STARBUCKS



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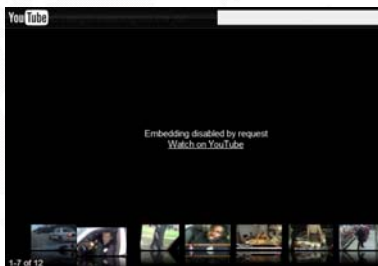
EXAMPLES OF TROUBLE - COMCAST



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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

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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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> 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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> 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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DISCLAIMER

This presentation is informational only. It does not constitute legal or professional advice.

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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