



Webinars for Wise Nonprofits: Understanding Social Media and the Law

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Laura Abel, Senior Policy Counsel
label@lawyersalliance.org

Ciarra A. Chavarria, Senior Staff Attorney
cchavarria@lawyersalliance.org

Germaine Grant, Extern Attorney
extern@lawyersalliance.org

Resource Call Hotline: 212-219-1800 x224

ResourceCall@lawyersalliance.org



Connecting Lawyers, Nonprofits, and Communities

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Disclaimer

Please note: Today's presentation is informational only and is not intended to constitute legal advice. This presentation references both federal and state laws and regulations but primarily focuses on New York law. Please consult with appropriate counsel for guidance pertinent to your organization or situation.



Overview





**Intellectual
Property**

**Privacy and Data
Protection**

**Employment
Law**

**Fundraising/
Lobbying/
Political Activity**



Third party content

- Posting third party content
 - Not everything you find online is fair game to post
 - Most content is protected by copyright or trademark
 - General rule: no posting others' content without permission
 - Copyright: protecting creative expression
 - Trademark: protecting brand



Third party content – getting permission

- How to obtain permission for third-party content
 - Copyrights
 - Photos or video clips: try to identify the owner of the copyright and contact that person or entity
 - Music: you will need permission to use the copyrights in both the musical work and the sound recording.
 - Trademarks
 - If you want to use a third party's trademark other than to identify that third party as the originator of its specific goods or services, you should consider reaching out to that entity to obtain permission



Public domain

- No permission needed for works in the public domain:
 - Works whose copyright protection has expired
 - Works that have been dedicated to the public domain by the copyright owner
 - Works that do not meet the originality standard (*e.g.*, titles, short phrases) or are not fixed in a tangible medium (*e.g.*, ideas)
 - Works created by the U.S. government (*e.g.*, federal statutes)



Reposting

- Reposting on social media:
 - Check the “terms of use” or “terms of service”
 - Some social media platform terms of use allow reposting content found on the platform within the same platform
 - For example, the terms of service of X (formerly known as Twitter) state that all X users grant a license authorizing X to "make your Content available to the rest of the world and to let others do the same." In other words, you can retweet



Hyperlinks

- Permission is typically not necessary when using a basic hyperlink:
 - Generally seen by courts as a roadmap to the content, not a use of the work itself
 - However, ensure that the hyperlinks direct users to content that is lawfully posted and is not itself infringing!
 - Note that embedding the link so that the copyrighted content appears on the same page might constitute infringement



Fair Use doctrine

- Trademark and copyright law allow for certain exceptions where “fair use” of protected content is permissible
- Under copyright law (covers use of photographs, video clips, excerpts, music, etc.), whether a use falls within the "fair use" exception is determined based on a four factor test:
 - character and purpose of the work (e.g., "transformativeness," parody, satire)
 - nature of the copyrighted work (fiction, fact)
 - amount of the copyrighted work copied (quantitative, qualitative)
 - whether the allegedly infringing work usurps the market for the original



Fair Use doctrine (continued)

- Under trademark law issues (covers use of logos, names, colors, slogans, etc.), courts examine the following factors:
 - use of the mark is not likely to create consumer confusion;
 - using mark is necessary to describe both the third party's product or service and your product or service;
 - you use only so much of the mark as is necessary to describe your product or service; and
 - your conduct or language reflects a true and accurate relationship between you and the third party's products or services.





Privacy and data protection

- What kind of data is being collected?
 - personal information of program participants
 - donor information
 - other confidential information
- What information or data might be posted on social media?
 - photos/videos
 - information in captions



Protecting the privacy of program participants

- Don't post someone's image or video (or other personal information) without permission
- Working with children
 - special privacy considerations
 - parental consent/ communication with parents



Publicity releases

- Get a written release!
 - Still need permission even if you took the photo
 - Should be a comprehensive publicity release
 - specifically including use on social media
- Special considerations:
 - large events
 - public spaces



Hypothetical

- **Field Day International, Inc. (FDI)** is a New York not-for-profit that focuses on creating outdoor activities for youth in the North Bronx to promote a healthy lifestyle and community building.
- **FDI collaborates with local schools to host bi-weekly sporting events where students compete against each other. The sporting events are open to the community,** so parents as well as people from the community can come to watch the children compete. Community members must register in order to attend the event.
- FDI would like to advertise these events on social media, as they desire to grow their programming and expand to other boroughs in New York. **FDI plans on photographing their next field day** and include some of these photographs on its growing X and Instagram accounts. **The photographs would be of the youth participating in the event as well as the audience viewing the events.**

What should FDI consider before proceeding?



Relevant privacy laws

- Many state-level data privacy laws (e.g., NY SHIELD Act, California CPRA)
- Also federal and other privacy laws that might apply (e.g., COPPA, GDPR)
- Some cover nonprofit organizations, but not all
- If you're collecting personal data through your website or social media, work with a lawyer to develop terms of service and a data privacy policy



Privacy and data protection policy

- Should have written policies to address:
 - data collection and protection
 - child protection and privacy
 - confidentiality
 - relevant privacy laws
- should also include these elements in a specific social media policy





Social media & employees: general principles

- The underlying laws concerning employer obligations and employee conduct are the same in the social media context
- But the same rules must be considered carefully, since:
 - Employees can access personal social media accounts during working hours
 - Employee discussions can be widely disseminated
 - Employee posts on social media are indelible



Social media & employees: general principles

- **Employers** should be asking:
 - What information about applicants or employees am I able to access?
 - Should I access this information?
- **Employees** should be asking:
 - What information about myself should I be sharing on social media?
 - What information should I be accessing on employer-provided devices?



Social media & employees: social media accounts

- Who owns social media accounts used for work purposes?
 - Courts often have to determine if employers are owners of social media or e-mail accounts, especially after an employee leaves

Eagle v. Morgan (2013): employee lost control of LinkedIn account used at previous job when the former employer changed her password

In re Info. Mgmt. Servs., Inc. Derivative Litig., (2013): corporation's policy notified employees it had unrestricted access to communications sent using company computers, so employees did not have an expectation of privacy



Social media & employees: private employee posts

- When can an employer safely confront an employee about a private posting?
 - When the employee has voluntarily “friended” the employer
 - When the posting is reported by another employee

Employee out on intermittent FMLA for back injuries, but posts photos of herself enjoying a beer festival on Instagram. The photos are seen by a fellow supervisor who was a “friend.” Court approves employee’s termination!



Regulating private employee posts

- Misconduct and harassment rules *still* apply.
 - No threats
 - No bullying
 - No harassment
- Privacy/confidentiality rules *still* apply.
 - Other employees' privacy
 - Patient/consumer privacy
 - Employer's protected information
 - Donors' protected information
- Other considerations:
 - Organizational confidential information
 - Obscenity
 - Illegal activity
 - Official statements

**All policies must be consistent
with employee's exercise of NLRA
§ 7 rights.**



Relevant laws

- **Stored Communications Act (18 USC § 2701)**
 - Prohibits employer from hacking into employee's private account, including unauthorized use of another employee's password
 - Crispin v. Christian Audigier, Inc. protected Facebook and MySpace communications under the SCA
 - Pietrylo v. Hillstone Rest. Group employer wrongly obtained employee's password through coercion, violating SCA
- **Computer Fraud and Abuse Act (CFAA, 1984)**
 - Prohibits accessing a computer without authorization
 - United States v. Nosal Defendant used victim's employee credentials to access computers "without authorization" and was properly convicted under CFAA.
 - Lee v. PMSI, Inc. employee violated their employer's acceptable-use policy, the court found the employee did not violate the CFAA.
- **Electronic Communications Privacy Act (ECPA, 1986)**
 - Provides some privacy protections for employee's e-mail messages, cell phones, and other electronic communications
- **New York Labor Law (March 2024 update)**
 - NY employers may not request or require a log-in name, password or other access means to a personal account or service



Social media policies: purpose

- set clear expectations
- establish ownership
- protect reputation and organizational identity
- promote productivity
- prevent security breaches
- stay on top of public relations



Social media policies

Social media policies should:

- Make clear that they do not proscribe the use of social media to discuss or attempt to resolve concerns about working conditions
- Encourage employees to use internal mechanisms to report harassment / discrimination - but not require such use
- State that employees will investigate harassment / discrimination complaints regardless of how they are discovered (i.e., on social media sites)
- Be placed in the employee handbook where it is clear that the employer is not trying to curtail § 7 rights

Employers should also:

- Advise supervisors to be cautious about “friending” employees or engaging in social media
- Advise supervisors that they must report claims of discrimination / harassment discovered through “friending”



Checking social media accounts of prospective employees

- Access to a private social media site can increase the risk of learning protected information
- Remember, you only need job-related information
- Be consistent. If you conduct Internet searches on applicants, do so in a consistent manner to avoid discrimination claims
- Observe laws regarding password protection



Hypothetical

- **Food for All, Inc. (FFA)** is a New York not-for-profit that provides free or low-cost meals to low-income residents and programs to encourage communities to create local gardens.
- FFA is looking to reach a larger audience to receive more donors and donations for its services. **FFA has created a social media account to post its content and create audience engagement. FFA hired a social media manager to manage its social media account.** The social media manager is responsible for curating content to post, posting entertaining content to promote brand popularity and inform the public of FFA events.
- The social media manager also has a personal account on this same platform that they use for their own entertainment and use. **One day, while working, the social media manager posts a satirical comment about one of the communities in which FFA works on their personal account.** Another of FFA's employees, who follows the social media manager's account, sees the post and reports it.

How should FFA handle this situation?





Multistate charitable solicitation

- Charitable solicitation laws are regulated on a state-by-state basis
 - Need to register in each state where you are soliciting funds

Charleston Principles of Internet Solicitation

- Charities conducting charitable solicitation via the internet should be registered as charities in the state where the charity has its principal place of business.
- If the charity is soliciting via the internet and (a) targets donors of a specific state or (b) receives contributions from the state on a repeated and ongoing basis or a substantial basis, the charity may be required to register in that state.



Multistate charitable solicitation

- Are you soliciting?
 - Letters, phone calls, grants, etc. – YES
 - Donation button on website
 - Social media posts
- What can you do?
 - Stay on top of where your funds come from
 - Register in every state with requirements
 - Another option: post a disclaimer that you will only accept contributions from the states in which you are registered



Partisan political activity

- **501(c)(3) organizations** *cannot* engage in partisan political activity, including supporting or opposing:
 - someone running for public office, or
 - a political party
- Support or opposition can include:
 - retweeting or “liking” a candidate’s campaign posts
 - linking to a campaign or political party website
- During election season:
 - What’s the non-electoral reason for your advocacy?
 - Focus on the issue not individual candidates



Issue advocacy – lobbying

- **Public charities** *can* lobby, but have a *limit* on the amount of legislative lobbying they can do
 - Legislative lobbying must be reported on IRS 990
- **All organizations** must *track* lobbying aimed at federal government, NYS, NYC
 - You may be lobbying if you're trying to ...
 - influence legislation
 - change agency rules
 - get government funding
 - and more
 - Register & report as a lobbyist if you spend:
 - \$14k/quarter lobbying the federal government
 - \$5k/year lobbying state or local government in NY



When is social media lobbying?

Lobbying

- direct message to official
- post on official's page
- tagging a public official
- asking readers to lobby

@SenSmith Pass the
Ethics in Government Act
now!

The City Council must pass the
Ethics in Government Act now!
Find your Council Member's email
address [here](#)

Call Sen. Schumer and tell
him: Pass the Ethics in
Government Act now!

Click [here](#)
to ask Sen. Jones
to co-sponsor the
School Lunch Bill.

NYS Rule: Employee's personal social media posts are only attributed to the organization if employee is specifically retained for such social media activity ("influencer")



Personal activities of staff & board

Everyone has a right to participate in the political process, even if they are affiliated with a nonprofit, but consider these tips:

Don't

- Use organizational social media accounts (or time, mailing list, email) for personal activities

Do

- If you use personal social media account for work purposes, make clear all opinions are your own
- Conduct your political activities (including social media) after work



Thank you!

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Join us for our upcoming webinar:

- **Webinars for Wise Nonprofits: Introduction to Loan Agreements, Tuesday, Jun. 11, 2024, 12:00 pm - 1:00 pm**
- Register now at lawyersalliance.org!

Resource Call Hotline: 212-219-1800 x224

ResourceCall@lawyersalliance.org