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Buchanan Ingersoll & Rooney PC
700 Alexander Park, Suite 300
Princeton, New Jersey 08540
Law Firm

Brian Rath, Esq., Counsel

Buchanan Ingersoll & Rooney PC
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Social Media in Long Term Care:

Privacy, Liability and Other Legal Considerations

Presented by:

Brian N. Rath, Esq.

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What is Social Media?

Social Networks - Connect with other people of similar interests and background. **Snapchat, Facebook and LinkedIn.**

Media Sharing - Upload and share media such as pictures and video. **YouTube, Pinterest, Instagram and Flickr.**

Microblogging - Short updates that are pushed out to anyone subscribed to receive the updates. **Twitter, Tumblr, Snapchat.**

Blogs, Comments and Forums

Websites - Traditional websites sharing information.
CaringBridge.org, PatientsLikeMe.com, OurParents.com, Caring.com

Texts and Instant Messaging

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What to Understand About Social Media?

- Generational differences at work:
 - Those who've grown up using social media vs. those who have not.
 - Instant communication.
 - Connected 24/7.
 - Sharing personal information with the world, including photos, videos.
 - Complaining to the world wide web community.
 - Reliance on electronic communication rather than face-to-face.

- Importance of educating yourself about social media

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Legal Issues Implicated by Social Media

- Employee**
 - Privacy
 - Free speech rights
 - NLRB protections
- Facility**
 - Reputation
 - Proprietary information
 - Potential liability
- Resident / Family**
 - Safety
 - Granny Cams
 - Privacy
 - Protected Health Information / HIPAA
 - Physical/personal privacy

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AFTER IRMA, NURSING HOME WORKER FIRED AFTER SEEKING HELP ON FACEBOOK Palm Beach Post, September 22, 2017

NURSING HOME EMPLOYEE POSTED NUDE PHOTO OF RESIDENT ONLINE Argus Leader February 24, 2016

NURSING HOME WORKERS ACCUSED OF POSTING REVEALING PHOTOS OF THEIR PATIENTS ON SNAPCHAT Business Insider June 26, 2017

SNAPCHAT VIDEO SHOWS MOUNT PLEASANT ASSISTED-LIVING WORKERS TAUNTING TWO ELDERLY WOMEN Charleston Post & Courier May 26, 2017

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Social Media Policies

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What Policies are Necessary?

- Social Media Policies / Guidelines**
 - Address use of social media products, particularly the more popular sites such as Facebook, Twitter, LinkedIn, etc.
 - Address other types of internet usage such as blogs and posting comments.
 - Define personal usage vs. professional usage.
- Personal Electronic Device ("Device") Policy**
 - Address use of cell phones, smartphones, other digital audio and video recording devices.
 - In the workplace
 - Outside the workplace (whether personal or professional)
 - Driving

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Considerations When Drafting Policies

- To whom do the policies apply?
- What are the policies purposes?
- How does social media / Device usage integrate into the job?
- What professional personal boundaries make sense?
- How will compliance be monitored?

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To Whom Do the Policies Apply?

- All Employees, regardless of level in organization
 - Policies must be consistent
 - Differentiation between employees who use social media / Devices for professional purposes
 - May create more specific policies for certain groups of employees / positions (e.g. IT professionals, Privacy Officer, Sales, etc.)
- Residents/Families
 - Use of Devices or other recording equipment in Facility

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What Are the Policies Purposes?

- Define the Facility's position on social media and Device use
- Protect private health information of residents
- Protect Facility's confidential and proprietary information
- Strike a balance between employee privacy interests and Facility's interests in protecting its reputation and operating safely and productively
- Allow for "protected, concerted activity" in compliance with NLRB's guidelines

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State and Federal Employment Laws and Social Media

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National Labor Relations Board Rulings on Social Media

- ❑ Employer must permit employees to engage in “concerted activity” in which certain aspects of employment are discussed.
 - “Concerted activity” includes “circumstances where individual employees seek to initiate or induce or to prepare for group action, as well as individual employees bringing truly group complaints to the attention of management.”
 - Protected activity includes that concerning wage and hour or other terms and conditions of employment.
- ❑ Employer policy may not “chill” protected speech.

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National Labor Relations Board Rulings on Social Media

- ❑ Examples
 - Hispanics United of Buffalo
 - Facebook discussion: “[co-worker] feels that we don’t help our clients enough ... I about had it! My fellow co-workers how do you feel?” Termination overturned.
 - Costco
 - Policy prohibited “statements posted electronically (such as online message boards or discussion groups) that damage the company, defame any individual or damage any person’s reputation...” Policy was found too broad.
 - Karl Knauz Motors
 - Facebook post mocking quality of food served at employer car dealership public event found protected.
 - Facebook posting of wrecked dealership vehicle with snarky comment not protected.

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State Social Media Privacy Law

□ e.g. New Jersey employers prohibited from requiring usernames and/or passwords of private accounts or requiring access to those accounts in any other way from current or prospective employees.

- Original draft:
 - prohibited employers from even asking if a current or prospective employee had a personal social media account or used social media in any way.
 - Included a private cause of action permitting the employee to sue the employer for requesting the information or access and to seek damages and attorneys fees.

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What Is Prohibited?

- **Requiring disclaimers that a post does not represent the Company's views**
 - May require that employee postings not create the impression that they are speaking in any official capacity on behalf of the employer.
- **Prohibiting "confidential information" posts**
 - "Confidential information" is too vague. Must be specific, e.g. "company confidential financial information" or "internal company information not available to the general public"
- **Prohibiting anonymous posts**
 - employees have the right to post about their employer anonymously, even if such postings are highly critical
- **Vague descriptions of prohibited activity**
 - "inappropriate," "disrespectful," or "offensive" vs. "threatening," "harassing," or "discriminatory"

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Relationship Between Employer and Employee and Social Media

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Social Media in Employee's Work

- Social Media as part of assigned duties
 - Marketing
 - Sales
 - Interacting with families
 - Researching Facility reputation
- Policies must allow for "officially sanctioned" use of Social Media
 - Facebook, Twitter, etc.
 - LinkedIn
- What about non-sanctioned employees?
 - Speaking for themselves only

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Boundaries Between Professional and Personal

- Need for boundaries
 - Multiple constituents
 - Residents
 - Families
 - Government regulators
 - Highly confidential and personal information
- Limitations on Social Media/Devices usage at work.
 - Cameras
 - Interference with productivity
- Limitations on Social Media/Device usage outside.
 - Personal rights of employees vs. Facility concerns

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Monitoring Employee Social Media/Device Use

- Use of Facility computers, networks, other property.
 - Limit any expectation of privacy using Facility equipment.
- Managers responsible/accountable for monitoring and enforcing policies.
 - Actively monitor use vs. relying on "hearing about" use.
- Focus on conduct not medium.
- Require reporting of known violations
 - Employees are those who will witness violations
 - Include no retaliation agreement for good faith reporting.
- Policies should spell out extent of monitoring and disciplinary action.
 - Build in discretion based upon circumstances

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Monitoring Employee Social Media/Device Use

- Monitoring use outside of the workplace.
 - Privacy expectation of employee vs. interest of Facility.
- Example cases
 - NJ Health Care Company
 - Critical remarks about company on Facebook to FB friends only.
 - (Non-FB friend) supervisor used another (FB friend) employee's FB access to review comments.
 - Court found possible privacy violation - employee may have reasonable expectation of privacy in posting to FB friends only.
 - Board of Education
 - Teacher fired for FB post calling students "future criminals" and herself "warden."
 - Firing upheld for conduct that has a "tendency to destroy public respect for government employees and confidence in the operation of public services."

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Interaction With Other Policies

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Interaction with other policies and procedures

- Cross-reference other related policies.
 - Technology (e-mail, internet).
 - Confidentiality
 - Anti-Harassment
 - Non-solicitation (Personal, Charitable, and Union)
- Reporting Obligations
- Post-termination social media use in employment contracts.
- Revisit hiring/selection procedures using Social Media to investigate background.
 - Benefits/risks

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Communication and Implementation

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Communication and Implementation

- Communicate with Residents, Families and Employees.
 - Employees review and sign new policies
 - Families given copies of policies as relates to them
 - Revise Facility handbook
- Ensure as much specificity in policies as possible.
- Don't assume that residents, families or employees will understand/appreciate the issues.

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Resident / Family
Use of Social Media

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Control over Resident/ Family Use Limited

- Public Computer Terminals.
 - Can place restrictions on Facility owned equipment
- Use of photography/video taken in Facility.
 - Photographs
 - Videos
 - "GrannyCams"
- Monitor Internet
 - Google Alerts
- Publically Available Wi-Fi.
 - HIPAA security

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OPEN DISCUSSION

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