
# HOW SOCIAL MEDIA AFFECTS THE LEGAL RIGHTS OF EMPLOYEES

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Let's face it—there is no avoiding social media. At the close of 2016, the number of Facebook© users had grown to 1.86 billion, more than the populations of the United States and China combined. YouTube©, which now reaches more viewers ages 18 to 49 than any single cable network in the United States, reports that 300 hr of video are uploaded to the site every minute. And while the world-famous Louvre museum houses more than 300,000 paintings, users upload over 300 times as many images to Instagram© every day.

Long gone are the days when the impact of online social networks could be avoided, particularly in the commercial context. Today's fitness professionals, like any other service providers who must navigate rapidly-evolving, competitive markets, often weave social media strategies into their business plans. Indeed, for small business owners like those who operate health clubs, online social networks provide cheap and effective channels for attracting new clients, recruiting new employees, and marketing services or products. But while social networking sites can serve as efficient business tools, they can also complicate the legal rights of the entrepreneurs who use them. This is particularly so when it comes to the rights that employees have against their employers, and vice versa. This article will focus on three specific—and perhaps surprising—ways in which social media networks can alter the employment rights of fitness professionals and the gyms they work for.

To illustrate these three employment issues, the following will examine three hypothetical scenarios, all of which are loosely based on actual cases. Together, these examples show just how much a single social networking page can impact employer-employee relationships.

## NEGATIVE SPEECH ABOUT AN EMPLOYER

Imagine the following: an enthusiastic personal trainer, who we will call Frank Fitness, has recently been hired by a franchise gym. Shortly after his first day on the new job, Frank befriends four other personal trainers who are also employed there. After getting better acquainted with his fellow trainers over the coming days, he connects with each of them on Facebook.

As the onboarding process continues, Frank becomes increasingly unhappy as he learns the terms and conditions of the new job. He feels especially dissatisfied with the compensation scheme for entry-level trainers, who are told to spend long hours prospecting on the gym floor, oftentimes without pay. Frank complains about this and other policies to management, but is told that these policies will not be changed, and that if he gives it more time, he will adjust. Frustrated, Frank takes to Facebook to air his grievances, and tags his coworkers in negative posts he writes about the gym. "They're taking advantage of us at this place," he writes. "They expect us to do all the work while they take the credit for it, and they pay us next to nothing!" The other trainers, who've harbored similar feelings, "like" each of Frank's posts. Frank also complains about the lack of benefits: "And they don't give us health insurance! What's that about?" Some trainers comment that they agree, and that they too think the gym's practices are unfair.

It does not take long for members of the gym to see Frank's Facebook posts (which are public), and those members become uncomfortable. Some members reach out to the gym's management to express their concern, and some others try to cancel their memberships altogether. A manager at the gym becomes furious, promptly terminates Frank's employment, and cites the gym's employee handbook as the reason why. That handbook, which Frank and the other trainers received during onboarding, explicitly forbids making public comments about the gym that "might be considered inflammatory, disparaging, or otherwise objectionable."

*This isn't fair,* Frank thinks to himself as he walks out, *I have my rights to free speech!* Is Frank correct? Was it wrong that he was fired for his social media activity?

In short, yes, Frank's intuition is correct. And Frank's employer, by firing him for complaining about the gym's employment practices, has very likely violated federal law. As a general rule, employment relationships in the United States are "at will." That means that a worker's employment can be terminated at any time, for any reason, whether voluntary or involuntarily (1). The employer's freedom to fire an employee at will, in its sole discretion, is restricted only by a limited set of exceptions. Under Title VII, for example, an employer is not allowed to fire an employee because of that employee's race or gender. For our purposes, however, another relevant limitation on an employer's freedom to fire is found in the National Labor Relations Act (or NLRA). The NLRA is a federal statute that allows employees to engage in "concerted activities" for "mutual aid and protection," (2). That means employees can legally congregate to discuss their disagreements with the terms and conditions of their employment, even if that discussion takes place online. To fire an employee because of such discussion is unlawful. In our above example, the employer likely violated the NLRA by terminating Frank's employment because of his Facebook posts. Frank's posts, in which he tagged coworkers and complained about his employer's policies and practices, probably constitute the kind of "concerted activity" that is protected by the NLRA. Moreover, the employee handbook at Frank's gym likely also violates the NLRA, since its social media policy bans what could be protected employee speech (3). As this example illustrates, employers should take caution before issuing social media policies, or discussing social media use with employees. Any such discussions or policies should be screened by an attorney appropriately to ensure compliance with applicable labor laws.

## RIGHT TO CONTROL A SOCIAL MEDIA ACCOUNT

Now imagine the following: after walking away from the unpleasant experience at his prior gym, Frank Fitness next lands employment at a smaller, private gym. This gym is a relatively new venture, and the trainers who are hired there have wide latitude to chase their own leads and fix their own schedules. Frank has successfully used social media as a way to attract new clients in the past, so he decides to build a new Instagram page for the purpose of attracting new clients to the gym. On his page, he regularly posts photos and videos promoting the spacious studio, its cutting-edge equipment, and the challenging group exercise classes. He also creates a screen name that reflects his employment at the new gym, and his bio links to the gym's website. Frank's Instagram posts get positive reactions from many of his 17,000 followers, some of whom are potential business partners and sponsors. Following Frank's social media push, new clients do, in fact, begin to show up. Frank and his employer are pleased to see increasing traffic, which eventually reaches critical mass.

After years of working amicably at this private gym, however, Frank decides that he's ready to open his own fitness facility. He thanks his employer for the years of great experience, and resigns. Immediately after leaving, Frank changes the name of his Instagram account, then starts posting photos to draw clients into his own business venture. A large portion of Frank's 17,000 followers subsequently leave the old gym and follow Frank to his new facility. His old employer gets upset by this, seeing it as betrayal. Soon after, Frank receives a letter from his old employer in the mail. The letter asserts that Frank's Instagram account password should be turned over, and that Frank is not entitled to continue using the page. That assertion seemed ridiculous to Frank. *This is my Instagram account*, he thought to himself, *There's no way an ex-employee should ever have to turn over his social media followers to his old boss*. Frank tosses the letter, and ignores it.

Unfortunately for Frank, however, his ex-employer could have a valid legal claim. It has now been established that an employer can, under the right circumstances, assert legal rights to an employee's social media page and followers. In one such case, *PhoneDog v. Kravitz*, an employer sought access to an ex-employee's Twitter© account, which had 17,000 followers. The employee had previously used the Twitter account to attract customers to his then-employer's business. After resigning, however, that employee changed the username associated with his Twitter account and began advertising a new venture. The ex-employer sued, and the court in that case stated that by taking away those 17,000 Twitter followers, the former employee may have unlawfully interfered with his ex-employer's business relationships (4). In another case, a viewer of a popular cable TV show created a fan page on Facebook. After the viewer's fan page gained widespread popularity, the TV show's network entered into an agreement to adopt the fan page as the official one for the show. Following a subsequent fallout between the network and the fan page's creator, however, the network sought exclusive control of the fan page. A federal court agreed that the network was entitled to shut down the viewer's fan page and migrate all of her followers to a page of the network's own creation (5).

Some personal trainers heavily rely on social media pages to brand themselves, and some of those pages have tens of thousands of followers. Employers and employees should take care that no confusion exists regarding ownership of a social media account, and trainers might consider explicitly stating whether their page is personal or professional. In certain circumstances, a trainer's social media page, particularly if it has numerous followers, might be akin to a legally-owned business asset.

## USING SOCIAL MEDIA TO SCREEN EMPLOYEES

Next, imagine that Frank resolves the issue with his former employer, and resumes focus on his own business. His studio's membership base is expanding rapidly, and Frank needs to hire additional trainers. He intends to be selective about who he hires, gathering as much information about applicants as he can. He asks each applicant to provide links to their LinkedIn© and Facebook pages as part of the application process. Frank believes that viewing these social media pages will help him get to know the applicants better (rather than reducing them to just their resumes). While viewing one candidate's Facebook page, Frank comes across a picture of the applicant smoking a cigarette. Yuck, Frank thinks to himself, *I don't want cigarettes associated with my gym. I can't hire this applicant.*

In many states, so-called "off-duty laws" protect lawful activities done in an employee's or applicant's personal time (6). Many such laws expressly prohibit negative employment action based on an applicant's tobacco use (7). In certain states, like California for example, it is illegal to even ask for an employee's social media screenname (8). Surprisingly, according to a 2016 survey of hiring managers, 60% of employers regularly engage in such potentially unlawful social media screening (9). Fitness professionals, particularly those in charge of interviewing or hiring personnel, should familiarize themselves with restrictions on applicant screening and ensure compliance with applicable laws.

## CONCLUSION

Indeed, social media can be a useful tool for attracting, monitoring, and motivating top talent. Online social networks no longer exclusively serve as leisurely distractions to pass time. In today's digital economy, social media pages serve as important tools to expand a fitness professional's business. Fitness professionals who use social media, however, should decide which function their account is built to serve—personal or professional—and act accordingly when they post.

## REFERENCES

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2. 29 U.S.C. § 157.

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*4. PhoneDog v. Kravitz*, No. C 11-03474 MEJ, 2012 WL 273323, at *1 (N.D. Cal. Jan. 30, 2012).

*5. Mattocks v. Black Entm't Television* LLC, 43 F. Supp. 3d 1311, 1319 (S.D. Fla. 2014).

6. N.D. Cent. Code Ann. § 14-02.4-01.

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