

TO: AHCA/NCAL Membership
FROM: AHCA Legal Operations Subcommittee, Long Term Care Consortium (LTCC),
[Sarah Swale](#) and [Craig Day](#) (Lane Powell PC), AHCA/NCAL Public Affairs
DATE: June 10, 2016
RE: Social Media Guidance for Nursing Care Centers and Assisted Living Communities

Social media are web-based communication tools that enable people to interact with each other by both sharing and consuming information.¹ Social media usage has exploded over the last decade, with 65 percent of all adults and greater than 90 percent of young adults now using social networking sites.² There are a range of websites and applications including Twitter, Facebook, Snapchat, YouTube and Instagram, to name just a few.³ These tools can be used effectively in healthcare to improve or enhance professional networking and education, organizational promotion, and resident care, education and public health programs. Unfortunately, these tools also introduce potential risks to residents, employees and providers, and can result in the distribution of poor quality information, damage to care center and professional images, breaches of resident privacy, violation of personal-professional boundaries and licensing and legal issues.⁴

Since 2012, there have been [numerous instances](#) where nursing care centers and assisted living communities (collectively, care centers) employees have posted information, photos, or videos on social media in violation of resident privacy protections. American Health Care Association/National Center for Assisted Living (AHCA/NCAL), National Association of Health Care Assistants (NAHCA) and lawmakers in Washington, D.C. are concerned about instances where residents are harmed by the inappropriate use of social media. AHCA/NCAL members have asked the Association for critical information and suggestions to help them better protect vulnerable and elderly residents. Although it is extremely difficult for a care center to ensure that employees use social media appropriately 100 percent of the time, it is critical that providers develop and implement social media policies, adequately train employees and initiate internal investigations, as appropriate, whenever it is determined that there is a potential problem. AHCA/NCAL has developed this guidance to help care centers better focus on this important issue.

UNDERSTAND SOCIAL MEDIA:

Care center employees are using social media, both at work and at home, according to a recent poll of AHCA/NCAL member compliance officers. Most commonly, employees are using:

- [BLOG](#) is an online personal journal or diary that is typically updated daily.

¹ See <http://webtrends.about.com/od/web20/a/social-media.htm>

² See <http://www.pewinternet.org/2015/10/08/social-networking-usage-2005-2015/>

³ See <http://www.socialmediatoday.com/social-networks/2015-04-13/worlds-21-most-important-social-media-sites-and-apps-2015>

⁴ See <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC4103576/>

- [FACEBOOK](#) is an online site that connects individuals, and allows them to keep in touch with friends, post photos, share links and exchange other information.
- [FACETIME](#) is a video telephone service that allows an individual to conduct one-on-one video calls between iPhone, iPad, iPod touch and Mac notebooks and desktops. Similar to Skype and Google Hangouts.
- [FOURSQUARE](#) is a service that allows an individual to search local businesses or attractions on an iPhone, BlackBerry, Android-powered, or otherwise “smart” phone.
- [GOOGLE+](#) is an online site that delivers functionality and features similar to Facebook including "Posts" for posting status updates, "Circles" for sharing information with different groups, "Sparks" for offering videos and articles, and "Hangouts" and "Huddles" for video chatting with a friend or group of friends.
- [FORUM](#) is an online discussion group that allows individuals to post messages.
- [INSTAGRAM](#) is an online photo sharing service that allows individuals to share pictures and videos instantly on other social networking sites including Flickr, Facebook, Tumblr, Twitter or Foursquare.
- [KIK MESSENGER](#) is an instant messenger service that allows an individual to share photos, files and greeting cards between “smart” phones.
- [LINKEDIN](#) is a professional, business-oriented online site that allows individuals to create a resume and connect with colleagues and business contacts.
- [YELP](#) is an online site that allows individuals to post reviews and rate businesses.
- [PINTEREST](#) is an online site that allows individuals to share photos and videos using a system of “boards.”
- [SKYPE](#) is a telephone service that allows individuals to make free calls, as well as file transfers, texting, video chat and videoconferencing.
- [SNAPCHAT](#) is a service that allows an individual to share photos or video clips for a matter of seconds. **NOTE:** Snapchat photos can easily be saved.
- [TWITTER](#) is an instant messenger service that allows an individual to stay connected through brief text message updates up to 140 characters in length.
- [YOUTUBE](#) is an online site that allows an individual to upload and share video clips online.

REVIEW SOCIAL MEDIA POLICIES:

Care centers are encouraged to have a social media policy that protects not only the residents; but also the employees and the care center. The policy should define what employees can or cannot do on social media, and should operate as a “code of conduct” or guide that clearly defines what the care center expects from its employees when it comes to online behavior. The social media policy should be included with other center policies governing employee conduct, and employees should sign an acknowledgement form and receive training on the policy. If/when employees violate the social media policy, employees should understand that they will be subject to discipline, up to and including termination. Lastly, centers should implement a process to periodically review the social media policy. The social media landscape is changing rapidly, with new technologies and tools emerging all the time, and it is important to ensure that the social media policy is not only effective but also legally comprehensive and consistent with new technologies and trends.

Some simple “tips,” for either creating or improving a social media policy could include:⁵

- Don't Ban Access Completely: Restrictive policies do not change the fact that most employees can connect to the internet from their smart phone. The best approach for employers is to proactively educate staff in acceptable practices.
- Learn from the Best: A simple Google search using the term “social media policy” will provide a wealth of information. Use this as a starting point, and pay attention to how other health care companies address issues related to confidentiality, inappropriate online behavior, etc.
- Involve Staff: Include staff in the development of a social media policy. There is always better “buy in” from staff if they are involved from the very beginning.
- Keep it Simple: Keep the policy as simple as possible while still including critical information.
- Take it Off the Page: Make social media training part of on-going professional development and/or orientation for care center employees.

Before a care center drafts or modifies its social media policy, it should carefully consider the National Labor Relations Board (NLRB) guidance. In 2011-12, NLRB released [three reports](#) that highlight specific examples of unlawful social media policies. Although the NLRB guidance on social media has not necessarily always been consistent, the three reports provide a good starting place for understanding the NLRB's concerns with respect to social media policies. In those reports, NLRB makes clear that, whether union or not, employees generally have the right to discuss work-related issues and share information about pay, benefits and working conditions on social media, without fear of discipline or criminal prosecution. The NLRB emphasizes that an employer's social media policy should be clearly written, and where prohibitions are listed, employers should clarify with examples. Specifically, NLRB provides the following guidance:⁶

- Friending: Employees have the right to communicate with each other, so a statement in the policy encouraging employees to “think carefully about ‘friending’ co-workers” is considered illegal.
- Posting: Employees have the right to criticize the company, so a policy that unqualifiedly states that employees must refrain from criticizing the business is illegal.
- Talking About Co-Workers: Employees have the right to discuss wages and conditions of employment with each other, so a blanket prohibition concerning talking about co-workers is illegal.
- Indecent Talking: Employees have the right to criticize their employers' labor policies and treatment of employees, so a provision warning employees to “avoid harming the image and integrity of the company” is unlawful.
- Inflammatory Topics: Employees have the right to talk in a “robust” manner about working conditions, so statements encouraging employees to “adopt a friendly tone” in online discussions is illegal.

⁵ See Monster.com; *Social Media at Work: Developing a Social Media Policy for Employees*, by Emily Bennington.

⁶ See Adage.com; *Eight Ways Your Employee Social-Media Policy May Violate Federal Law*, by Brian Heidelberger.

Besides ensuring compliance with the NLRB guidance, the care center's social media policy (or related policies in the employee handbook) should include definitions, standards, disciplinary guidelines and enforcement actions. The policy also should clearly address the appropriate use of care center-owned technology and the use of the internet during working hours. AHCA/NCAL has developed its own [social media policy](#) template for the general membership. This social media policy template should not be construed as legal advice. This policy also should be individualized and modified to fit the care center's particular organization and culture, and legal counsel should be consulted before the implementation of any social media policy

Lastly, although this is not the focus of this guidance, if a care center is planning to use a social media strategy to market its qualifications and services, the Federal Trade Commission (FTC) has published [Endorsement Guidelines](#), requiring that marketing information is truthful, fair and has adequate evidence to back up its claims. For more information see [The FTC's Endorsement Guides: What People are Asking](#).

CONDUCT SOCIAL MEDIA TRAINING:

Care centers should not only train new employees during orientation; but also should retrain existing employees periodically about its privacy (*e.g.*, Health Insurance and Portability Accountability Act [HIPAA]) and social media policies. Training should clearly articulate the care center's process for monitoring and/or taking corrective action against individuals who inappropriately use social media. In fact, it is a good idea for employers to ask employees to sign an attestation form, agreeing formally and in writing that they will comply with the center's social media policy. Lastly, care centers should prominently post the center's social media policy for residents, families and staff.

A simple checklist that care centers could share with employees during social media training to ensure HIPAA compliance/privacy for the residents may include:⁷

- Keep personal social media accounts separate from care center accounts.
- Avoid "friending" residents or families.
- Recognize that even a deleted post text message or picture can still exist in cyberspace.
- Understand that posts on a private page can still be accessed by users other than friends or followers.
- Understand that [HIPAA personal identifiers](#) (*e.g.*, pictures, neighborhoods, birth dates, etc.) must remain private.
- Know that even if a resident posts information, staff should not share in any form this information on their personal pages.
- Be aware that commenting on a resident's social media page may go to other friends and individuals.
- Avoid taking any unauthorized photos of a resident (written authorization is required).
- Avoid transmitting any electronic media image or recording of a resident.

⁷ See Law 360, *A Checklist for Avoid HIPAA Violations on Social Media*, by Kyna Veatch.

- Recognize that any privacy or confidentiality breach must immediately be reported to center management.
- Refrain from posting any protected information about the care center on social media – in particular, do not use the center logo or trademark.
- During parties or events, ensure that all resident files or other confidential items are put away before a group photo is taken. Don't forget to cover the white boards; and obtain the appropriate consent form from the resident and/or family to post the photo.
- If the resident, his/her family or staff members have any questions about social media, they should be directed to the care center's management staff.

Further, the National Council of State Boards of Nursing (NCSBN) has published a white paper, [A Nurse's Guide to the Use of Social Media](#), which describes "myths and misunderstandings" that may be factors in potential social media abuses, and that could be helpful in reviewing with staff during training, including the mistaken beliefs that:

- the post is private and accessible only to the intended recipient(s);
- the contents of a post that have been deleted from a site are no longer accessible;
- the post is harmless if private information about the resident is disclosed and accessed only by the intended recipient;
- it is acceptable to discuss or refer to a resident if they are not identified by name; but instead referred only by a nickname, room number, diagnosis or condition; and
- it is acceptable to post information that a resident has disclosed about him/herself.

AHCA/NCAL also has developed a power point presentation, [#Winning at Social Media](#), that can be used as the center develops or revises its own social media training materials.

INVESTIGATE SOCIAL MEDIA ABUSES:

In most instances, care centers learn about inappropriate photos and posts from their staff. Some care centers monitor social media regularly to find photos and posts that violate residents' privacy or are offensive to both the residents and the care center. However, it is difficult (even with full-time or outside vendor help) to discover every inappropriate photo or post. There are hundreds of social media sites (each with its own complexities), and with changes occurring daily, there is no magic bullet for uncovering all the potential problems. Despite the limitations, care centers should consider scheduling regular website reviews by an appropriate member of management (preferably one who is insulated from any employment-related-decisions) to scan for and identify social media misuse or abuse. A care center cannot effectively accomplish that task unless it understands how individuals in its building interact, get attention, post, like/heart/retweet, friend, etc., on social media. This is key to uncovering serious problems.

If/or when a care center uncovers an inappropriate photo or post, it should immediately take action and initiate an investigation. A thorough investigation should be launched to ensure that any harm to the resident (*e.g.*, exposure of resident's confidential information or loss of dignity, etc.) or center is limited. Further, the investigation should attempt to discover the

source of the inappropriate post, when it occurred, remedies, and possible revisions to care center processes and policies that could help deter future social media violations. If the care center determines that an employee has violated its social media policy, the care center should administer the proper discipline, including in some cases, termination.

FEDERAL GOVERNMENT ENFORCEMENT:

Under the Health Insurance Portability and Accountability Act of 1996 (HIPAA), the U.S. Department of Health and Human Services (HHS), Office for Civil Rights (OCR) is responsible for enforcing the HIPAA [Privacy](#) and [Security](#) Rules, including the improper disclosure of resident protected health information (PHI) that sometimes occurs with inappropriate social media photos or posts. The Health Information Technology for Economic and Clinical Health (HITECH) Act signed into law in 2009, amended the HIPAA Privacy and Security Rules. Under the HIPAA [Breach Notification Rule](#), [covered entities](#) (e.g., all nursing care centers and some assisted living communities) and their [business associates](#) must provide notification to OCR following a reportable breach of even one resident's PHI.

A breach is the acquisition, access, use or disclosure of PHI in a manner not permitted under the privacy rule. Whether or not a breach is reportable depends on the outcome of an assessment by the covered entity. Specifically, the HIPAA breach notification rules require a covered entity that discovers a breach to presume that the event is reportable unless the covered entity determines that there is a low probability that the PHI has been compromised based on a risk assessment. The risk assessment must consider the nature and extent of the PHI involved, including the types of identifiers and the likelihood of re-identification; the unauthorized person who used the PHI or to whom it was disclosed; whether the PHI was actually acquired or viewed; and the extent to which the risk to the PHI has been mitigated.

If a breach affects fewer than 500 individuals (which is usually the case when individuals post resident PHI inappropriately), a covered entity must notify the affected individuals no later than 60-days following the discovery of the breach; must notify the HHS Secretary of the entire breach within at least 60 days of the end of the calendar year in which the breach was discovered (but may also report immediately); and must complete a separate notice for each breach incident. The covered entity must submit the notice electronically.

HIPAA enforcement is primarily complaint-driven. When a formal complaint is filed, OCR first attempts to resolve the matter informally; but if this is not possible, civil money penalties (CMPs) are possible and could include: \$100-\$50,000 for an unintentional violation (capped at \$1,500,000); \$1,000-\$50,000 for a violation that is not "willfully negligent" (capped at \$1,500,000); \$10,000-\$50,000 for a willfully negligent but corrected violation (capped at \$1,500,000); and \$50,000 or more for a willfully negligent, uncorrected violation (capped at \$1,500,000). Criminal CMPs also are possible and range from \$50,000 to \$250,000, and up to 10 years in prison.

Over the last several years, OCR has increased both its enforcement and the amount of fines related to HIPAA violations, and with Congress' interest in social media abuses, we will continue to see enforcement increase.

Under the Omnibus Reconciliation Act of 1987 (OBRA '87) (*i.e.*, its [Medicare provision](#) and [Medicaid provision](#)), the Centers for Medicare & Medicaid Services (CMS) is responsible for enforcing the nursing care center regulations, including those regulations specifically written to protect the resident from any type of abuse and neglect (*e.g.*, social media abuses or otherwise). Under [42 CFR §483.13](#), CMS clearly delineates its expectations, including both reporting and investigation requirements for nursing care centers. Further, in [F223, F224, and F226 in the State Operations Manual, Guidance to Surveyors](#), CMS describes the nursing care center requirements for reporting to the state either as soon as possible or not later than 24 hours after the discovery of an incident.

Each year, state-assigned and federally-trained surveyors enter care centers unannounced and conduct a rigorous examination of all facets of caregiving, food preparation, facility fire and life safety, resident quality of care and quality of life, safety systems impacting resident care, medication management, and more. If a deficiency is found, citations can result, as well as remedies imposed. CMS and state surveyors have many tools at their disposal to encourage care centers to achieve and maintain compliance with all requirements of participation. Specifically, under [42 CFR §488.406](#), CMS can impose any of the following remedies: 1) Termination of the provider agreement; 2) Temporary management; 3) Denial of payment for all Medicare and/or Medicaid individuals by CMS; 4) Denial of payment for all new Medicare and/or Medicaid admissions; 5) CMPs; 6) State monitoring; 7) Transfer of residents; 8) Transfer of residents with closure of facility; 9) Directed plan of correction; 10) Directed in-service training; and 11) Alternative or additional State remedies approved by CMS.

Lastly, under the Affordable Care Act (ACA), [§1150B](#), CMS is responsible for enforcing the Elder Justice Act (EJA) in nursing care centers. This EJA requires any nursing center owner, operator, employee, manager, agent, or contractor (*e.g.*, individuals) that receive at least \$10,000 in federal funds during the preceding year, to report any "reasonable suspicion" of a crime against any individual who is a resident of, or receiving care from a nursing center to the HHS Secretary and one or more law enforcement entities. CMS has released a [memorandum](#) to implement the EJA. Under [§1150B](#)

CMS can impose CMPs up to \$200,000 per individual or the HHS Secretary can exclude the individual from participation in a federal health care programs.

REAL-LIFE AND EGREGIOUS SOCIAL MEDIA ABUSES

Unfortunately, in the following examples, care center staff were involved in activities that caused significant harm to the involved residents. Although these instances rarely occur, the care center's leadership must be alert and immediately responsive to any similar instances of social media abuse. Staff typically see and report such instances to their administrator or

supervisor directly. When this occurs, the care center should make every effort to delete the offensive photo, video or post as soon as possible, and to alert the resident’s family. Further, any staff involved in these activities, should be suspended during an investigation, and reported to the appropriate federal agency and the local law enforcement. Anytime even one such instance occurs in a care center, staff should be informed and reminded of the care center’s social media policy. Egregious examples include where a staff member posts a:

- photo of a nude or partially-dressed resident (including lewd markings attached to the photo or covered by fecal matter)
- photo of a nude resident that a friend subsequently posts
- video of a resident being harassed or taunted by other staff or visitors (including abusive words, such as “jerk”)
- video of a resident vomiting or being assisted with a bowel obstruction procedure
- photo of a resident while the resident is on the toilet
- photo of a resident in the bathtub or shower
- photo of staff mistreating resident (e.g., dancing in sexually explicit ways, carrying resident over his/her shoulder while partially dressed, treating a deceased resident inappropriately, etc.)
- photo of a resident being changed on the bathroom floor
- photo of two residents posted in a sexually explicit way

RESPONDING TO REAL-LIFE EXAMPLES:

The social media issues and tips that follow are “real-life” care center examples, with suggested center responses:

FACEBOOK – RESIDENT HARM

Issue:	Action:
Staff member posts inappropriate photo or video of a resident	<ul style="list-style-type: none"> • Work with the resident, family member, and Facebook to take down the picture immediately • Facebook has a process for harmed individuals to report inappropriate or abusive items on its website. This process includes reporting anything in violation of the Facebook’s Community Standards (e.g., nudity, hate speech, violence) on the Report link near the offensive post, photo or comment • If the resident or family member is ill or incapacitated; then the legal guardian or representative can report the abuse

	<ul style="list-style-type: none"> • Facebook encourages the resident, family member or legal guardian to contact local law enforcement if relevant • Suspend involved staff, pending investigation, and take appropriate employment action once the investigation is complete • Investigate thoroughly • Report to the appropriate federal agency and the local law enforcement, as well as any applicable state regulatory agency and/or licensing agency • Inform and reeducate staff using the social media policy
Staff member posts a photo of resident, or any other resident PHI (e.g., name, condition, diagnosis, etc.) without permission	<ul style="list-style-type: none"> • Work with the resident, family member, and Facebook to take down the picture immediately (see above) • Suspend involved staff, pending investigation, and take appropriate employment action once the investigation is complete • Investigate thoroughly • Report to the appropriate federal agency and the local law enforcement, as well as any applicable state regulatory agency and/or licensing agency • Inform and reeducate staff using the social media policy
Family member or other individual posts a photo or video of a resident medical procedure	<ul style="list-style-type: none"> • Discourage family members from recording resident medical procedures via photos or video, and remind them of both the family’s and the center’s dual responsibility to ensure patient dignity

FACEBOOK – CENTER HARM

Issue:	Action:
Family member or other individual post comment or picture with a “tag” of a center	<ul style="list-style-type: none"> • Establish an official page, and request that Facebook take down the other “unofficial pages”

(both complaints and/or praise), and Facebook automatically starts a “rogue” page	<ul style="list-style-type: none"> • Consider creating official Facebook pages for each individual center in a large company to avoid rouge pages
Family member or other individual post information on Facebook (both complaints and/or praise) about the center online	<ul style="list-style-type: none"> • Consider having staff monitor and find both online praise and complaints • Where it is impossible for staff to monitor online posts; consider contracting with an outside vendor to help with a social media management system (SMMS) • If there is a complaint, follow-up as soon as possible, making personal contact with the person who posted the review • If the follow-up is on-line, do not “debate,” but leave a positive message welcoming further discussion offline • To promote positive public reviews and decrease negative remarks, encourage patients and families to review their experience

YELP – CENTER HARM

Issue:	Action:
<p>Family members or other individuals post Yelp reviews (both complaints and/or praise) about the center online.⁸</p> <p><u>Complaint:</u> “The elderly man in the wheelchair next to my grandfather soiled himself because no one came to help him out of the chair for almost half an hour. The food was terrible. They misplaced my grandfather’s wound dressing, and it was only after my cousin, who is a police officer, went to visit my grandfather...did the employees change their tune. Shame on them! I plan to go to the [newspaper] with</p>	<ul style="list-style-type: none"> • Consider having staff monitor and find both online praise and complaints • Where it is impossible to use staff to monitor online posts; consider contracting with an outside vendor to help with a social media management system (SMMS) • If there is a complaint, follow-up as soon as possible, making personal contact with the person who posted the review • If the follow-up is on-line, do not “debate,” but leave a positive message welcoming further discussion offline • To promote positive public reviews and decrease negative remarks, encourage

⁸ See *Provider Magazine, Managing Online Reviews*, by Cassie M. Chew, February 2016.

<p>my opinion and my grandfather’s experience. Don’t take your loved ones to this care home. It will break your heart.”</p> <p><u>Praise:</u> “Garden City was our favorite of the five we have experienced...The management is very efficient, nursing is spot-on in their attentiveness and care, and their rehab is by far the best as to facility, equipment, and rehab therapists...”</p>	<p>patients and families to review their experience.</p>
<p>Family members or other individuals use the center’s trademark in posting a comment or picture.</p>	<ul style="list-style-type: none"> • Send a message to the individual who posted the content, and see if the issue can be resolved without YELP involvement. • If the trademark is not taken down, then consider whether or not the review violates any of Yelp's terms of service and contact the YELP support team.