



Best Practices For Addressing Negative Social Media Posts Caused By The COVID-19 Pandemic

Insights

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As the COVID-19 pandemic continues, the healthcare industry is understandably fraught with unease and uncertainty. This, coupled with the ubiquity of social media, creates challenges for healthcare providers facing public criticism. What follows are guidelines for healthcare employers tasked with responding to negative social media posts made by patients, employees, and vendors/contractors.

Responding To Patients

With Yelp, Facebook, Google, and many more, healthcare patients have countless methods to convey both gratitude and displeasure. Our social media age emboldens patients to publicly share their healthcare reviews and experiences, with some commenters inevitably turning negative. Though unfavorable reviews and complaints can be detrimental, the approach taken by healthcare employers in responding to these reviews can be just as damaging when not executed correctly. From a legal perspective, you must keep several factors in mind before responding to patient complaints.

To start, understand that websites hosting patient reviews are largely shielded from liability under Section 230 of the Communication Decency Act. Congress passed the Act in 1996 to promote “the continued development of the Internet” and encourage free market competition. The Act states that “no provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.” For this reason, the Act largely protects review sites from liability for hosting allegedly defamatory speech. And to complicate matters further, getting negative reviews removed is often difficult. For example, in a 2018 decision, the California Supreme Court decided that Yelp cannot be forced to remove an allegedly defamatory review due to Section 230 immunity.

You may be better served engaging negative reviewers directly (but offline) to allay criticisms and change attitudes. In doing so, you can avoid disclosing patients’ private medical information. Indeed, the consequences for divulging patient information and medical records under the Health Insurance Portability and Accountability Act (HIPAA) and state privacy laws are severe – including possible civil and criminal penalties – even where patients voluntarily disclosed personal medical information within their own comments.

Thus, it is crucial not to defend patient treatment decisions online, or even to acknowledge that a specific reviewer or negative commenter was a patient. Rather than responding to patient reviews publicly, you may consider contacting patients privately to discuss standards and best practices, with the goal being to develop a mutual understanding. This proactive approach may not be suitable for every circumstance, however. Other possible approaches include responding generically in a manner that does not divulge patient information but explains your policies or practices at issue without reference to the patient, or ignoring negative comments altogether.

Responding To Employees

Healthcare employers must also tread lightly when responding to negative social media content posted by employees. As we discussed in our [May 2020 edition of this Newsletter](#), employee posts discussing workplace terms and conditions are often protected under either the First Amendment of the U.S. Constitution or the National Labor Relations Act (NLRA). This is because public employees are afforded First Amendment protections when their speech concerns “a matter of public concern,” whereas private sector employees are legally protected when posting content addressing wages, hours, or terms and conditions of employment.

The National Labor Relations Board (NLRB) has recently brought actions against employers for unduly restricting social media content and for stifling speech by implementing overly broad social media policies. Given these potential pitfalls, you are encouraged to work with counsel to review applicable social media policies and ensure they are consistent with [the NLRB’s recent guidance](#) [CVS Health] and cannot be reasonably construed as prohibiting employees’ rights to discuss wages, hours, and working conditions.

Responding To Vendors And Contractors – Including Physicians

Recently, a California hospital suspended the medical staff privileges of a physician after she publicly posted a social media video shaming colleagues for not following COVID-19 social distancing protocols at a restaurant near the hospital where they allegedly worked. The incident drew national media attention after the physician filed suit in Orange County Superior Court alleging the hospital retaliated against her because she reported “unsafe patient care and conditions.” The lawsuit is ongoing.

Healthcare organizations have greater latitude to address negative content posted by vendors and contractors because these non-employees are not protected by the NLRA. That said, a hospital’s suspension or termination of a physician’s medical staff privileges should be done in accordance with the medical staff bylaws and, if applicable, the peer review process.

For example, California requires an evidentiary hearing before the medical staff’s peer review body when the proposed physician discipline is “based on a medical disciplinary cause or reason.” Further, you must be careful to review your vendor contracts and assess any joint employer liability should the individual claim any adverse action taken was in retaliation for raising patient safety concerns.

Conclusion

It is imperative that healthcare employers exercise caution (and work in tandem with counsel) before responding to negative social media content. This approach is difficult – particularly in today's COVID-19 environment – but is certain to yield long term benefits.

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