There appears to be no reported case law in West Virginia (from either the Supreme Court of Appeals or the District Courts) that indicates that a departure from the “general rules” regarding social media evidence and the intersection of social media and employment law established in other case law and described below.

I. Social Media Evidence

A. What means are available in your State to obtain social media evidence, including but not limited to, discovery requests, and subpoenas? Can you give some examples of your typical discovery requests for social media?

Both discovery requests and subpoenas can be used to acquire relevant information on social media. The following is a typical discovery request for social media:

Please produce any and all information you have shared on social media (Facebook, twitter, Pinterest, LinkedIn, Google+, or any other social media platform) from [date] to [date].

Case law is clear, however, that requests for social media information, as with all other discovery requests, must be limited to information that is “relevant” to the case per Rule 26 of the West Virginia Rules of Civil Procedure. For example, a request for “user history” — i.e., everything a particular person has ever done on social media — is objectionable on the basis that it exceeds what is “relevant” per Rule 26.
B. Which, if any, limitations do your State’s laws impose on a party on obtaining social media evidence from an opposing party? Possible limitations include a privacy defense, relevance, etc.

Aside from the relevancy objection imposed by Rule 26 of the West Virginia Rules of Civil Procedure (see discussion in I.A. above), parties often assert a “privacy defense” whenever social media information is requested. However, case law is clear that a user of social media has no “legally protectable” expectation of privacy regarding the use of social media. Privacy settings -- on Facebook, for example -- are not legally enforceable. Ethically, an attorney is not permitted to “friend” a party for purposes of viewing social media content or activity that may be otherwise hidden or screened. If such information is not accessible by a simple search, it is best to go to opposing counsel and formally request such information.

C. What, if any, spoliation standards has your State’s Bar or courts set forth on social media for party litigants?

Ethically, attorneys in West Virginia (and elsewhere) are obligated to include social media use with other similar documents subject to a “litigation hold.” Furthermore, if an attorney knows that his or her client has a social media account that could house information potentially relevant to the case, that attorney may not direct or advise the client to remove that account. The attorney may advise the client not to post anything about the case on social media going forward, but an effort must be made to preserve what is already on social media.

D. What standards have your State’s courts set for getting various types of social media into evidence? Please address relevance, authenticity, and whether any exclusionary rule might apply (e.g., Rules 404(a) or 802).

Like any other documented evidence, the admission of social media postings is subject to the same scrutiny pursuant to the West Virginia Rules of Evidence and Federal Rules of Evidence.

II. Social Media & Employment Law

E. How have your State’s courts addressed an employer’s right to monitor employees’ social media use?
The NLRB has ruled that an employee’s activity on social media can be considered “concerted activity” protected by the NLRA, especially where such posts discuss “terms and conditions of employment.” However, like a constitutional right to “free speech,” there are limitations. It is also important to note that under no circumstances may an employer ask for an employee’s social media ID and password to “scout” the employee’s social media activity. Roughly 15 states have laws forbidding such conduct, and last year a bill was introduced (but not passed) in the West Virginia Legislature forbidding the same.

F. How have your State’s state or federal courts addressed limitations on employment terminations relating to social media?

See discussion in II.E above.