

# Rising Tides: Dealing With Social Media in the Workplace

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## Social networking

- Building and maintaining social relations among people who share interests and/or activities. The “social networking” we are talking about today is that which is typically happening over the internet, including wireless internet on cell phones, and includes such things as instant messaging, texting, and posting updates on social networking websites, such as Facebook, LinkedIn, and Twitter.

# Social Media Landscape



# How Does Social Media Affect Employers?

- The increased use of social media in our society has created both exciting opportunities and dangerous challenges for employers.

# Why you can't ignore social networking:

- ▶ Don't you want to know what individuals, including your employees, are saying about you and/or your company on the internet?
- ▶ Don't you want some extra information on that person you are about to hire?
- ▶ Don't you want to know if someone is infringing upon your trademarks, trade secrets, or other confidential information?

# Why you can't ignore it . . .

- ▶ Social networking can be used for good, such as marketing, screening applicants, recruiting, etc.

# How are Employers Utilizing Social Media?

- Hosting their own company websites
- Encouraging employees to use social media to promote the company and enhance business relationships
- Recruiting
- Hiring
- Investigation and termination of employees

## Why you can't ignore it . . .

- ▶ Social networking can be used for bad and the sky is the limit. The internet and smartphones have basically made it much faster and easier for individuals to do harm to others, including their employers.
- ▶ Sexual (or other forms of) harassment
- ▶ Defamation
- ▶ Stealing of confidential information and posting it for everyone to see



# Social Media Usage

- Facebook reports more than 800 million active users
- 50% of active users log on in any given day
- 350 million active users access Facebook through their mobile devices throughout the day

Facebook Statistics, Facebook.com, <http://www.facebook.com/press/info/php?statistics>.

# Firing employees because of their actions on the internet

Two new phrases have entered our lexicon:

1. “Dooxed” – to be fired because of comments made about the company in a personal blog
2. “Facebook fired” – being fired for something you posted on Facebook

## Real world example: firing

- ▶ The voters of Arlington, Oregon recalled their Mayor after discovering that her MySpace page contained pictures of her posing in lingerie in front of a fire truck. The photos had been taken before she had become Mayor. Citizens suggested that her decision to pose in lingerie in front of a fire truck called into question her decision-making abilities. The former Mayor suggested in an interview that the photo was private since the photo was on her MySpace page and that is why it is called “MySpace.”

## Real world example: firing

- ▶ In March 2009, an employee of the Philadelphia Eagles was fired for criticizing his employer on his Facebook page. Dan Leone, a gate worker at the stadium, posted an angry, expletive-laced complaint about the team's failure to re-sign safety Brian Dawkins. Management found out and fired him for making the team look bad.

# Real world example: Hiring

- A story reported on MSNBC.com cited an interview with a corporate recruiter charged with hiring physicians. As part of the recruiter's due diligence he logged on the Facebook site of a young female psychiatrist. After finding pictures of the doctor taking off her shirt at parties (on more than one occasion) he called the candidate and asked for an explanation. He apparently was unimpressed and did not offer the position, noting that, "Hospitals want doctors with great skills to provide great services to communities. They also don't want patients to say to each other, 'Heard about Dr. Jones? You've got to see those pictures.'"

# Real world example: Firing/Resignation



# Real world example: Pure Embarrassment

Busted by your boss

From: [REDACTED] <[REDACTED]>  
Date: Nov 1, 2007  
Subject:

There is a new intern on my team who has called in "sick" on a couple of occasions. If you scroll down to the bottom you can see the email from him yesterday to my boss Paul saying that he wouldn't be able to come into work today because of a "family emergency". A co-worker of mine pulled up his face book page (similar to my-space) and found pictures of him at a party last night- so he basically said he had to go to NY for a family emergency because he wanted to party in Worcester for Halloween. Below is Paul's response to him...he BCC'd the whole office



-----Original Message-----

From: Kevin Colvin [mailto:[kevin.colvin@dinsmore.com](mailto:kevin.colvin@dinsmore.com)] |

Sent: Wednesday, October 31, 2007 3:55 PM

To: Jill Thompson (North America)

Cc: Paul Davis (North America)

Subject:

Paul/Jill -

I just wanted to let you know that I will not be able to come into work tomorrow. Something came up at home and I had to go to New York this morning for the next couple of days. I apologize for the delayed notice.

Kind regards,

Kevin

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From: Paul Davis (North America)  
Sent: Thursday, November 01, 2007 4:54 PM  
To: Kevin Colvin; Jill Thompson (North America); Kevin Colvin (North America)  
Subject: RE:

Kevin,

Thanks for letting us know--hope everything is ok in New York. (cool wand)

Cheers,  
PCD

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# Business Justifications for On-The-Clock Use of Social Networking

- ▶ Strengthen professional relationships
- ▶ Expand professional network
- ▶ Promote company blog / Marketing the business
- ▶ Access information / employee message boards

# Do's and Don'ts of Using Facebook/Twitter for Marketing

- ▶ DO keep a separate professional profile
- ▶ DO add value with your posts.
- ▶ DO answer people's questions.
- ▶ DON'T deliberately sell your services.
- ▶ DON'T constantly talk about how much you are working for your clients.

# Do's and Don'ts

- ▶ DO be aware that everything you say is almost permanent
- ▶ DO emphasize quality over quantity in your posts
- ▶ If you DON'T take anything else away from this, simply be aware of your online presence. If it is nonexistent, are you satisfied with that in the year 2013?

## Do's and Don'ts continued...

- ▶ DO “Google” yourself – if you’re not on the first page, you’re not there
- ▶ DO raise your online profile – Gmail account / Google Profile / Link your Facebook / LinkedIn / Twitter accounts – the more links, the easier it is for Google to find you
- ▶ DO associate a unique business name with yourself

# Potential Benefits of On-Line Social Networks to Employers

- ▶ Use in litigation
- ▶ Use in investigations (for example, harassment)
- ▶ Recruiting (Twitter / Facebook Job Postings)
- ▶ Screening applicants

# Potential Risk to Employers

- ▶ Textual harassment – harassment of other employees through social media websites
- ▶ Not just “sexual” harassment
- ▶ Harassment / discrimination suits can easily cost a company between six and seven figures



# Possible Solution

- ▶ Review and update your anti-harassment policies to ensure that online conduct is covered
- ▶ Remind employees of the guidelines set forth in sexual harassment policy
- ▶ Consider monitoring if appropriate
- ▶ Investigate and take action if needed

# Potential Risk to Employers

## Violation of anti-discrimination laws

- Be careful what you look for . . .

## Employment Law Issues: Hiring Decisions

1. Privacy Concerns
2. Discrimination Issues
3. Contextual Deficiencies



# Statistics:

- Approximately 80% of hiring and recruiting professionals research applicants online.
- 70% of hiring and recruiting professionals have rejected a candidate based on data found online.
- Hiring and recruiting professionals indicated that lifestyle concerns, inappropriate comments and text written by the candidate were among the leading causes for the rejection of candidates.

Cross-Tab, Online Reputation in a Connected World 6 (Jan. 2010), <http://go.microsoft.com/?linkid=9709510>.

# Privacy Concerns:

- Potential Risk to Employers involve Invasion of Privacy Claims
- Currently, courts lack a coherent methodology for determining what information, unprotected by privacy settings, should be given a reasonable expectation of privacy.

## Privacy Concerns:

- An employer may not circumvent privacy settings in order to view information posted and shared by potential candidates. There is a difference between personal facts acquired through deception and deceit, compared to facts freely and openly published for anyone with an Internet connection to see. See *Johnson v. K-Mart Corp.*, 723 N.E. 2d 1192, 1196 (Ill. App. Ct. 2000).
- Since mid-2012, 36 states have introduced and 10 states have enacted social media password-protection legislation.

# Solution

- ▶ Include disclosure on application that such information will be accessed with a signed “no expectation of privacy” clause
- ▶ Never use subterfuge to gain information
- ▶ Friending someone on Facebook to get information (lawyers can't do this per ethical rules)

# Discrimination Issues:

- An employer may not discriminate against an employee or a candidate for employment based on a protected class status under Title VII of the Civil Rights Act of 1964. This includes discrimination through the use of social media.
- Information regarding a candidate's protected class status is readily discernable from even the simplest of Internet searches.
- It is not problematic to simply view this information, it is problematic when hiring decisions are made based on this protected information.
- Employers are advised not to use the information discovered online differently than they would under any other circumstance.



# Discrimination Issues:

- Despite concerns, employers may legitimately use social media to decline to extend interviews or employment offers to candidates.
- The key is consistency. An employer must perform a similar search on all job applicants to avoid a disparate impact claim made by an applicant.

# Potential Risk to Employers

Use in Litigation

# Real World Example:

Take for example, **Professor Martin Gaskell**, an astronomer, who applied for a position as Observatory Director at the University of Kentucky. Gaskell stood well above the other applicants in terms of qualifications for the position. **During the interview process, one of the committee members opted to conduct an Internet search on Gaskell.** In doing so, the committee member discovered a personal website containing a link to an article titled “Modern Astronomy, the Bible, and Creation” written by Gaskell. The Hiring Committee recommended another person for the position because they questioned whether Gaskell’s religious ideologies were sound due to the content in the article.

After their Motion for Summary Judgment was denied, the University decided to settle the case with Gaskell.

*Gaskell v. Univ. of Ky.*, No. 09-244-KSF, 2010 U.S. Dist. LEXIS 124572 (E.D. Ky. Nov. 23, 2010).

# Possible solution

- ▶ Use non-decision-makers to compile and filter online information
- ▶ Train supervisors

# Contextual Deficiencies

- The information gained from any online source is highly contextual.
- Remember: the information posted online may not be an accurate reflection of the individual now applying for a particular position.
- Some information collected may not be valid. For instance, many times individuals have no control over what is posted about them or about someone with a similar name as their own.

## Real World Example:

Take for instance a librarian named Lauren Bernat. Ms. Bernat experienced an extremely difficult time securing employment once a YouTube video surfaced with her name on it. The YouTube video starred a woman by the name of Lauren Bernat performing a virtual hula-hoop using the Nintendo Wii in her underwear.

For this reason, the “clothed, non hula-hooping” Lauren Bernat suffered because another individual with a similar name failed to exercise good judgment with her online videos.

Erica Ogg, *I'm NOT the Wii Fit Girl!*, CNET News (Jun. 12, 2008 4:41P.M.), [http://news.cnet.com/8301-17938\\_105-9967527-1.html?tag=cnetfd.mt](http://news.cnet.com/8301-17938_105-9967527-1.html?tag=cnetfd.mt).

# Potential Risk to Employers

## Fair Credit Reporting Act

- Requires that employers obtain express written consent before conducting a background check for employment purposes, and written notice and copy of report before taking action upon its contents

# Solution

- ▶ Obtain written consent before conducting background check
- ▶ Provide applicant with notice and copy of report before taking adverse action
- ▶ Give adverse action notice (name, address and phone number of screening company; a statement that the company did not make the adverse action; the right to dispute the accuracy of the report)



# Model Social Media Policy: Hiring

- (1) The intention to use an Internet search should be disclosed to all applicants;
- (2) Internet searches should be consistent for all applicants for a similar position;
- (3) Applicants should never be required to provide screen names, Internet aliases, frequented networking sites, blogs visited or started, internet gaming sites, etc.;
- (4) The search must be limited only to publicly available information;

# Model Social Media Policy: Hiring

- (5) The employer should only consider information that is related to a legitimate business purpose;
- (6) The employer must not take into account any information regarding a protected classification under Title VII;
- (7) The decision-making process should be kept separate from the information-gathering process; and
- (8) Records of the search and findings should be maintained for a minimum of two years following the search.

# Limitations on Employer's Right to Monitor Electronic Communications

1. Electronic Communications Privacy Act (“ECPA”)
  - Prohibits employer from “intentionally intercepting” electronic communications, including email and internet access.
    - Interception must occur during actual transmission

# ECPA “Safe Harbor”

## E-mail interception is permissible where:

1. The party consents to the interception; or
2. The interception occurs in the ordinary course of business

# Limitations on Employer's Right to Monitor Electronic Communications

2. Stored Communications Act (“SCA”)
  - Creates civil liability for one who
    - intentionally accesses without authorization a facility through which an electronic communication service is provided; or
    - intentionally exceeds an authorization to that facility

## Defenses to SCA Claim

1. Consent
2. Ordinary Course of Business
3. Access is by entity providing communication service

# The NLRB and Employer Policies



# Recent Legal Attacks on Employer's Policies

## National Labor Relations Act

- ▶ Don't fall asleep, it even applies to employers whose workforce isn't unionized.
- ▶ Over the past few months, it has become increasingly clear that the National Labor Relations Board has become focused on applying the NLRA in ways that are far-reaching for existing employer policies.
- ▶ Some of which you likely have in your own handbook



# THE NLRA

## Section 7 of the NLRA (29 U.S.C. § 157)

- “**Employees** shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, **and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection**, and shall also have the right to refrain from any or all such activities except to the extent that such a right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3) of this Act.

# THE NLRA

- ▶ Section 7 rights apply to both union and non-union employees.

# The NLRB and Employer Social Media Policies

- ▶ Today, we're focusing on the NLRB's stated opinion that a large number of the provisions in employer Social Media policies are unlawful under the NLRA.
- ▶ Non-union employers could be met with unfair labor practice charges in Social Media cases and have no idea what hit them.

# The NLRB and Employer Social Media Policies

- ▶ As of late 2011, the NLRB had reviewed between 100 – 200 Social Media cases, and they haven't shown any signs of slowing down.
- ▶ A number of those cases have resulted in charges, hearings, and/or settlements with the NLRB.
- ▶ These cases typically involve either an employee who was disciplined/discharged because of Social Media activity, or review of an employer policy on the subject.

# The NLRB And Employer Social Media Policies

- ▶ “PROTECTED”
- ▶ To be protected, posts must be about employees’ terms and conditions of employment.
- ▶ Most common: wages/benefits
- ▶ treatment by supervisors
- ▶ work assignments
- ▶ discipline of employees

# The NLRB And Employer Social Media Policies

## “CONCERTED”

- ▶ Social media communication must normally involve 2 or more employees
- ▶ NOT “gripping” or solely for the benefit of one individual
- ▶ COULD be a posting by 1 individual – may be posting a group complaint if previously discussed with other employees
- ▶ The Board has found calling supervisors “liar and a bitch,” “an egotistical f\*\*k” and a “f\*\*king son of a bitch” protected!

# The NLRB And Employer Social Media Policies

## Hispanics United of Buffalo (03-CA-027827)

- ▶ Complaints by employee about other employee's job performance; others criticized her for the complaints she posted.
- ▶ Employer terminated those critical of the employee's posts due to "cyber-bullying" and "harassment."
- ▶ ALJ: Criticism was "protected, concerted activity." Employees don't lose protection of the Act by engaging in misconduct (swearing) during the course of their protected activity (made during non-work hours on personal computers).
- ▶ Solomon: "the Facebook discussion here was a textbook example of concerted activity."

# The NLRB And Employer Social Media Policies

- ▶ Knauz BMW
- ▶ Sales employee at a BMW dealership posts criticism of management for a sales event with hot dogs and bottled water.
- ▶ An Administrative Law Judge ruled that the postings about the hot dogs were protected, concerted activity.
- ▶ Although employee posted the photos and wrote comments himself, he was “vocalizing sentiments” of his co-workers and continuing the course of concerted activity that began when sales people raised their concerns at a staff meeting.



# The NLRB And Employer Social Media Policies

- ▶ The NLRB isn't just looking for policies that expressly prohibit employees from engaging in protected activity (e.g., a policy prohibiting employees from discussing their salary information).
- ▶ “If the rule does not explicitly restrict protected activities, it will only violate Section 8(a)(1) upon a showing that: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights.”

# The NLRB And Employer Social Media Policies

- ▶ An employer's best guidance as to the NLRB's view on what an employee "would reasonably construe" as prohibiting Section 7 activity is contained in the three Memoranda issued over the past year by the NLRB's General Counsel.
- ▶ Most recently, on May 30, 2012.

# The NLRB And Employer Social Media Policies

- ▶ The NLRB underestimates the ability of employees to reasonably understand employer policies, invalidating Social Media policies that employees **could potentially** interpret as infringing on Section 7 rights, rather than merely policies that employees **would reasonably** interpret that way.
- ▶ For example, the NLRB has declared that a policy encouraging employees “to resolve concerns about work by speaking with co-workers, supervisors, or managers,” is unlawful.
- ▶ Despite later stating that “[a]n employer may reasonably suggest that employees try to work out concerns over working conditions through internal procedures.”

# The NLRB And Employer Social Media Policies

- ▶ The most important takeaway point from the NLRB Memos, and the one with the most practical application, is that the NLRB's opinion on the validity/invalidity of an employer's Social Media Policy is likely to be based, in large part, on whether the employer has taken steps to avoid "ambiguity" and "overbreadth."

# The NLRB And Employer Social Media Policies

- ▶ The NLRB frowns on policies and language that could be interpreted too broadly.
- ▶ The Board has advised that employers draft “rules that clarify and restrict their scope by including examples of clearly illegal or unprotected conduct, such that they could not reasonably be construed to cover protected activity.”

# The NLRB And Employer Social Media Policies

## Practical Examples:

- ▶ Ban on posting “confidential” or “non-public” information.
  - ▶ NLRB believes employees could construe this as prohibiting them from discussing information regarding the terms and conditions of their employment.
- ▶ Ban on posting “proprietary,” “trade-secret,” or “attorney-client privileged” information.
  - ▶ More specific, and “clearly intended to protect the employer’s legitimate interest in safeguarding its confidential proprietary and privileged information.”

# The NLRB And Employer Social Media Policies

## Practical Examples:

- ▶ Prohibition on “inappropriate” or “unprofessional” comments.
  - ▶ “[T]his provision proscribes a broad spectrum of communications that would include protected criticisms of the employer’s labor policies or treatment of employees.”
- ▶ Prohibition on “harassing, threatening, intimidating, bullying, or discriminatory” comments.
  - ▶ More specific, and limited to comments that are clearly unlawful, and not protected by the Act.

# The NLRB And Employer Social Media Policies

## Practical Examples:

- Ban on “disparaging” or “misleading” comments.
  - Would include criticism of the employer or management concerning the terms and conditions of employment.
- Ban on “slanderous” or “maliciously false” comments.
  - More specific, and focused on comments that are unlawful and therefore not protected.



# The NLRB And Employer Social Media Policies

## Practical Examples:

- Ban on employees identifying themselves as employees on Social Media.
  - Could prohibit legitimate discussion of the terms and conditions of employment.
- Ban on posting comments in the name of the employer or in a manner that could reasonably be attributed to the employer, without prior written authorization
  - More specific, aimed directly at the legitimate employer interest.

# The NLRB And Employer Social Media Policies

## Practical Examples:

- ▶ Encouraging Employees to Resolve Conflicts by speaking directly with other employee, rather than posting complaints online
  - ▶ Cannot tell employees to use internal resources rather than airing grievances online because it will preclude or inhibit employees from protected activity seeking redress through alternative forums
- ▶ Suggest that employees resolve conflicts in-person
  - ▶ Does not direct employees to do anything.

# The NLRB And Employer Social Media Policies

## Practical Examples:

- Policy relating to Exercising Good Judgment & Requiring Employees who disclose affiliation with Employer to make posts “completely accurate and not misleading”
  - Overbroad and could be interpreted to apply to protected discussions and criticisms of Employer policies and treatment of employees
- “When in doubt, check with Employer”
  - **Any rule that requires employees to secure permission from an employer as a precondition to engaging in Section 7 activities violates the Act. See *Brunswick Corp.*, 282 NLRB 794, 794–95 (1987).**

# The NLRB And Employer Social Media Policies

## Practical Examples:

- ▶ Policy relating to “Friending” Co-Workers
  - ▶ Overbroad because it would discourage communications among co-workers, and thus it necessarily interferes with Section 7 activity.
- ▶ Ban on disclosing “Legal Matters”
  - ▶ **Restricts** employees from discussing the protected subject of potential claims against the Employer.

# Savings Clause

“[Employer’s] Social Media Policy will be administered in compliance with applicable laws and regulations (including Section 7 of the National Labor Relations Act).

Generally speaking, a savings clause **will not cure** the ambiguities in a social media policy that contains overbroad rules. *See General Motors, Case 07-CA-053570.*

Report of the Acting General Counsel Concerning Social Media Cases, National Labor Relations Board, Office of the General Counsel, Division of Operations-Management, Memorandum OM 12-59 (May 30, 2012).

# Best Practices

Rules that are ambiguous as to their application to Section 7 activity and that contain no limiting language or context to clarify that the rules do not restrict Section 7 rights are **unlawful**.

Rules that clarify and restrict their scope by including examples of clearly illegal or unprotected conduct, such that they could not reasonably be construed to cover protected activity are **lawful**.

# Action Steps for Employers

- ▶ Consider and discuss Social Media policy
- ▶ Tailor it for your company, culture, business needs
- ▶ Focus on work performance; if it suffers because of online time, discipline and manage

# Why you need a social networking policy

- ▶ Protect the company's trade secrets, confidential, proprietary, and/or privileged information.
- ▶ Protect the company's reputation
- ▶ Protect the privacy of other employees
- ▶ Establish guidelines for whether use of social networking sites during work hours is permitted.



# Considerations for Your Policy

- ▶ Prohibit / Permit / Encourage Social Networking
- ▶ If you prohibit, how will you monitor?
- ▶ If you permit, what are the limitations?
- ▶ Tie in other policies – business conduct; fair use; harassment; confidentiality
- ▶ Distribution & Training

# Considerations for Your Policy

- ▶ Cover latest technologies – E-mail; internet; instant messaging; blogs; social networking; smartphones; laptops
- ▶ No expectation of privacy in any company owned and issued system
- ▶ At home conduct

# Considerations for Your Policy

- ▶ Prohibit unlawful conduct
- ▶ Provide a central resource for reporting violations
- ▶ Signed acknowledgement

# Other Considerations

- ▶ Urge employees to go to HR before blogging about work-related problems
- ▶ Set forth disciplinary consequences
- ▶ Do not selectively enforce the policy

# Sample Policy

## Social Media Policy

- Encourage employees' involvement to build relationships, learn, innovate and collaborate
- Business Conduct guidelines must be followed
- Employees are responsible for content; be careful
- Identify yourself (no anonymous) when talking about Company
- Outside content should have a disclaimer ("I'm not the Company")
- Respect copyright and fair use laws
- Don't publish Company's confidential info
- Don't talk about clients, partners, suppliers, etc.

# Problem: Decreased Productivity

- ▶ Same issue as with the internet – good for some things, but bad for others, including productivity
- ▶ Same solution – limit personal use and consider monitoring

# Protecting Your Business

- ▶ Are you devoting enough resources to protecting your company from cyberabuse?
- ▶ Trade secrets and other proprietary information comprise 62 percent (average) of the valuable data for a business, but companies devote only 40 percent of their data security budgets to actually protecting this information – the rest is spent on protecting client data.

# Protecting Your Business

## Are you covered?

- ▶ Employment practices liability insurance may cover employee related abuses such as harassment, discrimination, etc.
- ▶ Cyberliability insurance may cover data breaches, destruction, liability for viruses, etc.



# Protecting Your Business – Pending Lawsuit

- ▶ Comb internet for things the plaintiff / former employee may be saying about you or the lawsuit
- ▶ Remind attorney to explore online information on the plaintiff

# The Employer's Toolkit: Best Practices for Your Workplace

Questions?

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