

Friday, May 30, 2014

Workers' Compensation  
Seminar

Social Media: Pitfalls,  
Defense Uses and  
Labor Implications

Dinsmôre

Andy Recker, T.J. Jagoditz and Jessica Bauml

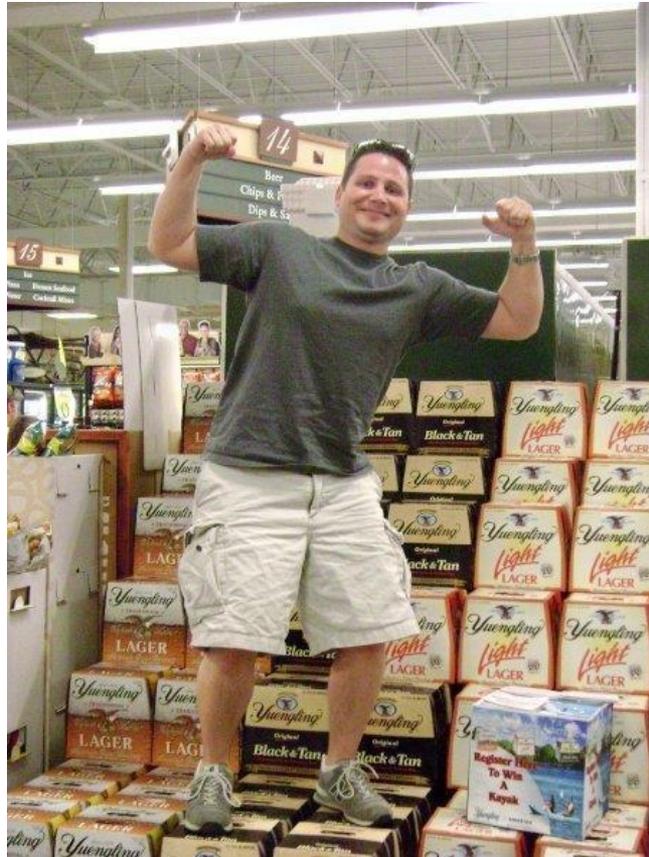


# People are often careless with what they post...

-  **Andy Recker** 4:34pm  
Hey T.J., how's your day going?
-  **TJ Jagoditz** 4:36pm  
Probably just as crummy as yours. I'm not sure if I can put up with much of these self-centered, egotistical jerks we work for...
-  **Andy Recker** 4:36pm  
I know! We deserve a medal.
-  **Brian Perry** 4:37pm  
You guys know I can see this, right????!!!!
-  **Andy Recker** 4:38pm  
I'm going to prepare my resume.
-  **Brian Perry** 4:41pm  
Better work on TJ's too. 😞
- ✓ Seen by everyone
-



T.J.'s true passion...



Sorry, THIS is T.J.'s true passion.

# Social Media Landscape





As of September 2013:

- 73% of online adults use social networking sites
- 71% of online adults use Facebook
- 18% of online adults use Twitter
- 17% use Instagram
- 21% use Pinterest
- 22% use LinkedIn

Facebook users share 2.5 billion pieces of content on the site each day

70% of business-to-consumer marketers have acquired a customer through Facebook

The 45-54 year old age bracket is the fastest growing demographic on both Facebook and Google+

*See Social Networking Fact Sheet, Pew Research Internet Project, <http://pewinternet.org/facts/sheets/social-networking-fact-sheet/> (last visited Feb. 19, 2014).*

TJ SLIDES

# Busted by the 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

# Busted by the Boss

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

From: Kevin Colvin [mailto:[kevin.colvin@hugoboss.com](mailto:kevin.colvin@hugoboss.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

# Busted by the Boss

**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

---



# REPORT FRAUD 1-800-OHIOBWC



## BWC Special Investigations

397 likes · 5 talking about this

Like Follow Message

Law Enforcement · Government Organization  
If you are looking for more information about BWC or SID,  
please visit [www.ohiobwc.com](http://www.ohiobwc.com)



Terms

397

Likes



Contact Us



Wanted Fugitives

8

About – Suggest an Edit

Ohio BWC Fraud Division's Facebook Page

## Social media helps secure conviction of Port Clinton woman committing workers' comp fraud



May 21, 2013



SID Social Media Team



[Go to comments](#)



[Leave a comment](#)

COLUMBUS – Kelley Wheeler of Port Clinton (Ottawa County) pleaded guilty to workers' compensation fraud after her Facebook postings helped prove she was working while collecting benefits for a workplace injury. Wheeler pleaded guilty May 16 in a Franklin County courtroom and was ordered to repay more than \$61,000 she collected inappropriately.

"As social media has grown, BWC investigators have deployed enhanced analysis of these sites to support our investigations," said BWC Administrator/CEO Steve Buehrer. "Our fraud team has proven very resourceful when it comes to ensuring dishonest employers, workers and providers do not escape detection."

Wheeler was receiving working wage loss, which is available to injured workers who have found work other than their former position but receive less in pay than they did at the time of injury. BWC's Special Investigations Department (SID) opened an investigation after receiving an allegation from a BWC claims services specialist who became suspicious of the employment documentation Wheeler submitted in order to qualify for these benefits.



Example from an actual claim:



TJ SLIDE

How to search for social media... informally.

Google™

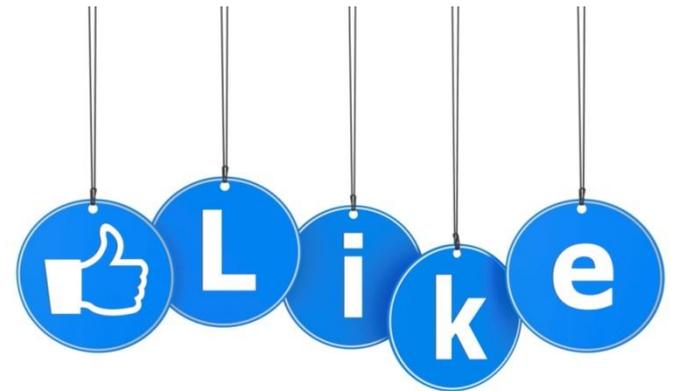
YAHOO!

bing™

Dinsmôre



*I Saw What You Said Last Night: Can Employers Discipline Employees Based On Social Media Activities?*



Dinsmôre



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



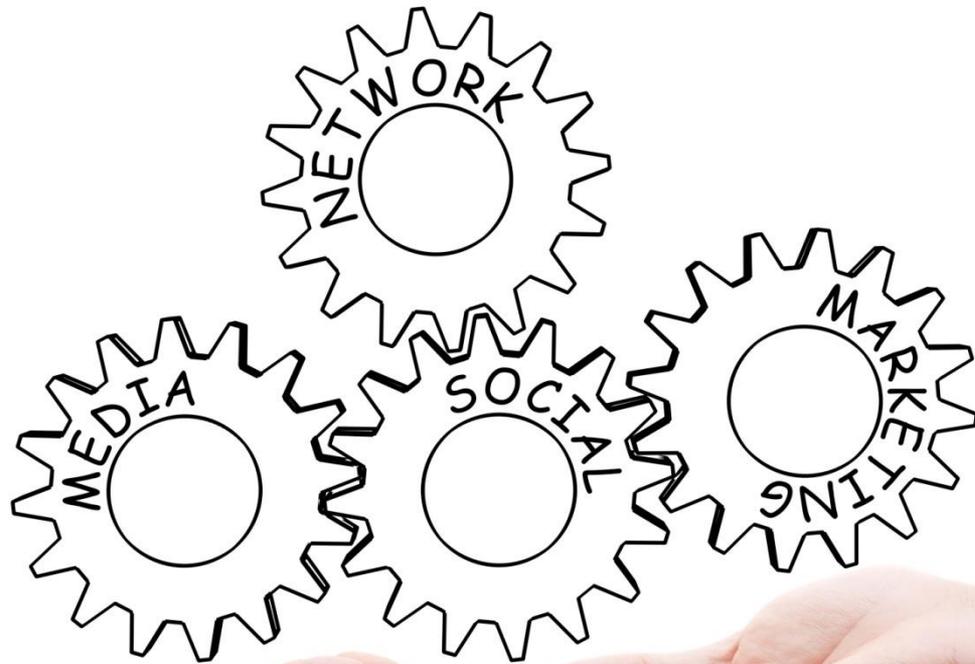
# Why employers cannot ignore social networking:

What are employees saying about the company on the Internet?

What are employees posting about themselves on the Internet?

What are employees saying about/to each other on the Internet?

Are employees publishing information regarding company trademarks and trade secrets or otherwise releasing confidential information?



# How are Employers Utilizing Social Media?

How Recruiters Use the Most Popular Social Sites		
	Search for candidates	96%
	Contact candidates	94%
	Keep tabs on potential candidates	93%
	Vet candidates pre-interview	92%
	Post jobs	91%
	Showcase employer brand	65%
	Generate employee referrals	51%
	Post jobs	48%
	Vet candidates post-interview	35%
	Vet candidates pre-interview	31%
	Showcase employer brand	47%
	Post jobs	43%
	Generate employee referrals	31%
	Contact candidates	19%
	Vet candidates post-interview	18%

Source: Jobvite Social Survey 2013

Advertising/promoting business.

Encouraging employees to use social media to promote the company and enhance business relationships.

Recruiting/hiring.

Investigations and terminations of employees.

# Employers are Facebooking ...

facebook Suche Jan Kirch

**KRONES**

**Krones AG**  
13.418 „Gefällt mir“-Angaben · 605 sprechen darüber · 1.881 waren hier

Industrie  
Meet OUR EMPLOYEES, start YOUR CAREER, get the LATEST NEWS and follow the latest TRENDS IN FILLING AND PACKAGING

Info Fotos Das Krones Team Career Impressum

# Employers are Blogging ...



# Employers are recruiting and hiring ...

© Randy Glasbergen  
glasbergen.com



**“I need your Facebook password before I can hire you.  
If you’re not on Facebook, I need you to join and post a  
bunch of personal stuff you don’t want me to know about.”**

# Investigations and Terminations

Social Media has become a treasure trove of information for employers.

- ▶ Helping to investigate employee misconduct
- ▶ Providing a basis for termination
- ▶ Providing evidence to support claims or defenses in employment lawsuits.



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 even became mayor. Citizens suggested that her decision to pose in lingerie in front of a fire truck called into question her decision-making abilities. In response, the former mayor suggested in an interview that the photo was private since it was on her MySpace page and that is why it is called “MySpace.”



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.





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 viewed the Facebook profile 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.'"



# Busted by the Boss





A Michigan employee named Alicia Ann Lynch came to work dressed as a Boston Marathon bombing victim. When Lynch posted this picture of herself on Instagram and Twitter, the picture ignited a firestorm on the Internet and even resulted in Lynch and her family receiving death threats.

While Lynch's employer initially did not reprimand her for the costume, Lynch's employment ultimately was terminated in response to the public outcry.

# Is It Permissible to Use Information Obtained From Social Media in Employment Decision?

Various courts have upheld terminations based, at least in part, on information obtained over the Internet:

*Marshall v. Mayor of Savannah*, 366 Fed. Appx. 91 (11<sup>th</sup> Cir. 2010)

*Snyder v. Millersville University*, 2008 U.S. Dist. LEXIS 97943 (Ed. PA 2008)

*Jaszczyszyn v. Advantage Health Physician Network*, 504 Fed. Appx. 440 (6<sup>th</sup> Cir. 2012).

# Potential Risk to Employers

## Discrimination lawsuits – discovery of protected status



Title VII of the Civil Rights Act – prohibits discrimination based on race, sex, national origin, and religion. Applies to employers with at least 15 employees.

Americans With Disabilities Act (ADA) – prohibits employment discrimination based on disability. Applies to employers with at least 15 employees.

Age Discrimination in Employment Act of 1967 (ADEA) – prohibits employment discrimination based on age. Applies to employers with at least 20 employees.

Executive Order 11246 – prohibits federal contractors and federally-assisted construction contractors and subcontractors from discriminating on the basis of race, religion, sex, or national origin.

# Potential Risk to Employers



Protected legal off-duty activities

Whistleblower protections

Stored Communication Act

- *Konop v. Hawaiian Airlines*, 302 F.3d 868 (9th Cir. 2002)

Electronic Communications Privacy Act

Social Media Privacy Acts

# Potential Risk to Employers



Right to Privacy (state law)

Common Law Right to Privacy

Fourth Amendment Concerns

- *City of Ontario v. Quon*, 560 U.S. 746 (2010)

Contextual Deficiencies

National Labor Relations Act

# Social Media Policies and the NLRB

## National Labor Relations Act (NLRA)

- ▶ It even applies to workforces that are not unionized.
- ▶ Over the past year, it has become increasingly clear that the National Labor Relations Board is focusing 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 National Labor Relations Board utilizes the NLRA to protect the rights of employees to act together to address conditions at work. This includes certain work-related conversations conducted on social media.



# Social Media Policies and the NLRB

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

- ▶ An employee posted complaints about another employee's work performance. Coworkers were annoyed by this employee's complaints and began criticizing her for the posts.
- ▶ The employer terminated those critical of the employee's posts because it viewed their actions as "bullying" or "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).



# Social Media Policies and the NLRB

## Knauz BMW

- ▶ Sales employee at a BMW dealership posted criticism of management for offering hot dogs and bottled water at a sales event.
- ▶ ALJ: 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.



# Social Media Policies and the NLRB

The most important takeaway 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."



# Developing Social Media Policies



All companies should have a social media policy.

Address the fundamental issue of the company's culture as well as its approach to the use of social media by employees. Either embrace and encourage social media, be wary of it, or find a healthy balance between the two.

# 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



Determine how much personal use of social media will be permitted during working hours.

Reserve the right to monitor employee use of social media while at work or while using company electronic devices.

Specify uses of social media that violate the policy.

Provide a resource for reporting violations.

Obtain signed acknowledgments.

# Monitoring and Enforcement

The background of the slide shows a person in the foreground writing on a blue notepad with a silver pen. Another person is visible in the background, also writing on a notepad. The scene is brightly lit, suggesting an office or classroom environment.

Decide what type of monitoring is needed and who is going to do it.

Train, train, train.

Consistently enforce the policy. Avoid selective enforcement.

Keep up with the law, and revise the policy when necessary!

Questions?



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