

A detailed microscopic image of plant cells, showing various colors like orange, purple, blue, green, and yellow. The cells have distinct cell walls and some have dark, circular nuclei.

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SOCIETY FOR HUMAN
RESOURCE MANAGEMENT

Social Networking in the Workplace: Untangling the
Web of Employer Risks, Employee Rights, and
Management Best Practices

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- What is social media?
- What rights does an employee have?
 - > Discuss working conditions (even non-union employees)
 - > Complain of discrimination
 - > Whistleblowing
 - > Worker privacy
 - > Employee monitoring
 - > Legal off-duty, off-site conduct
- What are the employer's risks from social media?
 - > Employer's reputation
 - > Loss of trade secret, confidential, or privileged information
 - > Defamation
 - > Violation of FTC rules on endorsements
 - > Loss of employee productivity
- Management best practices to minimize the risks
 - > How to structure a social media policy
 - > How to react to violations of company policy

Web Tools Used by Employees— Often During Work Hours

- Social Networking Sites (Facebook, Myspace)
- Business Networking Sites (LinkedIn, Plaxo)
- Online Media (YouTube, Hulu)
- Twitter
- Texting
- Personal Blogs
- Employer-Sponsored Blogs



How Frequently Are Web Tools Used?

- 22% of employees visit social networking sites five or more times per week; 23% visit social networking sites one to four times per week.
- 74% of employees say it's easy to damage a company's reputation on social media.
- 27% of employees say they do not consider the ethical consequences of posting comments, photos, or videos online.
- 72% of executives say their companies do NOT have formal policies that dictate how employees can use social networking tools.

Source: http://www.deloitte.com/dtt/cda/doc/content/us_2009_ethics_workplace_survey_220509.pdf.

- 65% have Twitter accounts
- 54% have Facebook pages
- 50% have YouTube channels
- 33% have corporate blogs

- Marketing and Brand Awareness, including targeted marketing
- Recruiting
- Knowledge Sharing
- Online Communities

- Many company CEOs are successful tweeters: Richard Branson (Virgin), Eric Schmidt (Google), Tony Hsieh (Zappos)

- 79% of employers frequently use social media to engage employees and foster productivity (19% occasionally, 1% rarely/never)*

* Source: The Buck Consultants/IABC "2009 Employee Engagement Survey," available at <http://www.iabc.com/rf/pdf/EmployeeEngagement.pdf>.

- > Discussion of wages, hours, and working conditions (even for/with non-union employees)
- > Complaints of discrimination, harassment, and retaliation
- > Whistleblowing
- > Worker privacy
- > Employee monitoring
- > Legal off-duty, off-site conduct

- Can an employer have a policy that prohibits an employee from making disparaging, discriminatory, or defamatory comments when discussing the company, its products, or the employee's superiors, coworkers and/or competitors?
- If so, would it apply to what the employee says on his/her Facebook page?

- Section 7 of the National Labor Relations Act (NLRA) gives employees the right to discuss their pay and working conditions and prohibits employers from disciplining or terminating employees for exercising such rights.
- This provision applies to **non-unionized** employees as well.

National Labor Relations Board v. Hispanics United of Buffalo (2011)

- An employee of a nonprofit posted to her Facebook page a coworker's allegation that employees did not do enough to help the organization's clients. The initial post generated responses from other employees who defended their job performance and criticized working conditions, including workload and staffing issues.
- After learning of the posts, the employer discharged the five employees who participated, claiming that their comments constituted harassment of the employee originally mentioned in the post.

National Labor Relations Board v. Hispanics United of Buffalo (2011)

- Even though the employer was non-unionized, the NLRB filed suit against the employer claiming that all employees, including non-unionized employees, have the right to complain about their working conditions and cannot be fired for doing so.
- The NLRB claims that the Facebook discussion was concerted protected activity, and that by firing the five employees the employer violated the NLRA.

- An ambulance driver wrote on her Facebook page, “Love how the company allows a 17 to be a supervisor,” referring to AMR's code for a psychiatric patient, and called her boss a “scumbag as usual.”
- The employee was terminated.
- The NLRB complaint claimed that AMR violated Section 7 of the NLRA.
 - > Right to engage in “concerted activities” for “mutual aid or protection.”
 - > AMR’s policy forbade employees from making disparaging remarks about the company or its employees.
 - > NLRB position is that employees are allowed to discuss the conditions of their employment with coworkers—at a water cooler or a restaurant, or on social media.
- AMR settled the dispute and agreed to amend its policy.

- In February 2010, reporter Deborah Zabarenko sent a tweet to Reuters: “One way to make this the best place to work is to deal honestly with Guild members.”
- Reuters verbally disciplined her for the public tweet.
- NLRB office alleged that Reuters implemented an unlawful social media policy that chilled employees’ rights to discuss working conditions and applied the policy improperly to Zabarenko.
- Dispute was settled with Reuters agreeing to adopt a new social media policy.

- The *Arizona Daily Star* newspaper encouraged its reporters to tweet. A crime beat reporter opened a Twitter account, and his screen name linked him to the newspaper. He tweeted sarcastic remarks about his “witty and creative editors.” Management instructed him not to tweet about the newspaper. He then tweeted about his crime beat, including:
 - > (i) “You stay homicidal, Tucson. See Star Net for the bloody deets” and
 - > (ii) “What?!?!? No overnight homicide? WTF? You’re slacking Tucson.”
 - > He also posted a derisive tweet about the “stupid people” at a local TV station, prompting a complaint from the station to the *Daily Star*.
- The paper fired him on the ground that he had repeatedly disregarded guidance “to refrain from using derogatory comments in any social media forums that may damage the goodwill of the company.”
- The reporter filed a charge with the NLRB, alleging that his termination violated section 7 of the NLRA.

- The NLRB general counsel held even if the newspaper's rule prohibiting the reporter from tweeting about the paper was invalid, the newspaper did NOT violate the NLRA because it terminated the reporter for posting **inappropriate and unprofessional** tweets that did not involve protected concerted activity, after being told repeatedly not to do so.

- An employee writes on her blog that the company she works for discriminates against female workers. The company's CEO sees the blog and wants to terminate the employee. Can the company terminate the employee?

- A manager puts a racist joke on his Facebook page. A subordinate sees the joke and reports it to HR. Can the company terminate the manager?

- An internal audit employee believes that the company's audit processes do not comply with the Sarbanes-Oxley Act (SOX), and posts information, including company documents, about his concerns. The company has a policy prohibiting employees from posting such information. The company terminates the employee, who sues for violation of SOX, claiming that he was a whistleblower who was retaliated against for reporting SOX violations.
- Who wins?

Tides v. The Boeing Co. (9th Cir. May 3, 2011)

- The case involved disclosure to a newspaper, which the employees knew violated company policy.
- The court held that SOX only protects disclosures to federal regulatory and law enforcement agencies, to Congress, or to employee supervisors, not disclosures to the media.
- NOTE: Importance of company policy prohibiting the employees' actions.
- States may have whistleblower protection laws that protect employees from termination.

What Should an Employer Do?

- An employee posts on her Facebook page:
 “Terrible day at work. Boss is a scumbag. Want to kill him.”
- A coworker sees it and reports it to the company.
- Can/should the company do anything about it?

- Employee Privacy
 - > e.g., Constitutional right of privacy in California
 - > Does the employee have a reasonable expectation of privacy?
- Right not to be disciplined for legal, off-duty, or off-site conduct
 - > e.g., California Labor Code Section 96k
- The Stored Communications Act, 18 U.S.C. § 2701, also comes into play for employees' use of social networking sites.
 - > It is a federal statute that prohibits third parties from accessing electronically stored communications (e.g., email or Facebook entries) without proper authorization

- Can an employer monitor a current employee's emails or texts or review a former employee's emails or texts?
- Does the employee have a "reasonable expectation of privacy"?
- Does the employer's business justification outweigh the employee's expectation of privacy?
- Is the employer using the least restrictive means possible?

- The City of Ontario provided its employees with pagers using a third-party service provider, Arch Wireless. The employer paid for the pagers. Its policy limited the pagers to official use and stated that employees should have no expectation of privacy when using the devices. Employees were allowed personal use of the pagers if they paid for it.
- One of its employees sent sexually explicit pages to his wife. As part of an audit to see if overuse was due to business or personal use, the city obtained copies of the pages. It then terminated the employee.
- The employee sued for violation of his privacy rights, claiming he was told that the policy allowing the city to review his pages would not be enforced.
- The U.S. Supreme Court held that the employer had not violated the employee's privacy rights based on the facts of the case.

- Can employers use keystroke-capturing software on employer-provided keyboards to access employee passwords to social media sites?
- Can employers use passwords stored in the Internet history on employer-provided computers to access employees' social media sites?
 - > Does the employee have a reasonable expectation of privacy?
 - What does the company's policy say?
 - Is the employee's account password protected?
 - > Does the employer have a business justification?
 - Is the employer trying to determine if the employee sent company confidential information to his email account?

- How do you ensure that the employee does NOT have a reasonable expectation of privacy?
 - > Have a clearly communicated policy about what privacy rights an employee has.
 - > Have a business justification for conducting searches.
 - > Make the searches reasonable in scope.
 - > Do not obtain access to an employee's social media site (e.g., "friending") through a third party or otherwise using improper means.

Be Cautious About Reading an Employee's Emails to His/Her Attorney

- ***DeGeer v. Gillis*** (N.D. Ill. 2010). Employee did not waive attorney-client privilege by using work-issued computer for email exchanges with counsel.
- ***Stengart v. Loving Care Agency*** (D.N.J. 2009). Employee exchanged emails with her attorney through her personal, password-protected Yahoo! account using a company laptop. Company policy made it clear that there was no expectation of privacy when using company equipment. The court held that the attorney-client privilege outweighed the company policy, and the employer had no right to review the emails.
- ***Convertino v. U.S. Dep't of Justice*** (D.D.C. 2009). No right to review employee's communications with his attorney because the company policy allowed for personal use of the equipment, and he employee deleted the emails right away and did not know that the employer was accessing and saving emails.
- ***Nat'l Econ. Research Ass'n v. Evans*** (Mass 2006). Employee did not waive the attorney-client privilege for personal emails sent and later accessed by his employer.
- ***Holmes v. Petrovich Dev. Co., LLC*** (Cal. 2011). No right of privacy for employee communications to attorney using company email account in light of company policy making clear that there was no expectation of privacy.

- An airline pilot sued his employer, alleging that the airline viewed the pilot's secured website in violation of the Stored Communications Act.
- The pilot maintained a website in which he criticized the airline, the airline's officers, and the union. Airline employees were eligible to access the site by logging in with a username and password created by the individual employees. Management employees were expressly excluded and were not eligible to create usernames or access the site.
- The vice president of the airline was concerned that the pilot was making untruthful allegations on the website. The vice president asked an eligible employee to assist him with accessing the website.
- The court found that there was an issue of fact as to whether the eligible employee had the power to authorize the vice president, a third party, to access the website. If the vice president was authorized to access the website, then the employer would not be liable.
- *Konop v. Hawaiian Airlines, Inc.*, 302 F.3d 868 (9th Cir. 2002).

- Research commissioned by Microsoft in December 2009 found that 79% of U.S. hiring managers and job recruiters reviewed online information about job applicants.
 - > 35% of hiring managers “google” applicants, while 23% check social networking sites; approximately 1/3 of these searches result in a job rejection.

- > Karen Glickstein, Social Networking and Employment Law (2008), available at <http://forthedefense.org/articles/Social%20Networking%20and%20Employment%20Law.pdf>

Use of Social Media in Making Hiring Decisions

- Should employers search the Internet or review the social networking sites of job applicants?
- Should employers adopt policies on whether and when their recruiters, HR professionals, and managers may review publicly available information on job applicants?
- Should employers require job applicants to give them access to their social media sites (including passwords)?
 - > Does it depend on the level or type of position that the applicant is seeking?

- Does doing so invade an employee's privacy rights?
- Is it a lawful background check?
- Even if not unlawful, employer may be making employment decisions based on inaccurate information.

- May learn medical information about an applicant in violation of GINA.
- May learn information about an applicant's age, race, sex, sexual orientation, disability, pregnancy, religion, etc.
 - > This pre-screening issue potentially implicates a number of federal employment statutes including the Americans with Disabilities Act (ADA), Title VII of the Civil Rights Act of 1964 (Title VII), the Age Discrimination in Employment Act (ADEA) and the Uniformed Services Employment and Reemployment Rights Act (USERRA), among other statutes providing protection for employees and applicants.
 - > In the event of litigation involving the company's hiring practices, viewing such information could create an inference that the employer considered and relied on prohibited information in making hiring decisions.
- Cannot use any Megan's Law list (registered sex offenders) in making employment decisions.

- If decision is made to review social media sites of job applicants, consider having a trained person to do so, and separate that person from the decisionmakers who call back applicants or offer them positions.

- > Risk to the employer's reputation
- > Loss of trade secret, confidential, or privileged information
- > Defamation
- > Violation of FTC rules on endorsements
- > Loss of employee productivity

- 82% of employees admit to using social media during work time for “personal reasons.”
- Employer not allowed to assert a claim against employee under Computer Fraud and Abuse Act, 18 U.S.C 1030, for “excessive” accessing of Facebook and personal email, because the employer could not show injury to its computer or information as required by the statute. *Lee v. PMSI* (M.D. Fl. May 6, 2011).
- Can/should an employer bar or block employees from accessing social media during work hours?
 - > Only allow employees to do so on their breaks.
 - > Creates morale issue and may impact hiring and retention of employees

- **Whole Foods** – CEO’s anonymous blogging promoting his company and criticizing competitors, including Wild Oaks Markets prior to hostile takeover, led to unfair competition claims/lawsuit following FTC/SEC investigation.
- **Delta Airlines “Queen of the Sky”** – Flight attendant fired for posting revealing photographs in company uniform on her blog. She sued for sex discrimination, claiming men not similarly punished.
- **Microsoft** – Employee posted software upgrade on blog prior to release.
- **Domino’s, Burger King, KFC** – Employees posted videos/photographs harming company image.
- **Viruses** imported into company computer systems through employees’ use of social media sites (such as Facebook and Twitter)

- A manager posts explicit requests for sex and nude photographs of himself on a social media site. In his spare time, he is a stripper.
- Can the employer terminate his employment?
- What if the employee is the CEO?

*San Diego Unified School District v. Commission on
Professional Competence (California 2011)*

- California Court of Appeal recently overturned a personnel commission's decision to reinstate a middle school administrator after he posted a pornographic and obscene ad on the popular Craigslist website soliciting (free) sex.

- Someone posts an anonymous blog making false statements about the company and its CEO and disclosing confidential information about the company's upcoming products.
- What can the company do?

- When lawsuits are filed to discover the identity of an anonymous blogger, the courts balance the competing interests of the company and the blogger.
 - > ***Krinsky v. Doe***, 2008 WL 315192 (Cal. App. 2008): Prima facie showing of defamation required before court would grant subpoena to Web host to obtain the identity of an anonymous blogger.
 - > ***Dendrite Int'l v. Doe***: Courts weigh right of anonymous free speech against strength of company's case and legal necessity for disclosure.

- Apple brought suit against unnamed individuals claiming they "had leaked specific, trade secret information about new Apple products to several online websites."
- Apple subpoenaed documents that would reveal the defendants' identities. The "John Does" brought a motion seeking a protective order based on their claim that they were "journalists" and thus entitled to invoke a privilege against disclosing their sources.
- Court ordered an ISP to identify people that Apple accused of stealing trade secrets and leaking information about Apple products through websites but left unresolved whether three ISP employees who claimed journalistic shield law protection of sources were indeed journalists.

Apple Computer v. Doe 1, et al., 139 Cal. App. 4th 1423 (2006).

- What if a former employee posts thousands of documents derogatory to a senior executive of the company, causing a public relations nightmare with customers, investors, and the media?
 - > “Cybersmearing” of employer by former employees. *Varian Med. Sys., Inc. v. Delfino*, Santa Clara County Super. Ct. No. CV780187 (Dec. 18, 2001): Santa Clara County, California jury awarded employer \$775,000 in compensatory and punitive damages against former employees for defamation and invasion of privacy.
 - > But is this really an effective remedy?

- Court refused to issue the employer an injunction to keep former employee from publishing false statements about the company on her blog because of the strong presumption against prior restraints of speech and the established law against issuing preliminary injunctions in defamation cases, and because the employer failed to show irreparable harm.

FTC Guidelines established in 2009 (16 C.F.R. § 255)

- Requires disclosure of status as company employee
- Requires disclosure of connections between bloggers and the companies they promote
- Requires disclosure of connections that might “materially affect the weight or credibility of the endorsement”
- Endorsements must reflect the beliefs or opinions of endorser and cannot be deceptive

Endorser must be bona fide user of company/product

- Paid or other relationship between seller and endorser must be disclosed
- Should monitor blogging by employees and others compensated by the company for blogging to clear up any misunderstandings that arise
- Must take steps to halt publication of deceptive representations
- Includes tweets and social media sites (Facebook “Like” button?)

- Online message board discussing new music download technologies and products, with information exchanges about new products
- Employee of product manufacturer posts messages promoting the product
- Knowledge of poster's employment would affect weight or credibility of comments
- Poster should clearly and conspicuously disclose relationship to readers

- Identifying a “lost witness” through Facebook, LinkedIn, etc.
- Reviewing blogs, public Facebook postings, or Twitter comments for evidence undermining plaintiff’s liability theories and emotional distress allegations
 - > Courts are split on whether to order a plaintiff to give a defendant access to the plaintiff’s social media sites.
- Researching prospective jurors

Who Should Be Involved in Setting the Social Media Policy?

- Office of General Counsel
- Risk Management
- Ethics and Compliance
- HR
- Marketing, Public Relations, and Communications
- IT

- Fit the policy to your company's culture and employees' use of social media
- Make robust, precise policies specifically addressing social media issues
 - > Certain limitations are acceptable, such as:
 - No use at work during working hours
 - No disclosure of confidential information
 - No use of company name, logo, or branding
 - No defamation or false information
 - No harassing or discriminatory conduct regarding company employees
 - Include disclaimer re: nothing in policy intended to restrict rights to discuss terms and conditions of employment

- Make it clear that the policy applies to all devices that the employees use for work, and that the company reserves the right to monitor all employee devices used for work or connected to the company network, even if they are not company issued, to eliminate any expectation of privacy.
- Employees should know that:
 - If it is done on a work machine, it belongs to the company.
 - Content produced on work machines is not private.
 - Content produced at work or on a work machine may be monitored.

- Coordinate with your other policies
 - > Code of conduct
 - > Media communications
 - > Disclosure of trade secrets and company confidential information, including material nonpublic information
 - > Use of company trademarks, names, and logos
 - > Harassment and discrimination policies
 - > References
 - > Allow employees to discuss terms and conditions of employment
- You may want to create links to other companies' policies in your social media usage policy.

- Define social media, but include language that acknowledges unknown future trends.
- Set rules. For example:
 - > Your postings may not violate any company policy.
 - > You may not discriminate or harass someone because of that person's race, religion, gender, sexual orientation, disability, national origin, or other protected characteristic. You may not retaliate against someone who complains of discrimination or harassment.
 - > Never post inappropriate content whether depicted in words, links, or photos.
 - > Do not post false statements about someone.

- Rules:
 - > Never comment on the company's legal issues online.
 - > Never post confidential or "trade secret" information of the company or its customers, partners, clients, suppliers, and vendors.
 - > Do not post copyrighted information or use company trademarks or logos
 - > Employees should not hold themselves out as representatives of the company when posting, and should make it clear that their views are their own. Prior approval is required to post on behalf of the company.
 - > Employees may not post content that reflects negatively on, or has the potential to harm or disparage, the company or its employees, customers, vendors, or partners.

- Rules:
 - > If you are posting a review, your opinions, or your experiences about a product or service of the company, you must conspicuously disclose if you have a connection to the company.
 - > When you choose to go public with your opinions, you are legally responsible for your postings. You may be subject to personal liability if your posts are found to be defamatory, harassing, or in violation of any other applicable law. You also may be liable if your postings include confidential or copyrighted information (music, videos, photos, text, etc.) belonging to third parties.

- Rules:
 - > If a member of the media contacts you about a posting about the company, please contact _____.
 - > Failure to comply with the Company's Social Networking Policy may result in disciplinary action, up to and including termination from employment and/or legal action by the Company.
 - > If you have any questions about this policy, or if you believe that someone may have violated this policy, please contact _____.

- Exception:
 - > Please be advised that the above rules are in no way intended to prohibit employees from appropriately and professionally discussing the terms and conditions of their employment with others through social media or otherwise to prevent employees from engaging in protected activity. In conducting such discussions, however, employees should remain aware of the company's policies prohibiting unlawful harassment and discrimination and should comply with these policies. In addition, employees should remain aware that various laws may prohibit dissemination of false factual information about other people and entities.

- In addition to rules, you may want to set guidelines for use of social media:
 - > Access to social media sites at work should not be excessive or interfere with work
 - > Respect the privacy of others
 - > Use common sense and good judgment
 - > Be truthful and accurate
 - > Be polite and treat others with respect
 - > Do not use obscenity or profanity
 - > Be clear and transparent
 - > Think twice before you post
 - What happens online stays online forever!

- Do allow employees to ask questions and ultimately sign the policy.
- Don't discipline employees for social media policy violations without consulting your attorney.
- Don't view social media profiles without authorization. Never attempt to hack into a website, ask a third party to give you access to a page, misrepresent your identity, or talk someone into giving you a password to see a social media page.
- Do not consult social media sites when making hiring decisions.

- Conduct training and send out reminders
- Compliance monitoring/enforcement
 - > Be vigilant for and responsive to information about improper use or activity
 - > Set Google alerts to keep up with who is talking about the company and what is being said

- Policies should explicitly address employees' obligations regarding blogs and other forms of social media when engaging in company promotion.
 - > Establish an approval and moderating process for any employee who wishes to hold himself or herself out as a representative of the company (for example, if an employee writes a professional blog).
 - > Consider requiring a disclaimer: "The views expressed in this blog are my personal views and do not represent the views or opinions of my employer."
 - > Consider whether to allow employees to blog or post information on social networking sites about the company's competitors, clients, and vendors.
 - > Create employee committee/mailbox to review and approve company blogs and answer any questions.
 - > Review FTC regulations and craft policies and training to comply with them.

- Should you prohibit your employees from giving LinkedIn references?
- Be careful of LinkedIn use by employees to unlawfully solicit employees or customers of former employer.

- See the fun YouTube video below on social media policies.
- http://www.youtube.com/watch?v=8iQLkt5CG8I&feature=player_embedded#at=110



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