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## My Space or Your Space: Workplace Privacy in the Age of Electronic Communication

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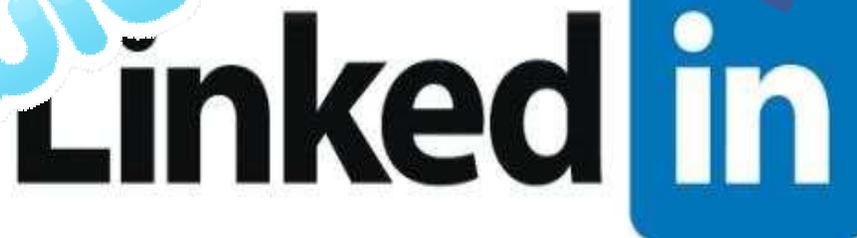
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# MySpace or Your Space?





## Prevalence of Social Media

- 80% of companies use LinkedIn as their primary tool to find employees.
- 1 out of 8 couples married in the U.S. last year met via social media.
- Aston Kutcher and Ellen DeGeneres have more Twitter followers than the entire population of Ireland, Norway, and Panama.

## In the News...



- Official US Secret Service Tweet on May 9, 2011:
  - “Had to monitor Fox for a story. Can’t. Deal. With. The. Blathering.”
- From the agency’s official statement of apology:
  - “An employee with access to the Secret Service’s Twitter account, who mistakenly believed they were on their personal account, posted an unapproved and inappropriate tweet...We apologize for this mistake, and the user no longer has access to our official account. Policies and practices which would have prevented this were not followed and will be reinforced for all account users.”

## Social NOTworking

- How many working hours are lost to social networking?
- 22% of employees visit social networking sites 5 or more times per week; many admit to logging in while at work
- Largest growth of social network users is not by teenagers, but by 25 to 54-year-olds



## Social NOTworking

- 75 million Twitter registered users
- 80% of Twitter usage is on mobile devices. People update anywhere, anytime.
- There are over 200,000,000 blogs. 54% of bloggers post content or tweet daily.
- Texting at Work, including “Sexting”
- But at 2010 Corporate Counsel Conference, only 54% of employers surveyed have a formal policy for social media use inside and outside the workplace.

## Facebook.com figures and facts:

- Facebook has over 600 million active users
- 50% of Facebook users log on every day
- Average user spends from 15 hours and 33 minutes on Facebook per month
- Average user visits the site 40 times per month
- Average user spends 23 minutes (23:20 to be precise) on each visit



## Facebook.com figures and facts:

- If Facebook were a country it would be the world's 3<sup>rd</sup> largest.
  1. China
  2. India
  3. Facebook
  4. United States



## What Are You Likely to Find on A Social Networking Site?

- Education History
- Work History
- Career Interests
- Hobbies
- Favorite Music
- Favorite Movies
- Vacation Photos
- Party Photos
- Family Information
- Links to Profiles of Friends
- Links to Blogs
- Political Views

## The Blogging Paramedic

- Susan regularly blogs on her own Internet site. She blogs on her own time at home, and not at her job, where she works as a paramedic.
- Lately, Susan has begun expressing frustration with her supervisors and others at work on her blog. HR finds out that Susan wrote the following blog entry:



## The Blogging Paramedic

- “This company is completely screwed up. Tom and I were on the same crew last night and were treating a little boy who was in a car accident and began having seizures. Tom misdiagnosed the boy’s condition and gave the boy the wrong medication. I’m thinking about reporting him.”
- Can Susan’s employer discipline her?



## Questions to Ask When Disciplining An Employee

- Was the employee engaging in protected “concerted activity?”
- Is the employee protected under a “whistleblower” statute?
- Was the communication related to political activities or affiliations?
- Was the employee engaging in “legal off-duty activity” protected by state law or illegal activity?
- Does the employee have a potential discrimination claim?

## Engaged in Protected Concerted Activity Under the NLRA?

- “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...”



National Labor Relations Act

## Social Media In the Courts

- Over 24 pending lawsuits involving social media firings, most involve the NLRB

## NLRB's Aggressive Approach

- American Medical Response of Connecticut Inc. – February 2011
  - Settlement where employer had to revise policies regarding online communications after firing of employee for Facebook comment
- Build.com – April 2011
  - Settlement in which similarly terminated employee is reimbursed for lost earnings and employer must post signage in the workplace saying the company cannot terminate anyone over what they post online

## NLRB's Aggressive Approach

- Thomson Reuters News – April 2011
  - NLRB threatening complaint will be issued for employer reprimanding of reporter for Twitter message about workplace
- Hispanics United of Buffalo – June 2011
  - Trial set after charitable nonprofit's decision to lay off five employees who allegedly criticized workload and staffing conditions on Facebook
- Karl Knauz BMW – July 2011
  - Trial set after Chicago luxury car dealership's firing of salesman for purported Facebook comment with photo critiquing a company event

## Distinguishing Between Tweets

- Arizona Daily Star – September 2010
  - NLRB *declined* to pursue complaint after reporter was allegedly fired for Twitter comments noting that even though employer did not have internal policy addressing social media, which could have made the termination illegal had the employee complained about working conditions or employment terms, the employer's actions were not illegal because the messages themselves were not protected by law.
    - “You stay homicidal, Tucson. See Star Net for the bloody deets.”
    - “What?!?! No overnight homicide? WTF? You’re slacking Tuscon”
    - “Hope everyone’s having a good Homicide Friday, as one Tucson police officer called it.”

## Protected Concerted Activity

- NLRB's acting counsel Lafe Solomon has said using Facebook is the same as employees talking around the water cooler.
- Employers must tread lightly if considering terminating an employee based on internet postings!



## Key Challenges for Employers

- Discrimination/Harassment/Retaliation
- Negligent hiring/supervision
- Divulgence of trade secrets or proprietary information
- Reputational harm to employees
- Reputational harm to employers
- Privacy pitfalls
- Legal constraints on employee discipline



## Applicant Screening

- 24 million American Facebook users leave their profiles mostly public
- 73% of social media profiles can be found through a public search engine
- 77% of social network users do not restrict access to their photos
- 2007 study – 45% of employers questioned use social networks to screen job candidates
- Of these, 35% decided not to offer a job to an applicant based on the content posted
- Facebook was the most popular for screening
- 7% of employers followed job candidates on Twitter



## Applicant Screening

- Over 50% of the employers surveyed attributed their decision not to hire to:
  - Provocative photos
  - References to drinking and drug use
  - Bad-mouthing of previous employers and colleagues



## Discrimination, Harassment and Retaliation

- An employer's viewing of an applicant's personal information on social networking/blogging site may trigger protections of antidiscrimination laws
- Sites may contain information regarding age, race, national origin, disabilities, sexual orientation religion and other protected characteristics
- May be difficult for employer to prove it did not rely upon personal information

## ***Gaskell v. University of Kentucky***

- Title VII claim after a University failed to hire a job applicant for a position as Director of the university observatory.
- The university admitted the plaintiff had more education and experience than the person hired for the position, but asserted the person hired had demonstrated more of the qualities it wanted for the position.



## ***Gaskell v. University of Kentucky***

- Plaintiff claimed he was rejected for the position because of his religious beliefs and expression of those beliefs.
- Claimed that during the hiring process, one of the hiring committee members conducted an internet search and came across his personal site, which contained an article titled “Modern Astronomy, the Bible, and Creation,” and lecture notes from a lecture plaintiff gave regarding the same topic.
- Both the article and lectures notes *referenced several religious topics.*

## ***Gaskell v. University of Kentucky***

- Hiring committee members expressed concern regarding the statements which they believed blended religious thought and scientific theory.
- The committee members undertook a review of the scientific integrity of plaintiff's statements, including bringing the article and the lecture notes to the attention of the Biology Department, which expressed concerns about plaintiff's "creationist" views and its potential impact on the university.

## ***Gaskell v. University of Kentucky***

- The Plaintiff successfully defeated summary judgment
- The Court found the arguments were very fact intensive and difficult to determine at the summary judgment stage
- This case eventually settled before trial for \$125,000



## Can You Base Hiring Decisions on Information from Social Networking Sites or Blogs?



- Beware of inadvertently obtaining information regarding a protected status!
- Avoid circumventing a potential employee's privacy settings by pretending to be someone else in order to gain access to a restricted network
- Understand that information may be inaccurate, misleading, or flat-out wrong!

## Wrongful Termination Claims

- Employee may contend that he or she was terminated for reasons related to protected activities.
- Employee may:
  - Point to an employer or supervisor's knowledge of a protected characteristic (i.e., pregnancy or religion)
  - Point to a time where the employer learned about any such information through the employee's social networking site
- Could potentially provide a strong basis for the employee's wrongful termination claim.



## Harassment Claims

- Social media necessarily expands the employer's liability outside the workplace and outside work hours
- When taken out of context, a simple comment on Facebook of a friend request may turn into the basis of a harassment or discrimination claim.



## Harassment Claims

- Example:
  - A supervisor “be-friends” a co-worker on Facebook.
  - If the employee accepts the friendship request and opens communication with the supervisor outside the workplace, any inappropriate remarks or conversations between the two, even if outside work hours or outside the workplace, may set the basis for a harassment claim.



## Violence in the Workplace

- Employers have an obligation to guard against workplace violence under the Occupational Safety and Health Act (OSHA)
- Employers are directly responsible for providing a safe working environment for all employees and any other people present in the location of employment.



## ***Mai-Trang Thi Nguyen v. Starbucks Coffee Corp.***



- A Starbucks barista had exhibited erratic behavior, which several customers complained was inappropriate. Starbucks arranged for the employee's leave of absence.
- During her leave a co-worker showed an assistant manager the plaintiff's MySpace page, which detailed very disturbing remarks and threats against Starbucks.

## ***Mai-Trang Thi Nguyen v. Starbucks Coffee Corp.***



- Notably, a blog entry dated ten days after the employee's last day at Starbucks stated:
  - *“Starbucks is in deep s--t with GOD!!...I've worked Tirelessly 2 not cause trouble, BUT I will now have 2 to turn 2 my revenge side (GOD'S REVENGE SIDE) 2 teach da world a lesson of stepping on GOD. I thank GOD 4 pot 2 calm down my frustrations n worries or else I will go beserk n shoot everyone . . . Prepare to See Crazy Trang in public eye soon IN UR TELEVISION n other news vehicles.”*

## ***Mai-Trang Thi Nguyen v. Starbucks Coffee Corp.***

- Employees expressed their concerns for their safety
- Starbucks terminated plaintiff by letter because of “inappropriate conduct and threatening violence”
- The employee sued Starbucks for sexual harassment, retaliation, religious discrimination, violations of the California Occupational Safety and Health Act, and the California Fair Employment and Housing Act Section 12940(j)(1).

## ***Mai-Trang Thi Nguyen v. Starbucks Coffee Corp.***

- The court eventually ruled in favor of Starbucks on a motion for summary judgment finding that Plaintiff failed to go beyond the pleading to support her claims.
- Lessons learned for employers:
  - Remain aware of any employee's violent tendencies.
  - Take preventative steps to address workplace violence.



## Proprietary Business Information

- Intellectual property infringement
  - Microsoft employee posted software upgrade
- Securities fraud/Unfair Competition
  - Whole Foods CEO's anonymous blogging criticizing competitors led to unfair competition lawsuit and FTC/SEC investigation



## Bart's Blackberry Bonanza

- Bart was a salesperson with Acme Equipment. As part of his duties, Bart carried a company-issued Blackberry.
- Acme's company policy stated employees could use their Blackberries to send and receive personal messages provided those messages were not "excessive" and that the company could at any time audit employees' messages.



## Bart's Blackberry Bonanza

- After Acme was charged steep overage fees for Bart's use of his Blackberry, the company audited Bart's messages and discovered he was sending an average of 50 messages per shift, most of which were personal. The company also discovered that many of the messages contained sexually explicit material and violated the company's harassment policy.
- Can Acme discipline Bart?



## ***City of Ontario v. Quon*, 130 S. Ct. 2619 (2010)**

- The U.S. Supreme Court unanimously held the City of Ontario's review of transcripts of an employee's text messages sent and received on a City-issued pager was a reasonable search under the Fourth Amendment.
- Lessons learned for employers: 
  - Be prepared with comprehensive computer and electronic equipment usage policies.
  - Update policies frequently.
  - Have employees acknowledge policies.

## Federal Wiretap Act

- Wiretap Act
  - Prohibits “interception” of electronic communications
  - Ordinary course of business exception



## Stored Communications Act

- Stored Communications Act
  - Prevents employers from using illicit or coercive means to access employees' private electronic communications.
  - *Quon v. Arch Wireless Operating Co.*, 554 F.3d 769 (9th Cir. 2008)
    - Court held Arch Wireless violated SCA by disclosing text messages without consent; U.S. Supreme Court ruled separately the City's policy defeated expectation of privacy – 130 S.Ct. 2619 (2010)

## ***Brian Pietrylo, et al. v. Hillstone Restaurant Group dba Houston's***

- An employee created a group on MySpace.com while working as a server for a restaurant.
- The stated purpose of the group was to allow group members to vent about their jobs. The group was private and an invitation was required to join for access to postings.
- The plaintiff invited past and present employees of the restaurant to join the group.

## No Access Without an Invite

- While at a manager's home, one of the group's members showed the manager the website.
- The manager then requested and obtained the password from that member, and accessed the group site without an invitation.



## No Access Without an Invite

- The MySpace group included:
  - Postings of sexual remarks about management and customers
  - Jokes about the restaurant's policies
  - References to violence and illegal drug use
- Based on these postings, the manager terminated two employees.
- The two employees brought suit against the restaurant for, among other things, violation of federal and state SCA statues and other federal and state privacy laws.

## No Access Without an Invite

- The case went to trial where a jury verdict was rendered for employees on SCA claims
  - Found the restaurant *intentionally or purposefully* accessed the group site *without authorization* on five occasions, in violation of the SCA.
- However, jury also found that the restaurant had not invaded the employees' common law right to privacy and therefore unnecessary to reach a verdict on the employees' wrongful termination in violation of public policy of private rights claim.

- **Employers should:**
  - Avoid accessing social media accounts or groups without authorization
  - Refrain from accessing employee personal e-mail accounts by utilizing password information stored on the company's network.



## Legal Constraints on Employee Discipline

- NLRA and Calif. Labor Code §232.5
- Expression of political opinions
- Legal off-duty activities
- Wrongful termination in violation of public policy (arrests, convictions, bankruptcy, workers' compensation history)
- Whistleblowing



## Methods to Minimize Risk

- Develop policy on whether HR/Hiring Managers can access social networking sites for job applicants/employees
- HR/IT personnel responsible for monitoring/using electronic information are properly trained to avoid improper access and to screen out information that can not be lawfully considered in the application and/or disciplinary decision-making process



## Methods to Minimize Risk

- Ensure appropriate employment decisions are made based on lawful verified information
- Consider whether to block employee access to social networking sites through company computers or to limit access during working hours
- Consider restriction on professional references via LinkedIn

## Methods to Minimize Risk

- Investigate complaints of discrimination or harassment stemming from posts on social networking sites and blogs
- Ensure security of employer sponsored blogs
- Implement a social networking and blogging policy



## Key Elements of Electronic Communications Policies

- Consider whether to block employee access to social networking sites through company computers or to limit access during working hours
- Consider Company philosophy – business only?
- No expectation of privacy when using company equipment
- Employees must abide by non-disclosure and confidentiality agreements/policies



## Key Elements of Electronic Communications Policies

- Only individuals officially designated may speak on behalf of the Company
- “Bloggers Beware” - “The views expressed in this blog are my personal views and opinions and do not necessarily represent the views or opinions of my employer”
- Company policies governing corporate logos, branding, and identity apply to all electronic communications



## Key Elements of Electronic Communications Policies

- Employees are prohibited from making defamatory comments when discussing the employer, superiors, co-workers, products, services and/or competitors
- Based on new FTC guidelines, require employees to obtain prior approval before referring to company products and services and to disclose the nature of the employment relationship
- Employees must comply with company policies with respect to their electronic communications, such as policies prohibiting harassment and standards of conduct

## Key Elements of Electronic Communications Policies

- Company reserves the right to take disciplinary action if the employee's communications violate company policy
- If allowed at work, time spent social networking/blogging/texting should not interfere with job duties
- Remind employees expected to comport themselves professionally both on and off duty

## Key Elements of Electronic Communications Policies

- Do not prohibit employees from discussing terms and conditions of employment
- Avoid “Big Brother” image while protecting the company and its employees
- Obtain signed acknowledgments of the policy



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# Questions???

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