



PITFALL POTENTIAL:

The Risks of Social Media

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A few short years ago, the word “friend” was a noun, not a verb. The terms Facebook, Twitter, Myspace, LinkedIn, YouTube and blogging were not part of the American lexicon. Fast forward to 2010: employers can rest assured their employees are actively using these and many other forms of social media. Online social media can elevate the time-honored act of saying or doing something stupid to a whole new level by instantaneously sharing ill-advised comments and acts with a potential audience of millions, including fellow employees, customers and competitors. Once a social media posting has been made, there is little or no opportunity for second thoughts. And, there is the added bonus that an employee’s online display of stupidity may forever be preserved in electronic or printed form, to embarrass and haunt the employer on an ongoing basis.

Generally, social media destroys any useful attempt to distinguish between employee conduct inside work (which employers are much more comfortable regulating) and employee conduct outside work (which traditionally has been viewed, at least by employees, as none of an employer’s business). As the illustrations in this article demonstrate, when an employer is forced to deal with employee misconduct on social media, it often makes little difference whether a social media posting takes place inside or outside of work, on or off the clock, or with or without use of the employer’s equipment. Anyone harboring doubts that social media is a cause for employer heartburn should consider the following sampling of issues and risks:





Dangers of Supervisor/Subordinate “Friend”-ships¹

“TMI:” Too Much Information...Employee Interactions Outside of Work

An employer is liable for co-worker harassment if it knew or reasonably should have known about the harassment and fails to take appropriate remedial action.² A manager's knowledge of harassment between co-workers is generally imputed to the employer. Because “friends” on Facebook have access to content posted on another “friend’s” page, a manager who is friends with a non-supervisory employee can view the employee's online information.

If the manager happens to see harassing comments or offensive dialogue being exchanged among employees and does nothing, the employer may later be accused of having knowledge of co-worker harassment and failing to respond. Even if the manager never actually

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saw the inappropriate content, the existence of the friendship with the subordinate in and of itself may give an enterprising plaintiff-employee the opportunity to claim that the employer knew or should have known of the alleged harassment.

Vicarious Liability for Supervisor Harassment or Discrimination

Employers are always vicariously liable for a supervisor's unlawful harassment resulting in a tangible employment action such as an undesirable work assignment, demotion or termination.³ It is possible that a supervisor's own misconduct via social media could constitute harassment for which an employee may attempt to hold an employer vicariously liable. While it is obvious that a supervisor should never say anything online which would not otherwise be communicated to an employee, including discriminatory or sexually explicit remarks, social media provides a massive grey area, particularly due to the ways in which people are drawn to express themselves to their friends.

Consider this scenario: Emily Employee's Facebook status says "Emily Employee wishes there were some hot guys around the office – no one here is my type!!!" Sam Supervisor, one of Emily's 396 Facebook Friends, jokingly comments: "What do you mean I'm not your type?" Emily, who was really directing her Facebook status update to her female friends, is startled by her boss's comment. A week or two later, Sam legitimately writes up Emily for poor productivity and job performance. Also, business has been very slow lately and the company needs to lay off some of its workers. Sam and the human resources manager (who knows nothing about Sam and Emily's Facebook exchange) later decide together that Emily, due to her recent performance counseling, is one of the employees selected for lay off. Emily sues, claiming the real reason for her termination was her refusal to reciprocate Sam's Facebook "advance."

What if Sam Supervisor in the above hypothetical has a Facebook page which indicates his nickname is "Spanky" and that he is a member of a Facebook "He-Man Woman Haters Club?" Those of us old enough to qualify for age discrimination protection may recall the episode of "Our Gang" (aka "The Little Rascals") in which club president, Spanky, administered the following oath to club members:

"I...(state your name)...Member in good standing of the He-Man Woman Haters Club... Do solemnly swear to be a he-man and hate women and not play with them or talk to them unless I have to. And especially: never fall in love, and if I do may I die slowly and painfully and suffer for hours – or until I scream bloody murder."

Sam may simply be a Little Rascals aficionado who has absolutely no negative feelings towards women. However, Generation Y employee Emily has never heard of The Little Rascals and perceives Sam's club membership as a sexist indication that Sam treats women less favorably. When Emily sues the employer following her lay off, a printout demonstrating Sam's homage to The Little Rascals will likely be Exhibit A in Emily's gender discrimination suit against the employer. As the employer's attorney, you may find yourself attempting to persuade a jury that Sam really did not mean it that way.

Potential Loss of a Key Employer Defense to Discrimination Claims

To sustain a claim of intentional discrimination under federal and state laws such as Title VII, the Americans with Disabilities Act, and NRS Chapter 613, an employee must prove that the employer took adverse action against an employee "because of" the employee's membership in a protected classification (for example, an employee's disability, religion, sexual orientation, race, etc.) Often a first line of defense for employers against a disparate treatment claim is that the employer was unaware of the employee's protected status and, therefore, as a matter of law, could not have discriminated against the employee "because of" that status. If Emily is friends with Sam Supervisor or Maria Manager on Facebook, and Emily's Facebook page displays her date of birth, membership in a cancer survivor's group, or other indications of legally protected status, this defense may disappear.

Retaliation and Favoritism

Wayne Worker recently filed a workers' compensation claim due to a back injury he sustained at work. Wayne just created his Facebook account and is now excitedly friending everyone he knows, including Sam Supervisor and Maria Manager. Maria, who had existing friendships with several other non-supervisory employees,

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feels burned by what happened with Emily and is not going to make that mistake again, so she declines Wayne's friend request. Wayne wonders why Maria is friends with other employees but rejected him, and the only explanation he can think of is retaliation for having filed a workers' compensation claim.

On the other hand, Sam Supervisor accepts Wayne's friend request, but steers clear of friendships with female employees in light of what happened with Emily. Sam rejects Carol Clerk's friend request. Carol believes Sam accepted Wayne but rejected her because he favors men over women. Sam's and Maria's responses to the friend requests are conveniently electronically preserved for introduction into evidence in Wayne's and Carol's lawsuits against the company.

Electronically Letting the Cat out of the Bag: Disclosure of Confidential Information and Trade Secrets

Another ill-advised and potentially damaging use of social media by employees involves the discussion or posting of confidential information or trade secrets. Consider the legal and regulatory nightmare which could result from employees in a publicly traded company posting information about an anticipated merger or other circumstances (for example, a product recall) affecting a company's stock prices.

What about the risk of losing trade secret protection when employees disclose confidential customer information or other trade secrets via social media? Under Nevada's Uniform Trade Secrets Act⁴, customer lists and pricing information can constitute trade secrets provided reasonable efforts have been made to maintain secrecy of the information.⁵ Thus, if an employer wishes to preserve statutory protection of its confidential proprietary information, it must take precautions to prevent employees from disclosing that information, including on social media sites. While an employee is unlikely to use social media to blatantly post online a document entitled

"Customer List and Trade Secrets," an employee's readily-accessible contact list on professional social networking sites such as LinkedIn could set the stage for an argument that a customer list has been disclosed and is no longer confidential. This defense has been raised in a Minnesota trade secrets case filed this year.⁶

Federal Trade Commission (FTC) Regulations: "I Love My Employer!"

What if Susie Salesperson, attempting to generate sales for her employer's products, uses a personal blog under a fake name or sends out "Tweets" to tout the employer's products or prices as "the best in Las Vegas?" What if, in that blog or on Twitter, Susie Salesperson does not reveal her connection to the employer and pretends to be a disinterested consumer? Even though the employer has not authorized Susie Salesperson's conduct, the employer (and Susie) may be found to have violated Federal Trade Commission regulations.

In 2009, new FTC guides⁷ went into effect covering "endorsements and testimonials" in advertising

which encompass (among other things) employee "endorsements" on social media websites. The guides define "endorsement" as an "advertising message...consumers are likely to believe reflects the opinions, beliefs, findings or experiences of a party other than the sponsoring advertiser."⁸ "Material connections" between the endorser and the "sponsoring advertiser" must be disclosed.⁹ Under the guidelines, a company may be subject to corrective action for deceptive, false or unsubstantiated statements made by an endorser about the company's products or services or for the endorser's failure to disclose the "material connection" (i.e., that the "endorser" works for the company).¹⁰

Business Disparagement and Defamation: "I Hate My Employer!"

Reports of employees being in hot water for inappropriate use of social media have become

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commonplace. In May 2010, a waitress in North Carolina was fired by her employer after using Facebook to gripe about a “cheap” customer who left a bad tip.¹¹ In another recent incident, in June 2010, the Pittsburgh Pirates fired an employee who appears at games dressed in a pierogi costume after he posted a disparaging remark on his Facebook page about the contract extensions of the team’s Manager and General Manager. However, this “dumping of the dumpling” was short-lived – the Pirates re-hired the pierogi after a firestorm of bad publicity over the termination.¹² Closer to home, a Las Vegas firefighter came under scrutiny this past spring (including reportedly being investigated by the police) for a posting on Facebook, wherein she stated that she wanted to shoot a Clark County Commissioner, who has been an outspoken critic of firefighter salaries, in the groin.¹³

As a general rule an employer may adopt a policy forbidding employees from disparaging an employer or its customers, posting threats or

engaging in other inappropriate conduct on social media. An employer further, as a general rule, may discipline or terminate employees who engage in such conduct. However, as discussed below, there are several potential statutory (and for public employers, constitutional) restrictions which must first be considered by an employer before such action is taken.

Pitfalls of Limiting or Attempting to Prohibit Employee Social Media

So now you are convinced: you will advise your clients to strictly prohibit employees from using social media, right? Not so fast...

Social Media: Constitutional Protections

What is more American than invoking one’s perceived constitutional right to free speech? Many employees do not realize First Amendment speech protections and Fourth Amendment unreasonable search and seizure protections

generally do not apply to private employers. While constitutional limitations are beyond the scope of this article, the First¹⁴ and Fourth¹⁵ Amendments do constrain the lengths to which public employers may go in accessing or prohibiting employees’ online content.

A host of Federal and state laws do afford protection for employees’ online communications; for example, the federal Stored Communications Act (SCA)¹⁶ provides civil and criminal penalties for (1) intentionally accessing electronic communications without authorization; or (2) intentionally exceeding an authorization to access electronically stored communication. Although the law was generally intended to punish computer hackers,¹⁷ courts, including the Ninth Circuit, have applied the

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SCA to cases where employers accessed employee chat rooms¹⁸. This area of the law is fraught with peril. Employers must proceed cautiously before accepting even an employee's voluntary offer to show the employer what other employees are saying about the company in a chat room or to provide the employer with the employee's own user ID and password to a chat room.

What's an Employer to Do?

Social media is here to stay. Undoubtedly, it poses a vast new array of challenges for employers. It is crucial that employers develop and implement sound policies and procedures addressing employee use of social media. Policies must be tailored to each employer's individual operations and needs: there is no off-the-shelf, "one-size-fits-all" policy. Employers need to determine what to permit, what to require, and what to prohibit. Whatever approach is taken,

employers should apply the policy uniformly and train its workforce on the appropriate (and inappropriate) uses of social media. When violations occur, employers are well-advised to consult with their attorneys for assistance in navigating the myriad of federal and state laws impacting the employer's response. ■

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- 1 Because of the multitude of social media websites, this article uses the ubiquitous Facebook for many illustrations for the sake of brevity, but the same principles and issues can apply to other social media sites.
- 2 29 C.F.R. § 1604.11; *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 759 (1998).
- 3 EEOC's Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors.
- 4 NRS Chapter 600A.
- 5 *Frantz v. Johnson*, 116 Nev. 455, 466, 999 P.2d 351, 359 (2000); NRS 600A.030(b).
- 6 *TEKsystems, Inc. v. Hammernick*, Case 0:10-cv-00819-PJS-SRN (D. Minn., Complaint filed March 16, 2010). The former employees are also accused of soliciting employees via LinkedIn, in violation of non-competition and non-solicitation agreements.
- 7 "Guides Concerning the use of Endorsements in Testimonials in Advertising," 16 C.F.R. Part 255.
- 8 16 C.F.R. § 255.0.
- 9 16 C.F.R. § 255.5.
- 10 16 C.F.R. § 255.5.
- 11 Associated Press, "Waitress Fired for Griping About Tip on Facebook," May 17, 2010.
- 12 Dan Majors, *Pirates Put Pierogi Back In the Race*, Pittsburgh Post-Gazette, June 23, 2010.
- 13 Antonio Planas, *Police investigating firefighter's comments about Sisolak*, Las Vegas Review Journal, April 9, 2010; Joe Schoenmann, *Firefighter who posted fantasy of shooting official still on the job*, Las Vegas Sun, June 20, 2010.
- 14 The First Amendment protects public employees' speech on *matters of public concern* although a public employer may take non-retaliatory action against an employee whose speech can reasonably be expected to disrupt the employer's operations. See e.g., *City of San Diego, Cal. v. Roe*, 543 U.S. 77, 80, 125 S. Ct. 521, 523 (2004). The applicable test balances an "employee's right to engage in speech" against "the government employer's right to protect its own legitimate interests in performing its mission. *Dible v. City of Chandler*, 515 F.3d 918, 926 (9th Cir. 2008).
- 15 Recently, in *City of Ontario, California v. Quon*, the United States Supreme Court held that a police department's review of an employee's text messages on his departmental pager did not violate the Fourth Amendment because the search was motivated by a legitimate, non-investigatory work-related purpose and was not excessive in nature. ___ S.Ct. ___ (2010) WL 2400087 (June 17, 2010).
- 16 18 U.S.C.A. § 2701(a).
- 17 See *Konop v. Hawaiian Airlines, Inc.*, 302 F.3d 868, 890 (9th Cir. 2002).
- 18 *Konop v. Hawaiian Airlines, Inc.*, 302 F.3d 868, 890 (9th Cir. 2002); *Pietrylo v. Hillstone Restaurant Group*, 2009 WL 3128420 (D. N.J. Sept. 25, 2009).