


Bond

EFFECTIVELY USING SOCIAL MEDIA WHILE LIMITING LEGAL LIABILITY

LeadingAge NY HR Summit

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“Social Media”

an umbrella term that defines the various activities that integrate technology, social interaction, and the construction of words, pictures, videos, and audio


Questions You’re Likely Contemplating

- Should we utilize social media as part of our screening/hiring process?
- Can we terminate employees for social media activity?
- Should supervisors “friend” or connect with subordinates on social media?
- Should we have a Social Media Policy?
 - If so, what should the policy address?
- If we, as an organization, utilize social media, what do we need to do to protect ourselves?




Social Media – Why Should You Care?

- Americans now spend more time on social networking sites than they do e-mail*
 - Social networking – 22.7% of online time
 - Email – 8.3% of online time
- Primary social networking outlet – Facebook
 - 85% of social networking




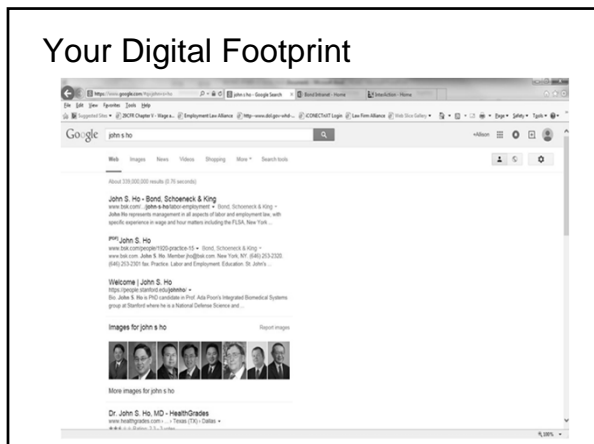
WHAT IS SOCIAL MEDIA ?



Relating to Social Networking


| Social Networking Tool | Real World Corollary |
|------------------------|----------------------|
| LinkedIn | The Office |
| Facebook | Backyard Barbeque |
| Twitter | Street Corner |






Where to begin...

- Can I search social media content as part of the hiring process?
- Can/should I access/monitor employee social media posts?
- Can I discipline/terminate employees for what they say/do on social media?




Social Media – The Challenge

- Employees believe use of social media outside of work is “my time, my business”
- Employers need to make employment decisions based on best available information




Can Employers Search Social Media As Part Of The Hiring Process?

- Yes
- However, there are some legal concerns of which employers must consider
- Namely:
 - Title VII
 - ADEA
 - ADA
 - NLRA
 - FMLA
 - GINA
 - NYHRL




WHAT ARE THE WORKPLACE CONCERNS?



Employer Use in Recruiting/Screening

- 70% of surveyed HR professionals have rejected an applicant based solely on online reputation information
- What is being searched?

| | |
|----------------|--------------|
| Facebook - 29% | Blogs - 11% |
| LinkedIn – 26% | Twitter – 7% |
| MySpace – 21% | |



What Caused Employers to NOT Hire a Candidate

| | |
|--|-----|
| Inappropriate photos/information | 53% |
| References to drug/alcohol abuse | 44% |
| Negative comments about previous employers/clients/coworkers | 35% |
| Poor communication skills | 29% |
| Discriminatory comments | 26% |
| Misrepresentations about job experience | 24% |
| Confidential information concerning previous employer | 20% |



Case Study

- Any concerns?
- What could have been done differently?



Case Study

- Bob, a hiring manager at ABC Company, interviews Steve, a candidate for an open position
- Steve's resume made him a borderline candidate and Steve did not perform well in the interview
- Nonetheless, after the interview, Bob Googles Steve's name and discovers Steve's public Facebook page
- The Facebook page reveals Steve is 55, gay, Jewish and immigrated from Poland
- Bob also sees that Steve is a "fan" of a union that has been attempting to organize ABC Company

(cont'd)



Should Social Media Be Part of The Screening Process?

- Pros
 - Important decision, need best information available
 - May give you insight into the applicant's character
 - Easier to avoid a bad hire than to terminate post-hiring
 - Failure to hire cases are less common than termination lawsuits
 - May help to avoid a negligent hiring case



Case Study

- The next candidate interviewed for the position, Sally, has a much stronger educational background and work experience
- She is also under 40, U.S. born, and heterosexual and has never belonged to or supported a union
- Sally interviews very well and Bob decides to offer her the job
- Steve files a failure to hire claim alleging discrimination based on his age, national origin, sexual orientation and former union affiliation

(cont'd)



Should Social Media Be Part of The Screening Process?

- Cons
 - Sites contain lots of information that you cannot consider in the hiring process (age, sexual orientation, race, religion, ethnicity, etc.)
 - Possession of this information could taint an otherwise well-based decision



How Do We Address These Concerns?

- At a minimum, direct hiring managers not to access social media as part of the hiring process
- If social media will be accessed/utilized as part of the hiring process, determine:
 - will it be utilized for every position or only certain positions?
 - for what job categories/positions?
 - scope of search?
 - internally or by a third party? (by mindful of FCRA concerns)



Screening / Hiring Do's

- Use the right people to conduct searches
 - Consider use of a third-party (FCRA concerns)
- Insure impermissible information (e.g., protected status) is not used in decision making
- Attempt to verify information before relying on it
- Retain information obtained in search
 - Search criteria
 - Information relied on



If Social Media Background Checks Will Be Conducted-

- Develop a social media in hiring policy
- Define search criteria
- Address when search will occur – ideally later in the process, if not post-offer
 - Pros – avoids tainting otherwise clear-cut decisions
 - Cons – focuses the applicant on the reason for the decision
- Identify information
 - you will not look at or consider
 - that will be reported to those involved in hiring



Screening / Hiring Don'ts

- Access any site to which the employer has not been provided access
- Falsify information or impersonate in order to obtain access



Implementation

- Have non-decision maker conduct search and report only relevant, nonprotected information to decision maker
- Instruct individual conducting search not to dig into "impermissible" information



Social Media in Hiring

- Bottom Line –
 - A decision about whether social media will be utilized in the hiring process needs to be made and communicated to hiring managers



Can Employees Be Disciplined for Social Media Activity?

- Yes
- However, there are legal concerns to consider
- Namely:
 - Limitations on accessing and monitoring social media use, and
 - the NLRB's protection of protected, concerted activity



Limitations on Accessing and Monitoring Social Media Use

- Concerns:
 - Electronic Communications Privacy Act
 - New York Wiretapping Law
 - Stored Communications Act
- Work Around:
 - Obtain express or implied consent
 - Do not obtain access to a restricted social network by
 - Coercing employees to provide access
 - Impersonating someone



Case Study

- Employee creates and maintains Facebook group to “talk about all the crap/drama/and gossip occurring in our workplace, without having to worry about outside eyes prying in”
- Access by “invitation only” and given to select coworkers
- Managers hear of Facebook group and ask employee with access to provide his login information
- Managers use employee’s access information to access forum
- After viewing the forum and its discussion of sexual and criminal acts and fantasies pertaining to coworkers and customers, employee was fired



Electronic Communications Privacy Laws

- Electronic Communications Privacy Act (federal)
 - Prohibits intentional, unauthorized, interception and access of wire, oral or electronic communications (including e-mail)
- New York State Wiretapping Law
 - One party consent state prohibit monitoring, intercepting or accessing electronic communications without **consent** of one of the parties
 - N.Y. Penal Law Section 250 (Class E felony)



Legal Concerns

- Did the managers have the right to gain access in this manner?
 - Did the coworker *freely* share the login information?
 - Did the coworker have the authority to share his/her access to the managers?



Stored Communications Act

- Prohibits intentional and unauthorized access of wire or electronic communications while in electronic storage
- Does not apply to:
 - Provider of wire or electronic communications service
 - User of that service
- Employee may have privacy claim where an employer accesses a restricted social network
 - *Ehling v. Monmouth-Ocean Hosp. Service Corp.*
 - New Jersey Federal Court found SCA applies to an employee’s privacy restricted Facebook posts



Case Study Modified

- Now, instead of using another employee's access info to view the postings in the private group, an employee who is a member of the group presents a manager with a print out of posts from coworkers, which contains posts that violate the employer's confidentiality policy.
- Can you discipline the employees for these posts? Should you?



NLRA

- Section 7 provides that employees “shall have the right . . . to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection”
- Section 8 makes it an unfair labor practice for an employer
 - “to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [Section 7]” or
 - “to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this subchapter”



Can I discipline/terminate employees for what they say/do on social media?

- Yes, however, an employer must first consider the legal concerns presented by the National Labor Relations Act's protection of protected, concerted activity.



When Is A Social Media Post Protected?

- When it is posted by a nonsupervisory employee; and
- Constitutes protected, concerted activity



Social Media and the NLRB

- The NLRB Office of the General Counsel has produced three reports summarizing cases before the NLRB related to:
 - The lawfulness of an employer's social media policies and rules
 - The “protected” and/or “concerted” nature of employees' social media posts (i.e., employee discipline related to social media use)



When Is Activity “Protected”?

- Protected activity includes a broad range of conduct that relates to “wages, hours, working conditions, and other terms and conditions of employment”, or banding together for “mutual aid or protection”



When Is Activity “Concerted”?

- Activity is concerted when an employee acts with or on the authority of other employees, and not solely by and on behalf of the employee himself
- Considerations:
 - Did the employee appeal to co-workers for assistance?
 - Did employees discuss the issue before or contemporaneous with the online posting?
 - Did employees raise the concern with management (online or off)?
 - Was there an online discussion with coworkers?



Lawful or Unlawful?

- He also referred to the employer’s customers as “rednecks” and stated that he hoped they “choked on glass as they drove home drunk”
- No coworkers commented on Facebook
- The employer saw the Facebook post and terminated the bartender



Lawful or Unlawful?

- A reporter at a newspaper opens a Twitter account at his employer’s urging and identifies himself as a reporter with the newspaper in his bio.
- Reporter tweets about how bad his paper’s copy editors were and his employer issued him a warning as a result.
- Reporter later posted insensitive things about homicides and criticized a local television station.
- Newspaper terminated reporter’s employment.



Does Protected, Concerted Activity Ever Lose Its Protection?

- Yes
- Activity may lose its protection if it is “opprobrious” or “disloyal, reckless, or maliciously untrue”
- Considerations:
 - where the discussion occurred (i.e., in the workplace)
 - subject matter of the discussion
 - nature of the outburst
 - whether the outburst was provoked by a ULP by the employer



Lawful or Unlawful?

- A bartender was upset about that waitresses did not have to share tips with him even though he helped serve food
- Bartender complained about this policy to another bartender, who agreed it “sucked”. Neither bartender raised this issue with management
- The bartender then vented on his Facebook wall to a relative, complaining that he hadn’t had a raise in five years and that he was doing the waitresses’ work without tips

(cont’d)



Lawful or Unlawful?

- Two employees discovered that they owed more income taxes than they had expected, allegedly due to an employer withholding error
- One of the employees discussed this at work with other employees, and some employees complained. In response, the company planned a staff meeting to discuss these concerns

(cont’d)



Lawful or Unlawful?

- In the meantime, a former employee wrote on his Facebook page, "*Maybe someone should do the owners of Triple Play a favor and buy it from them. They can't even do the tax paperwork correctly!!! Now I OWE money...Wtf!!!!*"
- A number of people respond to this post, including an employee who called her boss "*an a__hole*"
- Another employee "*liked*" one of the other messages in the thread
- Employer learns of the posts and fires the employees for disloyalty

(cont'd)



Lawful or Unlawful?

- NLRB found the termination was unlawful:
 - discussion was "textbook" concerted activity
 - activity was protected because it related to terms and conditions of employment
 - swearing in posts was not sufficient to cause the post to lose protected status



Lawful or Unlawful?

- NLRB found termination unlawful:

"Although we do not condone her conduct, we find that Sanzone's use of a single expletive to describe a manager, in the course of a protected discussion on a social media website, does not sufficiently implicate the Respondent's legitimate interest in maintaining discipline and order in the workplace"



Lawful or Unlawful?

- Employee car salesman posts photographs and sarcastic commentary on Facebook criticizing the "less than luxurious" food and drink served by his employer, a luxury car dealership, at a kickoff sales event.
- Employer terminated the salesman.

(cont'd)



Lawful or Unlawful?

- Five employees engage in a discussion on Facebook using offensive language regarding job performance and staffing level issues, after one of the employees requested assistance in preparing for an anticipated meeting with management about these topics.
- Employer terminated all five employees.

(cont'd)



Lawful or Unlawful?

- NLRB found termination was unlawful.
 - conduct was protected as it related to impact of "cheap" car dealer on commissions
 - conduct was concerted as employee was vocalizing sentiments of co-workers about commissions, that were previously expressed at a meeting regarding planning for the event.



Protected Concerted Activity on Social Media – In a Nutshell

- Social media posts by supervisory employees – not protected
- Purely personal gripes or posts directed at nonemployee relatives/friends, even about work-related issues -- may not be protected
- Disparaging comments and profane, rude or vulgar language -- may be protected

(cont'd)



Supervisors & Employees “Friending” One Another

- Benefits –
 - Builds stronger connections
 - Stronger team results
- Concerns –
 - Appearance of favoritism
 - What the supervisor puts “out there”
 - What the employee puts “out there” (do you really want to know?)
 - Supervisors interacting with subordinates when they are not thinking like supervisors



Protected Concerted Activity on Social Media – In a Nutshell

- Social media posts by nonsupervisory employees concerning a workplace concern that generate comments by other employees – most likely protected
 - Even if no other employees respond, the post is likely to be found protected if:
 - the post is on a site designed to be seen by fellow employees,
 - there is a clear intent to initiate or further group action, and/or
 - the issues has been presented to management and/or discussed with fellow employees



Nonsupervisory Employees “Friending” One Another

- Avoid outright ban on employees “friending” co-workers (nonsupervisory) on social media sites
 - Unlawfully overbroad because it would discourage communications among co-workers and thus “necessarily interferes” with Section 7 activity



Takeaways

- Exercise extreme caution when disciplining/terminating an employee for social media conduct
- Consult with HR/counsel to insure compliance with applicable law



The Only Facebook Privacy Notice You Need to Be Familiar With

If it's private,
do not put it on Facebook*

*Article 1, Section 1, Statutes of
Common Sense

Case in Point...


 **██████████** OMG I HATE MY JOB!! My boss is a total pervy wanker always making me do shit stuff just to piss me off!! WANKER!
Yesterday at 18:03 · Comment · Like

 **██████████** Hi **██████████**, i guess you forgot about adding me on here?
Firstly, don't flatter yourself. Secondly, you've worked here 5 months and didn't work out that I'm gay? I know I don't prance around the office like a queen, but it's not exactly a secret. Thirdly, that 'shit stuff' is called your 'job', you know, what I pay you to do. But the fact that you seem able to -up the simplest of tasks might contribute to how you feel about it. And lastly, you also seem to have forgotten that you have 2 weeks left on your 6 month trial period. Don't bother coming in tomorrow. I'll pop your P45 in the post, and you can come in whenever you like to pick up any stuff you've left here. And yes, I'm serious.
Yesterday at 22:53

Write a comment...

How Do We Address These Concerns?

- Educate supervisory personnel
- Personal/professional dichotomy
 - Personal – Facebook
 - Professional – LinkedIn



And more...

Goodbye thyroid! I won't miss you!
 about an hour ago via BlackBerry · Unlike · Comment

 You like this.

 **██████████** Good luck!
56 minutes ago · Like

 **██████████** Oh my goodness! Good luck with your surgery When are you doing that?
38 minutes ago · Like

 **██████████** Thanks girls! Tomorrow am. Can't wait!
30 minutes ago · Like

Write a comment...



HOW DO WE DEVELOP A SOCIAL MEDIA POLICY AND WHAT SHOULD IT ADDRESS?



And more still...

is still waiting for latest thyroid results. Cardio came back last night... valve issues...liver MRI again tomorrow to check size change in a growth. Gosh, it sucks to be getting older!
14 hours ago · Like · Comment

 **██████████** Sending you good thoughts!
12 hours ago · Like

 **██████████** Thinking of you. Please let know if you need anything.
12 hours ago · Like

 **██████████** Just more results, Michelle! Thanks, though. Good to see you (and) this morning! ;)
10 hours ago · Like

Write a comment...


 had "f*** you b****" yelled at me at school today, was told I'm back on the lay-off list, and got a call that my thyroid test came back "off." GREAT day.
March 2 at 1:57pm · Like · Comment

 View all 31 comments



Should We Have A Social Media Policy?

- Yes
- Social media policies are an important tool to raise employee awareness and address the perception in disparity concerning social media
 - 53% of employees believe social networking pages are none of their employers' business



Why So Complicated?

- Organizational Level
 - No generally accepted standard for technology usage and behavior
 - Varying degrees of employer tolerance

(cont'd)



At a Minimum ...

- Modify existing policies to address concerns arising from social media
 - Screening/hiring
 - Anti-harassment/retaliation
 - References
- Educate supervisory personnel on issues arising from social media use



Why So Complicated?

- Individual Level
 - Informality of social media/email
 - Elimination of wall between personal and private lives
 - Perception disparity
 - 53% of employees believe social networking pages are none of their employers' business
 - 51% of employees believe employers do not have the right to monitor employee email use

(cont'd)



Developing a Social Media Policy

- Choose the type of policy that is the least restrictive to meet your end goals
- Types of policies to consider:
 - Banning use of social media during work time
 - Develop a social-network policy outlining acceptable uses and prohibitions during working time
 - A policy that concerns all employees' online activity, including activity outside of work



Why So Complicated?

- The essential conflict-
 - Employers are searching for the best information available to make decisions
 - Employees expect their "private" information will not be misused
- NLRB's position that unnecessarily restrictive or overbroad policies are unlawful
 - NLRB will find a policy overbroad if it could be reasonably interpreted by employees to prohibit complaints and conversations about terms and conditions of employment



Developing a Social Media Policy

- Avoid temptation to outright ban social media use altogether (*i.e.*, both during working and nonworking time)
- Brainstorm with constituent groups –
 - What social media tools are currently being used and why?
 - Access/Use at Work
 - Block or prohibit use of?
 - Who? And for what purpose?
 - Legal limitations
 - e.g., cannot outright ban disparagement of company
 - Monitoring/Enforcement
 - consent is key to monitoring



Social Media Policies – Guiding Principles

- Be specific
- Give examples
- Include a savings clause
 - *Nothing in this policy will be interpreted to limit or interfere with your rights under Section 7 of the National Labor Relations Act or other applicable labor laws or regulations*



Social Media Policy – Do's

- Address use of company name, logo, product photos, & other trademarked materials (except out Section 7 activities)
- If employees are permitted to post about employer's products/services – require disclosure of relationship to employer (Reference FTC Guidelines)
- Prohibit employees from providing references/recommendations of other current/former employees (e.g., LinkedIn)

(cont'd)



Social Media Policy – Do's

- Define social media & why a policy is necessary
- Address employers' overall philosophy
 - Discourage use?
 - Encourage thoughtful participation?
- Identify scope (e.g., contractors, interns)
- Include latest technologies (e.g., Instagram, Vine) with flexibility to cover new technologies

(cont'd)



Social Media Policy – Do's

- Address expectations regarding:
 - business use
 - personal use
- Put employees on notice of employer monitoring
- Integrate with other corporate policies (e.g., discrimination, ethics, code of conduct)

(cont'd)



Social Media Policy – Do's

- Address limits on use
 - at work (e.g., reasonable use so as not to interfere with productivity, only on nonworking time, etc.)
 - outside of work (define working time!) (e.g., prohibition on disclosing trade secrets or other confidential business information with specific definitions)
 - on employers' technological resources

(cont'd)



Social Media Policy – Do's

- Consider Prohibiting:
 - Speaking on behalf of the employer (consult with counsel)
 - Disclosure of proprietary/confidential information (define!)
 - Disparagement (define!) of customers/competitors
 - Communication with the media on behalf of the employer
 - Unlawful harassment, bullying, and other wrongful workplace behavior

(cont'd)



Social Media Policy – Do's

- Exempt Section 7 conduct from prohibitions
 - *Nothing in this policy will be interpreted to limit or interfere with your rights under Section 7 of the National Labor Relations Act or other applicable labor laws or regulations.*
- However, this will not rescue an otherwise unlawful policy
 - For example, if your policy generally prohibits "all disparaging and inappropriate comments" without any limiting language, a savings clause will not help, because an employee could not be reasonably expected to know what language the employer deems "disparaging" or "inappropriate"

(cont'd)



Social Media Policy – Don'ts

- Do not prohibit:
 - use of social media on personal devices during non-working time
 - "friending" other employees
 - disparaging remarks about the company or supervisory personnel
 - "inappropriate discussions about the company"

(cont'd)



Social Media Policy – Do's

- Address consequences of violating policy – address Section 7 rights
- Identify central source, such as HR, for reporting alleged violations
- Put employees on notice of employer monitoring
- Integrate with other corporate policies (e.g., discrimination, ethics, code of conduct)



Social Media Policy – Don'ts

- Do not prohibit:
 - comments that "might damage the reputation" of the employer or "cause embarrassment to it"
 - disclosure of "confidential information" or "confidential personnel information"
 - "offensive, demeaning, abusive or inappropriate remarks"



How far can you go?

- The NLRB has struck down social media policies that "reasonably tend to chill" protected activity.
- A policy may be found to do so if it:
 - explicitly restricts protected activity (e.g., prohibits employees from disclosing/discussing their compensation or other terms/conditions of employment), or
 - implicitly restricts protected activity – occurs when:
 - employees would reasonably construe the language to prohibit protected activity;
 - policy was issued in response to union activity; or
 - policy is applied to restrict protected activity



Implementing Your Social Media Policy

- Have policy reviewed by counsel
- Announce/distribute policies - anticipate push-back
- Include as a part of your handbook/policy manual
- Obtain employee acknowledgment of receipt
- Educate workforce



Quick Recap

- An effective social media policy should:
 - Be specific
 - Provide examples
 - Include a disclaimer
 - Identify and define which sites are covered
 - Address when/where the policy applies
 - Identify and define with specificity proprietary and confidential information
 - Tell employees that they are responsible for what they post



Quick Recap

- An effective social media policy should:
 - Define what constitutes “confidential information”
 - Exclude general info on wages, hours, and terms and conditions of employment
 - Tread lightly with restrictions on presenting false or inaccurate info through social media
 - Expressly indicate that restrictions on the use of company logos/trademarks does not apply to Section 7 activities



Quick Recap

- An effective social media policy should:
 - Limit anti-disparagement provisions to communications regarding company products and/or anti-harassment guidelines
 - Relate the social media policy to the employer's other policies



What Do We Need To Do If Employees Are Utilizing Social Media On Behalf Of The Employer?

- Take pro-active steps to protect your interests
- Ownership of Accounts
 - An employer may “own” an employee's social media account where they encourage employees to create social media accounts for professional networking and promoting
 - To avoid confusion/litigation, take pro-active steps to insure ownership is clear



Quick Recap

- An effective social media policy should:
 - Provide a contact person
 - Provide a list of “Frequently Asked Questions”
 - Address the consequences for violation



Using Social Media On Behalf of the Employer

- Insure your social media policy specifies control and ownership of accounts used in the course of employment by requiring:
 - accounts be set up using an employer-email address;
 - accounts identify the employer as the account holder/subscriber;
 - account holders to disclose password to employer when established/changed, upon request, and upon transfer from position/termination; and
 - employees to relinquish all right to access accounts upon transfer/termination

(cont'd)



Using Social Media On Behalf of the Employer

- Insure that employer's social media accounts have multiple administrators with ability to change administrator status
- Retain right of the employer to unilaterally change password(s) and block access to such accounts



The information in this presentation is intended as general background information on labor and employment law. It is not to be considered as legal advice. Employment law changes often and information becomes rapidly outdated.

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Questions?



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