

## Labor and Employment Corner

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# The Rising Tide of Social Media

Guess what? The manner in which employees communicate, both within and outside the workplace, has changed. It's not just e-mails and text messaging anymore, but a broad category of platforms collectively referred to as "social media." These media are now beginning to influence the workplace—the same workplace where we spend many of our waking hours before adjourning to discuss how this time was spent with our friends, family, and connections in cyberspace (known and unknown). Increased communication brings increased opportunity to offend and breach confidences in ways that may have a significant impact on a business. As with all things new, the courts and administrative agencies are hustling to respond and develop the legal landscape involved in using social media.



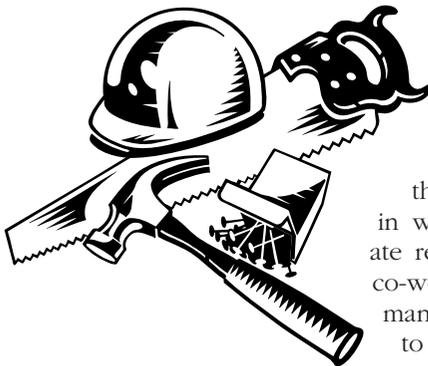
"Social media" is a broad term that generally includes various electronic and web-based means of disseminating or sharing information, including Facebook®, LinkedIn®, Twitter®,

MySpace®, YouTube®, blogs, chat rooms, wikis, photo-sharing sites, and more. The use of social media is becoming not only increasingly prevalent in the daily lives of people from all walks of life but also a greater presence in the daily business of many employers.

With employees using social media more frequently in both their private life and at their jobs, the lines between the uses are easily blurred. Are an employee's after-hours comments on a workplace incident subject to regulation or discipline? Where does one

draw the line when the screen name or identity of the individual posting the message is unknown or difficult to decipher? Does it make a difference if the employee clearly identifies himself or herself with the message? Is there a difference in what is considered an appropriate response to a comment about a co-worker as compared to company management? Some of the answers to these potential dilemmas are seemingly obvious; others are not.

Legal issues and challenges concerning social media in the workplace are currently winding their way through the court systems, and the legal outcomes are as uncertain as the myriad of fact patterns that may be presented.



### The Use of Social Media

The prevalence of social media is quite clear. Facebook claims to have 500 million active users ([www.facebook.com/press/info.php?statistics](http://www.facebook.com/press/info.php?statistics)) and, even though the estimate is impossible to verify, there are over 70 million blogs, with almost 1.5 million being added each day. The utility of social media is not limited to the private lives of individuals. Businesses are increasingly using social media in advertising, marketing, communication, and decisionmaking related to employment issues.

Many employers now routinely use social-networking sites to conduct research about the backgrounds of job candidates. The information runs the gauntlet of potentially delicate information that is assembled about an applicant as part of the hiring process: alcohol use, social groups, religion, age, sexual preference, and the list goes on and on. To further complicate the issue, employees (or applicants) may feel a false sense of privacy or anonymity about the information they are sharing over the Internet, leading them to share too much information about themselves with their employer or too much information about their employer with others. The informality of social networking undoubtedly contributes to piecemeal bites (or perhaps "bytes") of information that may lead to inaccurate and unfortunate conclusions. Claims of invasion of privacy or unlawful discrimination abound.

### Potential Effects of Social Media on the Relationship Between the Employer and the Employee

The terrain for potential claims relating to social media and its impact on the workplace is still in the development stage. The gut-level reaction most frequently observed from employees who learn that their employer has checked them out online is a claim of invasion of privacy. These claims, despite their naïveté when it comes to the Internet, can be (legally) frustrated by an employer's well-drafted policy advising applicants and employees of exactly how publicly accessible information may be used as part of the decision-making process in the workplace. A simple declaration that public sources of information, including social media portals, may be considered in the determination or evaluation of the applicant or employee may help dispel any expectation of privacy on the part of an employee.

Privacy claims are not the only landmine with which employers need to contend. The Stored Com-

munications Act, 18 U.S.C. 2701, protects the privacy of stored Internet communications. Although the protections do not apply to communications “readily accessible to the general public,” the main issue in the context of workplace disputes is how the employer gained access to the information. A case heard by the Fourth Circuit Court of Appeals—*Van Alstyne v. Electronic Scriptorium Ltd.*, 560 F.3d 199 (4th Cir. 2009)—involved an employer who was accused of violating the Stored Communications Act by improperly accessing an employee’s personal e-mail account. The employee discovered the e-mail “break-in” only when the employer tried to present the e-mails as evidence against the employee in a sexual harassment claim she had filed. In another case, the New Jersey District Court found that employers had violated the Stored Communications Act—but not the employee’s common law right to privacy—by gaining access to the employee’s chat group on MySpace without the employee’s authorization. The employer gained access to the chat group only after coercing another employee to provide the password. *Pietrylo v. Hillside Restaurant Group*, No. 06-5754 (FSH), 2009 WL 3128420 (D.N.J. Sept. 25, 2009). In both cases, the employer was found to have overstepped legal boundaries by gaining access to information that had been subject to security efforts without proper permission.

The Fair Credit Reporting Act requires the consent of an applicant or an employee before an employer can ask a “consumer reporting agency” or another third party to conduct a background check and produce a “consumer report” or other written report of its findings. Even though employers may use consumer reports that contain information from social-networking sites, they must disclose to their employees that such information was the basis for any adverse actions that may have been taken. The Fair Credit Reporting Act does *not* prevent employers from reviewing social-networking sites themselves; however, the act leaves a loophole for employers to do background checks.

The Electronic Communications Privacy Act makes it unlawful to listen to or observe the contents of a private communication without the permission of at least one party to the communication. In addition, the act prohibits parties from intentional interception, access, disclosure, or use of another party’s electronic communications. This law has been interpreted to include e-mail communications and may provide some protections for employees’ privacy. There are, however, exceptions that the employer may find helpful.

#### **Potential Discrimination Claims Against the Employer**

Even though the possibility of an unfiltered look at a job candidate may be tempting, the employer faces serious risks when using the Internet to investigate employees and job applicants. These risks include

the potential of discovering information that the employer is not allowed to ask in person or use in the selection or disciplinary process. Using Facebook as an example, many people have listed information for their personal profile that reveals their race, political affiliation, age, sexual orientation, national origin, and more. Status updates, tweets, and blogs may also reveal a person’s potential disabilities, past medical conditions, or the medical conditions of family members.

#### **Potential Implications of Employees’ Postings and Social Media Content on the Employer**

Employers must beware of confidential information to which employees have access through their jobs becoming public knowledge through employees’ use of social media, even in the apparent context of the employee’s role as a private individual. Not only can employees leak confidential information about their companies, they may knowingly or unknowingly publish confidential information about their employers’ clients or business associates. For example, if an employee works for a health care provider and later “tweets” about a patient at work, that employee could be disseminating information protected by the Health Insurance Portability and Accountability Act (HIPPA) creating serious liabilities for the employer. Other communications by employees may implicate federal copyright or trademark laws. Although many of these types of communications would be unexpected and subject to monitoring if they occurred within the workplace, the user’s theoretical anonymity when using the Internet and social media outlets can lead to unexpected consequences.

Guidelines issued by the Federal Trade Commission regarding endorsements and testimonials in advertising may have serious implications for an employee’s online activity. The guidelines require all endorsers, including employees, to disclose “material connections” between the endorser and the product or company about which they comment. Because material connections include employment relationships, if a company’s employee enjoys contributing to websites dedicated to product reviews, for example, and discusses a product produced by his or her employer, the employee may be considered an endorser and must then abide by the Federal Trade Commission’s guidelines. An employer can be held accountable for an employee’s actions every time the employee tweets or changes his or her Facebook status regarding a new product at work. A company may then face liability for any unsubstantiated or false claims made by employees, even if they are not authorized to make such comments.

This example further highlights the importance of having thoughtful technology use and confidentiality policies in place for both on-duty and off-duty use.

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Training employees about the potential consequences of their actions and the way to best use—or not to use—social media, even on their own time, may be just as important as properly disseminating a written policy. However, policies governing the use of a company's technology, which include off-duty activities, cannot simply ban social media use in its entirety. As discussed below, overbroad policies dealing with use of technology can create liabilities of their own for employers.

### **Protected Speech and Activity**

When dealing with an employee who is using social media in a way the employer does not like or with which the employer does not want to be associated, many employers would simply prefer to terminate the employee who is using social media in that way. Although termination would often seem to be the ideal resolution for the employer in situations like this, employers must be careful when making this decision. Even though the First Amendment does not protect an employee of a private employer from termination or adverse action because of the content of online postings, the content of the postings and information may invoke other kinds of protection, such as Title VII of the Civil Rights Act of 1964. Depending on the content of the online communication, whistleblower protections under state and federal laws may also be triggered.

Recently, the National Labor Relations Board (NLRB) issued a complaint after an employee was fired from American Medical Response of Connecticut for posting negative comments about her supervisor on her Facebook page. The employer had a policy prohibiting employees from making disparaging remarks about the company or supervisors and from discussing the company "in any way" over the Internet, including via social networks, without advance permission. The NLRB argued that policies restricting an employee's right to criticize working conditions, including the right to publish such criticisms to co-workers, violates the National Labor Relations Act. Faced with further litigation with the NLRB, the case was settled in early February 2011, with the employer agreeing to refrain from limiting the rights of its employees to communicate on work-related issues away from the workplace.

### **What Should an Employer Do?**

The legal arena surrounding the use of social media in the workplace is in the midst of what may be a lengthy evolution. Employers have to balance their own needs to protect their assets against the legal rights of their employees. Companies should strongly consider establishing clear policies regarding several work-related issues:

- use of the company's hardware, software, and computer systems;
- harassment, including via social media;
- trade secrets of the business;
- need for confidentiality, non-compete, and non-solicitation;
- use of social media and electronic communication during nonworking hours; and
- social networking and the Federal Communication Commission's requirements.

Employers' policies should prohibit employees from discussing, including through social media, company information that is confidential or proprietary; clients', partners', vendors', and suppliers' information that is confidential or proprietary; and information that has been embargoed, such as product launch dates or release dates; and pending organizations. At the same time, employers need to recognize that across-the-board restrictions on communications are subject to challenge. Policies related to use of technology and electronic communication should cover use of the company's intellectual property; sexual references; obscenity; reference to illegal drugs; disparagement of any race, religion, gender, age, sexual orientation, disability, or national origin; and the disparagement of the company's or competitors' products, services, executive leadership, employees, strategy, and business prospects.

One cautionary note must be made: The information provided in this column is intended to apply primarily to employment in the private sector. Employers in the public sector face additional limitations on the potential restraints that can be imposed based on the Constitution. As with all such issues, employment policies and decisions related to new issues raised by the widespread use of social media should be discussed with legal counsel, because the landscape is in a state of growth and rapid change. **TFL**

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