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Preventive Strategies and
Positive Solutions for the Workplace

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Risks of Social Media in the Workplace (and How to Protect Your Company and Employees)

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What are “Social Media”?



- MySpace
- Facebook
- Friendster
- LinkedIn
- Twitter
- Skype
- Texting
- Blogs
- Digg, Reddit, Technorati
- YouTube
- Unvarnished
- Instant Messaging

Information On The Web

- 25% of internet users share personal information through social networking
- Over 500 million Facebook users - Facebook makes up the “Fourth Largest Nation” in the World
- Over 75 million Twitter users



Information On The Web

➤ Largest growth in Twitter users:

- Not teenagers, but ...
- 25 to 54 year-olds

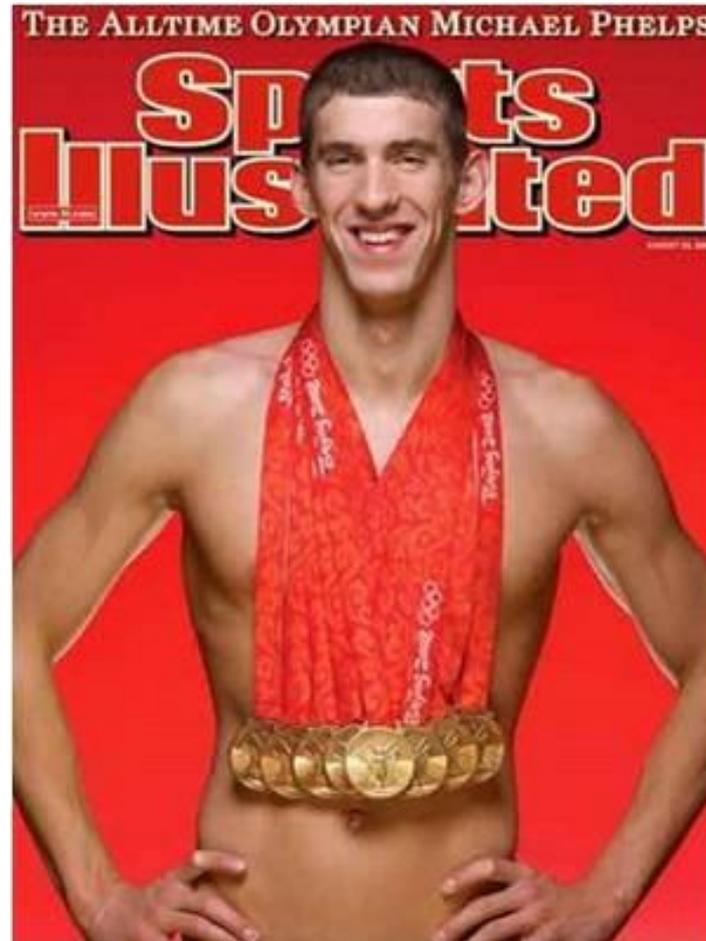


- How many working hours are lost?
 - 50% of Facebook users log on every day
 - 22% visit social networking sites 5+ times/week
 - Only 52% of employees say they don't use social networking sites during work hours
 - And that's not counting time spent texting, instant messaging, surfing, making phone calls, etc. ...

Key Challenges for Employers

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

Would You Hire/Retain Him as an Employee?



Do you have the same response?



Negligent Hiring/Supervision

- An employer may be held liable for an employee's wrongful acts if the employer knew or had reason to know of the risk the employment created
 - Doe v. XYZ Corp., N.J. Super. 122 (2005) (Court held employer had duty to investigate and respond in case of alleged negligent supervision of employee who was criminally charged with child pornography using workplace computer)

Discrimination, Harassment and Retaliation

- Employer viewing of applicant's personal information on social networking/bloggging site may trigger protections of antidiscrimination laws
- Sites may contain information regarding age, race, national origin, disabilities, sexual orientation religion and other protected characteristics
- Difficult for employer to prove it did not rely upon personal information
- Even if not unlawful, risk of relying on inaccurate or outdated information

Discrimination, Harassment and Retaliation

➤ Electronic communications provide employees with an opportunity for misuse and can be used as evidence to support a harassment or discrimination claim



➤ Knew or should have known standard applies *Blakely v. Continental Airlines, Inc.*, 164 N.J. 38 (2000) (Company has duty to take effective measure to stop harassment via “Crew Member Forum” once it knew or should have known harassment was taking place)

➤ What about off-duty conduct?

Reputational Harm to Employers

- Blogs and other electronic communications also may have dramatic negative consequences for employers:
 - Domino's, Burger King, KFC - Employees posted video/photographs harming company image
 - Former Intel employee sending 200,000 e-mails to 35,000 employees complaining about his treatment by Intel
 - California jury awarded employer \$775,000 in compensatory and punitive damages against former employees for "cybersmearing" of employer. *Varian Medical Systems, Inc. v. Delfino*, Santa Clara Super. Ct. No. CV780187 (Dec. 18, 2001)

Is this the Image You Want for Your Company?

The screenshot shows a Windows Internet Explorer browser window displaying a YouTube video. The video title is "Burger King employee takes bath in Kitchen Sink". The video player shows a woman sitting in a kitchen sink filled with water. The video has 475,277 views and 873 ratings. The video is uploaded by "GuysHorsingAround" on August 12, 2008. The video description states: "Burger King employee takes a bath in the restaurant's Kitchen Sink on his birthday. Needless to say, the employee, Timothy Tackett, aka Mr. Unstable, and everyone else involved lost their jobs at B...". The video player includes a progress bar, volume control, and a "Share" button. The browser's address bar shows the URL: "http://www.youtube.com/watch?v=a1yN7Y-1JQ". The Windows taskbar at the bottom shows the Start button, several open applications (Microsoft PowerPoint, My Pictures, YouTube - Burger Kin...), and the system clock showing 9:51 AM.

Reputational Harm to Employees

- Defamation - Plaintiff must prove the defendant published a false statement concerning the plaintiff that tends to harm the plaintiff's reputation. The internet provides the ultimate "publication" vehicle.
- Employer can be liable if the employee had apparent authority to speak on its behalf - Beware of personal references and of professional networks like LinkedIn.

Reputational Harm to Employees

➤ Negligent Referral

- FaceBook®, LinkedIn®, and Twitter® allow users to post recommendations from their employers.
 - Employee expects detailed favorable recommendation
 - Favorable on-line reference may conflict with employee performance evaluations
 - Negative online recommendation may be the basis for defamation claim.

- 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

Employee Monitoring and Privacy Issues

- The key question: did the employee have a reasonable expectation of privacy in the electronic communication?
- Employers should ensure monitoring is based on legitimate needs and limited in scope to achieve those needs.

Employee Monitoring and Privacy Issues

- City of Ontario, CA v. Quon, No. 08-1332 (U.S. Supreme Court), Decided June 17, 2010
 - Issue: Did city police officer have an expectation of privacy in personal text message send via a city-issued pager?
 - Officer paid for extended service so he could send message while off duty
 - Sued after police chief read messages in which officer was sexting his girlfriend and wife

Employee Monitoring and Privacy Issues

- The Town of Bozeman, Montana, required job applicants to provide passwords to email (Google, Yahoo!) and social networking sites (MySpace, Facebook) accounts.
- 98% of people polled believed this policy to be an invasion of privacy
- On June 22, 2009, the town rescinded the policy

- Employer viewed former employees' internet discussion group critical of the employer by coercing another employee to provide the password.
- Jury found violation of Federal Stored Communications Act which prohibits intentional access of stored electronic communications without proper authorization.
- Jury awarded \$17,000 in damages plus attorney's fees.

Lessons Learned from Recent Cases

- Verify there is a substantial need to access password protected social media site
- Receive and document appropriately obtained authorization to enter a site - i.e. have a witness
- Review the site for any notation that it is private
- Don't over extend company policy on privacy to search non-company related sites and equipment
- Don't log in under false pretenses!!
- Publish company policy and follow it
- Don't overreach. Obtain or use only what is necessary. Consider your business needs.

Employee Monitoring and Privacy Issues

- Courts will be more inclined to rule in favor of the employer if:
 - Employer owns the computer and e-mail system
 - Employee voluntarily uses an employer's network
 - Employee has consented to be monitored (usually based in written personnel policy)
- Currently unclear whether an employee has a reasonable expectation of privacy in blogs or IMs
- Courts have split on whether there is a reasonable expectation on the content on third-party servers (e.g., web-based e-mail accounts)

Legal Constraints on Employee Discipline

- National Labor Relations Act
 - Employees who IM or blog or post about their working conditions or employer may be protected under the NLRA
 - Employees have a right to engage in "concerted activity"
 - Must be engaged in for the purpose of collective bargaining or other mutual aid or protection
 - Applies to both union and non-union employees

- Recent case: NLRB filed a complaint after an employee was fired for making disparaging remarks about her boss on Facebook. NLRB contended the statements were protected concerted activity under labor laws.

Legal Constraints on Employee Discipline

- Expression of political opinions (e.g. New Jersey)
- Legal off-duty activities or “lifestyle discrimination”(e.g. California, Colorado, Connecticut, New York, North Dakota)
- Wrongful termination in violation of public policy (arrests, convictions, bankruptcy, workers’ compensation history)
- Whistleblowing (SOX, Wage & Hour)

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
- Consider prohibiting access to private password social networking sites without proper authorization. Do not allow third party to “friend” an applicant to gain access to site
- Ensure appropriate employment decisions are made based on lawful verified information

Methods to Minimize Risk

- 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
- Investigate complaints of discrimination/harassment stemming from posts on social networking/blogs
- Ensure security of employer sponsored blogs
- Provide guidelines on appropriate terms of use of employer sponsored sites/blogs
- Implement a social networking/blogging policy which explains diminished right to privacy

Key Elements of Electronic Communications Policies

- Consider Company philosophy - business
- No expectation of privacy when using company equipment
- Employees must abide by non-disclosure and confidentiality agreements/policies
- Only individuals officially designated may speak on behalf of the Company
- “Bloggers Beware” - Require a disclaimer:
“The views expressed in this blog are my personal views and opinions and do not necessarily represent the views or opinions of my employer”

Key Elements of Electronic Communications Policies

- Company policies governing corporate logos, branding, and identity apply to all electronic communications
- 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
- Company reserves the right to take disciplinary action if the employee's communications violate company policy

Key Elements of Electronic Communications Policies

- Do not prohibit employees from discussing terms and conditions of employment
- If allowed at work, time spent social networking/blogging/texting should not interfere with job duties
- Remind employees of expectation to comport themselves professionally both on and off duty
- Remind employees that off-duty conversations can have significant workplace affects
- Avoid “Big Brother” image while protecting the Company and its employees
- Get a signed acknowledgment of the policy



QUESTIONS?

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