

## **ONLINE SOCIAL NETWORKING: A NEW FRONTIER IN EMPLOYMENT LAW**

Because of the popularity of internet sites such as Facebook, MySpace, Twitter, and LinkedIn, employee blogging, tweeting, and “friending” have become common occurrences. Online social networking sites and blogs can be used for many purposes, including communication with friends and business colleagues, downloading music, and uploading photos and videos. Unfortunately for employers, as this technology continues to develop and grow, so do related employment law issues.

### ***COMMON EMPLOYEE ISSUES***

Employee blogging and use of social networking has become problematic for employers in a variety of ways. To the extent these activities occur during the workday, they impact employee productivity and can drain company bandwidth, slowing down servers. Perhaps even more problematic, some employees post pictures or videos of themselves – occasionally in company uniform – engaged in undesirable, offensive, or unlawful behavior.

Online social networking and blogging by employees may also expose employers to claims for harassment and discrimination pursuant to Title VII, the Americans with Disabilities Act, the Age Discrimination in Employment Act, and other federal and state laws. Additionally, employers are experiencing problems with employees posting defamatory or inappropriate statements on their blogs or social networking sites about the company, its customers, or fellow employees or supervisors.

Some employees have also used social media to disseminate confidential and proprietary company information or trade secrets. Because of the potential for rapid, widespread dissemination of posted information, the damage caused by this dissemination can grow exponentially in a short period of time. For example, on Twitter users can “re-tweet” a post made by an employee to thousands of followers with one click of a mouse. Furthermore, with the advent of sites like ping.fm and whzzz.com, employees are able to post simultaneously to all of their social networking sites from one central hub, resulting in quick dissemination.

### ***CREATING A POLICY MAY ADDRESS CERTAIN EMPLOYEE ISSUES***

Because employment issues related to social media are relatively new, there is limited guidance from a legal standpoint on what is and is not permissible in the online realm from either the employer or employee perspective. However, employers should update their employee handbooks to include a policy covering employee blogging and social networking.

This policy should clarify for employees what type of use is permissible; when use is permissible; whether use will be permitted on company equipment; what activities are covered; and whether employees have to identify themselves when discussing the company online. It should also include a statement that employees who violate the policy may be disciplined, up to and including termination.

Furthermore, all employers – regardless of whether they permit employees to engage in online social networking and blogging while at work or on company equipment – should have a conspicuous statement in their social networking policy informing employees that 1) there is no expectation of privacy in anything created, stored, posted, maintained, or accessed on company computers; and 2) the employer can access, reproduce, and disseminate this data at any time without providing the employee further notice. Social networking policies should also contain a statement that employees are not permitted to use these sites or make posts that violate company policy, including anti-harassment and equal employment opportunity policies.

### ***DEVELOPING EMPLOYER ISSUES***

Employers are also discovering various uses for social media with regard to hiring and other personnel decisions. For example, some employers routinely conduct internet searches on applicants. While such searches can be useful tools for obtaining information about a potential employee, they frequently lead employers to social networking or other sites that reveal protected traits about an applicant, such as his or her religious beliefs, marital status, race, or national origin, none of which can be lawfully considered in the interview and hiring process. Therefore, searching for information about applicants online may pose challenges, though not necessarily insurmountable ones, for employers in cases where applicants who are not selected file a charge of discrimination with the South Carolina Human Affairs Commission or the Equal Employment Opportunity Commission.

Although there is currently a shortage of legal decisions on social networking issues, available case law suggests that, generally, employers may lawfully access an employee's *public* blog or social networking site to view his or her comments and posts. But the legality of accessing employee sites becomes more questionable where the site is not publicly accessible on line and where access is obtained through coercion or deception. Employee terminations stemming from such access have resulted in claims against employers for invasion of privacy, among other things. Therefore, employers should consider consulting a labor and employment practitioner before accessing password-protected or non-public employee blogs or sites and before taking action against employees who have made posts that are inappropriate or may be damaging to the employer.

Additionally, as online social networking continues to expand, many companies are recognizing that such sites can be useful as targeted marketing tools. An increasing number of businesses are creating “fan” pages on social networking sites, such as Facebook, where customers and employees may post content. Prior to creating such a site, however, employers should carefully consider how they will control the content of their fan page, including whom they will permit to post. Allowing employee posts can lead to a wealth of employment law issues, including those discussed above. Such sites occasionally become popular venues for disgruntled employees to vent their complaints about a company. Before disciplining an employee for such posts on a fan page, or on the employee's own social networking site or blog, employers should evaluate whether the employee's behavior may be construed as concerted protected activity that is protected under Section 7 of the National Labor Relations Act.

Some employers are permitting and even encouraging employees to use various social networking sites while on company time and using company equipment. These employers typically believe that the business-related benefits of permitting this use, such as increased marketing opportunities, outweigh other concerns such as decreased productivity and use of company resources. Some employers also think that embracing online social networking is the key to attracting talented new workers entering the workforce.

There is no doubt that social media, regardless of the platform, holds both opportunities and hazards for employers. It truly does represent a “new frontier” in employment and labor law. As such, employers should be aware of the potential – good and bad – and have the appropriate mechanisms and policies in place to ensure that online activity does not lead to offline problems.

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