

Social Media Update



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The Agenda



- Background Information
 - Recent Developments in the Social Media Sphere:
 - Social Media and Hiring
 - Practice Tips for Developing a Social Media Policy
 - The Walmart[®] Policy
 - Applying the Policy to Discipline Employees
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Social Media Overview



Yummy Starbucks....

- *Twitter:* I'm drinking my coffee #PeppermintMocha
- *Facebook:* I love my Starbucks!
- *YouTube:* Here is a video of me drinking my mocha
- *LinkedIn:* My skills include coffee drinking
- *Pinterest:* Here's a peppermint mocha coffee recipe
- *Instagram:* Here is a photo of my coffee!



Why Is It Important?

- ❑ Social media is not a “fad”
- ❑ Mark Zuckerberg has a base salary of \$500,000 but is worth over \$17.5 billion.
- ❑ Facebook nearly doubled its revenue in 2011 by making over \$1 billion in advertisements (\$600MM in 2010)



How Information is Stored

□ Familiar Technologies:

- Email
- Instant Messaging (IM)
- Text Messaging



How Information is Stored

□ **Social Networking**

- Ability of users to delete information once posted varies based on the social network's policies
- Facebook policy: even after users deactivate their account, information remains on the server for a "reasonable period of time" but is generally not available to other users

□ **Blogging and Microblogging**

- data is stored on the website's servers, but may be available in many places
 - A large number of applications integrate Twitter with other applications, so tweets can be anywhere
 - Data can also multiply and be difficult to delete
 - A friend "sharing" a status message on Facebook posts it to their profile as well or "retweeting" on Twitter copies an update to another set of followers
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Legislative Update



Social Media Passwords

- ❑ Are private employers permitted to force employees to give passwords to private social media sites?
 - ❑ Probably not. Maryland, California and Illinois all have laws protecting employee passwords
 - ❑ Social Network Online Protection Act
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Administrative Enforcement



NLRB Takes on Social Media and Social Media Policies

- ❑ NLRB Acting General Counsel Lafe Solomon issued a three reports focusing on Facebook cases and social media policies
 - ❑ The focus in each of the cases: evidence of “concerted activity”
 - ❑ Concerted activity = when two or more employees take action for their mutual aid or protection regarding terms and conditions of employment.
 - ❑ Let’s test our knowledge...
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You decide: Protected Communications?

After an interaction with a new Assistant Manager, an employee posts a comment complaining about the workplace and suggests that the employer would get a wake-up call because lots of employees are about to quit. Several coworkers respond to his comment and expressed emotional support.

Held: not concerted activity because the comments "contained no language suggesting that the employee sought to initiate or induce coworkers to engage in group action; rather they expressed only his frustration regarding his individual dispute with the Assistant Manager over mispriced or misplaced items."

You decide: Protected Communications?

- ❑ Multiple employees at a nonprofit corporation discuss their job performance and evaluations on Facebook before a meeting with management

Held: Conduct is a "textbook" example of concerted activity—

"[t]he discussion was initiated by the one coworker in an appeal to her coworkers for assistance."

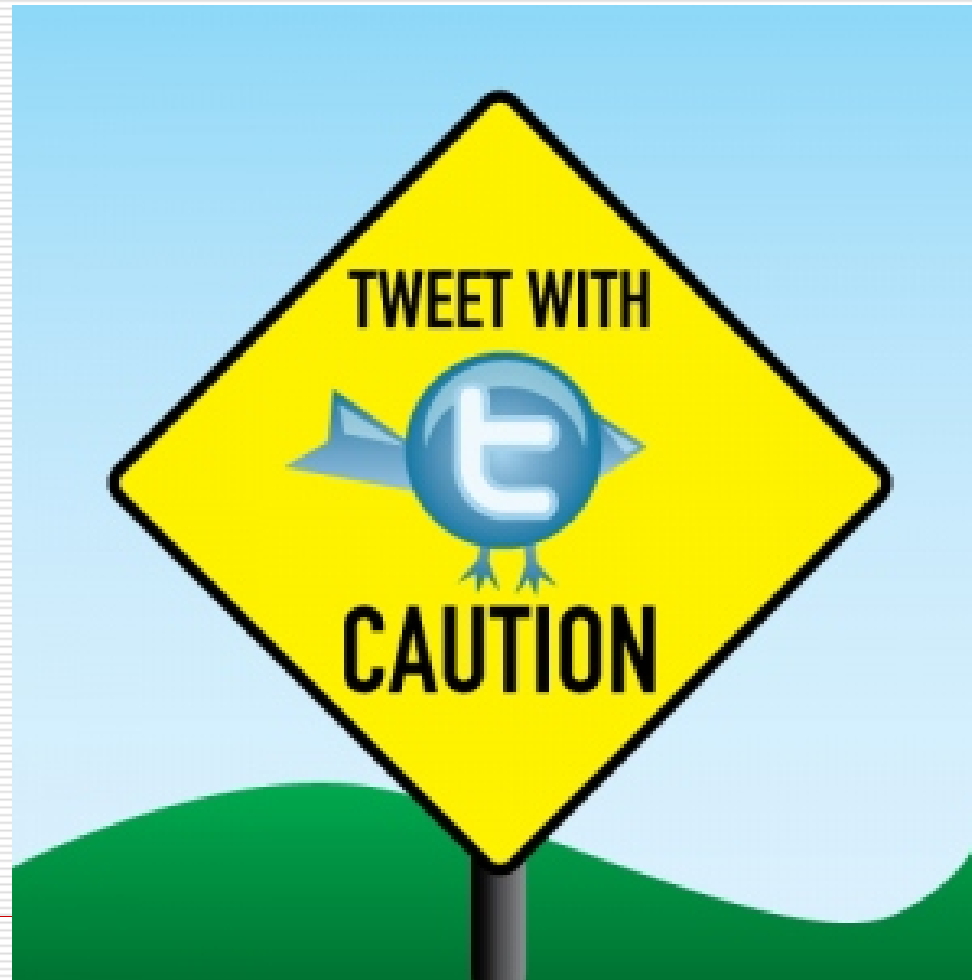
Vista Neuvas Head Start, 129 LA 1519 (2011)

- “Closed” Facebook Page started by Head Start teacher
 - Purpose: to “gripe” about employees, parents and students involved in the program
 - Head Start teacher discharged and filed grievance
 - Grievance denied by Arbitrator
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Take-Away

- Protected activity = expressing concerns about workplace issues or in an effort to discuss issues with others
 - Non protected activity = individual gripes
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Social Media and Hiring



Social Media and Hiring

- Be careful of the “protected classes”
 - Discrimination issues (race, religion, ...)
 - Arrests and convictions
 - Worker’s compensation issues
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Social Media and Hiring

- In a Career Builder Survey of 2,300 hiring managers, nearly 40 percent said they screen potential hires using social media
 - 1 in every 3 hiring applications are rejected as a result of what they find, namely:
 - Candidate's provocative/inappropriate photos/comments -- 49 percent
 - Candidate drinking or using drugs -- 45 percent
 - Candidate had "poor communication skills" -- 35 percent
 - Candidate bad-mouthed a previous employer -- 33 percent
 - Candidate made discriminatory comments related to race, gender or religion -- 28 percent
 - Candidate lied about qualifications -- 22 percent
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Social Media and Hiring

- Understand any state law concerns:
 - Lawful off-duty conduct– New York prohibits employers from taking any adverse action because of lawful “off-duty” conduct
 - California requires employers to report any adverse information learned in public records during the application process
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Mini Case Law Update



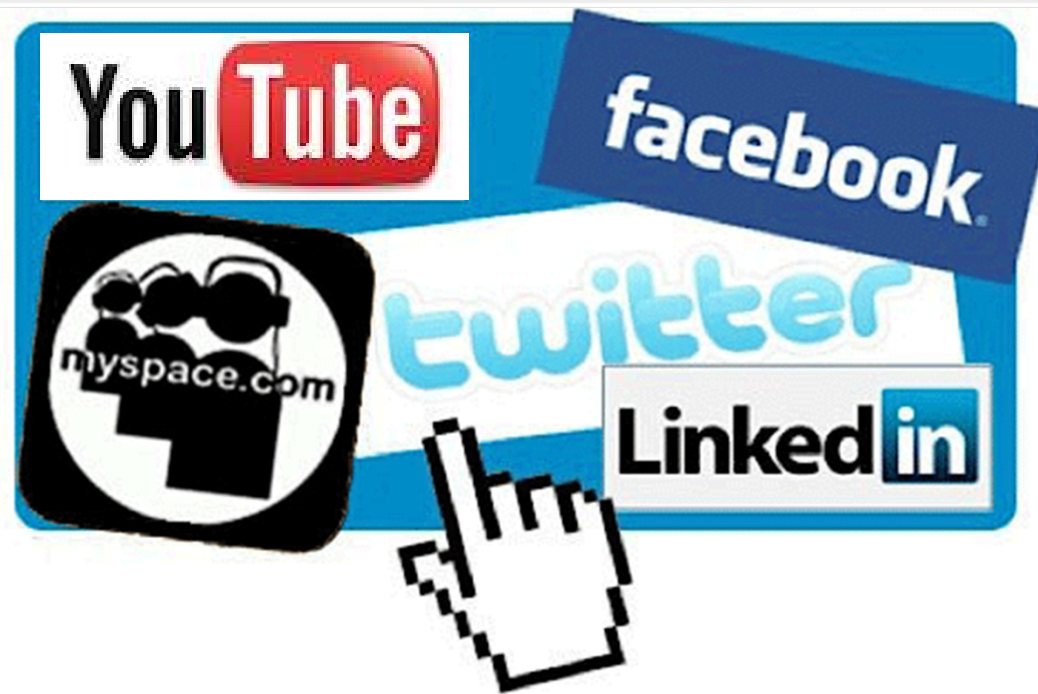
Howell v. Buckeye Ranch, Inc., et al., (S.D. Ohio 2012)

- ❑ Plaintiff brings discrimination claims alleging supervisors and coworkers sexually harassed her by inappropriate touching and making inappropriate sexual comments
 - ❑ Defendant's file a motion to compel for Plaintiff's social media user names and passwords
 - ❑ Held: Relevant information in the private section of a social media account is discoverable through interrogatories and document requests but cannot be overbroad.
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Eagle v. Morgan, et al. (E.D. Pa. 2012)

- ❑ Former CEO sued company for taking over her LinkedIn account after firing her
 - ❑ Brought claims under Computer Fraud and Abuse Act and Lanham Act
 - ❑ Summary judgment granted to employer but state law claims remain
 - ❑ Takeaway: employers need to put written policies in place to avoid disputes over social media account ownership
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Practical Tips for Employers



Steps Organizations Can Take to Protect Themselves

- Implement a social media policy
 - Implement an Internet use policy
 - Update disciplinary policy
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The Costco Policy

- Sept. 2012 NLRB decision analyzes Costco's electronic posting rules
 - *Held: Costco's rule that prohibits employees from making statements that "damage the Company ... or damage any person's reputation" is overly broad and invalid because it could "chill the exercise [of an employee's] Section 7 right" to engage in "protected, concerted activity".*
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The Walmart Policy

- ❑ Do not prohibit discussions of terms and conditions of employment
 - ❑ If any conduct is prohibited, make sure it is clear and uses specific examples
 - ❑ Disclaimers cannot save an otherwise invalid policy.
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Overbroad Language

- ❑ General language prohibiting the release of confidential information;
 - ❑ General language prohibiting any commentary on legal issues at the company;
 - ❑ Requiring employees respect the privacy of others;
 - ❑ Requiring employees to exercise personal responsibility; and
 - ❑ Requiring that employers treat co-workers with respect or use a friendly tone
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Developing Your Policy

- ❑ **Issue clear, written policies on computer use to employees and update such policies annually**
 - ❑ **Remind employees:**
 - ALL communications equipment is the employer's property (hardware, software, email, voicemail, mobile devices)
 - They should have NO expectation of privacy in any communications prepared on company equipment, even if deleted (e.g., personal email accounts, tweets, Facebook status updates)
 - ❑ **Recommended to remind employees with every login**
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Monitoring and Discipline



“Most of the social media policies that we’ve been presented are very, very overbroad. They say you can’t disparage or criticize the company in any way on social media, and that is not true under the law.”

--Lafe Solomon

Questions to consider before disciplining employees

- Is the post about workplace conditions?
- Did co-workers respond to the posting?
- Was the post in follow-up to something that happened to a group at work?

If answer is yes to any of the above, seek guidance before disciplining employee

What Would You Do?

- You received a printout of the following in the company's confidential mailbox, it is anonymous.
 - Sally Supervisor is Crazy Coworker's boss.
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Sally Supervisor

FAVORITES

News Feed

Messages 15

Events 3

Photos

GROUPS

Update Status Add Photos/Video

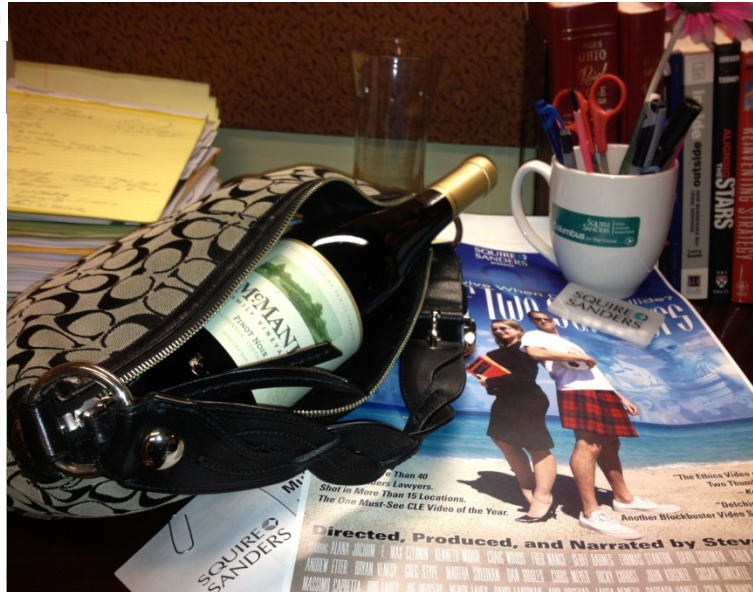
What's on your mind?

SORT: MOST RECENT



Crazy Co-Worker

Just another day in Sally's office!



With all the crazy issues we deal with on a daily basis, this is needed!!!

What to Expect in the Future

It's a Fine Line ...

- ❑ Organizations are permitted to monitor what employees do on their computers while at work under acceptable use policy
 - ❑ Organizations can monitor social networks to determine if their "sick" employees are really unable to work
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What to Expect

It's a Fine Line ...

- ❑ Organizations are not permitted to discipline if the post or email is about employees' terms and conditions of employment
 - ❑ Organizations may monitor after-hour behaviors that may affect the company's business or put its privacy in jeopardy
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Questions?



Credit Information

- For those you who require CLE please note the following states have been approved, California, Arizona, New York, and New Jersey through state reciprocity rules.
 - Please complete the online affidavit included in the webinar reminder sent to everyone yesterday. An additional copy of the affidavit will also be emailed in a follow up communication tomorrow.
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