Social Media: Staying Ahead of the Curve

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The Agenda

• Why Does it Matter?
• Recent Developments in the Social Media Sphere:
  ➢ Legislation
  ➢ Administrative (NLRB Update)
  ➢ Case Law
• Social Media and Employees
  ➢ Management Policies and Training
  ➢ Your Social Media Policy
Yummy Starbucks....

- **Twitter**: I’m drinking my coffee #PumpkinSpiceLatte
- **Facebook**: I love my Starbucks!
- **YouTube**: Here is a video of me drinking my latte
- **LinkedIn**: My skills include coffee drinking
- **Pinterest**: Here’s a pumpkin spice latte coffee recipe
- **Instagram**: Here is a photo of my coffee!
Why Does It Matter?

• YouTube is the 2nd most used search engine on the web.

• Zappos reports that YouTube drove 250,000 visits to its website in 2012.

• 700 YouTube video links are shared on Twitter every minute; 500 years of YouTube videos are watched on Facebook every day.

• The equivalent of 100 hours of video is uploaded to YouTube each minute.
Why Does It Matter?

- LinkedIn has over 238 million active users.
- 43% of US marketers have found a customer through LinkedIn.
- 61% of social media users primarily use LinkedIn for professional networking.
- 60% of LinkedIn users have clicked on an ad on the site.

http://socialmediatoday.com/stevepyoung/1656466/24-must-see-social-media-statistics-2013
Why Does It Matter?

- Facebook has a **billion** active users.
- Facebook will account for 13% of worldwide mobile ad revenue in 2013.
- Facebook users share 2.5 billion pieces of content on the site each day.
- 70% of business-to-consumer marketers have acquired a customer through Facebook.

http://socialmediatoday.com/stevepyoung/1656466/24-must-see-social-media-statistics-2013
Why Does It Matter?

- Twitter users send 400 million tweets each day.
- 25% of consumers who complain about products on Facebook or Twitter typically get a response within one hour.
- 69% of online business-to-consumer marketers use Twitter, compared to 80% for business-to-business.

http://socialmediatoday.com/steveyoung/1656466/24-must-see-social-media-statistics-2013
Legislative Update
Social Media Passwords

• Are private employers permitted to force employees to give passwords to private social media sites?
  ➢ Probably not. Several states including Michigan, California, Maryland, Illinois and others all have laws protecting employee passwords. Many states have bills pending.
  ➢ Social Network Online Protection Act.
Administrative Enforcement
Review of the NLRB View of Social Media

• NLRB Acting General Counsel Lafe Solomon issued 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.
• Where are we now?
Review of the NLRB View of Social Media

• **Section 7**
  - Employees may discuss wages and other terms of employment and may take “concerted” action in an effort to improve their working conditions.

• **Confidentiality of Complaint Investigations**
  - EEOC Guidance directs employers conducting investigations of workplace harassment to assure complainants that they “will protect the confidentiality of harassment complaints to the extent possible.”
BUT…NLRB Strikes Down Employer Policies on the Confidentiality of Complaint Investigations

• **The Boeing Co.** (July 26, 2013): Two notices issued by Boeing violated Section 7 of the NLRA—(1) “directing” employees not to discuss workplace investigations with each other and (2) a subsequent notice “recommending” that employees not discuss such investigations with other employees.

• **Banner Health System, d/b/a Banner Estrella Medical Center** (July 30, 2012): Prohibits blanket confidentiality rules whose potential effect may be to chill or prohibit the exercise of protected Section 7 rights.

• Held: While acknowledging that blanket confidentiality rules serve some useful purposes, the Boeing judge concluded that he was bound to follow Board precedent.
You Decide: Protected Communications?

- Employee posts profanity-laced comments about the company and her supervisor in a private group message on Facebook in which she allegedly told her supervisor to “back the freak off” and suggested that the employer could “FIRE ME…Make my day”…
Unprotected Activity

“boasting and griping” is not protected activity
Take-Away: State of Flux

• Supreme Court decisions and EEOC Guidance v. NLRB Decisions.
• Employers need to review and rethink existing policies and prohibitions to ensure that they properly take account of Section 7 concerns.
Social Media and Hiring
• Plaintiff was rejected for employment as a scientist after another employee circulated an email to hiring committee.

• Email included the plaintiff’s religious views which were visible on his personal website.

• Court denied the University’s motion for summary judgment on Title VII claims of religious discrimination, finding issue of fact as to whether his religious beliefs were a motivating factor in the decision not to hire.

• **TAKE AWAY**
  - Mere fact it was accessed can have implications
Social Media and Hiring

- Have a legitimate business reason for looking at a job applicant's social media identity.
- Be able to tie the review to the job. While some positions place a high value on image and online presence, others may not matter.
- If you use for one, use for all, i.e., be consistent.
- Try to separate the person reviewing social media information separate from the person making the final hiring decisions.

• Employee brings harassment claims based on Facebook posts.
• Employee reported conduct while at work.
• Employer investigates and as part of remedial action, instructs IT department to block employees’ access to Facebook.
• Held: Summary judgment appropriate because actions constituted a prompt and appropriate response to employee’s hostile work environment complaint.

• Employer brings trade secret misappropriation and conversion claims against former employee who refused to return control of employer’s Twitter account.

• When ex-employee left, he refused to return control of his employer-connected Twitter name, rather, he changed the name to eliminate reference to former employer (from @PhoneDog_Noah to @noahkravitz) but continued to use the account with the built-in following.

• Held: Summary judgment not appropriate and employer may proceed with claims. Ultimately settled.

• Discovery dispute where plaintiff requested, among other things, the defendant’s e-mail addresses, social media accounts, and list-serve or message board membership, comments made on websites or message boards that related to the allegations in the plaintiff’s complaint.

• The defendant objected, arguing that the requests sought confidential information and invaded his privacy, sought irrelevant information and amounted to a fishing expedition, and were intended to annoy, embarrass, and oppress him.

• Ruling: the “mere hope” that the information might contain an admission is not enough to require “open access to the plaintiff’s private communications with third parties.”

• TAKE AWAY
  ➢ Have a reason why you believe the information is there.
Social Media and Employees
Management Policies and Training

- Implement a social media policy.
- Implement an internet use policy.
- Update disciplinary policy.
- Train employees on expectations.
How to Train Your Employees to Handle Your Social Media

Social media consultants can be an expensive addition to your business. But in this day and age, no company can operate without a sound social plan. Despite the swanky pitches you may receive from pros, your best social media team might actually be your current workforce. But how can you find your company’s natural social media rock stars and get your entire team on board with your goals?

When it is and is not appropriate to suggest that an employee is speaking on behalf of the company.

Examples of behavior and harassment that will not be tolerated.

Any disclaimers employees should use when expressing a personal opinion about the company.

Information employees are never allowed to share such as numbers, internal communication, & performance data.

Unrestrained employee social media use, 76% of companies do not have a clearly defined social media policy.
The Courts and Social Media Policies

- Courts have not identified boundaries between lawful and unlawful social media policies.
- NLRB supports “narrowly-tailored” social media policies, but has yet to define what that means.
- Guidance on what is overly-broad language.
“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
• Prohibiting employee statements that “damage the company, defame any individual or damage any person’s reputation.”

• Prohibiting employees from making “disparaging or defamatory comments about [employer], its employees, officers, directors, vendors, customers, partners, affiliates, or ... their products/services.”

• Prohibiting “disrespectful” conduct and language that might injure the “image or reputation” of the employer.
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.
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.**
Discipline and Employee Complaints
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
You be the Judge:

“Lydia Cruz, a co-worker feels that we don’t help our clients enough at HUB[.] I about had it! My fellow coworkers how do u feel?”

“Tell her to come do [my] f**** job n c if I don’t do enough, this is just dum[b].”
Protected Concerted Activity

The comments related to a co-worker’s criticism of employee job performance, a matter the employees had a protected right to discuss.

You be the Judge:

- statements, including a short-hand expletive, expressing dissatisfaction with the employer’s tax withholding practices and asserting that the employer’s owners could not do paperwork correctly that were “Liked” and commented upon by other employees
Protected Concerted Activity

The employee’s act of clicking the “Like” button on a social media page was concerted activity because it expressed approval of employee complaints about payroll tax mismanagement and made “a meaningful contribution to the discussion”

Miscellaneous Issues: Bring Your Own Device

- **Sitton v. Print Direction, Inc. 718 S.E.2d 532, 535 (Ga. 2011).**
  - Salesperson for a commercial printing business used his personal laptop connected to his employer’s network for business and personal use.
  - CEO entered the employee’s office, moved the computer’s mouse, and printed certain emails to confirm personal use.
  - Employee sued: computer theft, computer trespass, and computer invasion of privacy under the Georgia law.
  - HELD: Affirmed summary judgment for employer, the employer was authorized to inspect the computer pursuant to the computer usage policy contained in Handbook.

- **TAKE AWAY**
  - Broad computer usage policy stated employer access to company data and should not regard email “left on or transmitted over” employer’s system as private.
Take Away

• Managing employee social media issues = not much different than what you already do.

• Ask yourself:
  ➢ Happen in the past? If so, be consistent.
  ➢ Social media policy cover? If so, follow.
  ➢ Protected concerted activity? If so, be cautious.
Questions?
Credit Information

• For those you who require CLE/CPD or HRCI credits please note the following states have been approved, California, Ohio and Texas; as well as Arizona, New York, and New Jersey through state reciprocity laws and Florida is pending. CPD and CPE have also been approved. If you require credit in a jurisdiction not pre-approved we can assist.

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