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Social Media In the Workplace

By Randy Green and John Michael Ekblad

Overview:

- Social Media
 - What is it?
 - Risks Presented
 - Properly Regulating Employee Usage
- Employee Privacy Rights Regarding Personal Information
- What Can You Do?



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Social Media

- Social media has been defined as “the use of web-based and mobile technologies to turn communication into interactive dialogue.”
- Examples include Facebook, Twitter, LinkedIn, MySpace, Skype, YouTube, Blogs, and Instant Messaging.
- Facebook:
 - There are more than 500 million active users.
 - 50% of active users log into Facebook on any day.
 - The average user creates 90 pieces of content each month.
 - Market value around \$50 billion.



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Benefits of Social Media to Employers

- Branding;
 - Client development and service;
 - Research;
 - Recruiting;
 - Improve employee engagement;
 - Facilitate multi-office workplaces.
-
- Facebook has noted this trend and now provides a number of business-related applications such as document sharing, networking tools, and blog promotion.



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Employer Issues/Hazards Created by Social Media

- Decreased productivity is an issue with any employee internet usage, but specific to social media, there are additional harms that may pose greater risks, such as:
 - Sharing confidential information and trade secrets;
 - Criticizing, disparaging, or harassing employers, co-workers, or clients;
 - Posting embarrassing videos recorded in the workplace;
 - Endorsing products or services without proper disclosure;
 - Engaging in criminal conduct;



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Employer Legal Liability Resulting from Misuse of Social Media

- Hostile Work Environment and Discrimination Claims
- Defamation Claims
- Improper Disclosure of Confidential or Other Protected Information
- Reporting Requirements for Child Pornography
- Federal Trade Commission (FTC) Guides



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Hostile Work Environment and Discrimination Claims

- Social media provides employees additional ways to engage in inappropriate conduct.
- Employees may post discriminatory statements, racial slurs, or sexual innuendos directed at co-workers, management, customers, or vendors.
- A supervisor who post discriminatory statements regarding employees who are later terminated may subject the employer to an adverse employment action, and such a post could be used as evidence.



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Defamation Claims

- Employee postings of rumors, gossip, and false statements about co-workers and supervisors may create unrest in the workplace.
- In addition, negative comments by management may create liability.
 - For example, a supervisor at one company posts false and damaging comments about an employee leaving the company.
 - If as a result of these comments the employee is not hired by a second company, the former employee may have a defamation cause against her former employer.



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Improper Disclosure of Confidential or Other Protected Information

- Employees may inadvertently reveal proprietary or confidential information.
- Employees may also act deliberately, such as a disgruntled employee who reveals trade secrets or other proprietary information.



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Reporting Requirements for Child Pornography

- Illinois and other states require mandatory reporting by information technology workers of child pornography found on computers they are servicing.
- Employers must take care to preserve evidence for legal authorities and not to destroy any equipment or files containing such evidence.



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Federal Trade Commission (FTC) Guides

- Newly revised FTC Guides address the use of “endorsements and testimonials in advertising,” and employers may be liable when employees comment on employer services or products on social media if the employment relationship is not disclosed.



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Ensuring that Employees Use Social Media Only as Desired

- Consider possible legal restraints on employer actions
- Consider privacy concerns;
- Need for a social media policy;
- Tips for developing an effective social media policy.



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Difficulties in Disciplining Employees for Using Social Media

- There are legal restraints on preventing or limiting employees:
 - Be cautious that social media policy is not overly broad and clearly defines the prohibited activity in order to avoid interfering with protected activity.
 - Labor Law
 - The National Labor Relations Act applies to all employers.
 - Employers have rights to concerted activity and therefore they can get together to discuss workplace activity related to their interests as employees.
 - This includes the right to discuss with co-workers and outsiders the terms and conditions of their employment and to even criticize employers.



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Difficulties in Disciplining Employees for Using Social Media

- Employees may be protected by federal and state whistleblower laws when complaining about company conditions that affect public health and safety and when reporting potential securities fraud violation;
- Many states do not allow employers to influence an employee's political activities or regulate employee political activities and affiliations;
- Some states protect an employee or applicant's legal off-duty activities with "lawful conduct" laws;
- In hiring, disciplining, and firing, an employer is prohibited from unlawfully discriminating against employees based on protected characteristics, such as race, age, sexual orientation, marital status, disability, and genetic information.



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Privacy Concerns

- Tort Law
- Federal Wiretap and the ECPA
- State Law
 - Illinois Eavesdropping Act
 - Illinois Law on Monitoring
- Stored Communications Act



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Tort Law

- Tort claims and invasion of privacy theories provide private sector employees with common law “privacy rights.”
- With regards to monitoring of electronic communications by employers, an applicable theory is “intrusion upon the plaintiff’s seclusion or solitude,” which requires proof of:
 1. An intentional intrusion, physical or otherwise,
 2. Upon the plaintiff’s solitude or seclusion or private affairs or concerns,
 3. Which would be highly offensive to a reasonable person.



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Tort Law

- Defense against such claims:
 - Establishing “that the employee did not have a reasonable expectation of privacy in the electronic communications.”
 - “Courts are generally more inclined to rule in the employer’s favor where the employee voluntarily uses an employer’s network and/or computer and consented to be monitored or was advised of the employer’s written electronic communications policy.”



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Federal Wiretap and the ECPA

- ECPA amended the Federal Wiretap Act
- The ECPA “imposes criminal and civil penalties against any person who intentionally intercepts an electronic communication with certain specific exceptions, including an ‘ordinary course of business’ exception.”
- The Stored Communications Act, which is part of the ECPA, covers stored electronic communications.
 - Federal Court in New Jersey upheld a verdict against managers at a restaurant “who intentionally and without authorization accessed a private, invitation-only chat group on MySpace in violation of the federal SCA.”



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Illinois State Law – Eavesdropping Act

- “A person commits eavesdropping when he:
 - (1) Knowingly and intentionally uses an eavesdropping device for the purpose of hearing or recording all or any part of any conversation or intercepts, retains, or transcribes electronic communication unless he does so (A) with the consent of all of the parties to such conversation or electronic communication.” 720 ILCS 5/14-2(a).



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Stored Communications Act

- “[A] person or entity providing an electronic communication service to the public shall not knowingly divulge to any person or entity the contents of a communication while in electronic storage by that service.” 18 U.S.C.A. § 2702.
- Courts have made clear that this Act applies to social media service providers.
- If an employee does not consent or can argue that the employer was coercive in gaining access to one’s social media information, an employer may not be authorized to access such information.



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The Need for a Social Media Policy

- To prevent the loss of productivity;
- To permit effective monitoring (compliance with laws);
- To protect the reputation and image of your company;
- To protect against the loss of confidential information and trade secrets;
- To protect against discrimination, harassment, and cyber-bullying;
- To guard against suits for invasion of privacy, defamation, improper recruiting and improper discipline and termination;



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Supreme Court Guidance Provided in *Quon v. City of Ontario*

- To guard against suits for invasion of privacy employers should:
 - “Have clear and understandable technology use policies that explicitly define the types of technology they are intended to cover and explain that employees have limited expectations of privacy in the workplace.”
 - “Employers must have a legitimate business interest for searching and employee’s personal communications or transactions.”



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Tips for Developing an Effective Social Media Policy

- Should be clear and organization specific depending on the organization's culture and approach to social technologies, and the nature of the work performed by its employees.
- Should be consistent with the organization's policies and procedures, such as:
 - Anti-discrimination
 - Anti-harassment
 - Computer, Internet, Email Systems
 - Employee Privacy
 - Confidentiality and Trade Secrets
 - References



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Tips for Developing an Effective Social Media Policy

- Inform employees of potential risk and make them aware of the employer's expectations.
- Warn employees that the employer will not tolerate will and will subject the individual to discipline for postings regarding:
 - Proprietary and confidential company information;
 - Discriminatory statements or sexual innuendos regarding co-workers, management, customers or vendors;
 - And defamatory statements regarding the company, its employees, customers, competitors, or vendors.



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Tips for Developing an Effective Social Media Policy

- Make clear that mentions of the company must include a disclaimer noting that any opinions expressed are the employee's own and do not represent those of the company.
- It should be made clear that these restrictions apply to social media usage at any time, on any computer.



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Make Expectations Clear

- The First Amendment does not protect an employee from being monitored, disciplined or terminated for violating a clear and reasonable social medial policy.
- Courts have often considered whether an employer has an electronic communications policy to determine whether an employee had a reasonable expectation of privacy.
- By making clear what is considered “acceptable use” and reducing the level of privacy that employees expect in their work computer systems, e-mail, and internet usage, this will insulate employers from liability, reduce the employees’ expectation of privacy, and give the employer more discretion to act when employees engage in misconduct.
- In addition to what an employee may not do as listed above, make clear what the employer considers “acceptable use” (i.e., business use only, limited personal use, or unlimited personal use).



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Make Expectations Clear

- Should make clear that employees may not:
 - Post proprietary and confidential company information;
 - Post discriminatory statements or sexual innuendos regarding co-workers, management, customers, or vendors;
 - Post defamatory statements regarding the company, its employees, customers, competitors, or vendors;
 - Claim or imply authorization to speak as an organization representative;
 - Make use of the organization's name in their online identity;
 - Make use of the organization's intellectual property, logos, trademarks, and copyrights in any manner;
 - Make use of restricted language such as profanity, inappropriate speech;
 - Use social media unless, use is acceptable.



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Additional Considerations

- Address whether an employee can access social media at work.
- If it is allowed, address restrictions on access and usage at work.
- Reserve the right to remove content without notice.
- Remind employees about privacy settings.
- Make clear that the company's policies apply to computers, email systems, blackberry, telephone/voicemail systems and any of the data on these systems.
- Provide mandatory training.



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Additional Considerations

- Reserve the right to take disciplinary action against an employee if they violate company policy.
- Designate a compliance officer and develop a compliance framework.
- Develop a reporting procedure.
- Let employees know they are expected to act professionally both on and off duty.
- Include a statement that the policy does not intend to interfere with rights granted under the NLRA
- Provide notice that monitoring will occur, which will further reduce an employee's expectation of privacy.
- Require that anything posted on a company social media page be approved by a compliance officer.



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Hiring Decisions

- As long as employer does not violate state or federal discrimination laws, there are currently no prohibitions against employment decisions based on information placed in the public domain.
- However Employers should:
 - Screen candidates in a uniform manner
 - Receive written consent from job applicants
 - Be cautious not to coerce access
 - Use a neutral third party to filter protected information
 - Have a legitimate, non-discriminatory reason for employment decisions based on information found on social media



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Employee Privacy Rights Regarding Personal Information

- Background Checks
- Medical Information
- Genetic Information
- Employer's Obligation to Prevent Disclosure and Notification
- Monitoring



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Background Checks

- Credit histories, criminal records, and similar records:
 - Cannot screen applicants protected by state and federal discrimination laws. Conduct reasonable job inquiries without discriminating.
 - Use of credit histories is conditional on consent of applicant and must only be used for hiring or promotion decisions.
 - In Illinois, an employer may not refuse to hire an applicant with a criminal record unless the underlying facts are corroborated and they speak directly to performance criteria for the job applied for by the applicant.



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Medical Information

- Illinois does not have a specific law addressing employer use of medical information.
- The ADA however is both an antidiscrimination statute and a medical privacy law.
 - The ADA places very strict limitations on the use of information obtained from medical examination and inquiries.
 - All information obtained must be collected and maintained on separate forms, in separate medical files separate from personnel files, and must be treated as a confidential medical record.



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Medical Information

- **Exceptions:**
 - “Supervisors and managers may be informed about necessary restrictions on the work or duties of an employee and necessary accommodations;”
 - “first aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment or if any specific procedures are needed in the case of fire or other evacuations;”
 - “government officials investigating compliance with the ADA and other federal and state laws prohibiting discrimination on the basis of disability or handicap should be provided relevant information on request;”
 - “relevant information may be provided to state workers’ compensation offices or “second injury” funds, in accordance with state workers’ compensation laws; and”
 - “relevant information may be provided to insurance companies where the company requires a medical examination to provide health or life insurance for employees.”



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Genetic Information - Illinois

- Illinois law protects genetic testing information.
 - “Genetic testing and information derived from genetic testing is confidential and privileged and may be released only to the individual tested and to persons specifically authorized.” *410 ILCS 513/15*
 - “No person to whom the results of a test have been disclosed may disclose test results to another person except as authorized by Section 30.” *410 ILCS 513/35*
 - Section 25 details the use of genetic testing information by employers. It states that “[a]n employer . . . shall treat genetic information in such a manner that is consistent with the requirements of federal law.”



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Genetic Information - Federal

- The Federal Genetic Information Nondiscrimination Act protects genetic testing information.
 - Employers “may not request, require, or purchase genetic information of an individual or family member of the individual.” 29 C.F.R. § 1635.8(a).
 - Where a request includes “conducting an Internet search on an individual in a way that is likely to result in . . . obtaining genetic information.” 29 C.F.R. § 1635.8(a).



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Employer's Obligation to Prevent Disclosure and Notification

- Personal Information Protection Act
 - “Any data collector that owns or licenses personal information concerning an Illinois resident shall notify the resident at no charge that there has been a breach of the security of the system data following discovery or notification of the breach.” 815 ILCS 530/10(a).
- An employer may be considered a “data collector.”
- However, *Cooney v. Chicago Public Schools* held that the PIPA does not create a duty to protect information of former employees.
- Unlike other states, Illinois does not have a data protection statute.
- Federal laws do exist that establish a duty to protect specific types of information as well.



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Monitoring Issues

- The Electronic Communications Privacy Act of 1986 governs the privacy of oral, wire, and electronic communications for private and public entities.
- A violation of the act occurs when there is intentional or willful interception, accession, disclosure, or use of another's wire, oral, or electronic communication that affects interstate or foreign commerce.”
- One exception to the act is to obtain its employee's consent to the interception, access, or disclosure of the electronic communication.
- Illinois requires the mutual consent of employees and employers in order to monitor communications.



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Summary

- It is critical for your business to have a detailed electronic communications policy to enable your company to take advantage of the power of social media while protecting its goodwill and not infringing on privacy rights granted to employees.



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Questions?

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