

Social Media in the Workplace

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L. Eric Ebbert

Shareholder

265 Brookview Centre Way, Suite 600

Knoxville, Tennessee 37919

Phone: 865.549.7000

Email: eebbert@bakerdonelson.com

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Roadmap

- Latest News
- Legal Issues
- National Labor Relations Act
- Social Media Policy
- Human Resource Issues
- Benefits of Social Media



What is Social Media?

Social Media Explained



I like donuts.



I just ate 3 donuts.



Here I am eating a donut.



My skills include donut eating.



This is where I eat donuts.



Here's a donut recipe..



Donut Lovers of NYC



75% off your next donut



I'm a Google employee who eats donuts.

Statistics

- 4.8 billion mobile users, 4.2 billion people with a toothbrush



845 million monthly users, 250 million photos are uploaded every day, 2.7 billion “likes” per day



465 million accounts, 175 million tweets a day, USA has 107 million members



2 new members join every second, USA has 57 million members, LinkedIn is the 36th most visited website in the world



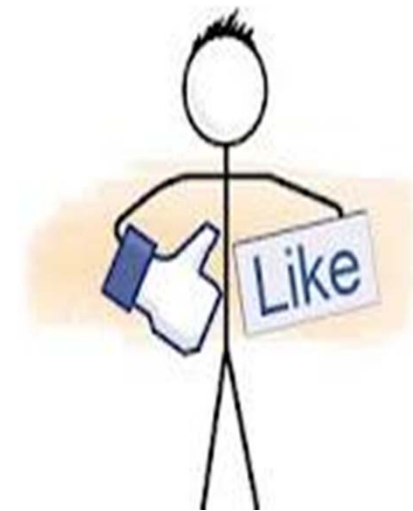
2 billion views per day, over 829,000 videos uploaded each day



10.4 million registered users, most users are female, drives referral traffic to retailers

Latest News

- Facebook “likes” are not protected speech
 - *Bland v. Roberts* - A Virginia federal judge held that Facebook “likes” are not constitutionally protected speech, nixing a lawsuit brought by workers who claimed the sheriff fired them for supporting his opponent. The termed workers alleged that they had engaged in a constitutionally protected activity by liking the opponent’s Facebook page. The Judge ruled that clicking on “like” is not protected speech.



Latest News (cont.)

- British Judge says legal claims can be served through Facebook
 - Lawyers for the plaintiff were unable to track down the defendant in order to serve him. Plaintiff's attorneys applied for permission to send Defendant the legal claim through Facebook. Plaintiff's counsel informed the judge that the Defendant had recently added two new friends. Defendant was given extra time to respond to the claim to allow for the possibility that he wasn't accessing his account regularly.
- Service through Facebook also exists in Austria, New Zealand, and Canada.

Latest News (cont.)

- Social Security Administration has told its disability-claims judges not to seek out information from websites because (1) reviewers cannot trust information posted online and (2) the act of typing in queries could compromise protected private information.
- Opponents of the new policy argue that the Internet has been used as a valuable anti-fraud weapon.
- Social Security's ban covers all internet sites, including social media like Facebook.

Latest News (cont.)

- Juror booted for “friending” defendant
 - Social media continues to pose problems for courts across the county, as a Florida man was kicked off a civil trial jury after trying to friend the defendant on Facebook. The juror’s response was that “he accidentally friend requested her.” In this case, the juror was dismissed after a scolding from the judge.

Employers Requesting Social Media Passwords

- Maryland - 1st state to pass legislation banning employers from asking employees and job applicants for their social media passwords
- Other states have either passed or proposed similar legislation
- Connecticut and NY – state senators have called for federal agencies to investigate employers' request for passwords
- Password Protection Act – proposed federal legislation
- Facebook has issued a statement condemning this practice



Legal Issues Associated with Social Media

- Employers Requesting Social Media Passwords
 - Legal claims resulting from information obtained by mandatory Facebook search.
 - Areas to watch include *Race, Age, Religion, Marital Status, Sexual Preference, Pregnancy Status or Disability.*
 - Employers held accountable for the information they gather as well as the information they miss.
 - Invasion of privacy claims.



Legal Issues Associated with Social Media (cont.)

- Wage & Hour Concerns
 - Are employees encouraged to promote the company on Social Media?
 - Time spent promoting the employer's product or service through social media sites is most likely compensable "working time" under FLSA and applicable state/local wage and hour laws.
 - Employers should require employees who blog or maintain a social networking site as part of their job and who are not exempt to record time spent "working" on the blog or site.



Legal Issues Associated with Social Media (cont.)

- Non-Competes & Non-Solicitation
 - Former employee starts friending all of your customers on Facebook.
 - Employers may require former employees to unlink and defriend their LinkedIn, Facebook, and other social network contacts connected with the company.
 - *Amway Global v. Woodward* – A blog post was evidence of violation of a non-solicitation.
 - *Sasqua Group v. Courtney* – Since company's customer information was available on LinkedIn and other public sources it was not a trade secret.

Legal Issues Associated with Social Media (cont.)

- Confidentiality & Privacy
 - Social Media enhances the possibility that confidential information and trade secrets may be disclosed.
 - Example: North Carolina Domino's Pizza Video



Legal Issues Associated with Social Media (cont.)

- Advertising and Brand Management
 - By identifying oneself as an employee, a social networker becomes a representative of the company.
 - Employee's posts reflect on the company and its image.
 - Companies need to make sure that employees are not posting unauthorized statements, endorsements or product claims.



NLRB

- Employers may not prohibit employees from engaging in protected concerted activities and/or union activities protected by the NLRA.
- Employees' comments are protected when they are made with or on behalf of other employees or where they discuss or seek to induce group action by employees.
- Employees are engaged in protected concerted activity when they are expressing a concern regarding terms and conditions of employment (including actions of supervisors) on behalf of co-workers, in concert with co-workers, or on a matter of common concern to co-workers.

NLRB

NLRB's Test

- Unlawful policies satisfy one of the following elements:
 - 1. Employees would reasonably construe the language to prohibit Section 7 activity;
 - 2. The rule was promulgated in response to union activity; or
 - 3. The rule has been applied to restrict the exercise of Section 7 rights.

Employer Policies Found to be Unlawful by the NLRB's General Counsel

- Prohibition of “disparaging remarks when discussing the company or supervisors.”
- Prohibition of employees posting pictures that depict the company, the company's uniform, or the company's logo.
- Prohibition of “offensive conduct” and “rude or discourteous behavior.”
- Prohibition of “inappropriate discussions” about the company, management, or co-workers.
- Prohibition of “using any social media that may violate, compromise or disregard the rights and reasonable expectations as to privacy or confidentiality of any person or entity.”

Employer Policies Found to be Unlawful by the NLRB's General Counsel

- Prohibition of “communication or post that constitutes embarrassment, harassment, or defamation” of the company or any of its employees.
- Prohibition of “statements that lack truthfulness or that might damage the reputation or goodwill” of the company.
- Prohibition of “talk about company business” on personal social media accounts.
- Prohibition of “posting anything that [the employees] would not want their supervisor to see or would put their job in jeopardy.”
- Prohibition of “use of the employer’s logos and photographs of the employer’s store, brand or product without written authorization.”

Not Safe for Work?

Examples of Facebook postings that were deemed protected by labor law by NLRB lawyers, and others that weren't.



'Scumbag'

A paramedic was fired after calling her supervisor a 'scumbag' on Facebook from her home computer.

NLRB'S POSITION:
Employee was
wrongfully fired

OUTCOME:
Case settled just
before trial



'Setting it off'

A Frito-Lay warehouse employee was fired after writing on Facebook he was 'a hair away from setting it off in that b—,' apparently referring to the warehouse.

NLRB'S POSITION:
Employee was not
wrongfully fired

OUTCOME:
Employee's lawyer
has appealed



'Rednecks'

A bartender was fired for communications on Facebook with a relative in which he called customers 'rednecks' and said he hoped they choked on glass.

NLRB'S POSITION:
Employee was not
wrongfully fired

OUTCOME:
NLRB didn't file
a complaint



Source: National Labor Relations Board

NLRB's First Social Media Decision - Costco

- Facts
 - Costco had a policy that forbade employees from posting statements on social media sites that damaged the company's reputation, defamed an individual or the reputation of anyone else.
 - No finding that Costco ever enforced the policy.
 - No finding that an employee was ever disciplined engaging in concerted activity.

NLRB's First Social Media Decision - Costco

- Holding
 - Although the rule does not expressly prohibit concerted activity, its terms were broad enough to include communications protesting Costco's treatment of its employees.
 - An employee could reasonably believe that she could not post critical statements about Costco's treatment of employees, payment of appropriate wages, and working conditions.

NLRB's First Social Media Decision - Costco

- Lessons learned:
 - Generic Social Media Policies do not work.
 - NLRB will probably adopt most if not all findings of its general counsel.
 - The policies do not have to be unlawfully enforced to be overbroad.
 - Policies must be narrowly drafted.

May 30, 2012 NLRB Acting General Counsel Report

- “. . . rules that clarify and restrict their scope by including examples of clearly illegal and unprotected conduct, such that they could not reasonably be construed to cover protected activity, are not unlawful.”
 - GC did not say or mean such policies are **lawful**, just that they are **not *per se* unlawful**.
 - Importantly, approved policy prohibits “inappropriate postings that may include discriminatory remarks, harassment and threats of violence or similar inappropriate or unlawful conduct.”

May 30, 2012 NLRB Acting General Counsel Report

- **Confidentiality:** limited to trade secrets and proprietary information – provided examples.
- **“Be Respectful,” “Fair and Courteous”:** questioned this, but approved because specific, detailed definitions of prohibited conduct were provided.
- Provisions approved without comment include:
 - “Carefully read these guidelines [and other applicable codes and policies] and ensure your postings are consistent . . .”
 - “Make sure you are honest and accurate. . . Never post any information or rumor that you know to be false about [Employer, customers or co-employees].”
 - “Never represent yourself as a spokesperson. . . make it clear that your views do not represent those of [Employer].”

May 30, 2012 NLRB Acting General Counsel Report

- Reiterates that work rules violate NLRA if they “would reasonably tend to chill employees in the exercise of their Section 7 rights.”

Policy Elements

- Confidentiality/proprietary information protections – need examples and definitions.
- Prohibitions against inappropriate postings need qualifying language to clarify this means unlawful discrimination, harassment, threats of violence, etc., and not everything an employer doesn't like.
- Prohibitions against false information are ok, but be careful not to be so broad that an employee's mistaken belief about a work practice, etc., would be included.
- Rules for identifying association with employer and/or representing opinions as the organization's.

Policy Elements

- Rules for workplace use of social media – be careful not to be too broad, but acceptable if tailored to work hours, work equipment and work-related content.
 - Prohibitions against dissemination of certain safety information are acceptable, but so far they need to be limited to information about the safety of products or services and not workplace safety.
 - Prohibitions against disclosure of information protected by attorney-client privilege are fine – but avoid blanket prohibitions of information regarding “legal matters.”
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- Remember, the “approval” of these provisions is a moving target as other agencies and courts consider the policies and as lawmakers, and other provisions may be endorsed (or endorsed by one court and criticized by another. . .).

NLRB's First Facebook Firing Decision

- Facts
 - BMW dealership had a sales event to introduce the redesigned Series 5 vehicles to customers. The dealership offered water, apples, oranges, small bags of Doritos and hot dogs from a hot dog cart as refreshments. Sales staff felt that dealership's decision to serve cheap food instead of wine and hors d'oeuvres hurt the dealership's image. Sales staff complained that it would impact their sales and commissions.
 - Sales person took pictures of the event and posted pictures of cheap food with sarcastic remarks. He also posted pictures of an accident that occurred a few days later at the adjacent Land Rover lot. A 13 year old boy was sitting in the driver's seat after a test drive taken by his parent. Parent was standing outside the vehicle. Sales person was in the passenger's seat with the door open.

Facebook Firing

- Apparently the boy hit the gas pedal, ran over his parent's foot, and the vehicle crashed into an adjacent pond. The sales person was thrown from the vehicle into the pond.
- The sales person photographed the vehicle and made more sarcastic remarks. Dealership fired the sales person for the postings.
- ALJ found that the posting about the sales event was protected, concerted activity, because it affected the sales person's terms of employment.
- The ALJ, however, found that the postings about the Land Rover incident were not protected because they had nothing to do with the sales person's employment. ALJ found that dealership fired sales person over the Land Rover posting and not the sales event.

Facebook Firing

- ALJ held that the termination did not violate the NLRA.
- On appeal, the NLRB adopted the ALJ's findings that the sales person's termination was lawful because the postings about the Land Rover incident were not protected.
- NLRB found it unnecessary to determine whether the sales event postings were protected.

Facebook Firing

- NLRB found this policy to be unlawful:
 - Courtesy: Courtesy is the responsibility of every employee. Everyone is expected to be courteous, polite and friendly to our customers, vendors and suppliers, as well as to their fellow employees. No one should be disrespectful or use profanity or any other language which injures the image or reputation of the Dealership.

Human Resources Issues Associated with Social Media

- Employee Website Monitoring
 - Ensure that employment decisions are made with accurate information.
- Supervisors “friending” subordinate employees
 - *Peer v. F5 Networks, Inc.* = Facebook friendship between an employee and her supervisor lead to a claim of disability discrimination.



Human Resources Issues Associated with Social Media (cont.)

- To Allow or Prevent Social Media Access at Work
 - Employee Productivity
- Social Media Addiction
 - Bergen Facebook Addiction Scale = was generated from a study showing that symptoms of Facebook addiction resemble those of drug and alcohol addiction.
 - Facebook Addiction Disorder (FAD)

Benefits of Social Media

- Why are companies using Social Media?
 - Build brand
 - Gain insight into customers and industry
 - Promote services
 - Increase traffic to Web site
 - Bring in new business
 - Crisis control



Benefits of Social Media (cont.)

“More companies are discovering that an uber-connected workplace is not just about implementing a new set of tools – it is also about embracing a cultural shift to create an open environment where employees are encouraged to share, innovate and collaborate virtually.”

– Karie Willyerd & Jeanne C. Meister, HarvardBusiness.org

“Businesses used to have a small suggestion box near the door that mostly housed dust bunnies and an occasional piece of gum. Rarely would someone get back to you. But people can now make a post from an iPhone or a BlackBerry while they’re sitting in your restaurant.”

– Charles Nelson, President of Sprinkles Cupcakes

Questions?

