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Social Media Policies



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Consider the Statistics

- A recent survey of employees conducted by Deloitte revealed some alarming realities:
 - 74% agreed that it is easy to damage a company's reputation on social media.
 - 53% said Facebook pages are none of their employers' business.
 - 24% don't even know if their company has a social media policy.
 - 49% says a policy would not change how they behave on social media sites.
- The increase in social media usage for employees age 30-39 was 105%, ages 40-49 was 164%, and ages 50-54 was 166%.



Today's Agenda....

1. What rules apply? Direct and indirect governing laws.
2. What are the goals? Positive and negative social media considerations.
3. What should be included and avoided in the policy language and terms.
4. Employee training and notification.
5. Employee discipline.
6. Facts to consider.
7. Legislative trends.
8. Odds & ends.



Laws Governing Employee Use of Social Media

- Among the laws that may impact workplace use of social media are the following:
 - National Labor Relations Act (NLRA);
 - The Stored Communications Act (SCA);
 - The Fair Credit Reporting Act (FCRA);
 - The Genetic Information Nondiscrimination Act (GINA);
 - Common law privacy principles; and
 - Other laws based on facts, i.e., HIPAA, Lanham Act, Communications Decency Act, Securities and Exchange laws, Sarbanes and Dodd-Frank, etc.



What are the goals?

Positive and negative social media considerations

- Benefits to organization can include:
 - Ability to connect and communicate efficiently and inexpensively.
 - Ability to promote values, goals, products and services.
 - Allows organization to further engage employees.
 - Promotes sense of employee freedom of expression.
 - Can be used to increase computer skills.
- Detriments to organization can include:
 - Increases risk of lawsuits/legal problems.
 - Can lead to disclosure of secrets.
 - Can cause damage to reputation.
 - Can become venue for disgruntled employee/union organization.



What are the goals?

Positive and negative social media considerations

- First, determine the **who, what when and scope**:
 - To **whom** should the policy apply?
 - All employees?
 - Only those with computers or email provided by employer?
 - Only those with nondisclosure agreements/access to confidential info?
 - **What** technologies need to be covered to accomplish your goals?
 - Just internal company email and sites?
 - What about privately owned and held sites and accounts (Facebook, etc.)?
 - What about devices (laptops, PDAs, etc.) provided by the organization?

What are the goals?

Positive and negative social media considerations

- **When** does the policy apply?
 - Only at work, only while being paid to work, or at all times?
- How broad does the **scope** need to be to accomplish your goals?
 - Do you need to include limitations or restrictions on employees' ability to identify their association with your organization?
 - What about confidentiality?
 - What conduct will be prohibited?
- The key is the ability to articulate a legitimate need for the work rule, and then to provide as much clarification through examples and definitions as possible.

Policy Elements

- After deciding the goals of the work rule(s), consider the following preliminarily approved provisions (assuming drafted correctly):
 - 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 (continued)

- 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 projected by attorney-client privilege are fine – but avoid blanket prohibitions of information regarding “legal matters.”
- 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. . .).



Policy Elements to Avoid

- Among others, avoid policy terms that include the following:
 - Prohibitions against “friending” co-workers. But, could an organization prevent managers/supervisors from “friending” subordinate employees? That remains unanswered.
 - Language that encourages employees to use alternative complaint mechanisms.
 - Prohibitions against discussions of salary information or work terms.
 - Blanket prohibitions against negative comments about co-workers, supervisors, or the employer generally.



Employee Training & Notification

- Remember, 24% of employees indicated they did not know if their employer had a social media policy.
- You have to provide employees with clear notice of the rules, what they mean, and the consequences for violations.
- Train supervisors and managers to be prepared to encounter criticism via social media, and on effective ways to deal with the criticism.
- Make sure new hires understand your policy as it may differ in many ways from prior employers.
- Get an acknowledgement of employee training.



Employee Discipline & Termination

- No law (yet) addresses acceptable levels of severity for violations of social media policies, but legislation has been proposed in several states that would limit the ability to fire an employee based on what they say on Facebook or the like.

So employers are asking:

When can you fire employees for social media misbehavior?

ENTER THE NATIONAL LABOR RELATIONS BOARD (NLRB)

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The Background

- General Counsel of NLRB has issued 3 memos providing guidance on social media.
- The latest memo that just came out on May 30 is the most useful. It says what employers are allowed to do; not just what they are prohibited from doing.
- While there has been a lot of attention to these cases, there have not been that many of them.

Sample Cases

Cost Cutter Crackdown

Facts: Costco sought to enforce a social media policy which prohibited employees from posting statements that damage the company or any person's reputation.

Result: NLRB deemed policy overboard because it could be seen as limiting employees' right to discuss working conditions. *Costco Wholesale Corp. and United Food and Commercial Workers Union, Local 371* (Sept. 7, 2012)

The Nosey Nun

Facts:

A fiendishly clever Nunn guesses an Employees' GMail password & access his account! Nun terminates Employee.

Result:

Violation of the Secured Communications Act. *Fisher v. Mount Olive Lutheran Church, Inc.*, 207 F. Supp. 2d 914 (W.D. Wis. 2002).

The Drunken Pirate

Facts:

University warns about postings on social media, then denies teaching certificate because of MySpace photo.

Result:

No problem. “Drunken Pirate you were “warned.” *Snyder v. Millersville Univ.*, 2008 WL 5093140 (E.D. Pa. 2008).

The Rowdy Romantic

Facts:

S.S.A. Employee obtains information about former & **future** girlfriends, sends flowers and makes “surprise” house calls.

Result:

Using computers and information for furthering one’s love life “exceeds scope and use” of one’s authorization. Section 1030 CFAA. *U.S. v. Rodriguez*, 628 F.3d 1258 (11th Cir. 2010).

EMT Tag Team

Facts:

Emergency Medical Technician posts a comment on the Facebook wall of another employee which was seen by the Compliance Officer who was also a “friend” of the co-worker. Both employees were terminated for comments the Compliance Officer found offensive.

Result:

Summary Judgment on claims of intrusion upon seclusion affirmed on appeal. *Sumien v. Careflite*, 2012 WL 2579525 (Fort Worth.2012)

The All-Seeing Attorney

Facts:

Attorney requires female employees to wear skirts to work, and then places cameras under desks. Female employees delete photos from Attorney's iPhone and iPad.

Result:

Complaint dismissed. Attorney could not show damages. *Bashaw v. Johnson*, 2012 WL 1623483 (D.Kan. 2012).

2012 and Beyond – What to Expect

- Look for employer-sponsored challenges to NLRB rulings and positions to make their way to courts.
- Watch for more legislation like Maryland's law that forbids employers from demanding access to employee's social media accounts.
- Look for legislation governing use of GPS with employees, email privacy issues, and use of social media with background checks.



QUESTIONS