PRESENTATION

Social Media in the Workplace

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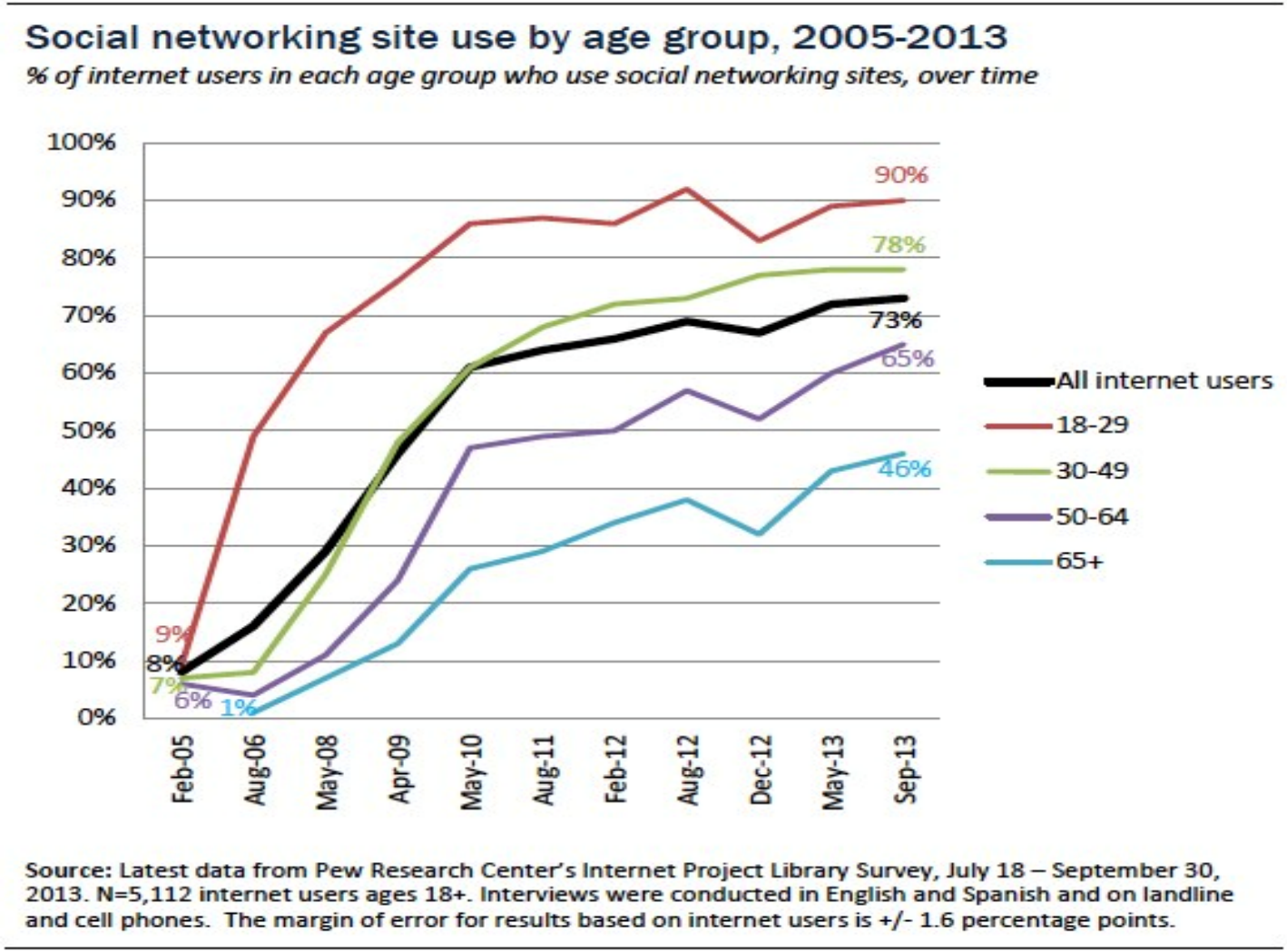
Social Media for Dummies

Social Media: Why Do We Care?



Social Media and Employment Law: Main Issues

I. **Social Media as a Screening Tool**:
   A. To what extent can employers rely on social media on hiring decisions?

II. **Employee Misuse of Social Media**:
   A. When can employers discipline or fire an employee for social media posts, comments, tweets, etc.?

III. **What can employers do to prevent social media misuse?**
   A. Monitoring Employee Social Media
   B. Social Media Policies

IV. **Post-Employment Issues**:
   A. Non-solicitation Agreements and Social Media
   B. Ownership of social media accounts

V. **Social Media as a Litigation Tool**

I. Using Social Media to Screen Job Applicants

If I'm hiring someone with two or three years' experience, and I Google them and see them doing a keg stand two or three weeks ago, that's going to be a turn-off.

--Kevin Nichols, vice president of Stark & Associates, a Fort Mill Internet marketing company

Social Media:
Common Reasons for Not Hiring an Applicant

- Candidate posted provocative or inappropriate photographs or information*BDBCB1
- Candidate posted content about them drinking or using drugs*
- Candidate bad-mouthed their previous employer, co-workers or clients
- Candidate showed poor communication skills
- Candidate made discriminatory comments
- Candidate lied about qualifications
- Candidate shared confidential information from previous employer

Slide 6

BDBCB1 Where is the footnote?
BDBCB, 10/5/2015

Problems with Social Media As a Screening Tool

- Social media sites like Facebook or Twitter can reveal more personal information than an employer is typically privy to from a traditional application or interview, including:
  - An applicant's religion, disability, age or some other protected characteristic under anti-discrimination laws (e.g. Title VII).
  - An applicant's involvement in union organizing.
  - Inappropriate/Offensive, but **lawful** **off-duty** conduct.
    - Some states like NY have "life-style" laws, which prohibit employers from taking adverse employment action against an employee for **lawful** off-duty conduct. (More to follow.)

Problems with Social Media As a Screening Tool (cont.)

- An employer who relies on this kind of information--consciously or unconsciously—opens the door to discrimination claims e.g. “failure to hire claims”, which can be hard to defend.

- Keep records of all information reviewed and used in any employment decision in case it later gets challenged.

- Employers should train decision-makers on what they can search for on social media networks and how to use it in application process.

When an Employer Uses Third Party to Conduct a Social Media Search

- The FCRA applies to employers when they hire an outside third party, known as a "consumer reporting agency," to perform credit and background checks on employees and prospective employees.
- This applies to any kind of search by a third party – not just credit report, but also criminal background searches and social media searches.
- FCRA requires the third party agency to notify the applicant of the search and provide a copy of the results of those searches to the applicant if the applicant is not hired. The applicant must be given time to correct or dispute those results.

II. Employee Misuse of Social Media

Can the employer fire this employee?

Yes. Why?

- **On-duty conduct and on employers' premises**
  - Social media posts that occur during work hours are afforded less protection.
- **Violation of Company Policy.**
  - Taco Bell issued a statement that the photo was part of an internal contest and the shells were not served to customers but the posting of the photo on social media was a violation of the franchisee's policies.
- The employee was fired.

Employee On-Duty Social Media Posts

- Employers can discipline or fire an employee for posts that are related to conduct:
  - That is “on the clock”
    - Employees should be working and can be legitimately disciplined for instead engaging in social media activity.
  - Involve employer premises or employer property
  - Violates company policy
    - **BUT** enforce violations of policies consistently. Allowing some social media posts to “slide” and not others will increase the employer’s legal exposure.

Off-Duty Social Media Posts

- Does the off-duty conduct negatively affect the employee's job or the employer's business (such as employee morale, reputation, relationship with clients)?

- Even if the answer is "yes," there are some limitations.

State Protection of “Off-Duty” Conduct

- Broad "lifestyle discrimination" statutes: Protect employees' right to engage in *any* lawful activity outside the workplace during non-working hours.
  - **California**: “Engaging in lawful conduct during non-working hours away from the employer's premises, unless the conduct actually constitutes a material and substantial disruption of the employer's operation.”
  - **New York**: Expressly prohibits an employer to "refuse to hire, employ or license, or to discharge from employment or otherwise discriminate against an individual in compensation, promotion or terms, conditions or privileges of employment because of:
    - An individual's **legal** political activities outside of working hours, off of the employer's premises and without use of the employer's equipment or other property
    - An individual's **legal** recreational activities outside work hours, off of the employer's premises and without use of the employer's equipment or other property."

State Protection of "Off-Duty" Conduct (cont.)

- Other states have passed narrower "life-style" statutes that provide protection for employees use of lawful products. (Illinois, Minnesota, Montana, Nevada, North Carolina, and Wisconsin).
  - Illinois: "[I]t shall be unlawful for an employer to refuse to hire or to discharge any individual, or otherwise disadvantage any individual, with respect to compensation, terms, conditions or privileges of employment because the individual uses **lawful products** off the premises of the employer during nonworking hours."
  - Examples: guns, cigarettes, alcoholic beverages

NLRA Protection of Off-Duty Conduct

- Multiple recent Unfair Labor Practice Charges filed against non-unionized companies for disciplinary action against employees who posted comments about their work environments online.

- National Labor Relations Board (NLRB) believes such communications are statutorily "**protected concerted activity**" and disciplinary action by company constitutes an "unfair labor practice" under the NLRA.

NLRA Protection of Off-Duty Conduct (cont.)

- Section 7: “concerted activities” 29 USC § 157: “Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.”

- Section 8: “interference with Union Activities” 29 USC § 158: It is unlawful for an employer to interfere with those activities.

NLRA Analysis of Protected Off-Duty Conduct

- **Does the employee's post/tweet constitute concerted activity?** If it serves as part of the conversation between and among co-workers or is designed to initiate such collective communications, it will likely be considered concerted.
- **Does the post constitute protected concerted activity?** If it addresses, either expressly or implicitly, the terms and conditions of the workplace (viewed broadly by the NLRB), then the concerted tweet or other social medial communication may be deemed protected.
- **Is the post so "malicious, disloyal or reckless" that the employee loses the NLRA's protection**? If so, the employer is permitted to take adverse action on what would otherwise be protected concerted activity. The threshold is quite high. Do not rely on this exception.

NLRB: “Concerted” Activity

- NLRB: A "like" or retweets or comments = “concerted” activity.
- An employee's FB post complaining about the company policies, **even if vulgarly stated**, may turn into concerted activity to improve working conditions protected under Section 7 of the NLRA if other employees like it.
- Essential to distinguish between individual gripes vs. initiation of group activity.
  - This is where it is tricky because social media sites are not static, but constantly change. Ex: A single FB post can turn into wide discussion when comments or “likes” are involved.

Three D LLC d/b/a Triple Play Sports Bar and Grille v. Sanzone, et. al (NLRB Decision dated August 22, 2014)

- A former employee of a bar posted the following on his FB account--

  "Maybe someone should do the owners of Triple Play a favor and buy it from them. They can't even do the tax paperwork correctly!!! Now I OWE money...Wtf!!!!"

- This post was "liked" by the bar's cook.
- One of the bar's waitresses commented on this post –

  "I owe too. Such an a**hole."

- Waitress and cook fired. They were told that they were fired for their decision to comment/like a "disparaging" comment about their boss. According to their supervisors, their behavior showed that they were not loyal to the employer.
- **NLRB**: **Unlawful discharge.** The "like" and "comment" were protected concerted activity within NLRA. Rejected employer's argument that comments were "disparaging."

NLRB Guidance on Protected Activity

- If the social media post relates to “terms of employment” or working conditions, then it is protected.
  - Note: Includes “likes”, “retweets,” “comments,” etc.

- Examples of protected posts:
  - Hours and pay
  - The way a company conducts its business
  - The way it generally treats its employees
  - The company’s culture/morale

What Off-Duty Social Media Posts are not Protected?

- NLRB: Posts that show/include:
  - Personal gripes
  - Excessive obscenities or inappropriate racist/misogynistic/religious language
  - Disclosures of trade secrets or highly private/confidential information

- An employee's use of social media to discriminate, harass or bully others is not protected activity.
  - Because such conduct can be imputed to employers, they have an obligation to redress complaints of unlawful harassment or discrimination known to the employer where it is related to the workplace (even where the conduct occurs off duty).

Unprotected Off-Duty Social Media Posts

This teacher was fired from "the most ghetto school in Charlotte"

A Charlotte, NC, teacher was recommended for firing by the superintendent after making some remarks that the superintendent perceived as racially insensitive. The teacher listed "teaching chitlins in the ghetto of Charlotte" in her "Interests" section and "I am teaching in the most ghetto school in Charlotte" in her "About Me" section.

Editor B via flickr

A waitress can't deal with a bad tip

22-year-old North Carolina waitress [redacted] blasted two customers over Facebook for stiffing her on the tip and keeping her late. She also took the time to mention her workplace by name.

She was fired for breaking a rule about disparaging customers.

Putting It All Together

- **Does the off-duty conduct negatively affected the employee's job or the business of the employer (such as employee morale, reputation, relationship with clients)?**
- **Does your Code of Conduct or Social Media Policy address this behavior?**
  - Does your policy address the questionable behavior? Have you been consistent in implementation of that policy?
- **Is there an applicable federal, state or local law that protects the employees' off-duty conduct?**
  - Seek legal counsel. An attorney can help you analyze the behavior in terms of applicable employment laws.
- **What are the ramifications of applying this policy consistently?** Think about what would happen if you uncovered the same behavior with your most productive, key employee. Would you take the same action?

Social Media Post # 1

- A female supervisor claimed that certain non-union employees did not do enough to help clients.
- Another female co-worker posted on Facebook:
  [Name of Supervisor], a coworker feels that we don't help our clients enough at [Employer's name]. I about had it! My fellow coworkers how do u feel?
- 4 other non-union employees responded to the post with:
  - "What the f… Try doing my job I have 5 programs"
  - "What the Hell, we don't have a life as is, What else can we do???"
  - "Tell her to come do [my] f… job n c if I don't do enough, this is just dum"
- Employer fired the five employees for "bullying" the female employee.
- NLRB? **UNLAWFUL DISCHARGE. Employees engaged in protected concerted activity because the initial post invited group discussion and talked about job performance. It was not harassment of female supervisor.**

Social Media Post # 2

- A tenured first grade teacher made two statements on Facebook
  - "I'm not a teacher – I'm a warden for future criminals!"
  - "They had a scared straight program in school – why couldn't [I] bring [first] graders?"
- Principal from the teacher's former school *forwarded* the Facebook comments to the teacher's *current* principal
- The School District filed charges with the Commissioner of Education.
- The teacher argued she was addressing work conditions and it was a matter of public concern.
- ALJ and Ct. of Appeals: **LAWFUL.** The teacher "made a personal statement driven by job dissatisfaction.

Social Media Post # 3

- Plaintiff was a nurse who had injured her back and legs at work. While on FMLA leave (in Mexico), the nurse posted photos showing her:
  - Riding in a motorboat
  - Lying on her side holding two beers
  - Holding one grandchild in each arm
- Her supervisor received complaints from co-workers that the nurse was clearly misusing FMLA leave.
- When she returned to work, HR informed her that her employment was terminated pursuant to its Progressive Discipline Policy regarding employee dishonesty.
- The nurse filed a lawsuit alleging employer interfered with FMLA claim.
- Result? **Lawful discharge.** The employer defeated plaintiff's FMLA interference and retaliation claim because it had an "honest belief" that the nurse had misused her FMLA leave.

Social Media Post # 4

- Sherriff's deputy "liked" the page of a candidate for Sheriff other than the incumbent Sherriff.
- When the incumbent Sherriff was reelected, he did not rehire the deputy who "liked" his opponent.
- The deputy, along with other deputies who had not been rehired, filed suit for reinstatement of their jobs.
- The District Court? "Liking" a Facebook page was insufficient to merit constitutional protection and dismissed the case on summary judgment.
- Fourth Cir. Ct. of Appeal: **UNLAWFUL**. A "Like" = Political Sign in a Front Yard.

III. Solutions Against Employee Misuse of Social Media: Monitoring Employee Social Media

- Some employers have decided to be proactive and monitor employee social media.

- Limitations:
  - Stored Communications Act (SCA)
  - State Social Media Privacy Laws

Monitoring Social Media: Stored Communications Act

- The Stored Communications Act prohibits **unauthorized** access to e-mails stored at an e-mail service provider. (The SCA is a criminal statute with civil remedies).
- Covers 1) electronic communications, (2) that were transmitted via an electronic communication service, (3) that are in electronic storage, and (4) that are not public.
- Applies to social media accounts, including "non-public" posts to "walls" – *Ehling v. Monmouth-Ocean Hospital Service Corp.*
- **Best Practice**: Obtain a written consent from employee to monitor or access e-mail accounts.
- **BUT…**

State Social Media Privacy Laws

- Be careful about asking permission. More than 20 states prohibit employers from asking employees or applicants to provide usernames and passwords to social media accounts. These states include:

Arkansas
California
Colorado
Illinois
Maine
Maryland
Michigan
Nevada
New Jersey
New Mexico
Oregon
Utah
Washington
Wisconsin

State Social Media Privacy Laws: Exception

- Exception: Permissible to ask for social media information when related to an investigation of workplace-related violations or misconduct.
  - Example: In California, “employers cannot require employees to divulge any personal social media unless it is reasonably believed to be relevant to an investigation of allegations of employee misconduct or violation of applicable laws and regulations.”

Solutions Against Employee Misuse of Social Media: Social Media Policies

- What do these policies typically cover?
  - Confidentiality and not disclosing trade secrets
  - Ownership of employer-directed social media account
    - Clarify that any social media account created during employment is the property of the employer and the employees must relinquish login credentials upon termination/resignation
  - Encourage employees to report online misconduct (e.g. bullying, harassment, discrimination)
- Social media policies should also include rules regarding acceptable or unacceptable content posted in an employee's social media site.

NLRB Strikes Down Social Media Policies

- NLRB: Employees' rights to concerted action can be restricted by a social media policy that is too broad, containing provisions prohibiting employees from disparaging employers or from discussing wage/pay information with other employees.

- NLRB violation if the social media policy:
  - Expressly restricts the exercise of Section 7 rights
  - Was promulgated in response to union activities
  - **Can be reasonably construed by employees to prohibit Section 7 activities**

Social Media Policy Example # 1: Costco

- **Policy**: *Employees should be aware that statements posted electronically (such as online message boards or discussion groups) that damage the Company, defame any individual or damage any person's reputation, or violate the policies outlined in the Costco Employee Agreement, may be subject to discipline, up to and including termination of employment.*

- **NLRB:** **Struck down.** NLRB found employees would reasonably construe Costco's Policy as prohibiting NLRA-protected activity because protected communications were not excluded.

Social Media Policy Example # 2: Landry's Inc. (Bubba Gump Shrimp Co.)

- **Policy**: *While your free time is generally not subject to any restriction by the Company, the Company urges all employees not to post information regarding the Company, their jobs, or other employees which could lead to morale issues in the workplace or detrimentally affect the Company's business. This can be accomplished by always thinking before you post, being civil to others and their opinions, and not posting personal information about others unless you have received their permission.*

- **NLRB***:* **Upheld.** The policy is clear that it is not the "job-related subject matter" with which the company is concerned, but the "manner in which the subject matter is articulated."

Social Media Policy Example # 3: BMW, Inc.

- **Policy**: *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*.

- **NLRB**:

  Struck down. Too broad – nothing excluding protected communications.

Social Media Policy Example # 4: Boch Imports, Inc.

- **Policy**: Employees prohibited from using the Company's logos "in any manner."

- **NLRB**: **Struck down.** Too broad because it could be reasonably read to cover protected employee communications.

- **Better Policy**:

  A policy which directs employees to "respect the laws regarding copyrights, trademarks, rights of publicity and other third-party rights" and to "not infringe on [company] logos, brand names, taglines, slogans or other trademarks."

Social Media Policy Example # 5: Hooters

Policy: *The unauthorized dispersal of sensitive Company operating materials or information to any unauthorized person or party [might result in discipline up to, and including immediate termination.] This includes, but is not limited to, recipes, policies, procedures, financial information in part or in whole as contained in any Company records."*

NLRB:

Struck down. This policy is overbroad. Employees could reasonably construe this policy as prohibiting them from discussing wages or other terms of employment. There is no language excepting protected activities.

Social Media Policy Example # 6: Wal-Mart

- **Policy contained the following language:**
  - Prohibited “inappropriate postings that may include discriminatory remarks, harassment and threats of violence or similar inappropriate or unlawful conduct.”
  - “Always be fair and courteous” to fellow employees and others.
  - Prohibits communications “that reasonably could be viewed as malicious, obscene, threatening, or intimidating.”
  - “Examples … might include offensive posts meant to intentionally harm someone’s reputation or posts that could contribute to a hostile work environment on the basis of race, sex, disability, religion or any other [protected] status.”

NLRB:

- **Upheld**. Policy is not ambiguous because “it provides sufficient examples of prohibited conduct so that, in context, employees would not reasonably read the rules to prohibit Section 7 activity.”

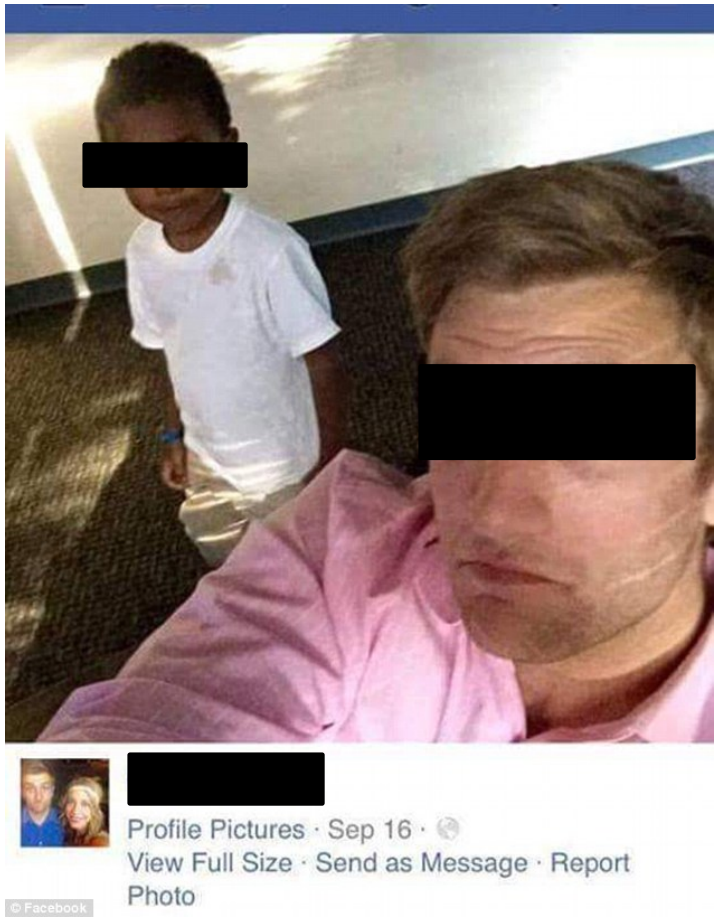
NLRB: Don’t’s on Social Media Policies

Don’t:

- Broadly reference communications which could “embarrass,” “harass,” or “defame” companies and/or staff
- Reference communications which “lack truthfulness” or could “damage the goodwill” of a company and/or its employees
- Prohibit postings “that could be construed as inappropriate”
- Ban "false statements" (only “maliciously false" statements are prohibited)
- Include overbroad anti-harassment rules
- Discourage criticism or “disparaging comments” about employees’ supervisors, or other members of management
- Include an overbroad ban on the use of company logo

For more examples of impermissible policy language: see https://www.nlrb.gov/reports-guidance/general-counsel-memos

Man Loses Job After Facebook Post About 3-Year-Old Boy **#hisnameiscayden**



Employee Fired!

NLRB: Do's on Social Media Policies

Do:

- Offer **examples** of the types of information an employee is not permitted to post on social media.
  - If prohibiting posting confidential information, provide an example of what would constitute confidential information.
  - Give examples of harassment or bullying behavior.
- Include an NLRA disclaimer.
- Restrict employees from discussing "embargoed information" under securities laws, trade secrets, "personal health information," etc.
- Articulate the need for the employer to place restrictions on an employee's social media use.
  - E.g. To protect employees from harassment, bullying, or other unlawful conduct.

IV. Post-Employment Issues

- Non-solicitation Agreements and Social Media.
  - Can “friending’ someone on Facebook constitute solicitation?
- Return of Social Media Account Information.
  - Protectable interest in social media account
  - Clarifying ownership of any social media account created at the behest of employer

Non-Solicitation of Employees/Customers via Social Media

- Non-Solicitation clauses not interpreted as prohibiting current employees/customers from becoming Facebook friends or “followers” with former co-workers or customers.
- An ex-employee updating his or her profile is not a violation of a non-solicitation agreement or customer restriction.
- Mere social media contact with a former employer's employee/ customers is not solicitation.
- There must be targeted communication.
  - Facebook: A personal message option or posting on someone’s wall could amount to solicitation.

Return of Social Media Account Information

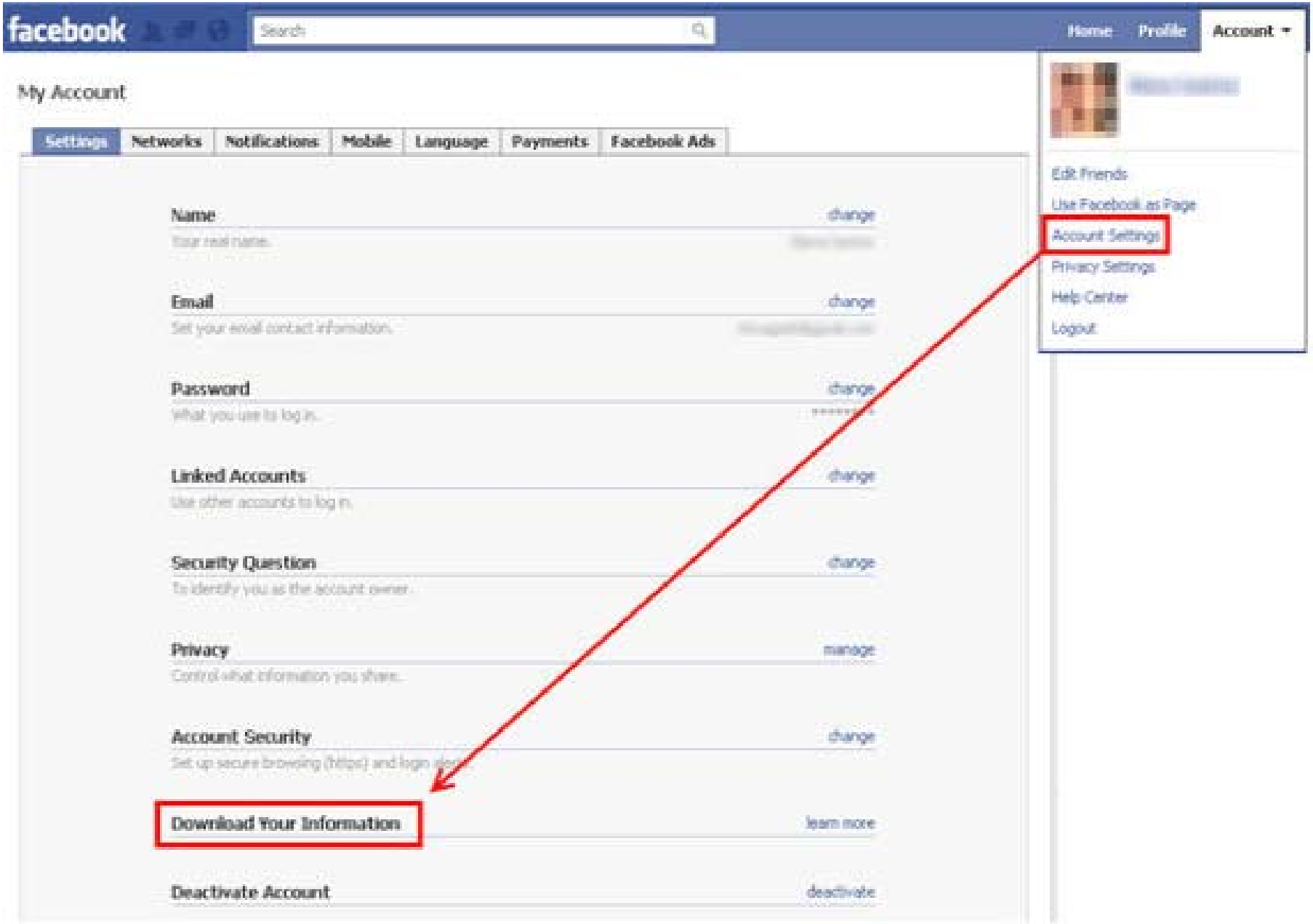
- Social media resources (including its platform usernames, passwords, and contacts) = “valid protectable interests”

- Problems arise when an employer encourages/requests employees to create social media accounts to market its products or services, but then the employee leaves. (Invasion of privacy and misappropriation claims). Who owns the social media account?

- Best Practices: Have a clear policy stating that such social media accounts are the property of employer. More likely to be enforce if:
  - The employer paid the fees
  - The employer dictated the precise terms of the employer’s account
  - The employee acted expressly on behalf of the company
  - The social media account was developed and built through investment of the employer’s time and resources.

V. Social Media as a Litigation Tool

- Many state and federal courts are acknowledging the relevance of social media in showing:
  - Employee's alleged emotional distress
  - Hours worked by an employee (i.e. social media posts during work hours shows an employee is not really working)
  - The genuineness of an employee's medical condition
  - Impeachment evidence
- There have been objections on privacy grounds, but most courts have permitted even broad requests so long as the party requesting information shows relevance. (Liberal discovery rules).
- Spoliation issues



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