

Breaking the Sound Barrier: What Employers Need to Know About Employment Law and Social Media

Presented by:

Jennifer Keller

Email: jkeller@bakerdonelson.com

Phone: 423.928.0181

and

Tim McConnell

Email: tmmconnell@bakerdonelson.com

Phone: 865.97111.5166



EXPAND YOUR EXPECTATIONS™

Everyone's Doing It

- Facebook (more than 500 million users as of July 2010)
- More than half of Facebook users are out of college. Among the users are U.S. Senators, doctors, lawyers, pizza deliverers, car salesman and everyone in between.
- MySpace (125 million accounts as of June 2009)
- LinkedIn (50 million users as of October 2009)
- On average, 900,000 blog posts occur in any 24-hour period. Recent study estimated that as many as 5% of American workers maintain personal blogs and of that 5%, 16% admitted posting information critical of their employer, supervisor, coworkers and customers.

Potential Pitfalls

- Defamatory postings about companies, their employees, clients and vendors
- Revealing company confidential/proprietary information
- Unprofessional pages
- Inappropriate photographs
- Bullying, threatening, harassing co-workers

Discussion Time



-
- XYZ Corp. has an electronic communications/email and internet policy which expressly provides that employees have no expectation of privacy in their use of XYZ Corp.'s network system. However, XYZ Corp. does not have a policy specifically addressing employees' use of social networking sites.
 - Two employees of XYZ Corp., Jack and Jill, decide to create a group on MySpace, and the stated purpose of the group is to "vent about anything we deal with at work without any outside eyes spying on us." The group is private and can only be joined by personal invitation from Jack. If a user accepts the invitation, that person can then access the site only by using a personal password. The site also includes language indicating that the group is private

-
- The employees use XYZ Corp.'s logo as the icon for the group and invite past and present employees to join, encouraging them to "let the s**t talking begin."
 - After establishing the site, Jack sends an invitation to Karen, a co-worker at XYZ Corp., to join the group. Later, Karen notifies one of her managers, Mary, about the site, and Mary then informs you about the site.
 - You and Mary then meet with Karen, and ask her about the site. During the course of this meeting, you ask Karen if she will provide you with her password so that you can access the site. Karen, concerned that she will be in trouble if she does not provide you with the password, gives you her password.

-
- You and Mary then access the site on multiple separate occasions. When you do, you discover that the site includes sexual remarks about management and other employees at XYZ Corp. and references to violence and illegal drug use.
 - You want to terminate Jack and Jill.
 - What do you do?
 - Are there any legal risks?
 - If so, what?

Employer Use of Social Networking Sites

Pre-Employment

- Hiring
- Recruiting

CareerBuilder.com Survey:
53% of Employers use Social
Networking Sites to screen
candidates

- 29% Facebook
- 26% LinkedIn
- 21% MySpace



Hiring and Recruiting

- Reasons to reject someone:
 - Provocative or revealing photographs or information (53%)
 - Posted content about drinking or using drugs (44%)
 - Bad-mouthing a previous employer, co-worker or client (35%)
 - Candidate showed poor communication skills (29%)
 - Candidate made discriminatory comments (26%)
 - Candidate lied about their background (24%)
 - Candidate revealed confidential information from previous employer (20%)
 - Candidate sent a message using an emoticon such as a smiley face (14)
 - Candidate used text language in an email or job application (gr8!) (16%)

CareerBuilder.com Survey

Hiring and Recruiting

- What kind of postings HELPED candidates get the job?
 - Profile provided good information as to candidate's personality and fit (50%)
 - Profile supported the candidate's professional qualifications (39%)
 - The profile showed that the candidate was creative (38%)
 - The candidate showed good communications skills (35%)
 - The profile showed that the candidate was well-rounded (33%)
 - Other people posted good references about the candidate (19%)
 - The profile showed that the candidate has won awards and accolades (15%)

CareerBuilder.com Survey



Use of Social Media as Employer

Employment Screen:

- Employers can benefit from the lawful use of information obtained from social media. Information discovered while viewing personal social media sites could be equated to questions asked in an interview. Areas to be careful about include Race, Age, Religion, Marital Status, Sexual Preference, Pregnancy Status or Disability.
- Best practices:
 - Screen applicants in a uniform manner.
 - Have a neutral party screen information.
 - Never create false personas to gain access to information.
 - Don't "friend" applicants to gain access to non-public profile
- Employers should be able to point to legitimate, non-discriminatory reasons for hiring & termination decisions, with documentation to support the decision.
- Negligent hiring issues

POST-EMPLOYMENT ISSUES



██████████ OMG I HATE MY JOB!! My boss is a total pervy ██████████ always making me do ██████████ stuff just to piss me off!! ██████████

Yesterday at 18:03 · [Comment](#) · [Like](#)



██████████ Hi ██████████, i guess you forgot about adding me on here?

Firstly, don't flatter yourself. Secondly, you've worked here 5 months and didn't work out that i'm gay? I know i don't prance around the office like a queen, but it's not exactly a secret. Thirdly, that ██████████ stuff is called your 'job', you know, what i pay you to do. But the fact that you seem able to ██████████ up the simplest of tasks might contribute to how you feel about it. And lastly, you also seem to have forgotten that you have 2 weeks left on your 6 month trial period. Don't bother coming in tomorrow. I'll pop your P45 in the post, and you can come in whenever you like to pick up any stuff you've left here. And yes, i'm serious.

Yesterday at 22:53

Write a comment...

Harassment/Discrimination Concerns

- Allowing or encouraging the use of social media in the workplace creates a hazard of online harassment or discrimination.
- Example:
When a supervisor wants to be a subordinate's friend on a social networking site, it can create an awkward interaction between the supervisor and subordinate. If the subordinate accepts the invitation, the supervisor can see the subordinate's other friends, photos, "wall" postings, social activities, and other personal information (and vice versa), unless privacy settings are adopted. If the subordinate doesn't accept the invitation, he or she may be concerned that his or her employment opportunities may suffer or that the supervisor will be offended.

Other Legal Issues

What about LinkedIn recommendations?

- Can be admissible in court to show an employer's stated reason for dismissal was pretextual
- Can be used to rebut an employer's assessment of performance deficiencies
- Can be legally binding on the employer
- Contrary to Company policy on providing references?

Social Media Advertising and Testimonials by Employees

- Federal Trade Commission guidelines concerning the use of testimonials in advertising
- FTC can hold the Company responsible and seek damages
- What do the Guidelines require?

-
- Advertisers are subject to liability for false or unsubstantiated statements made through endorsements, or for failing to disclose material connections between themselves and their endorsers. Endorsers also may be liable for statements made in the course of their endorsements
 - Under these new regulations, any time an employee endorses your product or service in social media, for example, he/she is required to disclose the employment relationship

More Legal Issues. . . .

- What about 1st Amendment?
- National Labor Relations Act
 - The NLRA safeguards certain discussions around salary, wages, hours and terms of employment.
 - Has the employee engaged in protected concerted activity?

More Legal Issues. . . .

- Whistle Blower
 - Sarbanes-Oxley
 - Other State Whistle Blower Laws
- Compliance with Law
 - Title VII, ADA, etc.
 - GINA
 - Copyright
 - Defamation
 - Legal off-duty activity

Some Responses to Social Media Pressures

- **Denial**

- ignore it and it will all go away.

- **Total control**

- block all uses by employees.

- **No Control**

- allow everything to be used.

- **No Compliance**

- a detailed lengthy policy that no one reads or follows

- **Embrace**

- Train
- Official Sites for Company
- Find a fit for social media

Path to Policy

- **Steps to Drafting**

1. Team to Get Started
2. Definitions
3. Internal Issues & Considerations to Incorporate
4. External Issues & Considerations to Incorporate

Path to Policy

- **Drafting**
 - Create Reasonable Policy. Keep it simple.
 - Other Policies to Re-Draft
 - Scope Recommendations
- **Training/ Launch of Policy**
- **Compliance**

Step 1: Social Media Team (ALL NEEDED)

- HR
- Marketing / Public Relations
- Information Technology
- Legal / Compliance / Ethics
- Bloggers

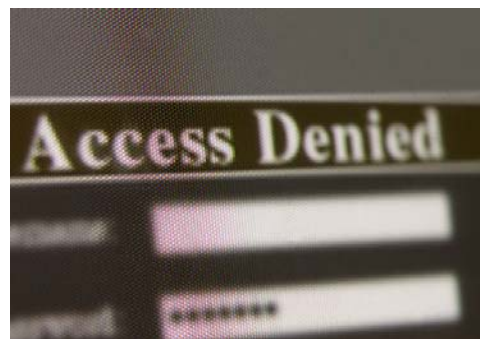


Step 2: Definitions

- **Define the Organization Culture around Social Media.**
 - Is this strictly personal activity?
 - Is the company interested in encouraging employees to use social networking for business purposes and incorporate into work time?
- **What is Social Media?**
 - Social Media allows people or groups to join together in cyberspace with the goal of connecting with other people or groups online.
- **Non-Compliance**
 - What are the consequences?

Step 3: Internal Issues & Considerations

- Blocked access.
- Additional work on already strapped departments. (Disciplinary Actions; IT Concerns, etc.)
- Legal issues for HR.
- Storage of the data.



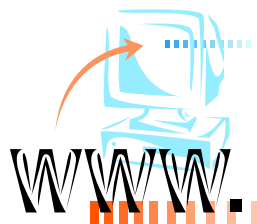
Step 4: External Issues & Considerations

- Representation of Company
- Brand Management
- Privacy Issues
- Legal & Compliance Concerns
- Departing Employees



Departing Employees

- What is the obligation of the company?
- Social Network Review upon departure
 - Build into policy to remove connection upon departure.
 - Encourage connection removal. This will NOT remove the history of the connection.
 - Monitor the connection



Scope Recommendations

- Build around regulations & rules the individuals are already required to follow. Make it an extension of those rules.
- Create Reasonable Policy with Best Practices.
- Keep short and sweet. Think of the main audience for which you are drafting the policies. Twitter is only 140 characters.
- Launch/ Train. Education is KEY!
- Support. Build a great support system around social media (IT, HR, KM, Marketing & Ethics)
- Conduct a bi-annual or annual review of policies. Update as needed for technology, culture and marketing changes.

Policies

- **Consider including some of the following provisions:**
 - A prohibition on all uses of social media which are disrespectful, inflammatory, offensive, dishonest or damaging to the company's business interests. In particular, content and posts should not include slurs, personal insults, obscenity or anything likely to tarnish the image of the brand, the store and the company.
 - A requirement that employees be honest regarding their identity and refrain from the use of aliases and pseudonyms.
 - If an employee has a vested interest in a topic of discussion, it should be disclosed. If commenting on a product or service, they must disclose employment.

Policies

- A requirement that an employee use a disclaimer when an employee is expressing his or her views through social media and has identified him/herself as an employee of the company. Such a disclaimer might read, "The views expressed herein are mine alone and do not necessarily reflect the views of the company."
- A prohibition on all uses of social media which disclose proprietary or confidential information belonging to the company or anyone else. Such information would include company trade secrets, customer identities, company financial details and business performance, planned acquisitions and future product launches.
- A prohibition on all social media uses of the brand owner's trademarks and logos, as well as those of brand owner's customers, absent written approval from the brand owner.
- The policy should be communicated in writing to every employee immediately upon hire, and it should be reemphasized periodically so that the provisions stay fresh in employees' minds.

Policies

- The policy should emphasize that employees remain responsible for the content of texting and Internet postings done outside of work. For example, employee posts should not violate any policies including the Code of Ethics or Anti-Harassment or Nondiscrimination policies.
- -If a profile can link someone to their place of employment, the employee should not post anything that could potentially embarrass or otherwise reflect poorly on the company. Moreover, if an employee posts information to a posting site that could impair or injure the reputation of, or otherwise harm the employer, the policy should reserve the company's right to demand that the employee remove the information from the posting site and discipline the employee.
- All policies should also emphasize that employees should have no expectation of privacy with respect to any information communicated via the company's electronic communication systems; and the company reserves the right to monitor, review and inspect all e-media use conducted through its networks and the contents thereof.

Policies to Consider Redrafting

- Consider other policies that need to be re-worked to deal with social media.
 - Privacy
 - Ethics
 - Copyright
 - Internet usage
 - Software
 - Email



Training/ Launch of Policies

- Who launches? Who is the main face of the policy? Who educates?
- Help employees understand how to use all tools safely.
- Teach employees they are brand ambassadors.
- Be consistent.
- Keep organization culture in mind.
- Conduct a periodic review of policies. Update as needed for technology, culture and marketing changes.

Enforcement of Policy

- Impossible to cover every contingency
- Monitor through a paid service or service such as Google Alerts (provides email updates of the latest relevant Google results on the search terms of your choice).
- What are the consequences for a violation?



Questions

