

Labor & Employment

Inner Workings





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Social Media: Employer's “Friend” or “Foe?”

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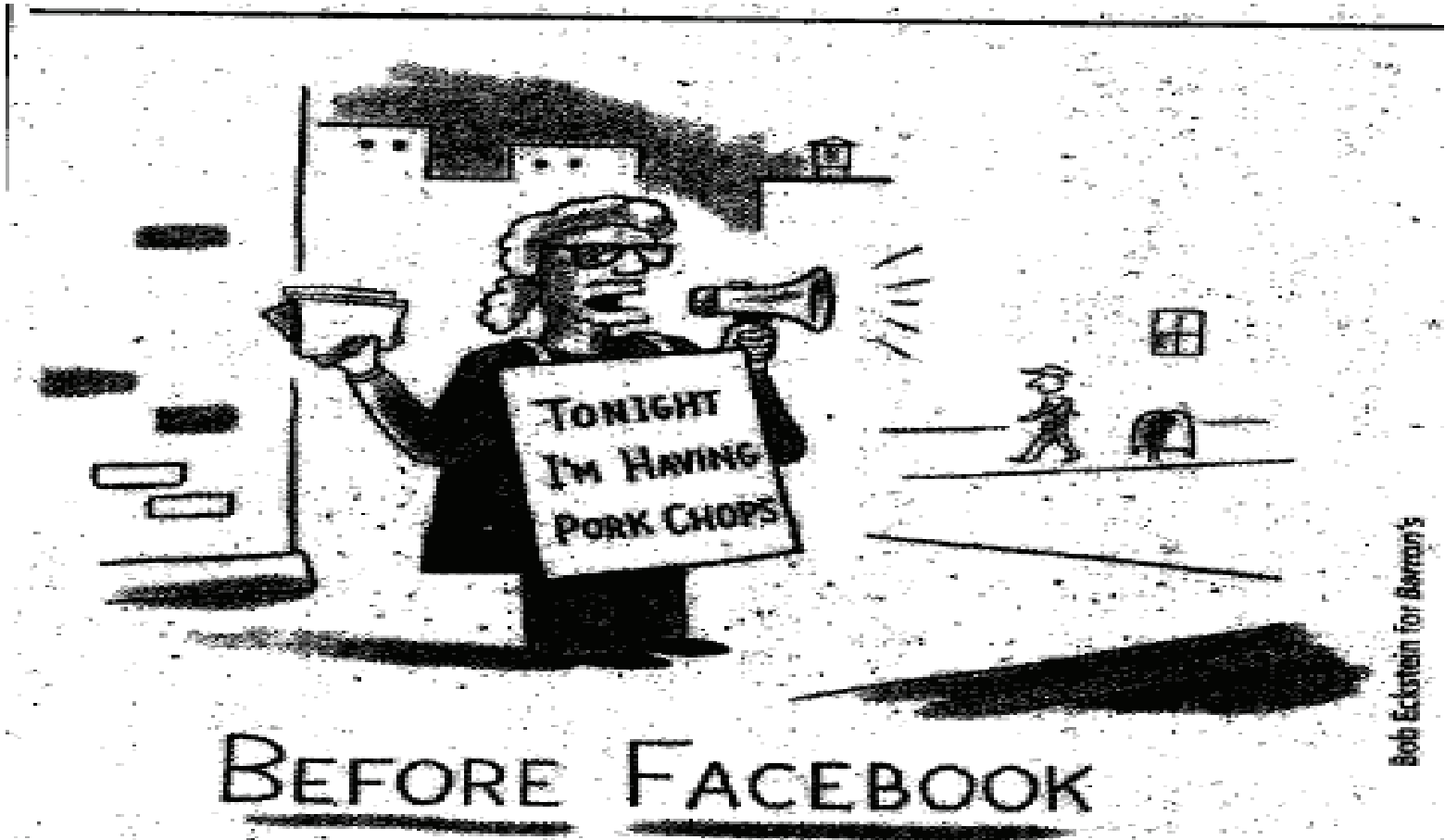
Common Issues with Employee Use of Blogs and Social Media

- Invasion of Privacy
 - Constitutional
 - Common Law
 - Statutory

Common Issues with Employee Use of Blogs and Social Media

- Invasion of Privacy
 - “The Internet profile is the modern equivalent of standing on a street corner with a sign.”

U.S. v. Wilcox, 66 M.J. 442 (U.S. Court of Appeals for the Armed Forces, 2008)



Common Issues with Employee Use of Blogs and Social Media

- Invasion of Privacy
 - “Please list any and all, current personal or business websites, web pages or memberships on any Internet-based chat rooms, social clubs or forums, to include, but not limited to: Facebook, Google, Yahoo, Youtube.com, MySpace, etc.” There are then three lines where applicants can list the Web sites, their user names and passwords.

Common Issues with Employee Use of Blogs and Social Media

- Invasion of Privacy
 - XYZ Corp was sued for negligence arising from an employee's use of XYZ's computers to post naked pictures of his minor step-daughter on pornographic websites. XYZ did not know about the employee posting the photos but did know he accessed porn sites, including one that spoke about kids. Allowing the case to go to trial, the court said XYZ could have done more to prevent harm such as viewing the content on the websites the employee had accessed, reporting the activity to police and taking steps to stop the action.

Doe v. XYZ Corp, 382 N.J. Super. 122 (App. Div. 2005)

Common Issues with Employee Use of Blogs and Social Media

- Invasion of Privacy
 - Patient sued Fairview Cedar Ridge Clinic for invasion of privacy after clinic employees posted on MySpace that she had an STD and was having an affair. The case against the clinic was thrown out because the clinic had previously blocked employees from accessing MySpace at work.

Yath v. Fairview Clinics, 767 N.W.2d 34 (Minn. App.2009)

The Stored Communication Act

- The SCA makes it unlawful to intentionally access stored electronic communication (e.g. Facebook pages and other websites) without authorization. Two relevant exceptions:
 - Access authorized by entity providing the electronic communication service.
 - Access authorized by the user of the service. An employer may access private e-mail accounts if someone authorized to access it freely allows it.

Pietrylo v. Hillstone Restaurant (2008)

- Employees at Houston’s restaurant in Hackensack create “private” MySpace group to “chat” regarding “BS” they deal with at work
- One employee – St. Jean – shows her supervisor
- St. Jean asked by other supervisors – and Regional Manager – for access and provides it
- No “adverse action” threatened but St. Jean felt she “would have gotten in some sort of trouble” if she had not given access
- Comments on group blog include
 - Sexual remarks about managers and customers
 - Jokes about Houston’s policies on customer service
 - References to violence and illegal drug use
 - Copy of new test on wine to be given to employees

2008 WL 6085437 (D.N.J. 2008)

Pietrylo v. Hillstone Restaurant (2008) (cont.)

- Creators of Blog (Pietrylo and Marino) are terminated
- Pietrylo and Marino sue claiming violations of Federal Wiretap Act, New Jersey Wiretap Act, Federal and State Stored Communications Act, Invasion of Privacy and Wrongful Termination
- Triable issue found on federal and state claims under stored communications statutes (accessed without authorization)
- Triable issue on invasion of privacy claim

Common Issues with Employee Use of Blogs and Social Media

- Defamation
 - Libelous statements about employers, colleagues and competitors
 - Cottage industry of sites targeted at disgruntled workers now exists on Internet. Rant sites: www.jobvent.com; www.hateboss.com; www.workrant.com; and www.fthisjob.com

Common Issues with Employee Use of Blogs and Social Media

- Harassment
 - Sexually explicit content
 - “Textual harassment”
 - Friending one too many times
 - Racially harassing or offensive content
- Discriminatory/violent statements posted to home page and blogs
 - Threats to co-workers on line; Text messaging while intoxicated



Common Issues with Employee Use of Blogs and Social Media

- Misrepresentation / False Advertising
 - WOMMA (“word of mouth marketing”)
- FTC Guidelines (December 1, 2009)
 - <http://www.ftc.gov/os/2009/10/091005endorsementguidesfnnotice.pdf>
 - Lack of disclosure of material connections
 - Lack of disclaimers on opinions can lead to vicarious liability for employers

Common Risk Issues with HR / Supervisors

- Invasion of Privacy
 - “Googling” applicants
 - Okay to view publicly available information

Recruiting Issues / How They Arise

- Receipt of “protected” information
 - Age
 - Race
 - National Origin
 - Sexual orientation
- Have non-decision makers review for inappropriate content
- Retain a third party to do the looking

Recruiting Issues/ How They Arise

- Provocative or inappropriate photos of or information about the candidate
- Content about candidate's drinking or drug use
- Bad mouthing or showing of confidential information about prior employers or others
- Postings showing poor communication skills
- Postings with discriminatory comments
- Evidence of lying about qualifications

Common Risk Issues with Employees Use of New Technology

- Blurring of the “workplace”
 - Telecommuting
 - Wage and Hour Issues
 - “Off the clock” claims
 - Commute time becomes compensable if workday starts at home (Employee checks e-mail before driving to work.)
 - *Allen v. City of Chicago*, No. 10-CV-03183 (N.D. Ill.)
(Police officer seeks to represent a class demanding overtime for “off the clock” use of Blackberry)

Labor & Employment Inner Workings



Even The NLRB Is Involved

- Why should I care?... I don't have a union
- NLRA addresses “protected concerted activity”
- Although “concerted activities” generally refer to two or more employees acting together to address an employment related concern, the term may also refer to a single employee's action, on behalf of others, that is a reasonable form of protest that will affect others

Protected Activity

- Section 7 of the National Labor Relations Act, 29 U.S.C. § 157
- Employees shall have the right...to engage in other concerted activities for the purpose of collective bargaining or
- ***Other mutual aid or protection***

Concerted Activity

- Activity is concerted when an employee acts “with or on the authority of other employees, and not solely by and on behalf of the employee himself.”

Meyers Industries (Meyer I), 268 NLRB 493 (1985)

The Board Steps into the Fray of Social Media

- *American Medical Response of Connecticut*, 34- CA-12576
- NLRB complaint issued against ambulance service for firing an employee who posted negative remarks about her supervisor on Facebook
- Complaint alleges American Medical Response illegally maintained and enforced an overly broad blogging and internet posting policy
- NLRB claims one policy unlawfully prohibited employees from making disparaging remarks about the company or supervisors and the other unlawfully prohibited depicting the company in any way over the internet without permission
- The NLRB Office of General Counsel argues such provisions interfere with employees in the exercise of their right to engage in protected concerted activity
- Case eventually settled

Compare and Contrast

- *Salon/Spa at Boro, Inc.* ALJ Decision (October 18, 2010)
- Non-union employees claimed their manager unlawfully threatened them about their social media usage.
- The manager warned employees that postings on social networking sites can often be seen by the public, and that their postings should be positive. She also said she was unhappy that certain current employees were choosing to post comments on social network sites belonging to disgruntled former employees.
- The ALJ found the purpose of the manager's statements concerning publicity to be didactic, not coercive. Regarding the statements about postings on sites belonging to disgruntled employees, the ALJ found no threats, but rather the employer's lawful expression of opinion.

...But They Used Bad Words

- *Atlantic Steel Co.*, 245 N.L.R.B. 814 (1979)
- Sets out four factors the Board must consider in determining whether employee speech is protected in the workplace
 - The place of the discussion;
 - The subject matter of the discussion;
 - The nature of the employee's outburst; and
 - Whether the outburst was, in any way, provoked by an employer's unfair labor practice.
- Another factor that can be considered is whether the employee's remarks have a negative effect on the status of workplace supervisors or managers

Word of the Day: “Opprobrious”

- Definition: outrageously disgraceful or shameful
- Unless its opprobrious, it may be protected - if its concerted

Is It or Isn't It? Only the Board Knows for Sure

- “Love how the company makes a 17 a supervisor”
- Serving hot dogs and soda to customers sends the wrong message
- Calling the boss. . .
 - A@#hole
 - Sc*\$bag
 - Cheap

What Does All This Mean?

- The Board is concerned about “overly broad” policies which restrict or prohibit discussions about protected concerted activities, for example:
 - No gossiping
 - Say nothing bad about the company or its managers
 - Overly restrictive non-solicitation prohibitions

What Does All This Mean?

- The Board does not like “discriminatory enforcement” of policies
 - Coming down harder on the “troublemaker”
- The Board is looking for surveillance of union or other protected activity
- The Board is concerned about unilateral implementation

Polices and Practices

- Is it the “Fix to All that Ails You?”
 - No, but in combination with enforcement, monitoring and education, it can certainly help
 - The following is limited to social media and networking issues – it is not a full service technology resources policy (which all companies should also have)

Critical Policy Elements

- Introduction / Application
- Appropriate Uses / Time for Use
- Limits for Use (Provision of Services Across Networks)
- Address Confidentiality / Trade Secret
- Admonition to “Follow the Law”
- Transparency / Disclosures / Disclaimers
- Content Matters
- Blogs
- Acknowledgement (signature)

Introduction / Application

- Identify what is included as social networking resources:
 - Example: LinkedIn, Facebook, blogs, Youtube, etc.
- Professional vs. Personal (time and representations)
 - Policy is mandatory for “professional” use, and may be used as a “guide” for personal use

Appropriate Uses / Time for Use

- Valuable tool, but can be a dangerous can of worms as well
- Define appropriate uses and time for use
 - Identify useful purposes for use of social media
 - Have an appropriate purpose in mind for all professional use
 - Remember non-exempt issues (work-time), therefore, limit professional use to work-time hours
 - Limit time – “while on company time, refrain from online activities that do not bring value to the company”

Limits of Use

- Should identify “limits” for use of social media
 - Some limits imposed by law
 - Some limits imposed by common sense
 - Some limits imposed by the Company
- Do NOT use social media to deliver services or goods
- Do NOT use social media to violate any law (more on this later)
- Do NOT use social media to violate *any* Company policy (includes non-harassment policy)

Confidentiality / Trade Secret

- Provision addressing confidentiality and trade secrets
- Remember – Social Media is an “open” window
- Must take active steps to protect confidentiality
- Prohibit –
 - Posting / transmitting any confidential information
 - Posting / transmitting any proprietary information
 - Posting / transmitting any client confidences
- Remind users of Company policies on confidentiality and trade secret treatment
- Not a substitute for direct communications (do not “communicate” with clients over social networking sites)

Follow the Law

- Provision requiring all users to follow all laws
- Many laws have application
 - FTC requirements on marketing / “fair disclosure” requirements
 - Harassment and Discrimination
 - Copyright and Trademark limitations
 - Privacy concerns
 - Common law (defamation, plagiarism, etc.)

Transparency / Disclosures / Disclaimers

- Provision requiring users to be transparent in communications
 - Must always use real name – no aliases, no “anonymous” posts, never misrepresent self
 - Always disclose relationship to company when blogging or “marketing” company services or products
 - Always use disclaimers where appropriate – whenever publishing to non-company sites (not views of company, etc.)

Content Matters

- Company logo's and others' copyrighted information
 - Never without express permission
 - Implies “approval”
- Post only content you are comfortable with your colleagues, immediate family reviewing
- Never post anything potentially embarrassing
- Think, Think, Think before posting
- All posts should be truthful, accurate and respectful
- Remind users that use of social media reflects upon users and company – be professional
 - Proper grammar, punctuation, spelling
 - No personal opinions on controversial topics

Blogs – A Special Emphasis

- Blogs can be very powerful communication tools – but, when discussing Company services or products – should be limited to the “professionals”
- Prohibit use of company resources for personal blogs or blogging
- Ensure company name does not appear in URL or any other post line
- This is NOT the time or place to permit personal promotion through blogging

Acknowledgement

- As with all company policies, a written acknowledgement can be of particular benefit
 - Acknowledges understanding of policy
 - Acknowledges agreement to comply with policy
 - Re-emphasizes other important employment factors (at-will relationship, etc.)

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